C#094404

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE -and- AMERICAN POSTAL WORKERS UNION	GRIEVANTS: Various St. Paul, Minnesota employees CASE NOS. H4C-4C-C 24016 H1C-4C-C 13693 et al

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: Michael P. Jordan
Field Director, Human Resources, Omaha Div.

For the APWU: Larry Gervais
National Business Agent
Minneapolis Clerk Div.

Place of Hearing: Washington, D.C.

Dates of Hearing: February 8 and May 17, 1989

Dates of Post-Hearing Briefs: August 12, 1989 (APWU)
September 22, 1989 (USPS)

AWARD: The several issues raised in this case are resolved in the manner set forth in the above opinion.

Date of Award: October 6, 1989.

Richard Mittenthal
Arbitrator

BACKGROUND

This dispute concerns the validity of a part of the annual leave clause in the Local Memorandum of Understanding (LMU) between the Postal Service and APWU in St. Paul, Minnesota. That clause gives employees a right, upon request, to certain incidental leave. The Postal Service contends that any such automatic leave approval without the employee giving "reasonable advance notice" and submitting a Form 3971 would deny Management the benefit of Parts 512.4 and 512.6 of the Employee & Labor Relations Manual (ELM). It claims, accordingly, that this clause is "inconsistent or in conflict with ..." the National Agreement, namely, Article 19 which incorporates the ELM into the National Agreement. The APWU disagrees.

The annual leave provisions of the LMU in question are found in Article IX, Section 3, Vacation Planning. They read in part:

> "A. The choice vacation period shall begin with the new leave year and end on the last Friday in November.
>
> "B. During the months of January, February, March, April, September, October, and November, 8% of the employees will be scheduled on annual leave in each section or unit.
>
> "C. During the months of May, June, July, and August, 12% of the employees will be scheduled on annual leave in each section or unit.
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> * * *
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> "F. To clarify choice vacation time for the months of January, February and March, it shall be the intent of Local Agreement that:
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> 1. Annual leave requested within the 8% for the months of January, February and March prior to January 1st of each year shall be deemed as part of the employee's first choice for that year.
>
> 2. Requests for units of five days or more submitted after January 1st shall be considered to be requested under the provisions of item L in the Local Contract.
>
> "G. It is agreed that all employees shall be

granted 2 (two) selections as their first choice during the choice vacation periods.

* * *

"L. Request for annual leave other than choice vacation selection will be allowed by the following priorities:

1. Units of five days or more, requested at least two weeks in advance.

An employee who wants to take annual leave of five days or more will get a priority over annual [leave] of 8 hours or more, up to two weeks before the week concerned.

2. Units of eight hours or more.

After the priority in No. 1 is fulfilled, that is, two weeks before the week in which annual [leave] of 8 hours or more is requested, all other 3971s that have been put in for 8 hours or more, will be granted by seniority within the proper percentage. Those 3971s which are over the quota will come under Section Z of the Local Contract. Annual leave of 8 hours or more requested after the two week period in No. 1 will be granted up to the percentage on a first-come-first-served basis except that those requests received at the same time will be [determined by] Seniority.

3. Units of less than 8 hours are an exception to the above and will be governed by Section Z (4 & 5).

* * *

"Z. The following applies for annual leave requests beyond the percentages..." (Emphasis added)[1]

Some brief comments on this LMU language are necessary at this point. After the choice vacation selections have been made, employees often have additional leave to use. Requests for such leave time take different forms - five days or more,

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[1] This provision appeared for the first time in the LMU as of July 21, 1978.

eight hours or more, less than eight hours. For each request, there appears to be a different rule.

Our concern here is incidental leave of eight hours or more. A request for such leave according to Section 3L2, "will be granted..." so long as the additional leave time will not result in more than a certain fixed percentage of employees being off on annual leave at any one time within a given section or unit. A request for annual leave is ordinarily submitted on a Form 3971. Those who hand in such forms, requesting incidental leave, two weeks before the week in which the leave is sought are given preference over those who make a later request. But regardless of the timing of the request, it seems plain that the request "will be granted..." provided those on annual leave do not exceed the appropriate fixed percentage. The ceilings are set forth in Sections 3B and 3C - 8 percent from January through April, 12 percent from May through August, and 8 percent again from September through November. To this extent at least, the parties seem to be in agreement as to the meaning of Section 3L.

This case concerns 105 requests for incidental annual leave between August 1982 and October 1987. Eighteen were made on Form 3971s, anywhere from 12 days to slightly less than 24 hours before the requested leave time. Twenty-five were made on Form 3971s a short time before the requested leave. Sixty-one were made through telephone calls shortly before the scheduled tour for which leave was sought. None of this group had submitted Form 3971s.[2] Management rejected all 105 requests. Each rejection prompted a grievance.

The Postal Service initially took the position that the automatic leave approval language of Section 3 of the LMU was unenforceable because it involved matters outside the permissible scope of local negotiations under Article 30B of the National Agreement and because it subtracted from rights granted Management under the National Agreement, particularly rights under ELM Parts 512.4 and 512.6. It argued therefore that this LMU was "inconsistent or in conflict with..." the National Agreement. Its view was upheld by Arbitrator Feldman in April 1980 although it is extremely difficult to understand the precise basis for his ruling. Perhaps it was that uncertainty which led to another arbitration on this same issue. This time, however, Arbitrator G. Cohen ruled in APWU's favor

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[2] All of this detail was taken from the Postal Service post-hearing brief. I use this information for illustrative purposes only. I do not know whether all of the data is correct.

in June 1982. He refused to follow Arbitrator Feldman's award. He held instead that Section 3 was within the permissible scope of local negotiations, specifically, Article 30 B's reference to "formulation of local leave program", and that Section 3 did not subtract from rights granted Management under the ELM. His ruling, in short, was that Section 3 was not "inconsistent or in conflict with..." the National Agreement.

In the Cohen case, an employee had phoned her postal installation shortly before the start of her tour and requested eight hours' annual leave in place of the tour she was scheduled to work. Her request was refused and she worked. She discovered there was no one from her section and unit on annual leave that day. The APWU alleged a violation of Section 3 of the LMU. Cohen granted the grievance and awarded the grievant "eight hours of annual leave."

Unfortunately, neither of these awards set the dispute to rest. Just as the APWU had challenged the correctness of the Feldman award, the Postal Service challenged the correctness of the Cohen award. The problem was further complicated by the fact that a national level grievance on this very issue had been filed by NALC in January 1982 and was later filed by APWU in April 1983. Hence, St. Paul Management decided to wait for the issuance of a national award on this subject.

That national level dispute (Case Nos. H1C-NA-C-59, -61) was heard and argued from April through September 1985. The parties sought to illustrate their disagreement and place it in sharper focus by agreeing to three hypothetical examples. One of those examples involved an incidental leave clause similar to the one which had been before Arbitrator Cohen. It permitted 12 percent of the employees to be on leave during the choice vacation period, 8 percent during the non-choice period, and provided further:

> "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."

I held in January 1986 that this provision was not "inconsistent or in conflict with..." the National Agreement. More specifically, my ruling was that a LMU granting employees the right to take incidental leave on the basis of a fixed percentage or other comparable formula is not "inconsistent or in conflict with..." Articles 3, 10 and 19 of the National Agreement or Parts 511 and 512 of the ELM.

Notwithstanding this national level award, St. Paul Management continued to deny incidental leave requests. Some 63 such requests were rejected between February 1986 and November 1987. Management's position was that the APWU interpretation of Article X, Section 3L2 of the LMU was still "inconsistent or in conflict with..." the National Agreement. Its position with respect to the earlier pre-February 1986 grievances was that it would comply with my award in H1C-NA-C-59, -61 but would not agree to the money remedy sought by APWU. In any event, the dispute raged on and has now been brought to the national level.

DISCUSSION AND FINDINGS

I

A large part of this unfortunate controversy is due to the parties' continuing disagreement over the meaning of their LMU, a disagreement which has not been defined with sufficient precision. Careful study of the post-hearing briefs reveals what appears to be conflicting interpretations of Article X, Section 3L2.

As to "notice", the first sentence refers to employees who have submitted Form 3971s requesting incidental leave of eight hours or more and have done so at least two weeks prior to the week in which they seek leave time. That is not in dispute. However, the final sentence in Section 3L2 speaks of employees who make a request for incidental leave "after the two week period..." mentioned above. Some kind of "notice" is plainly called for. But the parties disagree on how much "notice" is contemplated. The Postal Service says Section 3L2 should be read to require "reasonable advance notice"; the APWU says any "notice" prior to the commencement of the tour for which the employee seeks leave should suffice. Such an

interpretive question under a LMU is not a matter for national level arbitration. It is supposed to be resolved by a regional arbitrator.

The Union claims this question has indeed been resolved by Arbitrator Cohen. In the final portion of his award, he stated:

> "The Union contended that the leave percentage was available to Grievant because she gave notice in advance of her tour, however short this advance notice might have been.
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> "The [LMU]...speaks only of advance notice without designation of any specific amount of time. There is no evidence that would justify a statement by me that some particular amount of advance notice was required. The parties saw fit to omit a time element. Though it might have been an oversight on their part, I cannot correct what might have been a mistake, because that would be rewriting what others have freely agreed to. I do not have that authority. Therefore, as long as notice of leave is given before the start of the tour, the [LMU]...has been complied with." (Emphasis added)

However, Arbitrator Cohen was applying the terms of the LMU in effect in 1977. That LMU had leave language quite different from Article X, Section 3L presently before me. It read:

> "D. Request for annual leave other than choice vacation selection will be allowed by the following priorities:
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> 1. Units of five days or more, requested at least two weeks in advance.
>
> 2. Units of 8 hours or more.
>
> 3. Units of less than 8 hours are an exception to the above and are governed by..." (Emphasis added)

Cohen's interpretation of this language (D-2) can hardly be regarded as a binding interpretation with respect to the far more detailed terms of Article X, Section 3L2.

As to the submission of "3971s", a written request for incidental leave on a Postal Service form, the first and

second sentences of Section 3L2 expressly refer to "3971s". The final sentence, the contract language in dispute, makes no mention of "3971s". The parties obviously disagree on the role of the Form 3971. The Postal Service says an employee must submit such a form in writing before he can be entitled to incidental leave; the APWU says that no such submission is necessary before the employee takes his leave, that the Form 3971 can be signed after he returns, and that hence any "notice", oral or written, should suffice. Such an interpretive question under a LMU is not a matter for national level arbitration. It is supposed to be resolved by a regional arbitrator. It was not resolved by Arbitrator Cohen.

II

Given these findings, the basic question that brought the parties to national level arbitration can be examined more clearly. This question is whether Article X, Section 3L2 of the LMU is "inconsistent or in conflict with..." the ELM which is incorporated in the National Agreement. There are three distinct elements in this problem: automatic approval of incidental leave, notice to supervision of the request for a leave, and submission of the request on a Form 3971. Each element must be considered separately.

As to automatic approval, Section 3L2 states that eight hours or more of incidental annual leave "will be granted..." upon request provided the allowable maximum percentage of people on leave is not exceeded. This provision for automatic approval is not "inconsistent or in conflict with..." Parts 511 and 512 of the ELM. That was my ruling in H1C-NA-C-59, -61. I explained in the award:

> "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.
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> "This argument is not persuasive. The ELM itself, Part 512.61(a), states that leave for bargaining unit employees 'is <u>subject to</u> specific vacation planning provisions of <u>applicable collective bargaining agreements</u>.' 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 B4. 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." (Emphasis in original)

The Postal Service does not challenge my ruling. Its view seems to be that it has no objection to automatic leave approval provided (1) that supervision is given "reasonable advance notice" of the request and (2) that the employee seeking the leave submits a Form 3971. Indeed, if its interpretation of Article X, Section 3L2 proves correct, it will have achieved its goal and it presumably would no longer claim that automatic approval is "inconsistent or in conflict with..." the ELM. Its argument in this case, however, assumes that the APWU interpretation of the LMU is correct and that the arbitrator must hence determine whether the APWU interpretation would make Section 3L2 "inconsistent or in conflict..." Thus, in a real sense, the parties seem to have "placed the cart before the horse." A full and final understanding of the meaning of Section 3L2 should ordinarily precede the assertion of an "inconsistent and in conflict..." claim. Nevertheless, given the ten-year history of this dispute, I shall attempt to provide as much guidance as I reasonably can in face of the limitations on national level arbitration.

Hence, I now assume that the APWU interpretation of the LMU will prevail in regional arbitration and that Section 3L2 will be read to permit employees (1) to give "notice" of their leave request any time before the start of the tour for which they seek leave and (2) to give "notice" through means other than a Form 3971. The question is whether, under these circumstances, automatic leave approval would be "inconsistent or in conflict with..." the ELM.

Part 512 of the ELM, the language emphasized by the Postal Service, reads in part:

"512.4 Authorizing Annual Leave

.411 General. Except for emergencies, annual leave for all employees except postmasters must be requested on Form 3971 and approved in advance by the appropriate supervisor...

.421 Purpose. Application for annual leave is made in writing, in duplicate, on Form 3971, Request for, or Notification of, Absence.

"512.6 Vacation Planning

.61 Bargaining Unit Employees. For these employees, leave is subject to specific vacation planning provisions of applicable collective bargaining agreements. Note also:

a. For all regular employees, both full-time and part-time, vacation leave is granted when requested - to the extent practicable..."

As to the amount of "notice" necessary, the ELM provisions are silent. Nothing in these provisions deals with how much "notice" should be given prior to the start of the desired leave. The Postal Service stresses the term "practicable" in ELM 512.61a. But the final sentence of Section 3L2 of the LMU calls for automatic leave approval ("will be granted...") up to a certain maximum number. The local parties have in effect stated that it is "practicable" to allow a given number of employees to be on leave at any one time. If an employee's request will not place him over that maximum number, Section 3L2 requires that his leave request be granted. It is difficult to understand why, in these circumstances, the amount of "notice" should be a problem. Moreover, it appears from the evidence that St. Paul Management did take "practicab[ility]" into consideration before agreeing to Section 3L2. It now has changed its mind. Its argument as to the interpretation of Section 3L2 may (or may not) be persuasive before a regional arbitrator. But should that arbitrator decide that "notice" can be given any time prior to the start of the desired leave, as the APWU urges, I do not believe such an interpretation would make this LMU clause "inconsistent or in conflict with..." the ELM. This

ruling is supported by what I previously said in H1C-NA-C-59, -61.[3]

As to the type of "notice" necessary, the ELM provisions seem quite clear. ELM 512.411 says leave "must be requested on Form 3971"; ELM 512.421 says the leave request "is made in writing...on Form 3971..." Arbitrator Cohen commented on this very matter in these words:

> "Section 511.23a [like 512.411] requires Postal employees to request leave on Form 3971 and to obtain approval before taking it. As I read the leave program here [under the 1977 LMU], that is still the case."

The APWU asserts that any type of "notice", written or oral, is sufficient to justify automatic leave approval under Section 3L2. It insists that an oral request simply prompts Timekeeping to prepare a Form 3971 which is signed by the employee upon his return from leave. The Postal Service disagrees, relying upon the above ELM language and urging the employee must actually have completed a Form 3971 before he goes on leave. This interpretive issue, as I explained earlier, is for a regional arbitrator. Section 3L2 can be read in several different ways, based not only on language but on practice as well. Should the regional arbitrator decide that "notice" of the leave request need not be "made in writing...on a Form 3971...", I believe such an interpretation would make the LMU clause "inconsistent or in conflict with ..." the ELM.[4]

My conclusion is that automatic leave approval would not be required under Section 3L2 where the procedure contemplated by the ELM was not followed by the employee requesting leave.

III

In at least one respect, St. Paul Management seems to have handled Section 3L2 leave rights in an arbitrary manner. Until early 1986, Management could understandably have believed that automatic leave approval under Section 3L2 was "inconsistent or in conflict with..." the ELM. My decision in

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[3] Although Arbitrator Cohen did discuss the amount of "notice", he did not discuss it from the standpoint of the "inconsistent or in conflict..." claim.

[4] This particular issue was not before me in H1C-NA-C-59, -61.

January 1986 in H1C-NA-C-59,-61, however, set that matter to rest. I held that automatic leave approval within the 8 and 12 percent ceilings established by the LMU was not, by itself, "inconsistent or in conflict..." Management thereafter could still understandably have believed, notwithstanding my award and the Cohen award, that automatic leave approval without the proper amount or type of "notice" was "inconsistent or in conflict..." The present decision sets these matters to rest.

The Postal Service's argument seems to concede that, at least since January 1986, automatic leave approval with the proper amount of "notice" and with the proper type of "notice" would not have been "inconsistent or in conflict with ..." the ELM. Hence, when these conditions existed and a leave could be granted without exceeding the above ceilings, Management evidently had no reason for refusing a leave request. Yet, during this period, Management appears to have denied some leave requests under these very circumstances.[5] If that were so, Management's denial would have to be characterized as arbitrary unless some other compelling justification was present. A money remedy might well be warranted in this situation. But the unique circumstances of each case would have to be examined before any such remedy could properly be invoked.

More important, there are too many uncertainties here to venture deeply into the remedy question. I do not know whether Section 3L2 will be interpreted to mean "reasonable advance notice" or any "notice" however brief. I do not know whether Section 3L2 will be interpreted to mean that a Form 3971 submission is a pre-condition to automatic leave approval. I am not sure which of the grievants submitted Form 3971s in advance and which did not. I am not sure whether Management denied all of the leave requests on principle or whether some of the requests were denied because of special circumstances confronting Management on a particular day and tour. I am not sure whether any employee lost any part of his annual leave because of his request for incidental leave being denied. I am not sure whether a distinction should be made between what happened before January 1986 and what happened after.

For these and other reasons, I find that in any grievance in which a remedy question exists, it should be remanded to

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[5] I assume here that some of the many post-January 1986 leave requests were submitted on a Form 3971 with adequate notice.

the parties for their consideration. Should their discussion prove fruitless, they may return the matter to the appropriate arbitration forum.

AWARD

The several issues raised in this case are resolved in the manner set forth in the above opinion.

Richard Mittenthal, Arbitrator