

ARBITRATION AWARD

C# 05670

January 29, 1986

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION

Case Nos. H1C-NA-C-59
H1C-NA-C-61

-and-

NATIONAL ASSOCIATION OF LETTER
CARRIERS

Subject: Local Implementation of Annual Leave Rights - Local Provisions "Inconsistent or in Conflict with..." National Agreement

Statement of the Issue: Whether various Local Memoranda of Understanding provisions, granting employees the right to take certain leave time on the basis of a consolidated percentage, fixed number or other comparable formula, are "inconsistent or in conflict with..." the National Agreement or portions of the Employee & Labor Relations Manual?

Contract Provisions Involved: Articles 3, 10, 19 and 30 and the Memorandum of Understanding on Article 30 of the July 21, 1981 National Agreement.

Appearances: For the Postal Service, John S. Ingram, Manager, Arbitration Branch, Southern Region; for the APWU, Darryl J. Anderson, Attorney (O'Donnell Schwartz & Anderson); for the NALC, Keith E. Secular, Attorney (Cohen Weiss & Simon).

Statement of the Award:

To the extent to which Local Memoranda of Understanding provisions on leave time during non-choice vacation periods allow employees to ignore the choice period and make their initial selection of leave from the non-choice period, such provisions are "inconsistent or in conflict with..." the National Agreement.

In all other respects, these non-choice vacation period clauses or incidental leave clauses are not "inconsistent or in conflict with..." the National Agreement.

BACKGROUND

This dispute concerns the validity of certain annual leave clauses in thousands of Local Memoranda of Understanding (LMU). These clauses give employees a right to take part of their leave during non-choice vacation periods or a right to so-called incidental leave. The Postal Service contends that because these provisions require Management to grant such leave requests so long as the number of people on leave does not exceed some percentage or fixed figure, Management has been stripped of the discretion it possesses under Articles 3 and 10 of the National Agreement and Parts 511 and 512 of the Employee & Labor Relations Manual (ELM). It claims, accordingly, that these provisions are "inconsistent or in conflict with..." the National Agreement. The Unions disagree.

The most relevant terms of the National Agreement are found in Article 10 (Leave) and Article 30 (Local Implementation). They read in part:

Article 10

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:

1. Employees who earn 13 days annual leave per year shall be granted up to ten (10) days of continuous annual leave during the choice period. The number of days of annual leave, not to exceed ten (10), shall be at the option of the employee.

2. Employees who earn 20 or 26 days annual leave per year shall be granted up to fifteen (15) days of continuous annual leave during the choice period. The number of days of annual leave, not to exceed fifteen (15), shall be at the option of the employee.

3. The subject of whether an employee may at the employee's option request two (2) selections during the choice period(s), in units of either 5 or 10 working days, the total not to exceed the ten (10) or fifteen (15) days above, may be determined pursuant to local implementation procedures.

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

E. The vacation period shall start on the first day of the employee's basic work week. Exceptions may be granted by agreement among the employee, Union representative and the Employer.

F. An employee who is called for jury duty during the employee's scheduled choice vacation period or who attends a National, State, or Regional Convention...during the choice vacation period...

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.

B. The installation head shall meet with the representatives of the Unions to review local service needs as soon after January 1 as practical. The installation head shall then:

1. Determine the amount of annual leave accrued to each employee's credit including that for the current year and the amount he/she expects to take in the current year.

2. Determine a final date for submission of applications for vacation period(s) of the employee's choice during the choice vacation period(s).

3. Provide official notice to each employee of the vacation schedule approved for each employee.

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. (Emphasis added)

Article 30

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1981 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, 1981 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1981 National Agreement:

4. Formulation of local leave program.

5. The duration of the choice vacation period.

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.

8. Whether jury duty and attendance at National or State Conventions shall be charged to the choice vacation period.

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 a 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 the determination of the choice vacation schedule is to be part of the total choice vacation plan.

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 1981 National Agreement.

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

Full-time employees are credited with 13, 20 or 26 days of annual leave at the beginning of the year, depending on their length of service. Article 10 contemplates a "national program of vacation planning" and describes how most, but not all, of this annual leave is to be taken. Employees who earn

13 days' leave are given the opportunity to use up to 10 continuous days during the choice vacation period. Employees who earn 20 or 26 days' leave are given the opportunity to use up to 15 continuous days during the choice vacation period. 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. Presumably, those with greater length of service receive the weeks they desire.* The others have to accept their second or third choice of leave time.

These arrangements, however, do not dispose of all of the annual leave earned. For instance, the employee who earns 13 days and is scheduled for a continuous 10-day leave during the choice vacation period still has 3 additional days. Article 10 says little about how this additional leave is to be taken. Section 3D4 states that the "remainder" of one's annual leave "may be granted at other times during the year, as requested by the employee." Section 4C states that the parties may, at the local level, establish a bidding procedure "for annual leave periods other than the choice period..."**

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. Such a clause recognizes that many people have no interest in leave during the summer months. An example would be helpful. Suppose a LMU establishes a choice vacation period of May through August and non-choice vacation periods of September through November and January through April. This clause would permit an employee, a winter sports enthusiast for instance, to take his leave in January or February subject of course to whatever maximum limit the LMU places on the number of employees who may be off in any given week. Employees ordinarily bid for non-choice periods in the same way they bid for choice periods.

* It is not clear from the record whether length of service is always the controlling consideration in these circumstances.

** Precisely the same point is made in Article 30 B 12.

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. Perhaps an employee's daughter decides in May to get married in October. Or a death in the employee's family requires him to take time off. 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.

In an attempt to illustrate the dispute and place the problem in sharper focus, the parties agreed to three hypothetical examples of LMU provisions. They are:

Example #1

1. The choice vacation period consists of the entire year except December. A maximum number or percentage of employees (e.g., 12%) is allowed off during the choice period. During November and December, employees may bid for week-long blocs of annual leave during the choice period.

Example #2

A. The choice vacation period consists of the months of May, June, July and August. During this choice period, a maximum number or percentage of employees (e.g., 12%) is allowed off. During November and December, employees may bid for week-long blocs of annual leave within the choice period.

B. During the non-choice period -- i.e., months of January, February, March, April, September, October and November -- a maximum number or percentage (e.g., 8%) is allowed off. During November and December, employees may bid for week-long blocs of annual leave during the non-choice periods.

Example #3

Same as Example #2, above, except add:

C. After December, employees may bid for leave slots not filled by the November-December bidding, provided that bids are submitted a certain period in advance:

For example:

1. Units of five days or more, requested at least two weeks in advance.
2. Units of eight hours or more, requested prior to the commencement of an employee's tour.

D. All timely bids must be honored (on the basis of either seniority or first come/first serve), provided only that the applicable maximum number or percentage to be allowed off has not been reached.

Example #1 and Example #2, Paragraph A permit leave time up to a certain maximum figure during the choice vacation period. The parties agree that these clauses are valid and enforceable. Example #2, Paragraph B permits leave time up to a certain maximum figure during the non-choice vacation period; Example #3 permits incidental leave consistent with such a maximum and with adequate employee notice. The Unions insist these clauses are also valid and enforceable. The Postal Service disagrees. It believes they are "inconsistent or in conflict with..." the National Agreement and are hence invalid.

Throughout the country, the Postal Service has challenged the validity of leave provisions in LMU similar or identical to the ones contained in Examples #2 and #3. Those challenges resulted in local impasses in the 1981 local negotiations and perhaps grievances as well. These disputes have been held in abeyance because of two grievances filed at the national level, one by NALC on January 29, 1982 and the other by APWU on April 21, 1983. Such grievances assert that the leave clauses in question are not "inconsistent or in conflict with..." the National Agreement and should be deemed valid and enforceable. Hearings were held at the Postal Service headquarters building in Washington on April 9, June 19 and July 19, 1985. Post-hearing briefs were submitted on September 20, 1985.

DISCUSSION AND FINDINGS

I - The Principle

There is no quarrel here about the pertinent contract principle, namely, any LMU clause "inconsistent or in conflict with..." the National Agreement is invalid. That principle is clearly set forth in Article 30. In Case No. H1C-NA-C-25, I elaborated on this matter and observed:

...the purpose of the "inconsistent or in conflict..." language is to insure the primacy of the National Agreement. The parties established the principle that LMU provisions are subordinate to the National Agreement, that LMU provisions could be carried forward into successor LMU only if "not inconsistent or in conflict..."...

The issue in this case is not the principle but rather whether the LMU leave clauses in question are in fact "inconsistent or in conflict..."

II - The Postal Service Claim

The Postal Service stresses that Article 10, Section 3 says employees "shall be granted" most of their leave time during the choice vacation period but the "remainder" of their leave "may be granted at other times during the year, as requested by the employee." It argues that the latter language, found in Section 3D4, gives Management discretionary authority with respect to all leave time other than the initial leave during the choice period. It believes Management is thus free to determine when it wishes to grant the "remainder" leave to employees. In its view, a LMU clause which requires Management to grant the "remainder" leave at any particular time and thus restricts Management's discretion is "inconsistent or in conflict with..." Article 10, Section 3D4 of the National Agreement. It asserts that the disputed LMU provisions regarding incidental leave or leave during non-choice periods suffer from this defect and should therefore be declared invalid.

The Postal Service notes that employees have two options as to what to do with their "remainder" leave. First, they may carry over such leave to the next calendar year provided the accumulated carry-over is not more than 30 days. Second, they may apply for and receive leave time at Management's discretion under Section 3D4. It emphasizes that there is no evidence that employees have had to forfeit leave because of Management's exercise of this discretion.

Furthermore, the Postal Service maintains that the disputed LMU clauses are also "inconsistent or in conflict with..." Articles 3 and 19 of the National Agreement. It refers to Article 3 granting Management the right "to maintain the efficiency of the operations entrusted to it" and contends the LMU clauses undermine this right. It refers to Article 19 incorporating ELM provisions (Parts 511 and 512) giving supervision the right to "approve or disapprove requests for leave" and contends the LMU clauses undermine this right.

III - Meaning of Art. 10, Sec. 3D4

Section 3D4 bears repeating, "The remainder of the employee's annual leave may be granted at other times during the year, as requested by the employee." The Postal Service's interpretation of this language is stated in Part II of this opinion. It believes these words give Management sole discretion as to when the "remainder" leave will be taken. It believes these words permit Management alone to control the timing of all leave other than the leave initially selected during the choice period. This construction of Section 3D4 is not unreasonable. Indeed, a considerable number of regional arbitrators have accepted the Postal Service's view.

However, there are other equally plausible interpretations of this language. Sections 3D1, 2 and 3 provide that up to 10 (or 15) continuous leave days "shall be granted" during the choice period. Employees are entitled to the "remainder" of their annual leave as well. Section 3D4 then says this "remainder...may be granted at other times...", namely, during the non-choice period. It simply acknowledges that employees are not required to schedule all of their leave time during the choice period. It makes possible the "remainder" leave being taken at any time, within or outside the choice period. This construction strongly suggests that it was not Management discretion which prompted the language in question but rather the need to recognize that the "remainder" leave was not limited to the choice period.

Still another interpretation, one favored by the Unions, is not without appeal. The Unions note the same language as the Postal Service, "The remainder of the...leave may be granted at other times..." They stress that these words are wholly permissive. They stress that these words do not prohibit, expressly or by implication, granting employees a right to "remainder" leave at a certain time. It follows that Section 3D4 allows Management to deal with this issue in any way it wishes including consenting to a LMU clause requiring that certain "remainder" leave requests be honored. Surely, Management can exercise its broad discretion by negotiating

LMU provisions which spell out when employees will be entitled to incidental leave or leave during non-choice periods. Such provisions simply set forth in advance the circumstances under which Management will grant "remainder" leave as requested. In short, Management's authority under Section 3D4 is sufficiently broad and general as to permit the very LMU clauses in dispute.

These observations show that Section 3D4 is rife with ambiguity. It is susceptible to any and all of the readings described above. The Postal Service's interpretation may well demonstrate that the LMU clauses are "inconsistent or in conflict..." but the other interpretations produce no such "inconsisten[cy]." The burden of establishing "inconsisten[cy]" is on the party asserting that position, here the Postal Service. When several interpretations make sense, the arbitrator should not embrace the only one which will result in an "inconsisten[cy]." The arbitrator should nullify only that which must be nullified and should thus prefer the interpretation which permits the coexistence of the disputed LMU clauses with the National Agreement. This ruling, as will be further demonstrated in Part IV below, seems to be consistent with the underlying objectives of Articles 10 and 30. For these reasons, my conclusion is that the LMU clauses in question are not "inconsistent or in conflict with..." Article 10, Section 3D4.*

IV - Supporting Considerations

Article 10, Section 3A calls for the creation of "a nationwide program for vacation planning...with emphasis upon the choice vacation period(s) or variations thereof." These words reveal why most of Sections 3 and 4 deal with the "choice vacation period." That was the parties' primary concern. But an "emphasis" on the choice period plainly suggests the parties meant that some consideration also be given to "planning" for the non-choice period. Section 4C specifically speaks of local implementation on a bidding procedure for leave during the non-choice period. Moreover, the concept of "variations..." in choice period scheduling would appear to encompass the kind of incidental leave involved in this dispute.

* The one exception to this conclusion is discussed in Part V of this opinion.

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. They could negotiate a LMU clause which permitted up to 12 percent of the employees to be off in any week during the choice period (See Example #2A). 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.* That should be especially true where the LMU clause permits a lesser percentage of employees to be off during the non-choice period (See Example #2B). Given these circumstances, there should be far less reason for Management to be concerned about discretion to deny leave during a 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. Evidently most local Managements did not see any conflict between such provisions and Article 10, Section 3D4. No doubt others did. But the large number of these clauses suggests that, prior to 1981 local implementation, Section 3D4 was not ordinarily construed in the manner suggested by the Postal Service in this case.

All of these factors serve to undermine the Postal Service's reading of Section 3D4. I note that there is a sharp conflict among regional arbitrators on this issue.

V - An Exception

Article 10, Section 3D says employees "shall be granted" up to 10 (or 15) continuous days of leave "during the choice period" and the "remainder" of their leave "may be granted at

* 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."

other times..." This language establishes a clear sequence. The initial leave selection must relate to the choice period. The "remainder" is then requested, within the choice period or the non-choice period. The distribution of this "remainder" under Section 3D4 comes into play only after a selection of leave time within the choice period has been made.

Therefore, to the extent to which the LMU clauses allow an employee to make his initial selection within the non-choice period, such clauses are "inconsistent or in conflict with..." the plain meaning of Section 3D.

VI - Articles 3 and 19 (ELM)

The Postal Service claims further that the LMU clauses in question are "inconsistent or in conflict with..." Article 3 and certain portions of the ELM. It notes that the ELM is incorporated in the National Agreement through Article 19.

As for Article 3, the Postal Service asserts that it provides Management with the "exclusive right" to "maintain the efficiency of the operations entrusted to it." It believes the LMU clauses undermine efficiency by requiring Management to grant certain leave requests which, from the standpoint of scheduling, overtime costs or productivity, might better be denied. This argument is not convincing. Article 3 rights are not absolute. They are "subject to the provisions of this [National] Agreement..."; they are subject to the terms of Article 10, Sections 3 and 4 and Article 30 B 4. The latter provision contemplates that local parties negotiate LMU clauses regarding the "formulation of [a] local leave program." When the local parties do what they are expressly authorized to do, the resultant LMU clauses can hardly be said to be "inconsistent or in conflict with..." Article 3.

It may be that a particular LMU clause will, due to the poor judgment 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 or, if necessary, through arbitration of local impasses.* It cannot be said, on the present state of the record, that all (or most) LMU clauses on leave during non-choice periods (or incidental leave) must necessarily cause inefficiency. The fact that some clauses have such an effect is no basis for invalidating all clauses.

* My reference to "arbitration" here assumes a Postal Service claim that an existing clause should be modified to eliminate some inefficiency it created, not a Postal Service claim that the clause itself is "inconsistent or in conflict..." and hence invalid.

As for the ELM, the Postal Service emphasizes language in Parts 511 and 512 giving supervision the right to "approve or disapprove requests for leave" and calling for leave to be "granted when requested-to the extent practicable." It believes the LMU clauses eliminate this right and the practicability standard by requiring that all leave requests be granted so long as some maximum figure is not exceeded.

This argument is not persuasive. The ELM itself, Part 512.61(a), states that leave for bargaining unit employees "is subject to specific vacation planning provisions of applicable collective bargaining agreements." The LMU are "applicable collective bargaining agreements." Their leave clauses involve "formulation of local leave program[s]" pursuant to the instructions found in the National Agreement, namely, Article 30 B 4. The local parties have simply announced in advance, through LMU, what leave will be approved and what leave will be disapproved. They have announced in advance the criteria to be used in determining such approval or disapproval. These criteria represent the local parties' view as to what is or is not practicable. There is no requirement that the Postal Service limit itself to leave approval on a case-by-case basis without regard to any agreed upon criteria. Supervision has not surrendered its rights. Rather, it has been given fixed standards to follow in the exercise of its rights. Accordingly, I cannot find that the LMU clauses in question are "inconsistent or in conflict with... the ELM.

VII - Conclusion

My ruling is that, subject to the one exception mentioned in Part V, the LMU clauses in dispute are not "inconsistent or in conflict with..." Articles 3 and 10 of the National Agreement or the ELM.

AWARD

To the extent to which Local Memoranda of Understanding provisions on leave time during non-choice vacation periods allow employees to ignore the choice period and make their initial selection of leave from the non-choice period, such provisions are "inconsistent or in conflict with..." the National Agreement.

In all other respects, these non-choice vacation period clauses or incidental leave clauses are not "inconsistent or in conflict with..." the National Agreement.



Richard Mittenenthal, Arbitrator