USPS #873122

NATIONAL ARBITRATION PANEL C# 11160

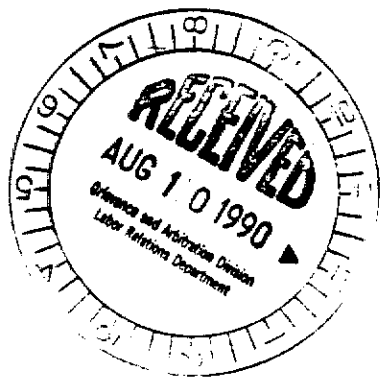
In the Matter of Arbitration between AMERICAN POSTAL WORKERS UNION and UNITED STATES POSTAL SERVICE	CASE NO. H7C-NA-C 10

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: Anton Hajjar

Karen A. Intrater

PLACE AND DATE OF HEARING: No hearing held



HEARING CLOSED: March 8, 1989

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the published changes to the DM-201 Handbook of April 14, 1988 are significantly different from the proposed changes of February 11, 1988. Publication, therefore, violated Article 19 notice requirements. Although the Union failed to give timely notice under Article 19 and may not proceed to arbitration under that contractual provision, the Union may take timely appropriate action under Article 15.4(D). The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Date: August 6, 1990

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
) ANALYSIS AND AWARD
AMERICAN POSTAL WORKERS UNION)
)
AND) Carlton J. Snow
) Arbitrator
UNITED STATES POSTAL SERVICE)
(Case No. H7C-NA-C 10))

I. INTRODUCTION

This matter came for arbitration pursuant to an agreement between the parties effective from July 21, 1987 to November 20, 1990. The parties agreed to present the issue of arbitrability in the dispute by means of written briefs, and no hearing has been held in the matter. The arbitrator officially closed the hearing on March 8, 1990 after receipt of the final brief in the matter. The National Association of Letter Carriers, an intervenor in the case, took no position with respect to the issue of arbitrability.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Did the Union file a timely appeal to arbitration concerning the proposed revisions at issue? If not, is there an arbitral dispute?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 19 - HANDBOOKS AND MANUALS

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

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

IV. STATEMENT OF FACTS

In this case, the Employer has challenged the procedural arbitrability of the dispute. The dispute has followed management's proposed revisions of the DM-210 Handbook. It covers the delivery of express mail. The handbook revisions have been the subject of several grievances between the parties. The Employer first initiated the revisions in the summer of 1986. (See, Joint Exhibit Nos. 9, 10, and 11). On March 11, 1988, the parties agreed to a settlement in one of the grievances, namely, Case No. H4N-NA-C 90. In November of 1989, the parties notified the arbitrator that they had agreed to arbitrate three other related disputes, namely, Case Nos. H4C-NA-C 69, H4C-NA-C 102, AND H7C-NA-C 10. (See, Joint Exhibit No. 7). Subsequently, the parties agreed to withdraw two of the cases, leaving only Case No. H7C-NA-C 10 for arbitration. They have agreed to present only the issue of arbitrability at this time.

The dispute in this case has stemmed from the Employer's notification of proposed changes in the DM-201 Handbook, dated November 20, 1987. (See, Joint Exhibit No. 1). The Union received the proposed changes on December 8, 1987. (See, Joint Exhibit No. 2). On December 15, 1987, the Union filed a Step 4 grievance, asserting that the proposed revisions violated certain portions of the National Agreement. (See, Joint Exhibit No. 2). This Step 4 grievance subsequently was withdrawn. On January 19, 1988, the parties met to discuss the revisions of November 20, 1987.

On February 11, 1988, the Employer sent the Union another proposed revision of the DM-201 Handbook. (See, Joint Exhibit No. 3). The Union responded on March 9, 1988 that it continued to have concerns about the impact of the revisions on Special Delivery messengers. (See, Joint Exhibit No. 4). The Employer chose not to respond to the Union's letter of March 9 and, rather, published changes to the DM-201 Handbook on April 14, 1988. (See, Joint Exhibit No. 5). On May 4, 1988, the Union initiated the present grievance under Article 19 of the parties' collective bargaining agreement. (See, Joint Exhibit No. 6).

V. POSITION OF THE PARTIES

A. The Employer

The Employer argues that the Union's certification of this dispute to arbitration was untimely pursuant to Article 19 of the National Agreement. It is the belief of the Employer that the submission to arbitration was due on or before February 6, 1988, sixty days from the Union's December 8, 1987 receipt of the Employer's November 20, 1987 Notice of Proposed Revisions. As it is undisputed that the Union did not file the present certification to arbitration until May 4, 1988, the Employer argues that the certification was untimely.

The Employer supports its contention that the sixty day

time limit contained in Article 19 is inflexible by reference to a national level arbitration award issued by Arbitrator Richard I. Bloch in 1982. According to the Employer, the Bloch award held that the employer has not waived the sixty day time limit by past practice and that the time limit is not impossible for the union to meet due to mandatory meeting requirements contained in the provision. The Employer has stressed the fact that, on prior occasions, the Union has complied with time limits imposed by Article 19.

The Employer also argues that the settlement agreement of March 11, 1988 is not relevant in this case for four reasons. First, the settlement agreement was executed after the November 20, 1987 notification at issue here. Second, even if the settlement agreement related to this dispute, there is no evidence that it ever was invoked by the parties in this case. Third, even if the settlement agreement had been invoked in this case, no appeal is allowed under the agreement after fourteen days from the close of the negotiations. Finally, the settlement agreement preventing the Employer from raising an "Article 19" procedural issue is inapplicable, according to the Employer, because management never affirmatively expressed that the changes at issue did not relate to wages, hours, or conditions.

The Employer rejects any contention that the time limit should be waived or extended in this case based on a contention that the Union may have been misled or confused by the Employer's earlier proposed revision. According to the

Employer, the Union was not confused by the Employer's earlier attempts to revise the DM-201 Handbook because the Union promptly had filed "Article 19" grievances on each of the prior occasions. This fact, in the opinion of the Employer, demonstrates the Union's familiarity with the requirements of Article 19.

Finally, the Employer argues that the Union cannot avoid forfeiture under Article 19 by resorting to the grievance procedures of Article 15. According to the Employer, by permitting the Union to avoid time limits established in Article 19 by resorting to Article 15 would have the effect of emasculating the carefully bargained for time limits with respect to changes in manuals. While the Employer recognizes that certain procedural violations of Article 19, such as failure by the Employer to give notice of proposed changes, may be grievable under Article 15, it contends that substantive violations of Article 19 cannot be considered under Article 15.

In anticipation that the Union would contend the published revisions to the DM-201 Handbook were not the same as revisions contained in the November 20, 1987 notice, the Employer argues that such differences are irrelevant to the issue of arbitrability under Article 19. According to management, the claim that the published version is different than the version for which notice has been given must be pursued under Article 15, as has been the case in the past. Because the Union has not filed a Step 4 grievance under Article 15, the Employer concludes that the Union may not raise the issue

in this "Article 19" certification to arbitration.

B. The Union

The Union argues that its appeal to arbitration was filed in a timely manner. According to the Union, the version of the DM-201 Handbook published by the Employer on April 14, 1988 was substantively different from either the November 20, 1987 or February 11, 1988 versions proposed by the Employer. The Union concludes that publication of the April 14, 1988 changes, in fact, was the only notice it received. Accordingly, the Union maintains that its May 4, 1988 appeal was timely since it was well within sixty days of the publication date of the DM-201 Handbook changes.

The Union also contends that the relationship between the Union and the Employer with regard to the DM-201 Handbook changes was one of negotiation. The Union characterizes the Employer's February 11, 1988 proposal of changes as a step in ongoing negotiations rendering the original version moot. At the same time, the Union believes the new version was insufficient to provide the Union with notice that it was itself a proposed change under Article 19.

The Union supports its contention that the Employer must expressly identify proposed changes as cognizable under Article 19 by relying on a national level arbitration award issued by Arbitrator Howard Gamser. According to the Union,

Arbitrator Gamser directed the Employer to resolve any ambiguities with respect to whether certain published changes in a handbook were issued pursuant to Article 19. The Union contends the principle in that award applies generally to the Employer's obligation to identify its proposals as proposals activating the Article 19 process. Because management did not so identify the changes of February 11, 1988, the Union believes it was under no obligation to appeal within sixty days.

The Union also points to the settlement agreement of March 11, 1988 with the Employer as an agreement that is directly relevant to this case. According to the Union, the settlement agreement obliges the Employer to provide the Union with a final draft of proposed revisions and/or a summary (or notice that none is available) in order to explain the specific changes proposed by management. The Union contends that the Emploer failed to follow these procedures and lost any right to object to timeliness as a result.

In addition, the Union contends that the settlement agreement of March 11, 1988 provides a party with an extension of the sixty day period to accommodate negotiations. The Union characterizes this provision as, in effect, an agreement which overruled the Bloch arbitration award. The Union also argues that the fourteen day limitation on appeals after the negotiation period set forth in the settlement agreement is inapplicable in this case because the Union was unaware that negotiations had ceased until the Employer unilaterally

published the DM-201 Handbook changes.

Finally, the Union argues that the Employer waived its right to use timeliness as a defense or, at least, should be estopped from raising it. It is the position of the Union that the great length of time during which the dispute over changes to the DM-201 Handbook has lasted, coupled with the complexity and confusion engendered by the Employer's proposal and subsequent revocation of changes, should bar management's resort to procedural technicalities to avoid a hearing of the dispute on the merits. The Union concludes that the Service, as much as the Union, is responsible for the procedural posture of this case and that management should not be permitted to profit from its "unclean hands" during the course of the dispute.

VI. ANALYSIS

A. A Timely Filing?

Did the Union file a timely appeal to arbitration concerning their proposed revisions at issue? If not, is there an arbitral dispute? It is appropriate to evaluate the dispute in two parts. First, it is necessary to decide whether the Union has taken a timely appeal to arbitration under Article 19 of the National Agreement. Second, if it has not done so, it, then, must be decided whether the dispute is, nonetheless, arbitrable under the parties' agreement. Each

question will be answered in turn.

Article 19 in the National Agreement is a two paragraph provision dealing exclusively with changes to manuals of the Employer and similar managerial guidance handbooks and instructions. The first paragraph of the contractual provision requires that the manuals be consistent with the National Agreement and remain in effect during the duration of the agreement if the provisions "directly relate" to wages, hours or working conditions. (See, Joint Exhibit No. 1, p. 80). The Employer, however, has retained the right to make changes consistent with the agreement that are "fair, reasonable, and equitable." This provision of the agreement states:

> Those parts of of all handbooks, manuals and published regulations of the Postal Service that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions. (See, Joint Exhibit No. 1, p. 80, emphasis added.)

The second paragraph of Article 19 sets forth the procedural requirement for changes and establishes its own grievance procedure and time limits if there is a dispute about whether the changes met the requirements of the first paragraph. The second paragraph of Article 19 states:

> Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the

> meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance. (See, Joint Exhibit No. 1, p. 80).

Procedural requirements of Article 19 are straightforward. The Employer must notify the Union if it proposes changes "that directly relate to wages, hours or working conditions" and must do so sixty days prior to issuance of the changes. (See, Joint Exhibit No. 1, p. 80). The Union, in turn, may request a meeting to discuss the changes. If such a request is made, the meeting is mandatory. If, after such a meeting, the Union believes that the changes violate a provision of the National Agreement (including Article 19), it may submit the issue directly to arbitration. The Union must submit the matter to arbitration within sixty days "after receipt of the notice of proposed change." (See, Joint Exhibit No. 1, p. 80). Copies of the actual changes are to be provided the Union on issuance.

Although procedures of Article 19 are not difficult, they have (as this case and others demonstrate) provided the source of much confusion and disagreement between the parties. Because of that fact, the processes of Article 19 must be closely examined. Before turning to that task, several important matters need to be discussed.

First, the arbitration award by Arbitrator Bloch is

highly instructive and cannot be ignored. (See, Case No. H1C-NA-C 5). Procedures in Article 19 are clear and unambiguous. Time limits set forth by the provision have not been waived by past practice or the concept of impossibility. The contractual intent of the parties with respect to procedures in Article 19 is clear from the language used by the parties and is binding on both of them, unless there is evidence in an individual case of an express agreement to the contrary.

Second, the Gamser award is not useful in this particular case and has not been a source of guidance. (See, Case No. H8C-NA-C 61). That award concerned a dispute with respect to whether certain handbook changes published without notice, in fact, directly related to wages, hours, or conditions of employment. In the award, Arbitrator Gamser directed the Employer to clarify the effect of specific changes on working conditions. The award did not establish any general principle of notification under Article 19 of the National Agreement. Arbitrator Gamser simply did not deal with the ultimate issue of this case in his decision.

Finally, there is the matter of a settlement agreement between the parties. (See, Case No. H4N-NA-C 90). The settlement agreement of March 11, 1988 is not dispositive of this dispute. The settlement agreement merely clarified duties and obligations of the parties when changes pursuant to Article 19 are at issue. The settlement agreement allowed the parties to extend the appeal deadline in order to accommodate negotiations over proposed changes to service manuals.

It states:

> The sixty day period during which the Union may appeal to arbitration may be extended to accommodate ongoing discussion of the proposed change(s) with the UPS in paragraph 2, above. (See, Union's Exhibit No. 2, p. 1).

The settlement agreement permits an extension. It does not mandate such extension. Nor has the settlement agreement changed the normal procedural provision of Article 19, absent an express agreement to do so.

In this case, there is no evidence of an agreement to alter procedures of Article 19. That being the case, the history of other proposed changes is not relevant. Each time the Employer proposes changes that "directly relate" to wages, hours, or working conditions, it "must" notify the Union. The parties have agreed that such notice "will be furnished" to the Union. (See, Joint Exhibit No. 1, p. 80). If management fails to do so (either deliberately or by mistake) and proceeds to publish the changes, the Union has every right to appeal the violation of the notice requirement to Step 4 pursuant to Article 15.4(D), National Level Arbitration.

Once the Union has been notified, the provisions of Article 19 apply. The Union, then, has sixty days in which to request a meeting and, if dissatisfied with the results, to appeal to arbitration. Once the Union is notified, the burden is on the Union, and "the clock is running." Failure of the Union to appeal is fatal to obtaining arbitration on the merits. Article 19 does not, by its terms, contemplate negotiation. It contemplates an expedited process by which

the Employer may quickly direct its supervisory personnel, and the Union, as quickly, may directly arbitrate any unfair consequence of the Employer's action. The process requires little communication. It is a formal process. It obviously has been designed for speed.

An application of the process in Article 19 to the facts in this case makes it clear that the Union failed to meet the applicable deadline and, therefore, must be prevented from pursuing arbitration under Article 19. The Union received notice of the November 20, 1987 proposed changes to the DM-201 Handbook on December 8, 1987. Barring an express agreement between the parties to the contrary, the Union had until February 6, 1988 to request a meeting and to appeal to arbitration if dissatisfied. The Union was dissatisfied, and the meeting was held on January 19, 1988. At that point, the Union had eighteen days left in which to meet the Article 19 deadline. Had the Employer published the November 20, 1987 version of the changes after February 6, no appeal to arbitration would have been possible.

The Employer, however, did not publish the November version of the changes. It, instead, proposed new changes on February 11, 1988. Those changes dealt with the same provisions of the same handbook, but they proposed very different language. In such circumstances, the proposal of February 11 had two effects. First, it rendered the proposal of November 20, 1987 moot. Second, it started the Article 19 "clock" running again by providing clear notice to the Union that

these changes to the DM-201 Handbook were being considered for publication by the Employer. Had the Employer attempted to publish the original November 20, 1987 version after proposing the February 11 changes, the Union would have had a clear case of wilful violation of the notification provisions of Article 19, grievable under Article 15.4(D).

The sixty day meeting and appeal deadline for the February 11, 1988 notification of changes expired on April 12, 1988. No meeting was called. No appeal was taken. The Union has presented various arguable equity arguments with respect to why it should not be held to the deadline. There, however, has been no evidence of any agreement between the parties to extend the time period. Nor has there been evidence submitted to the arbitrator about actions by the Employer which can be construed as a violation of the Article 19 process. Under such circumstances, it must be concluded that the Union's appeal on May 4, 1988 under Article 19 is untimely.

B. Is the Dispute Otherwise Arbitrable?

The Union has argued in its post-hearing brief that changes in the published version of the DM-201 Handbook are different from either of the versions about which the Employer notified it. The Union contends that its appeal under Article 19 is timely because it received notice of the published changes only when they were published on April 14, 1988. It concludes that its appeal of May 4, 1988 was within sixty days of that

date and, therefore, timely.

There is some merit to the Union's argument in that the published version of the DM-201 Handbook changes are, indeed, different from either of the versions for which notice was given. The Union, however, has not been persuasive with respect to the effect of that fact. Publication is not notice of changes under Article 19. For example, the Employer, when it publishes changes, may believe the changes do not directly relate to wages, hours, or working conditions. In such a case, no notice is required under Article 19. Similarly, publication of changes which are significantly different from those proposed is publication without the required notice. It is a violation of Article 19, not notice of proposed changes under Article 19.

At any rate, even if the publication could be considered notice of changes in this case, the Union failed to request the required Article 19 meeting prior to this appeal to arbitration. Accordingly, the Union cannot now maintain an appeal of the published version under Article 19 any more than it can the notice version. The procedures of Article 19 are clear and unambiguous, and the arbitrator is as bound as the parties to follow such clear language absent express agreement to the contrary.

This is not to say that the Employer may publish,without challenge, changes directly relating to wages, hours, or working conditions different from those of which the Union has been notified. Such action would be inconsistent with the

intent of the parties, and the value of notice would be completely lost if such conduct were permitted. It is of critical importance that the published version must match the notice version of any proposed Article 19 changes. The intent of the parties is clear that it must be possible to lay the published changes alongside the notice changes, to examine the language of both, and to conclude that one is not clearly different from the other.

In this case, the changes directly related to wages, hours, or working conditions; and no such congruity between notice version and published version exists. For example, the notice version of February 11 contains language involving specific holidays which is completely absent from the published version. Compare, for example, Section 242.121(c) as published with Section 242.11(c) of the notice version. Moreover, the delivery deadline in the same provision has been changed from the mandatory "must" in the notice version to the permissive "should" in the published version. In addition, there are smaller changes of language too numerous to detail.

The parties have not submitted an abundance of evidence with respect to what the substantive effect of these changes on Union members might be. Such evidence would have been appropriate in a hearing on the merits of the case. At the procedural stage, the question is whether or not the Employer, in fact, has published the changes it proposed to the Union so that one could say the Union clearly was on notice with

respect to the impact the changes would have on its members. In view of the grave subsequent effects that even one word might have on employe rights when handbook changes directly relate to employment conditions, any change of language must be suspect and carefully scrutinized. Where, as here, the language has changed from the specific to the general and from the mandatory to the permissive, there can be no question about the fact that the Union receive notice as required by Article 19. Accordingly, the Employer has violated Article 19 by failing to provide the Union with notice of proposed changes directly relating to wages, hours, or working conditions, and such a violation is grievable under Article 15.4(D).

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the published changes to the DM-201 Handbook of April 14, 1988 are significantly different from the proposed changes of February 11, 1988. Publication, therefore, violated Article 19 notice requirements. Although the Union failed to give timely notice under Article 19 and may not proceed to arbitration under that contractual provision, the Union may take timely appropriate action under Article 15.4(D). The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

Date: August 6, 1990