C#3206

ARBITRATION AWARD

September 21, 1981

UNITED STATES POSTAL SERVICE
Helena, Montana

-and-

Case No. N8-W-0406

NATIONAL ASSOCIATION OF
LETTER CARRIERS
Branch 220

Subject: Assignment of Work - Enforceability of Local Memorandum of Understanding

Statement of the Issues: Whether the Helena Memorandum of Understanding with respect to the assignment of re-labeling work is enforceable or unenforceable? Whether Helena Management waived its unenforceability claim by failing to invoke the procedures set forth in the 1978 National Memorandum of Understanding for resolution of an alleged conflict between the Helena Memorandum and the 1978 National Agreement?

Contract Provisions Involved: Articles III, XIII, XV and XXX and the Memorandum of Understanding on XXX of the July 21, 1978 National Agreement. Article XLI, Section 3U of the November 14, 1978 Helena Memorandum of Understanding.

Grievance Data:	Date
Grievance Filed:	April 28, 1980
Step 2 Answer:	May 22, 1980
Step 3 Answer:	June 30, 1980
Step 4 Answer:	December 19, 1980

Appeal to Arbitration:	January 22, 1981
Case Heard:	April 28, 1981
Transcript Received:	May 11, 1981
Briefs Submitted:	June 28, 1981

Statement of the Award: The grievance is granted. The Helena postal facility should reimburse the Regular Carrier or T-6 for re-labeling work improperly assigned to others in April 1980.

BACKGROUND

This grievance from Helena, Montana involves the Postal Service's refusal to honor a clause in a Local Memorandum of Understanding which requires cases for a particular route to be "...re-labeled by the Regular Carrier or T-6 only." NALC insists that this refusal is a violation of Article XXX of the 1978 National Agreement. The Postal Service argues, however, that this clause is unenforceable (1) because its subject matter does not fall within the 22 items enumerated for local negotiations in Article XXX, Section B and (2) because its terms are inconsistent or in conflict with Articles III and XIII. NALC disagrees with both of these propositions.

Since the mid-1960s, the parties have encouraged the execution of local agreements. Those local agreements included a 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 local ageements which went beyond the terms of the National Agreement. For example, Article VII, 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 shall 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 XXX 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 memoranda "shall be inconsistent or in conflict with this Agreement..."; it provided for arbitration of impasses reached in local negotiations.

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 could 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.

The language of the 1973 National Agreement, specifically, Article XXX, has been carried forward into the 1975 and 1978 National Agreements. It is crucial to the resolution of this grievance and must be quoted at length:

> "A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1978 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 implemention to commence October 1, 1978 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1978 National Agreement:
>
> ...[Items 1 through 22]
>
> "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 of understanding shall apply, unless inconsistent with or in conflict with the 1978 National Agreement.
>
> "D. An alleged violation of the terms of a memorandum of understanding shall be subject to the grievance-arbitration procedure."*

* This quotation is taken from the 1978 National Agreement. The language of the 1973 and 1975 National Agreements is identical except for the year 1973 or 1975, respectively, instead of 1978.

Given this background, the facts which prompted the instant dispute should be considered. Route cases are labeled so as to allow a Letter Carrier to case mail in a proper delivery sequence. Re-labeling is periodically required, perhaps two hours' work on each carrier route once a year, because of route changes (e.g., new addresses). In the 1975 local negotiations in Helena, Montana, the parties agreed to a Memorandum of Understanding which included the following clause in Article XLI, Section 3:

> "U. Routes will be re-labeled by the Regular Carrier or T-6 only."

This clause does not fall within any of the 22 items enumerated in Article XXX-B. It was nevertheless applied by Management throughout the life of the 1975 National Agreement. It was not mentioned during the 1978 local negotiations and it appeared again, unchanged, in the 1978 Memorandum of Understanding. No claim was made by Management in those negotiations that the clause was inconsistent or in conflict with the National Agreement.

Helena Management used a part-time Flexible Carrier and a limited duty Regular Carrier to remove and replace labels on route cases on April 14, 1980. This was contrary to the terms of the 1978 Memorandum of Understanding. NALC Branch 220 grieved on April 28, 1980, alleging a violation of the Memorandum and seeking back pay for the Regular Carriers who would have performed this re-labeling had Management complied with Article XLI, Section 3U of the Memorandum.

DISCUSSION AND FINDINGS

This case concerns the enforceability of that portion of the 1978 Helena Memorandum of Understanding which deals with the assignment of re-labeling work. Two principal questions are before the arbitrator. The first is whether this Helena clause is rendered unenforceable by reason of the fact that its subject matter is outside the scope of the 22 items enumerated for local negotiations in Article XXX-B. The second is whether this Helena clause is inconsistent or in conflict with the 1978 National Agreement and hence unenforceable under Article XXX-A and -B. The Postal Service believes both questions call for an affirmative answer. NALC disagrees.

I - Enforceability - Subject Matter

The Postal Service argues that Article XXX-B limits the permissible scope of local negotiations. It insists that local parties have the authority to negotiate only on those 22 items enumerated in XXX-B. It urges that they have no authority to negotiate on other subject matter and that should they nevertheless do so, any agreement they reach would be unenforceable. It asserts that these principles require that the Helena clause on re-labeling be declared unenforceable inasmuch as it does not fall within the 22 enumerated items.

This argument rests on a single sentence in Article XXX-B, "There shall be a 30-day period of local implementation...on the 22 specific items enumerated below..." These words simply state that the local parties are to negotiate on these 22 items. A familiar rule of contract construction provides, "To express one thing is to exclude another." The Postal Service apparently relies on this rule in asserting that the local parties are not to negotiate anything other than these 22 items. Its position is that the local parties in Helena had no authority to negotiate the clause on re-labeling and that this clause must therefore be deemed null and void.

This point of view is not persuasive. To begin with, it must be remembered that the local parties had in the past routinely negotiated local memoranda on subject matter nowhere mentioned in the National Agreement. No one claims these memoranda were, for that reason, invalid. However, so many local issues were deadlocked in the 1971 negotiations that the procedure for resolving such impasses was overwhelmed and hence unworkable. This problem prompted the introduction of XXX-B in the 1973 National Agreement. Clearly, the concern of the national parties was not the subject matter of the local memoranda* but rather the number of impasses. It is true that XXX-B served to limit the subjects on which the local parties were required to negotiate. But that obviously was done in order to limit the number of potential impasses in the future.

Given this tradition of broad local memoranda and the limited objectives of XXX-B, it would take clear contract

* The national parties were, of course, always concerned about local memoranda being consistent with the National Agreement. That matter is discussed later in this opinion.

language to prohibit the local parties from negotiating a clause on a subject outside the 22 listed items. No such language, no such prohibition, can be found in XXX-B. The Postal Service believes this provision describes what the local parties are authorized to negotiate. But it is equally plausible to argue, as NALC does, that this provision describes what the local parties are required to negotiate.* This interpretation is, I think, more consistent with the parties' history as well as collective bargaining reality.** The rule of construction noted earlier, when applied to this view of XXX-B, would indicate only that the local parties are not required to negotiate on any subject outside the 22 listed items. Thus, the local parties are free if they wish to expand their negotiating agenda to include subjects nowhere mentioned in XXX-B. That is exactly what happened in Helena when the local parties agreed to a re-labeling clause in the 1975 negotiations. They had the authority to negotiate such a clause.

Two other points deserve brief mention. First, the Postal Service concedes that any pre-1973 local memoranda on subjects outside the 22 listed items would be valid and binding notwithstanding XXX-B. It says only post-1973 memoranda are affected by the XXX-B constraints. If this distinction were correct, then the validity of many local clauses would depend not on their subject matter but rather on the date they happen to have been negotiated. The same clause might be valid if executed in the 1971 negotiations but invalid if executed in the 1973 negotiations. That would be a strange result. Second, the Postal Service cites several awards which have interpreted XXX-B in a manner consistent with its position. All but one*** of those awards were impasse arbitrations. They were not grievance arbitrations; they were not heard

* And Article XXX-B and -C together indicate that the parties are free to arbitrate what they are required to, but cannot successfully negotiate.

** Multi-facility (or multi-employer) collective bargaining contracts always permit local agreements so long as they are not in conflict with the master contract. That phenomenon is a result of the need for mutually acceptable arrangements for matters not covered by the master contract.

*** The one exception, Case No. AC-N-14034, was a grievance arbitration at the national level. But the arbitrator's opinion did not really deal with the issue before me in the present case.

at the national level; they do not appear to have involved a full airing of this XXX-B issue. In another award at the national level (Case No. A8-N-0036), Arbitrator Aaron stated, "...it can scarcely be contended that management is precluded by Article XXX, Section B, from agreeing to negotiate locally about any particular matter." Under these circumstances, I do not consider myself bound by the Postal Service citations.

For these reasons, my conclusion is that the Helena Local Memorandum clause on re-labeling was enforceable even though it covered a subject outside the 22 enumerated items in XXX-B.

II - Enforceability - Continuity of Memoranda

The Helena clause in question was initially agreed to in the 1975 local negotiations. It was incorporated in the 1975 Local Memorandum. No mention was made of this clause in the 1978 negotiations and the parties carried it forward into the 1978 Memorandum.

That clause is enforceable under Article XXX-A, "Presently effective local memoranda of understanding...shall remain in effect during the term of this [1978 National] Agreement..." It was in effect in April 1980 when Management ignored its terms and assigned re-labeling work to someone other than "the Regular Carrier or T-6..." According to XXX-D, such "an alleged violation of the terms of a memorandum of understanding shall be subject to the grievance-arbitration procedure."

III - Enforceability - Conflict with National Agreement

Article XXX-A provides that only those "presently effective local memoranda" which are "not inconsistent or in conflict with the 1978 National Agreement shall remain in effect during the term of this Agreement..." The Postal Service asserts that the Helena clause on re-labeling is "inconsistent or in conflict with" Articles III and XIII of the 1978 National Agreement and is hence unenforceable. NALC disagrees.

Article III (Management Rights) states in part:

> "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...in the performance of official duties;

B. To...assign...employees in positions within the Postal Service;

C. To maintain the efficiency of the operations...;

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

This contract language grants the Postal Service an "exclusive right" to "direct" the work force and "assign" work. Its broad discretion in these areas is "subject" to the provisions of the 1978 National Agreement. Neither party has cited any portion of the National Agreement which would limit that discretion in relation to the facts of this case. The M-39 Manual, Part 121.21, says that one of the Carrier's office duties is to "relabel cases if local management so desires..." These words merely indicate that Carriers are to perform re-labeling work only when Management asks them to do so.

The Helena clause on re-labeling work is part of a Local Memorandum of Understanding. It is not a provision of the 1978 National Agreement.* It states, "Route...[cases] will be re-labeled by the Regular Carrier or T-6 only." The issue raised by the parties is whether this clause, this restriction on Helena Management's right of assignment, is "inconsistent or in conflict with" Article III of the National Agreement.

The Postal Service's argument is not without appeal. It correctly observes that this local clause prohibits Helena Management from assigning re-labeling work to anyone other than the Regular Carrier or T-6. It insists that Management's "exclusive right" to "assign" is thereby limited, that the broad discretion granted by Article III is reduced by the Helena clause. In its opinion, therefore, the prohibition in this local clause is "inconsistent or in conflict with" its Article III rights. It says this inconsistency should prevent this clause from being treated, under XXX-A, as a

* Local memoranda are enforceable through the terms of the National Agreement. But that surely does not make any such memorandum a provision of the National Agreement.

"presently effective local memoranda..."

The difficulty with this argument is that it assumes Helena Management had no "right" to agree to such a clause. That is not true. One who holds an "exclusive right" has a wide variety of options. Thus, Helena Management had many alternatives with respect to the assignment of the disputed work. It was free to assign the re-labeling to any of its Carriers. It was free to assign the re-labeling to a special group of employees, the Regular Carrier or T-6 only. It was free indeed to reduce this latter arrangement (i.e., use of the Regular Carrier or T-6 only) to writing through a Local Memorandum. Each of these approaches represents a legitimate exercise of Management's "exclusive right" of assignment. It had a right to do whatever it wished to do.

In short, the "exclusive right" in Article III did not prevent Helena Management from contracting with the Local NALC Branch to limit the assignment of particular work to particular employees. That was simply one of the options available to it. Because this Helena clause was hence within Management's powers, it can hardly be considered "inconsistent or in conflict with" Article III rights. That being so, this local clause is not rendered unenforceable by XXX-A or -B. Helena Management was bound by this clause. When it assigned re-labeling to employees other than the Regular Carrier or T-6 on April 14, 1980, it violated that clause. Such a violation is subject to correction through the terms of XXX-D.

In reaching this conclusion, I have examined awards by Arbitrators Krimsly and Balicer cited by the Postal Service. Both appear to have been the result of impasse arbitrations. The Balicer award involves other provisions of the National Agreement besides Article III and seems to be distinguishable from the present case. The Krimsly award is based, at least in part, on the faulty premise that local parties cannot negotiate assignment restrictions because that is not one of the 22 local implementation items in XXX-B. I have already ruled otherwise in Part I of this opinion.

There remains the Postal Service's claim that the local clause in question is "inconsistent or in conflict with" Article XIII which concerns "assignment of ill or injured regular work force employees." The difficulty here is the lateness of this argument. Article XV describes in great detail what is expected of the parties in the grievance procedure. The Postal Service's Step 2 decision must make a "full statement" of its "understanding of...the contractual provisions involved." Its Step 3 decision must include "a statement of

any additional...contentions not previously set forth..." Its Step 4 decision must contain "an adequate explanation of the reasons therefor." In this case, the Postal Service made no mention of Article XIII in Steps 2, 3 and 4. Its reliance on this contract provision did not surface until the arbitration hearing itself. Under such circumstances, it would be inappropriate to consider this belated Article XIII claim.*

For these reasons, I find that the Helena clause on re-labeling is valid and enforceable and that Helena Management violated this clause in April 1980 by using employees other than the Regular Carrier or T-6 to perform the re-labeling work.

AWARD

The grievance is granted. The Helena postal facility should reimburse the Regular Carrier or T-6 for re-labeling work improperly assigned to others in April 1980.

Richard Mittenthal

Richard Mittenthal, Arbitrator

* This procedural objection to any consideration of XIII in this case was made by NALC at the arbitration hearing and in its post-hearing brief.