

C# 10949

**WESTERN REGION
REGULAR ARBITRATION PANEL**

In the Matter of the Arbitration) **GRIEVANT:**
) BRANCH
)
-Between-) **POST OFFICE:**
) Pasadena, CA
UNITED STATES POSTAL SERVICE)
)
-And-) **CASE NO:**
) W7N-5T-C 22023
NATIONAL ASSOCIATION OF) **NALC GTS NO:**
LETTER CARRIERS, AFL-CIO) 15725
)

BEFORE: CARL B.A. LANGE III, Arbitrator

APPEARANCES:

For the U.S. Postal Service: TERESA L. FLEMING
 Personnel Assistant
 313 East Broadway
 Glendale, CA 91209-9998

For the Union: LEROY COLLIER
 President, Branch 2200
 P.O. Box 60040
 Pasadena, CA 91116

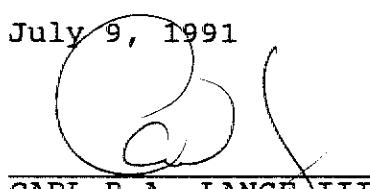
Place of Hearing: 600 North Lincoln
 Pasadena, California

Date of Hearing: May 7, 1991
 Record Closed: June 17, 1991

AWARD:

The Pasadena Post Office violated the National Agreement when it denied requests for Annual Leave for the month of December. The Pasadena Post Office shall cease and desist from refusing to grant Annual Leave requests up to the "maximum quota" set forth in Article II of the Local MOU.

Date of Award: July 9, 1991


CARL B.A. LANGE III

BACKGROUND
(Class Grievance - Vacation Scheduling)

Pursuant to the terms of the National Collective Bargaining Agreement ("National Agreement") between the UNITED STATES POSTAL SERVICE ("Service" or "Employer"), and the AMERICAN POSTAL WORKERS UNION, AFL-CIO ("APWU" OR "Union"), and the NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO ("NALC" or "Union"), the undersigned was selected from the USPS/NALC Western Region Regular Arbitration Panel to serve as the Arbitrator in this matter.

This matter arises out of the Service's denial of requests made by two letter carriers for Annual Leave during the Christmas week in December 1990. The requests were filed in January of 1990, pursuant to the regular Annual Leave procedure. The requests were denied on the basis that they had been made "too early" in the work year. At the time that the requests were made, there were no other requests on file for the week in question. According to the Local Memorandum of Understanding between the Pasadena Post Office and Branch # 2200, the "maximum quota" of carriers to be allowed on Annual Leave "each week during the leave year" was 13%.

A Step 2 grievance was filed on March 4, 1990. The grievance alleged a violation of Articles 3, 10, and 30 of the National Agreement and Article II of the Local Memorandum of Understanding. With regard to a remedy, the Union asked that Annual Leave be granted to carriers who made appropriate requests up to the 13% quota in any given week of the leave year, including the month of December. The Step 2 denial was issued on April 2, 1990. The grievance was denied on the basis that, since December was not specified as a month in which scheduled Annual Leave was available and since the past practice at Pasadena was to exclude December from the scheduled vacation process, neither the Local or the National Agreement had been violated. A Step 3 appeal, along with "corrections and additions," was filed on April 13, 1990. The Step 3 appeal was denied on July 20, 1990. The denial asserted that the grievance should have been filed when the vacation schedule was originally posted for the selection process. Further, it asserted that December was excluded from the vacation selection process at the Pasadena Post Office by past practice. The issue was certified for arbitration on August 8, 1990.

An evidentiary hearing commenced on May 7, 1991, at the postal facility located at 600 North Lincoln, Pasadena, California. The Service was represented by Teresa Fleming, Personnel Assistant. The Union was represented by Leroy Collier, President, Branch 2200. The parties agreed that there were no issues of procedural or substantive arbitrability to be resolved and that the matter was properly before the Arbitrator.

During the course of the hearing, the parties were afforded a full and complete opportunity to be heard, to call, examine and cross-examine witnesses, to develop arguments, and to present relevant

evidence. All witnesses who appeared before the Arbitrator were duly sworn. Michael Caliendo and Mark Ranallo, on whose behalf the Union carried the instant grievance, are carriers at the Jackie Robinson Station in Pasadena, California. Each was present at the hearing and testified on his own behalf.

An official transcript of the hearing was not made. The parties submitted post-hearing briefs. The Service's Post-hearing Brief, accompanied by arbitration awards in support of its position, was received by the Arbitrator on May 28, 1991. The Union's Post-hearing Brief, also accompanied by supporting material, was received by the Arbitrator on June 17, 1991. The matter was deemed to be submitted for decision as of June 17, 1991, upon receipt of the Union's Post-hearing Brief.

The Issue

The parties stipulated that the issue to be determined should be stated as:

"Did the Pasadena Post Office violate the National Agreement when it denied Annual Leave requests for the month of December?

"If so, what is the appropriate remedy?"

The Union's Position

The Union claims that the language of the Local Memorandum of Understanding in regard to this matter is very clear. It states, simply and directly that 13% of the letter carriers in each unit shall receive Annual Leave during each week of the leave year. The Union further argues that there are no contractual limitations or restrictions on Annual Leaves in December, or any other time during the leave year. Finally, the Union asserts that, until notified by Caliendo and Ranallo, it was not aware that appropriate requests for Annual Leave in December were not being honored by the Pasadena Post Office.

As to the remedy, the Union requests that the Arbitrator order the Pasadena Post Office to award Annual Leave to requesting carriers until the quota is filled in any given week of the leave year, including during the month of December.

The Service's Position

The Service argues that it was never the intent of the parties to include the month of December for vacation scheduling. The Service claims that December is available for scheduled Annual Leave only if the Local Memorandum of Understanding specifically states that it is available. Further, the Service asserts that the posted schedules for Annual Leave have not included the period from the week after Thanksgiving through the Christmas week for many years.

In addition, the Service claims that the Pasadena Post Office has had a long-standing past practice of disallowing scheduled Annual Leave for the period from the week after Thanksgiving through the Christmas week. In furtherance of that policy, only "spot" Annual Leave has been approved for that time period, and then only if operations would allow an employee to be off duty without affecting the overall operation in the unit.

Relevant Provisions of the National Agreement

The 1987-1990 National Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO, and the National Association of Letter Carriers, AFL-CIO, (Jt. Exhibit 1) provides:

"ARTICLE 3

"MANAGEMENT RIGHTS

"The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

"A. To direct employees of the Employer in the performance of official duties;

"B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

"C. To maintain the efficiency of the operations entrusted to it;

"D. To determine the methods, means, and personnel by which such operations are to be conducted;

"E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

"F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature."

"ARTICLE 10

"LEAVE

"Section 1. Funding

"The Employer shall continue funding the leave program so as to continue the current leave earning level for the duration of this Agreement.

"Section 2. Leave Regulations

"The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement.

"[See Memos, pages 190 and 191]

"Section 3. Choice of Vacation Period

"A. It is agreed to establish a nationwide program for vacation planning for employees in the regular work force with emphasis upon the choice vacation period(s) or variations thereof.

"B. Care shall be exercised to assure that no employee is required to forfeit any part of such employee's annual leave.

"C. The parties agree that the duration of the choice vacation period(s) in all postal installations shall be determined pursuant to local implementation procedures.

"D. Annual leave shall be granted as follows:

...

4. The remainder of the employee's annual leave may be granted at other times during the year, as requested by the employee.

"Section 4. Vacation Planning

"The following general rules shall be observed in implementing the vacation planning program:

"A. The Employer shall, no later than November 1, publicize on bulletin boards and by other appropriate means the beginning date of the new leave year, which shall begin with the first day of the first full pay period of the calendar year.

...

"C. A procedure in each office for submission of applications for annual leave for periods other than the choice period may be established pursuant to the implementation procedure above.

"D. All advance commitments for granting annual leave must be honored except in serious emergency situations.

"ARTICLE 15

"GRIEVANCE-ARBITRATION PROCEDURE

"Section 1. Definition

"A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

"Section 2. Grievance Procedure - Steps

"Step 1:

"(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or Union representative. . . .

"(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:

- "1. Detailed statement of facts;**
- "2. Contentions of the grievant;**
- "3. Particular contractual provisions involved; and**
- "4. Remedy sought.**

"Step 2:

"(a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Step 2 official, and shall so notify the Union Step 2 representative.

....

"(h) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed, (3) the Union corrections or additions to the Step 2 decision.

"Step 3:

"(a) Any appeal from an adverse decision in Step 2 shall be in writing to the Regional Director for Human Resources, with a copy to the Employer's Step 2 representative, and shall specify the reasons for the appeal.

...

"(d) The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

...

"Section 3. Grievance Procedure - General

"A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

...

"Section 4. Arbitration

"A. General Provisions

...

"5. Arbitration hearings normally will be held during working hours where practical. Employees whose attendance as witnesses is required at hearings during their regular working hours shall be on Employer time when appearing at the hearing, provided the time spent as a witness is part of the employee's regular working hours.

"6. All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. . . .

"9. In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

"ARTICLE 19

"HANDBOOKS AND MANUALS

"Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

"ARTICLE 30

"LOCAL IMPLEMENTATION

"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:

...

"4. Formulation of local leave program.

"5. The duration of the choice vacation period(s).

"6. The determination of the beginning day of an employee's vacation period.

"7. Whether employees at their option may request two selections during the choice vacation period, in units of either 5 or 10 days.

...

"9. Determination of the maximum number of employees who shall receive leave each week during the choice vacation period.

"10. The issuance of official notices to each employee of the vacation schedule approved for such employee.

"11. Determination of the date and means of notifying employees of the beginning of the new leave year.

"12. The procedures for submission of applications for annual leave during other than the choice vacation period.

...

"20. The determination as to whether annual leave to attend Union activities requested prior to determination of the choice vacation schedule is to be part of the total choice vacation plan.

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

..."

Relevant Provisions of the Employee and Labor Relations Manual

The Employee and Labor Relations Manual ("ELM") provisions that relate to the instant matter (Jt. Exhibit 3) state:

"Chapter 5

"Employee Benefits

"510 Leave

...

"512 Annual Leave

"512.1 General

"512.11 Purpose. Annual leave is provided to employees for rest, recreation, and for personal and emergency purposes.

"512.12 Definitions

"512.121 Leave Year. 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 year.

..."

Relevant Provisions of the Local Memorandum of Understanding

Provisions of the Local Memorandum of Understanding ("Local MOU") that relate to the instant matter (Union Exhibit 4) state:

"ARTICLE II

"LEAVE PROGRAM

"SECTION 1. Vacation Planning:

- "A.** The number of letter carriers to be allowed on scheduled annual leave each week during the leave year shall be 13% of the letter carriers assigned to each unit as of September 1st of each year
- "B.** An approved copy of leave request Form 1547 shall be given to each letter carrier at the time of leave selection and a copy shall be retained by management for the duration of the leave year.
- "C.** A carrier may choose leave in the choice vacation period and leave outside the choice vacation period simultaneously if the carrier so desires.

..."

"SECTION 2. Leave Periods:

..."

- "E.** It is not the intent of the parties to disallow any application for leave during the leave year in any section where the maximum quota has not been filled.

..."

"SECTION 5. Choice Vacation Period:

"The choice vacation period shall begin with the first Saturday of the leave year in January and end with the last full week in January. The intent of the parties is not to allow all letter carriers leave during the month of January.

...
"SECTION 7. Extra Leave Periods:

- "A. Applications submitted by letter carriers for annual leave after the posting of the yearly leave schedule must be handled as follows:

All request (sic) for annual leave (Form 3971) for any leave period which is open, submitted no sooner than two weeks prior to the of the weekly work schedule must be granted on a first-come, first-serve basis until the leave complement is full. Or (sic) unless a reasonable explanation is given on Form 3971 as to why request (sic) cannot be granted.

...
ANALYSIS AND CONCLUSION

Postal Service management has and retains the right to direct its work force, to provide for efficient operations, and to determine the methods, means and personnel through which its mission will be accomplished. (Jt. Exhibit 1, Article 3). Management's rights are limited and restricted by provisions of the National Agreement, by Memoranda of Understanding that are contained in the National Agreement, and by local Memoranda of Understanding that have been negotiated pursuant to Article 30. In addition, various Postal Service Handbooks, Operating Manuals and Regulations also limit and restrict the Service's exercise of its retained rights. Those limitations and restrictions are integrated with the National Agreement pursuant to Article 19.

In a contract interpretation case such as the instant matter, the first concern must be a determination of whether the language of the disputed provision is clear and unambiguous, or is unclear and ambiguous. If the language is clear and unambiguous, it will be applied directly to the issue at hand without further analysis. If the language is unclear and ambiguous, then other factors such as relevant National or regional arbitration decisions, relevant Step 4 settlements, other interpretive or instructive documents, or application of the disputed provision in similar circumstances are reviewed in order to attempt to ascertain the appropriate and intended meaning. The language is unclear and ambiguous if the divergent interpretations offered by the Union and the Service are equally capable of being read into the disputed provisions. It is the Arbitrator's responsibility to give meaning to the disputed provision within the context of the entire National Agreement.

In the Arbitrator's opinion, a detailed analysis of the genesis and application of Articles 10 and 30 of the National Agreement as they relate to this grievance is unnecessary. For a definitive analysis of these issues, consult the full text of National Arbitration case numbers H1C-NA-C 59 and H1C-NA-C 61 (1986) decided by Arbitrator Richard Mittenthal. There are certain passages in the Mittenthal

decision that bear repeating here in that they relate specifically to the instant matter. As a part of a discussion of Article 30 negotiations on procedures to implement Annual Leaves, Arbitrator Mittenthal states, at pages 6 and 7:

"At the local level, the parties are expected to define the 'choice vacation period' and determine the "maximum number of employees who shall receive leave each week during the choice vacation period." Employees then bid for the leave weeks they want during this choice period. If the bids for a given week are greater than the maximum number of employees permitted to be off, some requests must be denied. . . .

"These arrangements, however, do not dispose of all the annual leave earned. . . .

"This subject has been addressed in thousands of LMU. One type of clause provides for the selection of leave time during non-choice vacation periods. . . . Employees ordinarily bid for non-choice periods in the same way they bid for choice periods.

"Another type of clause provides for the selection of incidental leave. Such a clause recognizes that people may experience, for personal reasons, an unanticipated need for leave time. . . . A LMU allows employees to obtain such leave during the year even though the bidding period has passed. There are typically two conditions to any such incidental leave: (1) the employee must give supervision sufficient notice of his request and (2) the granting of the request must not result in exceeding the ceiling the LMU places on the number of employees allowed to be off in a given week." (Emphasis in the original.)

Further, at pages 12 and 13, Mittenthal explains:

"Hence, when Article 30 B 4 made 'formulation of local leave program' a subject for local implementation, these words must have been intended to have a broad reach. Local parties were authorized to deal with leave at any time during the year, within or outside the choice period. Local parties were authorized to deal with 'variations' as well. Their 'formulation' can make it mandatory on Management to grant leave at a certain time during the choice period. . . . That being so, it is difficult to believe their 'formulation' could not likewise make it mandatory on Management to grant leave at a certain time during the non-choice period. [footnote: Any such mandatory arrangement in a LMU would of course be subject to Article 10, Section 4D: 'All advance commitments for granting annual leave must be honored except in serious emergency situations.']. That

should be especially true where the LMU clause permits a lesser percentage of employees to be off during the non-choice period. . . .

"Moreover, one cannot ignore the fact that thousands of LMU clauses have been negotiated over the years. They have routinely required Management to grant leave during non-choice periods (or incidental leave) under certain conditions. . . ." (Emphasis in the original.)

In the Arbitrator's opinion, the language of the Local MOU is clear and unambiguous in regard to scheduling of Annual Leaves. Section 2.E specifically provides that "[i]t is not the intent of the parties to disallow any application for leave during the leave year in any section where the maximum quota has not been filled." (Emphasis added.) The term "leave year" is not defined in the Local MOU. The only definition of "leave year" submitted into evidence is found at Section 512.121 of the ELM (Jt. Exhibit 3). The ELM includes the entire month of December in the definition of "leave year." In addition, there is no specific provision that restricts the availability of Annual Leave as long as the quota has not been filled. Finally, the Union produced evidence from the 1981 local negotiations (Union Exhibit 1) that the Pasadena Post Office formally proposed that "[t]here should be no scheduled annual leave during the month of December." The proposal was subsequently withdrawn by the Service and the December exclusion was not memorialized in the Local MOU. While this item of local bargaining history is not, by itself, a dispositive indicator of the Service's position, it must be inferred that local management understood the ELM definition of the "leave year" and accepted the fact that Annual Leaves had to be granted in December unless they were limited by specific language in the Local MOU.

The Service's argument regarding past practice at the Pasadena Post Office is not persuasive. An Employer's past practice concerning the implementation of contract language is appropriately considered only when the language in question is unclear or ambiguous. Even if the language of this Local MOU was unclear or ambiguous, the Service would have had to demonstrate that the practice was "the understood and accepted way of doing things over an extended period of time." This "course of conduct" should have at least three basic features: (1) "clarity and consistency," (2) "longevity and repetition," and (3) acceptability and mutuality." (See, "Past Practice and the Administration of Collective Bargaining Agreements," by Richard Mittenthal, contained in "Arbitration in Practice," Arnold M. Zack, ed., published by ILR Press, NYSSILR, Cornell University: 1984, pp. 181-208.) If it had been determined that the contract language was unclear or ambiguous, the current state of the record in this matter would not satisfy Arbitrator Mittenthal's test for a binding past practice.

Further, in the opinion of the undersigned, the principles set forth in Arbitrator Mittenthal's National Arbitration decisions

require a finding that the Pasadena Post Office violated the Agreement when it denied the requests for Annual Leave during Christmas week of 1990. The Service has an valid concern regarding heavy mail volume and appropriate staffing levels for the time from Thanksgiving through Christmas. However, Arbitrator Mittenthal addressed those concerns directly when he stated:

"It may be that a particular LMU clause will, due to poor judgement of the negotiators, permit too many employees to be on leave at one time or permit employees to take leave on too short a notice. It may be that these arrangements will cause inefficiencies. But such matters can presumably be corrected through local negotiations . . . The fact that some clauses have such an effect is no basis for invalidating all clauses."

Where it is possible to do so, Arbitrators attempt to provide a remedy for a contract violation. The appropriate remedy for a contract violation is based to a large extent upon the degree of management's culpability for the violation. An honest mistake or misreading of the Agreement might call for a minimal remedy, whereas an arbitrary, capricious, or discriminatory action that is clearly in violation of the Agreement often supports a more substantial remedy. Remedies range from a simple declaration that a violation has occurred and the issuance of a cease and desist order, through partial or complete restitution for lost wages, or time, or both, and on to what could be characterized as punitive damages, depending on the severity of the violation.

In this matter, the Union sought only that the Pasadena Post Office allow scheduled Annual Leave up to the 13% quota. There is nothing in the record to indicate that any remedy beyond that which was sought by the Union should be ordered. Based on the record of this matter, the Arbitrator is of the opinion that the appropriate remedy is to declare that the Agreement was violated and to order that the Pasadena Post Office cease and desist from any future refusal to grant Annual Leave requests up to the quota set forth in Article II of the Local MOU.

AWARD

The Pasadena Post Office violated the National Agreement when it denied requests for scheduled Annual Leave for the month of December. The Pasadena Post Office shall cease and desist from refusing to grant Annual Leave requests up to the "maximum quota" set forth in Article II of the Local MOU.

Respectfully submitted,

CARL B.A. LANGE III