C# 08730

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration		
between		
UNITED STATES POSTAL SERVICE		
and	**GRIEVANT:**	Class Action
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	**POST OFFICE:**	Neenah WI
	USPS CASE NO:	H4N-4J-C 18504
and		
AMERICAN POSTAL WORKERS UNION, AFL-CIO *Intervenor*		

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service:	Kevin B. Rachel
For the Union:	Keith E. Secular
For the Intervenor:	Darryl J. Anderson
Place of Hearing:	USPS Headquarters
Date of Hearing:	November 18, 1988

AWARD:

For the reasons given, it is the decision of the Arbitrator that intervention by the National Rural Letter Carriers Association be permitted in this case.

Date of Award: March 16, 1989

Raymond L. Britton

ISSUE

Whether the National Rural Letter Carriers Association may intervene as a party in this arbitration?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the Hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the Hearing, it was agreed that the parties would submit Post-Hearing briefs to the Arbitrator by placing such briefs in the mails not later than January 30, 1989. A Transcript of the Hearing prepared by Diversified Reporting Services, Inc., Washington, D.C. was received by the Arbitrator on December 7, 1988. On February 2, 1989, the Arbitrator received a Post-Hearing Brief filed by the United States Postal Service (hereinafter referred to as "Employer"); a Post-Hearing Brief filed jointly by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "NALC") and, as Intervenors, the American Postal Workers Union, AFL-CIO (hereinafter referred to as "APWU"); and an Amicus Curiae Brief filed by the National Rural Letter Carriers Association (hereinafter sometimes referred to as "NRLCA"), a Proposed Intervenor.

SUMMARY STATEMENT OF THE CASE

This matter arose as the result of a grievance filed by the NALC on May 1, 1986, after local management in Neenah, Wisconsin, transferred certain territory from the city letter carrier bargaining unit to the rural letter carrier bargaining unit. After being processed through the various steps of the grievance procedure, Labor Relations Program Analyst Michael P. Jordan sent a letter dated April 10, 1987, to NALC National Business Agent Eugene McNulty, in which he stated in relevant part as follows (Joint Exhibit No. 2):

* * *

Given the jurisdictional aspect of this issue, Marilyn Dahlen, Executive Committeeman, National Rural Letter Carriers Association, has been invited to intervene in a tripartite arbitration.

* * *

On November 10, 1988, in a letter to NALC Vice-President Lawrence G. Hutchins, Muriel Aikens Arnold of the Grievance & Arbitration Division stated in relevant part as follows (Joint Exhibit No. 2):

* * *

The issue in this grievance is whether or not the National Rural Letter Carriers' Association should be permitted to intervene in the instant jurisdictional work dispute.

The NALC contends that the NRLCA should not be permitted to intervene in the subject grievance since that Union is not a party to the USPS-APWU/NALC collective bargaining agreement.

It is the position of the Postal Service that its interests as well as those of the NALC and the NRLCA will be best served by tripartite arbitration proceedings where jurisdictional work disputes arise as is appropriate under the law and the contract. Tripartite arbitration is the fairest and most efficient course of action to follow. In view of the Union's position, there is no alternative but to deny this grievance.

On November 10, 1988, the NALC appealed this matter to arbitration.

Provisions of the National Agreement effective July 21, 1984, to remain in full force and effect to and including 12 midnight July 20, 1987, (hereinafter referred to as "National Agreement") (Joint Exhibit No. 3) considered pertinent to this dispute by the parties are as follows:

PREAMBLE

This Agreement (referred to as the 1984 National Agreement) is entered into by and between the United States Postal Service (hereinafter referred to as the "Employer") and the American Postal Workers Union, AFL-CIO; and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to collectively as the "Unions"), pursuant to an arbitration award issued December 24, 1984. In accordance with the terms of the award, the Agreement is effective as of the date of the award unless otherwise provided, and except for certain provisions of Articles 9 and 26 which were effective retroactively to July 21, 1984.

ARTICLE 1

UNION RECOGNITION

Section 1. Unions

The Employer recognizes each of the Unions designated below as the exclusive bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the national level:

National Association of Letter Carriers, AFL-CIO--City Letter Carriers
American Postal Workers Union, AFL-CIO--Maintenance Employees
American Postal Workers Union, AFL-CIO--Special Delivery Messengers
American Postal Workers Union, AFL-CIO--Motor Vehicle Employees
American Postal Workers Union, AFL-CIO--Postal Clerks

Section 2. Exclusions

The employee groups set forth in Section 1 above do not include, and this Agreement does not apply to:

* * *

7. Rural letter carriers; . . . .

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

* * *

Section 4. Arbitration

* * *

A. General Provisions

* * *

(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.

POSITION OF THE PARTIES

The Position of the NALC

It is the position of the NALC that the Arbitrator does not have the authority to order the intervention of the NRLCA as a party over the NALC's objection. The NALC contends that intervention by the NRLCA, even if the Arbitrator had the authority to order such intervention, is inappropriate in this case. The NALC maintains, therefore, that the Employer's application for an order allowing the NRLCA to intervene as a party in this arbitration should be denied and the case remanded to the parties for resolution on the merits on a bipartite basis.

The Position of the Employer

The Employer takes the position that the Arbitrator has the authority to permit and should permit the NRLCA to intervene in this arbitration. The Employer contends that there is ample basis in the National Agreement for permitting such intervention. The Employer additionally maintains that federal labor policy favors tripartite arbitration of jurisdictional disputes and supports the Arbitrator's authority to permit intervention in this case.

OPINION

Central to the resolution of this matter is the question of whether the Arbitrator may permit intervention by the NRLCA in order to resolve the grievance that gave rise to this proceeding.

The NALC has taken the position that the Arbitrator lacks the authority to order such intervention where the NALC has objected to it and where no court of competent jurisdiction has ordered tripartite arbitration. In support of this position, the NALC contends that the National Agreement does not authorize the conversion of contractual grievance appeals into tripartite jurisdictional proceedings involving non-parties. Further, the NALC argues, the Arbitrator may not look to external law as a basis for allowing intervention and, as a result, management's application for intervention must be denied. According to the NALC, the express language of the Agreement demonstrates that the grievance arbitration procedure is only open to the NALC, the APWU, and the Postal Service. Referencing the provisions of the Preamble and Article 1 of the National Agreement, the NALC points out that only the NALC and the APWU are recognized as bargaining representatives for the specified employees. Moreover, according to the NALC, Section 2 of Article 1 specifically excludes the rural letter carriers, who therefore have no standing or status under the National Agreement. Similarly, in Article 15 of the National Agreement, Section 4.A.(9) limits the right of intervention to the Unions previously defined as the NALC and the APWU. The NALC argues that the absence of comparable language allowing intervention rights to non-parties establishes that such intervention is not authorized.

A second argument made by the NALC in support of its position that the Arbitrator lacks the authority to order intervention is based on the bargaining history and practice of the parties. In this regard, it is noted by the NALC that prior to 1978, the NALC, the APWU, and the NRLCA bargained jointly with the Employer and freely intervened in each other's arbitrations or were routinely invited to do so. After 1978, when the NRLCA negotiated a separate agreement with the Employer, all references to the NRLCA were deleted from the National Agreement, and the NALC maintains that the parties did not provide for any continuing right of intervention for the NRLCA in jurisdictional or work assignment grievances. The NALC points out that the NRLCA-USPS Agreement does not contain any provision for intervention by the NALC or any other union in NRLCA arbitrations. From the foregoing, the NALC argues that the inference is inescapable that in 1978, the parties never contemplated and, if anything, specifically intended to bar NRLCA intervention in NALC arbitrations and vice versa.

With respect to the arbitrations that have taken place since 1978 concerning rural-city delivery work assignment issues, the NALC maintains that none of the parties ever asserted a right of intervention (NALC Exhibit Nos. 6, 7, 8, and 9). On one occasion when the Employer sought to have the NRLCA heard, it has accomplished that result by calling a representative of the NRLCA as a witness (NALC Exhibit No. 10). By way of demonstrating that management's present position is a departure from the parties' practice since 1978, of disallowing intervention, the NALC references a memorandum from the Director of the USPS Office of Contract Administration wherein the Employer takes the position that, in jurisdictional disputes, it will insist that all involved unions be allowed to intervene (NALC Exhibit No. 11).

In further advancing its position in this matter, the NALC references the handling of regional level arbitrations involving the APWU and the Mail Handlers Union, which also negotiated jointly with other unions prior to 1981. Since that time, the APWU has appealed numerous grievances to arbitration concerning the assignment of jurisdiction or work to the Mail Handlers and the latter, with the support of the Employer, has persistently sought to intervene in these matters. According to the NALC, although arbitrators have split over the question of intervention, the weight of arbitral authority and the better reasoned decisions support the view that intervention should be denied. Six of the eleven awards submitted at the Hearing hold that the arbitrator does not have the authority under the National Agreement to permit intervention by the Mail Handlers over the objection of the APWU (NALC Exhibit Nos. 12, 13, 14, 15, 16, and 17). According to the NALC, these six decisions uniformly endorse its position here, namely, that the language of the National Agreement deprives the arbitrator of authority to compel the intervention of a union which is not a party to the National Agreement. In contrast, four awards in which the arbitrator allowed intervention over APWU objection were, the NALC argues, erroneously based on external law and not the National Agreement (USPS Exhibit Nos. 3, 4, 5, and 7), and none of the four awards identify a contractual basis for tripartite arbitration.

The present attempt by management to have the Arbitrator look to external law as an independent source of authority for compelling intervention, as was done in the above-referenced four awards, is, according to the NALC, fundamentally inconsistent with the basic teachings of the U.S. Supreme Court. Referencing the Court's opinion in the *Steelworkers Trilogy*, the NALC reminds the Arbitrator that he is ". . . . created by and confined to the parties . . . ." and that his decision must draw its essence from the collective bargaining agreement. Further, while conceding the existence of federal court decisions requiring unions to submit jurisdictional claims to tripartite arbitration, including one case involving the APWU and the Mail Handlers (USPS Exhibit No. 2), the NALC nevertheless argues that none of these decisions remotely suggest that an arbitrator, as distinguished from a court, is empowered to order a tripartite arbitration not provided for in a collective bargaining agreement. Similarly, according to the NALC, none of the holdings in the leading judicial decision on tripartite arbitration, *Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Association*, 414 F.2d 1326 (2d Cir. 1969), supports the proposition that an arbitrator may compel tripartite arbitration in a case similar to the present matter. The court is said by the NALC to have based its findings of subject-matter jurisdiction on a federal statute that confers upon district courts jurisdiction over suits for violations of collective bargaining agreements, and the NALC contends that the court predicated its conclusion that the district court had the power to consolidate the two pending arbitrations on Supreme Court precedent affirming the concept of "a 'new common law' for labor contracts" that includes the power to compel tripartite arbitration. The NALC argues, however, that nothing in the opinion suggests that the power is to be invoked in every case but that "the issue of whether there was a proper exercise of that power depends on the particular facts presented."

With respect to the case referenced above, *USPS v. APWU and Mail Handlers*, Civil Action No. 88-1383 (N.D. Cal July 7, 1988), *appeal pending* No. 88-15284 (9th Cir.) (USPS Exhibit No. 2), the NALC notes that this was an appeal of an arbitration award (NALC Exhibit No. 17), wherein the arbitrator denied intervention by the Mail Handlers in an APWU arbitration. According to the NALC, while the court issued an order compelling tripartite arbitration, it did not conclude that the arbitrator's initial denial of intervention was erroneous, but instead, as in the *CBS* case, defined the issue as whether the court itself had the power to order tripartite arbitration. Concluding that it did, the court is said by the NALC to have derived its power from the Postal Reorganization Act. More importantly, according to the NALC, the court specifically denied an application by the Mail Handlers for a permanent injunction requiring tripartite arbitration of all jurisdictional disputes between the two unions, finding that issuing such an order ". . . . would be inappropriate . . . . without consideration of the particular facts to determine if tripartite arbitration is warranted."

From the foregoing, the NALC contends that it is not clear that a court would order tripartite arbitration on the facts of the instant grievance. Moreover, even if such were the case, the decisions referenced above are said by the NALC to establish that it is for the courts, and only the courts, to make such a determination, since the arbitrator's authority is confined to the collective bargaining agreement which, in this case, does not provide for tripartite arbitration.

As presented to the Arbitrator, the thrust of the foregoing arguments made by the NALC is that the Arbitrator lacks the authority under both the National Agreement and external law to compel tripartite arbitration over NALC's objections, and that if such arbitration is to occur, it must be ordered by a court of competent jurisdiction. It appears that, under the NALC's interpretation of the Arbitrator's authority, if the merits of the case are heard without the intervention of the NRLCA, the USPS, according to its policy as stated in NALC Exhibit No. 11, will not implement the award. At that point, the parties in this matter will be left with no recourse other than a court proceeding in which the very same issue will be addressed. Thus, the NALC concludes that resolution of this matter can only be had after a court determines whether the NRLCA should be allowed to intervene. For the reasons hereinafter given, the Arbitrator does not find his authority so limited as to preclude him from rendering a final and binding award in this matter.

It is significant, it seems to the Arbitrator, that the regional awards that have addressed the question of intervention since 1978 are almost equally split over the issue. Of the awards that the NALC references as squarely holding that the arbitrator does not have the authority under the National Agreement to permit intervention, five reveal an underlying dissatisfaction with the outcome. In Case No. H1C-1J-C-25479 (NALC Exhibit No. 13), Arbitrator Scearce states that ". . . . the potential for an expeditious and final resolution for such matters would well be served by effectuation of an approach whereby tripartite disposition of such matters could be accomplished." In Case No. C4C-4C-C-16906 (NALC Exhibit No. 14), Arbitrator Erbs states that ". . . . it would probably be in the best interest of all of the parties to have a procedure established whereby not only this issue but all similar type issues which might ever require intervention could be handled expeditiously for all concerned." In Case No. C4C-4K-C-31507 (NALC Exhibit No. 15), Arbitrator Dobranski states that "There is little doubt that the final and binding resolution of the conflict in these cases . . . . would be greatly facilitated if all three agreed to the use of one arbitration proceeding." In Case No. C4C-4J-C-18849 (NALC Exhibit No. 16, Arbitrator Witney recognized ". . . . the inherent value and intrinsic merit of tripartite arbitration . . . ." In Case No. W4C-5C-C-6514 (NALC Exhibit No. 17, Arbitrator Rentfro ". . . . agrees with Arbitrators Erbs and Scearce, while tripartite arbitration is clearly the preferable approach, the contract under which this dispute is being arbitrated simply does not authorize it."

In contrast, Arbitrator Belshaw, in Case No. C4C-4M-24294 (USPS Exhibit No. 3), concluded as follows:

> *Where, like* CBS, *all of the parties are contractually bound to arbitrate, where each agreement's arbitration right is invoked (one way or another) by all of the parties, and where all have agreed on the arbitrator-selection procedure (or where, as here, waived that agreement right), consolidation is both desireable and required. A neutral, moving within the arbitration concept established by an involved agreement, and looking as he may, and should, at applicable law, can properly reach no other decision.*

Arbitrator Render, in Case No. W1C-5L-C-18903 (USPS Exhibit No. 4), found that the National Agreement ". . . . contains no express *prohibition* against intervention by a union with a separate agreement." In Case No. W1C-5L-C-9671 (USPS Exhibit No. 5), Arbitrator Levak concluded that ". . . . the better rule is that such applicable outside federal law should be considered and applied where a failure to do so would result in a decision in conflict with established federal court labor policy relative to the enforcement of collective bargaining agreement grievance arbitration provisions." Arbitrator Williams, after an extensive review of case law on the issue of intervention in Case No. S4C-3D-C-32595 (USPS Exhibit No. 7), concluded that ". . . . case law authorized the arbitrator to grant intervention and require tripartite arbitration, when there is a possibility of an adverse effect on the other union if it is missing from the arbitration."

All of the referenced cases, whether permitting or denying intervention, demonstrate a struggle within the arbitration community to reach the same result--tripartite arbitration of jurisdictional disputes--without stepping over the limits of the arbitrator's authority and treading into the no-man's land that lies beyond the four corners of the National Agreement. The arbitrators who have considered the question have likewise wrestled with their authority to examine external law in reaching their conclusions. At the same time, it seems clear from the decisions by the courts that the judicial preference with respect to the jurisdictional disputes such as the instant matter is that they be resolved in a tripartite proceeding, whether or not the underlying collective bargaining agreement specifically authorizes such an action, so long as that agreement does not forbid intervention by a non-party. This is particularly so where, as here, the party attempting to intervene has an almost identical collective bargaining agreement with the same employer and an almost identical grievance arbitration procedure. Thus, in the considered judgment of the Arbitrator, the determination of whether an arbitrator operating under the National Agreement can require intervention depends upon whether the arbitrator interprets his role as being limited only to the exercise of explicit powers enumerated in the National Agreement.

The explicit authority of an arbitrator to settle disputes between the parties is derived from the National Agreement, and often the resolution of a particular grievance is determined by an express provision therein. Nonetheless, arbitrators are frequently required to address matters raised by the parties without having the benefit of an express contract provision upon which to base their judgment. It seems to the Arbitrator that in establishing a grievance arbitration procedure with only the skeletal framework delineated in Article 15, the parties expected and intended that those selected to serve as arbitrators would be asked to respond to many questions not specifically addressed within the National Agreement. Thus, it cannot properly be said that the parties intended for its arbitrators to refrain from exercising the implicit authority that is inherent in the office. Indeed, Article 15, in Section 4D, specifies that "Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National level." That language, in the considered judgment of the Arbitrator, empowers an arbitrator at the National level to interpret the National Agreement in a manner that is ultimately dispositive of the disputed issue.

The NALC primarily relies upon the language of Article 1, Section 2 of the National Agreement as expressly excluding the rural letter carriers from the application of the provisions of the National Agreement. However, in the view of the Arbitrator, the referenced provision is not so confining as the NALC proposes. Article 1, Section 2, as read by the Arbitrator, is a manifestation of the intention of the parties that the rural letter carriers, among others, may not be represented by either the NALC or the APWU and are not subject to the provisions of the National Agreement. Thus, while it is clear from this language that a rural letter carrier has no right to file a grievance under the terms of the National Agreement, the National Agreement is otherwise silent as to whether the NRLCA, as opposed to individual rural letter carriers, may participate in an arbitration proceeding between the NALC and the Employer.

Similarly, the NALC cites the provisions of Article 15, Section 4A9, which addresses intervention, and urges that the absence of language therein allowing intervention rights to non-parties establishes that such intervention is not authorized. While Article 15, Section 4A9 does expressly provide that a Union shall be entitled to intervene where its interests may be affected, it does not at the same time expressly exclude intervention by others. Since Article 15, Section 4A9 additionally states that a dispute as to arbitrability may be submitted to an arbitrator for a final and binding decision, it may reasonably be concluded therefrom that the drafters anticipated the likelihood of questions being raised as to the arbitrability of matters involving intervention by those other than the original two parties to the underlying dispute. Thus, rather than a question of substantive arbitrability, the Arbitrator views the issue before him as being more in the nature of a procedural arbitrability question.

Once having reached the conclusion that the issue raised herein is one of procedural arbitrability, the Arbitrator need not rely solely on sources of external law for the authority to join the NRLCA as a party to the pending grievance. For the authority to determine any dispute as to arbitrability is conveyed to the arbitrator under the terms of Article 15, Section 4A9. There remains for consideration only the question of whether that authority should be exercised under the present circumstances.

The NALC contends that intervention by the NRLCA is inappropriate in the instant matter since the NRLCA had no contractual claim to the two streets removed from City Route 18 in Neenah, Wisconsin prior to the reassignment of that work by management. Further, the NALC maintains that there was never a finding by management that the two streets had taken on characteristics which made rural delivery more appropriate than city delivery. According to the NALC, the only reason the two streets were removed from Route 18 was that Route 18 was overburdened, and the only reason that the two streets were not assigned to another city route was that adjacent city routes were likewise overburdened, and management did not want to create a new city auxiliary route. Thus, the NALC argues, the NRLCA's present claim to the two transferred streets turns exclusively on whether management had the right to make the reassignment in the first instance, and the Employer is capable of defending that position without the NRLCA's intervention. Finally, it is urged by the NALC that the collective bargaining agreement

between the USPS and the NRLCA is entirely irrelevant to the ultimate outcome of this case. Since the NRLCA has nothing to add to these proceedings, intervention should, according to the NALC, be denied on that basis alone.

The difficulty with the foregoing position of the NALC, in the considered judgment of the Arbitrator, is that it ignores the ultimate objective of a grievance arbitration procedure, which is to assure all disputants an equal and fair opportunity to express their respective positions and then to put an end the matter through the issuance of a final award that is binding on all concerned. The NALC has presented no persuasive argument to suggest that its interests will in any way be prejudiced by the NRLCA's participation. Moreover, since the NRLCA has acceded to the invitation of the USPS to participate in the resolution of the underlying jurisdictional dispute and to be bound by the decision rendered on the merits, it seems to the Arbitrator to be an unreasonable expectation on the part of the NALC that the grievance can be fairly and finally resolved without hearing from the NRLCA, for the NRLCA will no doubt exercise its right to grieve the removal of the two streets from its jurisdiction if the NALC prevails on the merits. The specter of conflicting arbitration awards that might thereby arise compels the Arbitrator to conclude that the better reasoned approach is to permit the NRLCA to intervene and be heard now, thereby avoiding costly and time-consuming additional proceedings to resolve the matter. For as stated by the court in the *CBS* case, ". . . . tripartite arbitration in this instance is the fairest and most efficient course of action." Accordingly, it is the decision of the Arbitrator that the National Rural Letter Carriers Association may intervene as a party in this arbitration.