C#10694

AUG 22 1990
A.P.W.U.

Regular Arbitration Panel

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE (hereinafter "the USPS") and AMERICAN POSTAL WORKERS UNION, AFL-CIO (hereinafter "the APWU")	Grievant: Inglewood Local Post Office: Inglewood, CA Case No: W7C-5C-C-4548

BEFORE: Edna E. J. Francis, Arbitrator

APPEARANCES:

For the USPS: Patt Hutcherson
Labor Relations Assistant

For the Union: Allen W. Tracey, President
APWU, AFL-CIO
Inglewood, California Local

Place of Hearing: USPS
13031 West Jefferson Blvd.
Inglewood, California

Date of Hearing: June 21, 1990

AWARD: Management violated the National Agreement by unilaterally deleting and refusing to honor various provisions of the Local Memorandum of Understanding prior to exhaustion of the impasse/arbitration procedure provided by the Article 30 Memorandum of Understanding. (See page 26 for the remainder of the award.)

Date of Award: August 16, 1990
Los Angeles, California

Edna E. J. Francis
Edna E. J. Francis

BACKGROUND

In 1971, the Inglewood Local of the APWU and local management for the Inglewood Post Office negotiated their first local agreement. From 1981 to 1987, they agreed, from year to year, to carry over the existing provisions. In 1987, they engaged in "full blown" negotiations at the local level, pursuant to Article 30 of the 1987-1990 National Agreement, which provided in pertinent part:

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

During the 1987 local negotiations, management took the position that certain provisions of the existing local memorandum of understanding (hereinafter "LMOU") were inconsistent with the National Agreement and were, therefore, null and void. The Union disagreed with that position and informed management that it did not have the right to **unilaterally decide** that certain provisions of the

LMOU would no longer be enforced on the grounds that they were inconsistent with the National Agreement. The Union protested management's actions through the grievance which led to this proceeding, alleging that management's unilateral act of nullifying the provisions violated Article 5 and Article 30 (including the Memorandum of Understanding) of the National Agreement and Sections 8(a)5 and 8(d) of the National Labor Relations Act. Specifically, the grievance alleged:

> "During the period of 'Local Implementation' (10/1 -10/30/87), Management challenged various provisions of the 1984-1987 LMOU as being inconsistent or in conflict with the National Agreement. Management did propose and carry out the deletion of the cited provisions.
>
> Management's deletion and refusal to honor the cited provisions (in spite of the Union's submission of the disputed provisions to the impasse/ arbitration procedure in accord with the Memo of Understanding relative to Article 30) constitutes a unilateral action prohibited by Article 5."

As corrective action, the Union requested that the challenged provisions be restored to the text of the 1987-1990 LMOU and

remain in full force and effect, pending the outcome of the impasse/arbitration procedure; that in the future, such challenged provisions shall remain in full force and effect pending the outcome of the impasse/arbitration procedure; and that any employees who suffered any loss of pay and/or other benefits due to Management's refusal to honor the challenged provisions pending the outcome of the impasse/arbitration procedure shall be made whole for such losses."

At the time management declared various provisions of the existing LMOU null and void, Article 5 ("Prohibition of Unilateral Action") of the National Agreement provided:

> "The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law."

Article 30 ("Local Implementation") of the National Agreement provided for the following dispute resolution mechanism in the event

the parties did not reach agreement during the thirty-day local implementation period:

> "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 of understanding shall apply, unless inconsistent with or in conflict with the 1987 National Agreement."

A National Level Memorandum of Understanding, dated July 27, 1987, pertaining to Article 30, set forth additional provisions regarding local implementation, including provisions regarding dispute resolution:

> "2. In the event that any issue(s) remain in dispute at the end of the thirty (30) day local implementation period, the parties shall jointly identify such issue(s) in writing. Initialed copies of this document and copies of all proposals and counter-proposals pertinent to the issue(s) in dispute will be furnished by the local Union to the Regional Director, Human Resources, of the Employer with copies to the Postmaster and the Union's Regional Representative within fifteen

(15) days of the expiration of the local implementation period. Inclusion of any matter in the written statement does not necessarily reflect the agreement of either of the parties that such matter is properly subject to local implementation.

3. The Regional Representative of the Employer and the Union shall attempt to resolve the matters in dispute within seventy-five (75) days after the expiration of the local implementation period. The Regional Representatives of both the Union and the Employer will have full authority to resolve all issues still in dispute.

4. If the parties are unable to reach agreement at the Regional level by the end of the seventy-five (75) day period provided for above, the issue(s) may be appealed to final and binding arbitration by the National Union President within twenty-one (21) days of the end of the seventy-five (75) day period.

5. Where there is no agreement and the matter is not referred to the Regional level or to arbitration, the provision(s), if any, of the former Local Memorandum of Understanding shall apply unless inconsistent with or in conflict with the 1987 National Agreement.

6. Where a dispute exists as to whether an item in the former Local Memorandum of Understanding is inconsistent with or in conflict with the 1987 National Agreement, such dispute will be processed in accordance with the procedures outlined in two (2) through four (4) above."

Management denied the grievance at Step 2, relying upon a National Level arbitration award issued in April 1987 by Arbitrator Zumas, in Case No. H4M-NA-C-36, that:

> "The Service is entitled, under the Agreement, to cease unilaterally to honor and enforce LMOU provisions by declaring that such provisions were 'inconsistent or in conflict' with the National Agreement prior to the resolution of any such disputes through arbitration."

The Union appealed the grievance to Step 3, where management again denied it, stating that:

> "the provisions declared by local management to be inconsistent with or in conflict with the National Agreement are currently in the impasse procedure in accordance with regulations established by the parties at the national level. Such impasse procedure will be disposition (sic) of those matters raised. In view of the foregoing, the remedy requested that local agreement provisions continue to be implemented is herewith denied."

In May 1988, the Union submitted the grievance to arbitration.

At the arbitration hearing, the parties stipulated that, since there were no issues of fact, the Arbitrator's decision should be based upon the jointly developed written record the parties submitted at

the hearing, oral argument at the hearing, and further argument submitted via post-hearing briefs.

In addition to the Zumas award, the record contains the National Level arbitration award of Arbitrator Mittenthal issued in August 1984, in Case No. H1C-NA-C-25, wherein Arbitrator Mittenthal held that:

> "The Postal Service had a right to challenge provisions of 1978 Local Memoranda of Understanding on the ground that such provisions were 'inconsistent or in conflict with the 1981 National Agreement.' That is true regardless of whether such provisions had or had not been impacted by a change in the language of the National Agreement.". . .

As reflected below under the "Summary of Positions," both the Zumas and Mittenthal awards were relied upon in each party's arguments.

STIPULATED ISSUES

"Did Management violate the National Agreement by unilaterally deleting and refusing to honor various provisions of the Local Memorandum of Understanding prior to the final adjudication of the impasse/arbitration procedure provided by the Article 30 Memorandum of Understanding? If so, what shall the remedy be?"

SUMMARY OF POSITIONS

The Union

In order to avoid confusion and misunderstanding, it is important to note that the Union agrees that (1) LMOU provisions which are inconsistent or in conflict with the National Agreement cannot be retained or carried over in the LMOU; (2) management has the right to challenge provisions of the LMOU as being inconsistent or in conflict with the National Agreement; (3) if the Union does not submit a challenged provision to the impasse/ arbitration procedure, the Union implicitly agrees that such

provision is inconsistent or in conflict with the National Agreement and therefore should not be retained in the LMOU; and (4) if the Union does submit such provision to the impasse/arbitration procedure and Management's challenge is upheld, such provision shall not be retained in the LMOU.

The Union's position is that management does not have the right to unilaterally delete or refuse to honor LMOU provisions which it considers to be inconsistent or in conflict with the National Agreement. The Union's position is based upon several independent grounds.

Article 5 of the National Agreement prohibits such actions "which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law." The Memorandum of Understanding relative to Article 30 clearly provides that "Where a dispute exists as to whether an item in the former Local Memorandum of Understanding is inconsistent or in conflict with the 1987 National Agreement, such dispute will be processed in

accordance with the procedures outlined in two (2) through (4) above." There is nothing in the Memorandum which allows management to take independent, unilateral action with regard to a dispute over whether an item is inconsistent or in conflict with the National Agreement. Furthermore, the National Labor Relations Act requires that management "confer in good faith." Where a procedure exists to settle a dispute and management refuses to honor that procedure by taking premature unilateral action, management is not acting in good faith. Since the Article 30 Memorandum is, in effect, an extension of the negotiating process, management is prohibited from changing by deletion, the terms of the LMOU, until that process has been completed.

In an arbitration award in 1984, Arbitrator Mittenthal upheld the Postal Service's right to challenge LMOU provisions as being inconsistent or in conflict with the National Agreement when such provisions had been agreed upon by the parties. While he did not address the issue of whether the Postal Service had the right to

delete or refuse to honor provisions which the Service so challenged, he did make a crucial distinction regarding such challenges. In answer to a Union argument that such challenges could disrupt the workplace, Mittenthal answered by stating:

> "No doubt a successful challenge of such LMOU provisions, in place for a long period and accepted by employees and supervision alike, will be disruptive." (Emphasis added)

What could he have meant by a "successful challenge" except a challenge that was upheld through the impasse/arbitration procedure?

The Zumas award, at the very least, allows for retention of the disputed provision through the impasse procedure. Although Arbitrator Zumas clearly and appropriately stated the issue to be "whether the Service could unilaterally cease honoring provisions it deemed to be inconsistent or in conflict with the National Agreement," he proceeded to resolve another, separate question, which was not in dispute by the parties, i.e., whether the Service had

the right to declare provisions of the LMOU to be inconsistent or in conflict with the National Agreement. Then, he returned abruptly to the question presented to him, used the undisputed premise as the basis for his decision on the question presented, and rendered the question-begging decision upon which the Service relies herein. In summary, he assumed his conclusion to have been proved without having proved it. He erroneously equated the right to challenge the provisions to the right to remove them from the LMOU. Thus, Arbitrator Zumas's conclusion that the Service is "entitled to cease unilaterally to honor and enforce LMOU provisions because such provisions are "inconsistent with or in conflict with the National Agreement" is invalid because it is based upon a fundamentally flawed line of reasoning.

The Memorandum of Understanding relevant to Article 30 directs that disputes regarding whether or not a provision of the LMOU is inconsistent or in conflict with the National Agreement should be processed through the impasse procedure. Union

proposals to change former LMOU language which remained in dispute at the expiration of the local implementation period were submitted by the Union to the impasse procedure, in accordance with Article 30 and its Memorandum. In the meantime, the language in the former LMOU was retained. Why should that approach not be utilized regarding the dispute over whether a provision is inconsistent or in conflict with the National Agreement? There is no reason to make a distinction.

The Union requests that the grievance be sustained.

The USPS

The Postal Service maintains that its declaration during 1987 local negotiations that specific provisions in the former Local Memorandum of Understanding were null and void did not violate Article 30. The basis of this argument is as follows:

1. Article 30 clearly states that no LMOU may be inconsistent with or vary the terms of the 1987 National Agreement.

2. Article 30 (Memorandum Nos. 5 & 6) specifically provides for former items in dispute to be processed by Regional Union representation and on to Arbitration if there is no resolution.

3. There is no language in the contract, nor is it implied, that such disputed former provision should be enforced subject to an arbitration decision.

4. Absent such language or agreement, the Postal Service exercised its right to declare inconsistent and conflicting items null and void.

Arbitrator Zumas upheld the Postal Service's position in Case No. H4M-NA-C-36, stating that the Service is entitled under the Agreement to cease unilaterally to honor and enforce LMOU provisions by declaring that such provisions were inconsistent or in conflict with the National Agreement prior to resolution of any such disputes through arbitration. In Case No. H1C-NA-C-25, Arbitrator

Mittenthal held that the "Postal Service is free at the appropriate time to raise the inconsistent or in conflict ..." claim.

The Union has failed to prove that the Postal Service violated Article 30 when it unilaterally declared the instant provisions null and void during 1987-1990 local implementation. The Postal Service requests that the Union's grievance be denied.

DISCUSSION

There is no "puzzlement on my part" about the import of the grievance in this case, as one party indicated in the post-hearing brief. The issue here is whether the Postal Service violated the National Agreement when it *unilaterally* nullified or voided various provisions of the former LMOU on the grounds that the provisions were inconsistent or in conflict with terms of the National Agreement. I fully understand that such a position, whether inspired

by good motives or bad motives, could harm the bargaining process, e.g., by unfairly and unnaturally changing the balance of power at the bargaining table or, at the maximum extreme, by rendering the existing LMOU meaningless. Nevertheless, motives aside, the relevant inquiry is whether the Postal Service has the right to be the arbiter of whether and when provisions which it claims are inconsistent with or in conflict with the National Agreement shall be removed from the existing LMOU, *where the Union disputes the Service's claim that the provisions are inconsistent or in conflict with the National Agreement.*

Plainly, no such right is given to the Postal Service by the National Agreement. I believe that, to the contrary, the National Agreement disproves the existence of such a right. Initially, Article 30, Section A, of the National Agreement provides that:

> "Presently effective local memorandum of understanding not inconsistent with 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."

Article 30, Section C, provides, in general terms, that all *proposals* remaining in dispute at the end of the period of local implementation may be submitted to final and binding arbitration, with the written authorization of the National Union President. In particularized terms, a National Level Memorandum of Understanding regarding Article 30 (hereinafter "the Article 30-Memorandum of Understanding") provides a specific dispute resolution procedure for any *issues* which remain in dispute at the end of the thirty day local implementation period. Initially the local parties are required to submit any *issues* which remain in dispute to Regional Level representatives of the parties for attempted resolution; then, if agreement cannot be reached at that level within seventy-five days after the expiration of the thirty-day implementation period, the *issues* may be appealed to final and binding arbitration by the National Union President. The very last paragraph of the Article 30

Memorandum of Understanding addresses the scenario which is presented by this case, providing that:

> "Where a dispute exists as to whether an item in the former Local Memorandum of Understanding is inconsistent or in conflict with the 1987 National Agreement, such dispute will be processed in accordance with the procedures outlined in two (2) through four (4) above [referring to submission to the Regional Level representatives and then to final and binding arbitration]."

If Article 30 of the National Agreement leaves any doubt about whether the Service's declaration that a provision is inconsistent or in conflict with the National Agreement is the "final word" or is merely a proposal to delete the allegedly offending provisions, that doubt is removed by the last paragraph of the Article 30-Memorandum of Understanding. Two inescapable conclusions flow from the unambiguous language of that paragraph: (a) that a declaration that provisions are inconsistent or in conflict with the National Agreement may be challenged by the other party to the negotiations; and (b) that, if such a challenge is made, the "final

word" regarding whether the disputed provisions will be stricken as "inconsistent or in conflict" will be made either by the Regional Level representatives of the parties or by an arbitrator, if the Union chooses to proceed to final and binding arbitration regarding the dispute. It further follows that the disputed provisions remain in the former LMOU, endowed with the same status as the other provisions of the former LMOU which have not been changed by the bargaining process, unless or until stricken as a result of that dispute resolution procedure (or as the natural result of the objecting party's failure to use the dispute resolution procedure).

This situation is not analogous, as the Service contends, to the situation where management, for example, has the contractual right to discharge for just cause, subject ot the employee's or the Union's right to grieve. In the latter situation, the contractual provision regarding just cause remains in the contract, and any dispute between the parties relates to the existence or non-existence of just cause in the circumstances of that particular case. There is no

dispute between the parties regarding whether the "just cause" provision should remain in the contract. Here, however, it is the continued existence of a contractual provision which is in dispute, rather than the Service's application of its terms. In view of that material difference, the analogy is not a good one.

In summary, I believe the dispute resolution procedure set forth in the Article 30-Memorandum of Understanding reflects the intent of the parties to pre-empt unilateral or premature nullification of provisions deemed to be inconsistent or in conflict with the National Agreement. Thus, the Service's unilateral nullification of the provisions in dispute, without regard to or irrespective of the dispute resolution procedure, constituted a violation of Article 30 of the Agreement. Accordingly, its unilateral action also constituted a violation of Article 5 of the National Agreement (captioned "Prohibition of Unilateral Action"), since Article 5 prohibits "actions affecting wages, hours and other terms and conditions of

employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement..."

Although I have carefully reviewed the Mittenthal and Zumas awards, I must add that my decision herein is based first and foremost upon the language of the National Agreement. I find nothing in the Mittenthal award regarding the issue which was before him which supports the position of the Postal Service herein. Regarding the issue before him, Arbitrator Mittenthal decided that the Service had a right to challenge provisions of the 1978 LMOU on the grounds that such provisions were "inconsistent or in conflict with the 1981 Agreement" and that that right existed regardless of whether such provisions had or had not been impacted by a change in the language of the National Agreement.

The right of the Service to challenge provisions of the former LMOU on the grounds that the provisions are inconsistent or in conflict with the National Agreement is a given. The question here is whether the Service has the right to proceed beyond challenging

former LMOU provisions as "inconsistent or in conflict" to unilaterally nullifying them, i.e., by ceasing to enforce or to implement them. While that question was not directly addressed in Arbitrator Mittenthal's decision, some of his statements there tend to support the position that the National Agreement does not give the Service the right to unilaterally nullify provisions of the former LMOU. Addressing a threshold procedural issue in the case, he stated at page 7 of the decision:

> "The function of local impasse arbitration is to resolve deadlocks over what should or should not be included in LMOU. The impasse arbitrator determines the substantive content of LMOU. He is an 'interest' (as opposed to a 'rights') arbitrator who embraces or rejects proposed provisions on the basis of efficiency, equity, practice, and so on. His job is not to interpret and apply the National Agreement except in deciding whether a provision in LMOU is 'inconsistent or in conflict with the...National Agreement.'" (Emphasis added)

Interpreting the last paragraph of the Memorandum of Understanding pertaining to Article 30 (which, in the 1981 National Agreement, was essentially identical to the language before us in the

1987 National Agreement), Arbitrator Mittenthal stated at page 9 of the decision:

> "The parties thus anticipated that the Postal Service could challenge LMOU provisions in local negotiations as being 'inconsistent or in conflict...', that the local union could disagree, and that the resultant 'dispute' would be handled through the local impasse procedures." (Emphasis added)

In short, based upon the statements quoted above, I suspect that if Arbitrator Mittenthal had been called upon to decide the issue which is presented here, based upon the record I have before me, he would have decided it the way I have decided it.

Although the issue in the case before Arbitrator Zumas in the Mail Handlers case was identical to the issue which is presented here, I do not find his decision persuasive authority for this case, primarily because Arbitrator Zumas and I do not share a very basic, threshold premise. He imputes a far wider reaching effect than I to the Service's exercise of its right to challenge former LMOU provisions on the grounds that they are "inconsistent or in conflict with the National Agreement." At page 18 of his decision, he stated

that "Article 30 and its accompanying Memorandum of Understanding clearly and repeatedly indicate that the Service need not abide by LMOU provisions that are in conflict or inconsistent with the National Agreement." On the other hand, I do not equate the right to challenge a provision with the right to nullify it. I do not find that the right to declare provisions of an LMOU to be inconsistent or in conflict with the National Agreement automatically bestows upon the declaring party a right to unilaterally remove the provisions from the LMOU and to cease giving them effect. In my opinion, nothing in Article 30 authorizes such unilateral behavior, particularly in view of the language in the last paragraph of the Memorandum of Understanding that *disputes* over such claims shall be settled in accordance with the dispute resolution procedures set forth in the Memorandum. It is difficult to believe that the parties would have gone to the trouble to establish a procedure for resolving disputes "as to whether an item in the former Local Memorandum of Understanding is inconsistent or in

conflict with the 1987 National Agreement," if, in fact, they had intended Article 30 to allow one party to immediately dishonor provisions which it deemed to be inconsistent or in conflict with the National Agreement.

In accordance with the foregoing findings and discussion, the grievance is sustained.

INTERIM AWARD

Management violated the National Agreement by unilaterally deleting and refusing to honor various provisions of the Local Memorandum of Understanding prior to exhaustion of the impasse/arbitration procedure provided by the Article 30 Memorandum of Understanding. The parties are hereby directed to attempt to fashion an appropriate remedy in view of the foregoing award. If the parties are unable to fashion an appropriate remedy and wish to have me issue an award regarding remedy, they shall jointly notify me in writing on or before October 15, 1990, of their desire to have me do so. Thereafter, I shall promptly take steps to determine if a hearing is necessary before issuing an award regarding remedy.

Dated: August 16, 1990
Los Angeles, California

Edna E. J. Francis
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