C #176

BEFORE
ROBERT W. McALLISTER
ARBITRATOR

In The Matter of Arbitration	)	Case No. C1C-4C-C 15409
	)	Class Action
between	)	
	)	
UNITED STATES POSTAL SERVICE	)	William E. Simmons
ST. PAUL BMC, MINNESOTA	)	Postal Advocate
	)	
And	)	
	)	Larry Gervais
AMERICAN POSTAL WORKERS UNION	)	APWU Advocate

Hearing: December 3, 1984
Briefs Exchanged: February 11, 1985

I. FACTS

On January 3, 1983, Employee Jim Mattacola sustained a slight injury when he tripped on the topmost stair leading to the Keying Stations on Parcel Sorting Machine #3. The Union claimed the top step is approximately one and one-fourth inches higher than the rest of the stairs. As a result, a safety hazard report was filed, and local postal management denied a hazard existed. The Union asserted OSHA standards require that rise height and tread width be uniform throughout any flight of stairs. The Union requested corrective action be taken and that the steps be fixed in accordance with OSHA standards. The grievance was pursued throughout the contractual step procedures up to and including a fourth step meeting held on June 10, 1983. The parties agreed no national interpretive issue was presented and stated, in part, "This is purely a local dispute over the application of the appropriate standards." Remanded back to Step 3 on January 26, 1984, the Postal Service denied the grievance on the basis management properly notified employees of the height difference of the stairs leading to the parcel sorting machines.

II. ISSUE

Did the Postal Service violate the terms of the National Agreement when it refused to modify the stairway leading to Parcel Sorting Machine #3 and to make all rise heights consistent instead of painting the top step yellow to designate caution?

III. PERTINENT CONTRACT PROVISIONS

Article 14, Section 2

Article 19

IV. POSITION OF THE UNION

The Union takes the position the issue is of a contractual nature and may not be decided by application of external law. The Union notes that the Postal Service has agreed to comply with Section 19 of the Williams-Steiger Occupational Safety and Health Act. Citing Section 811.1 of the Employee and Labor Relations Manual, the Union states this directs ". . .the Postmaster General to establish and maintain an effective, comprehensive occupational safety and health program consistent with the standards of the Act."

At the hearing, the Union objected to the introduction of an OSHA letter which purported to agree with management's use of a cautionary solution to the variation of Standard 1910.24. The Union contends management may not rely upon this administrative ruling because the Union did not bargain for the opinion of a government agency in deciding grievance disputes. In support thereof, three arbitral cases of Arbitrator Aaron were submitted.[1]

It is pointed out by the Union that, as part of the contractually structured, comprehensive safety program, safety inspections are required. The specific form utilized is Form 1784,

1/ H1N-NAC-C3, H1C-NA-C 32, H8C-4A-C 11834

Safety and Health Inspection Checklist. This form, asserts the Union, sets forth in detail the various standards incorporated into the Safety Program and, therefore, by incorporation under Article 19, into the Collective Bargaining Agreement. The Union reminds us that Employee and Labor Relations Manual Section 857 sets forth the requirement to comply with the Codes, Standards, and Ordinances. Section 833.2 of the Employee and Labor Relations Manual sets forth the authorization to adopt more stringent, alternative, or supplemental standards. The Union argues that the Postal Service adopted a specific standard for fixed stairs which is found in the Safety Inspection Checklist (Article 1910.24 OSHA). The Union, citing contract construction, contends that the Postal Service by not opting to include Article 1910.144 opted for a single stringent standard versus multiple standards.

The Union objected to Postal Service Exhibits 2 and 3 being submitted at the hearing because this information was not shared with the Union until the day of the hearing. Secondly, the Union believes it was incumbent upon the Postal Service to produce the author of the OSHA letter for cross examination. Thirdly, the Union protests the failure of the Postal Service to afford the Union the opportunity to accompany the OSHA official during the inspection. Finally, the Union asserts the cautionary solution is not the appropriate standard and is contrary to OSHA regulations.

V. POSITION OF THE POSTAL SERVICE

At the outset, the Postal Service asserts that Article 14 of the National Agreement and the Occupational Safety and Health Act

were the only documents referenced by the Union throughout the grievance procedure. Accordingly, the Postal Service argues the Union's claim that various provisions of the Employee and Labor Relations Manual were also violated is an argument raised for the first time at the hearing and should not properly be before the Arbitrator, and the Postal Service is not obliged to rebut such late arguments.

The Postal Service takes the position it can go to any regulation listed in Section 19 of the Act in order to consider whether or not compliance has been met. This is averred to be what the Postal Service did when it painted the steps in question yellow. This was, according to the Postal Service, in compliance with OSHA Regulation 1910.144 (3). The Postal Service further argues that OSHA regulations do not demand a specific remedy where, after years of use, a step is found to be one and one-fourth inches higher than the other steps. The regulations, as viewed by the Postal Service, do not require the steps be torn apart and then reassembled to achieve uniformity throughout.

The Postal Service notes the area office of OSHA was contacted by letter of May 22, 1984, and a request was made to evaluate the stairs in question. The Postal Service introduced a letter from the Minneapolis area Director of OSHA, Robert B. Hanna, dated May 30, 1984. This response stated the use of a cautionary solution to the variation in stairs was in accordance with 1910.144. Notwithstanding the Union's objection to the admission of this document, the Postal Service contends the grievance procedures of

the National Agreement is not the proper vehicle to argue what the OSHA regulation should be. The Postal Service avers that OSHA is not subject to a grievance arbitration procedure to which it is not a party. The Postal Service believes the Union is, in fact, filing a grievance against OSHA.

As to the Union position that the use of Form 1784, Safety Inspection Checklist, somehow precludes management from using parts of Section 19 of OSHA other than 1910.24, the Postal Service argues the use of Form 1784 does not act to negate in any manner Article 14, Section 3D of the National Agreement. The Postal Service, in summary, denies it is in violation of Section 19 of the Williams-Steiger Occupational Safety and Health Act. Rather, it claims it is in compliance.

VI. DISCUSSION

Public Law 91-596 was passed on December 29, 1970, and is commonly referred to as the Williams-Steiger Occupational Safety and Health Act. Reference to this Public Law under Article 14, Section 3D is the underlying basis for this grievance. Stairs leading to the Parcel Sorting Machine #3 were found not to have uniform rise height and tread width. The height of the topmost step was one and one-fourth inches higher than the other rise heights. The original grievance was filed on January 11, 1983, and claimed a safety violation based on the lack of uniformity. The Union has consistently taken the position it cannot agree to modify OSHA Standard 1910.24 (f) and (j). A fourth step decision

made on June 22, 1983, held the issue to be local and involved the application of the appropriate standards.

The Postal Service strenuously objects to the introduction of six Union exhibits on the grounds they were not raised during the grievance procedure, and the initial argument for reliance was made at the hearing. Likewise, the Union strongly objected to two Postal Service exhibits which are dated after the January 26, 1984, Third Step decision. Notwithstanding both parties' objections, the Arbitrator must reference some of those submissions in order to issue an understandable and contractually proper award. There can be no doubt the Union did refer to OSHA Standard 1910.24 (f) and (j) albeit without precise reference to the source. By logical elimination, Form 1784, Safety Inspection Checklist) contains reference to OSHA 1910.24 in Item 12 on Page 1 of the checklist. This citation is in reference to a Federal regulation, which, properly cited, would read 29 CFR 1910.24. 1910.24 is not a Public Law; rather, as stated, it is a Federal regulation promulgated in accordance with the Williams-Steiger Occupational Safety and Health Act. Form 1784 acknowledgedly is made applicable through Article 19 of the National Agreement. However, the handbooks, manuals and regulations applying to employees ". . . shall contain nothing that conflicts with this Agreement."

To reach the conclusions drawn by the Union, the Arbitrator would have to agree the Postal Service set a specific standard for fixed stairs by incorporating the reference to 1910.24 in Form 1784.

It is the Arbitrator's view that this would place Form 1784 in conflict with Article 14, Section 3L which states:

> "The Employer will comply with Section 19 of the Williams-Steiger Occupational Safety and Health Act."

Article 19 of Public Law 91-596 deals exclusively with Federal Agency Safety Programs and Responsibilities and is hereinafter set forth:

> "(a) It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6. The head of each agency shall (after consultation with representatives of the employees thereof) -
>
> (1) provide safe and healthful places and conditions of employement, consistent with the standards set under section 6;
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> (2) acquire, maintain, and require the use of safety equipment;
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> (3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action;
>
> (4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a) (3) of this section; and
>
> (5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902 (e) (2) of title 5, United States Code.
>
> (b) The Secretary shall report to the President a summary or digest of reports submitted to him under subsection (a) 95) of this section, together with his evaluations of and recommendations derived from such reports. The President shall transmit annually to the Senate and

the House of Representatives a report of the activities of Federal agencies under this section.

(c) Section 7902 (c) (1) of title 5, United States Code, is amended by inserting after "agencies" the following: and of labor organizations representing employees."

(d) The Secretary shall have access to records and reports kept and filed by Federal agencies pursuant to subsections (a) (3) and (5) of this section unless those records and reports are specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, in which case the Secretary shall have access to such information as will not jeopardize national defense or foreign policy.

Perusal of Section 19 clearly reveals it does not specifically deal with standards, but, in discussing the establishment of Federal Agency Safety Programs, it does refer to Section 6. Section 6 is almost five pages long and is reproduced herein as an addendum. Suffice it to say, Section 6 (a) is the enabling language which directs the promulgation of standards, such as 1910.24. Without rehashing all of Section 6, the Arbitrator finds that Congress evidenced a specific intent to permit the prescription or use of labels or other appropriate forms of warning in the establishment of any standard, subject to review.

This is what the parties agreed to when they inserted Article 14, Section 3D. In so doing, the parties incorporated by specific reference external law. This external law, specifically, Section 19 of Public Law 91-596, is now an integral part of the contract. Since Section 19 requires Federal Agency heads to

establish and maintain a comprehensive safety program consistent with the standards promulgated under Section 6; all the language of Section 6 relevant to the promulgation of standards is likewise and necessarily incorporated into the contract.

Under Section 6, the Secretary of Labor is given the ultimate power to establish appropriate standards. The parties in including Article 14, Section 3D recognized this external procedure. The establishment and enforcement of standards is administered by the Department of Labor and the agency commonly referred to as OSHA. In the absence of any contract language to the contrary, any attempt to construe a handbook or manual to establish exclusive standards without recourse to the rights established under Section 6 of Public Law 91-596 is in direct conflict with the National Agreement.

Accordingly, I find the Postal Service, as well as the Union, may avail themselves of all rights set forth in Sections 6 and 19 of Public Law 91-596. Since Section 6 provides that any standard promulgated ". . . shall prescribe the use of labels or other appropriate forms of warning . . .," the Postal Service availed itself of a contractually granted right when it chose to utilize a painted yellow warning to correct the safety hazard involved herein.

Both parties objected vigourly to asserted failure to fully develop facts, arguments, and defenses during the grievance procedure. In this specific case, such failures have not substantively

harmed either party. It is my opinion, in view of the respective positions, that, even had the Postal Service acted more promptly in obtaining an OSHA inspection and review and the Union more clearly enunciated its reliance on Article 19 and the Safety Inspection Checklist (Form 1784), the issue would still have been joined.

VII. AWARD

In accordance with the above Discussion, the grievance is denied.

Chicago, Illinois
April 2, 1985

Robert W. McAllister
Arbitrator