

C # 14489

NATIONAL ARBITRATION PANEL

_____)
 In the Matter of the Arbitration)
) between)
) UNITED STATES POSTAL SERVICE)
) -and-)
) NATIONAL ASSOCIATION OF LETTER)
) CARRIERS)
 _____)

GRIEVANTS: Branch #57

CASE NOS.
 H7N-1F-C 39072
 H7N-1F-C 39075
 H7N-1F-C 39076

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:

John W. Dockins
Labor Relations Spec.

For the NALC:

Keith E. Secular and
Peter DeChiara
Attorneys (Cohen Weiss
& Simon)

Place of Hearing:

Washington, D.C.

Date of Hearing:

February 9, 1995

Date of Post-Hearing Briefs:

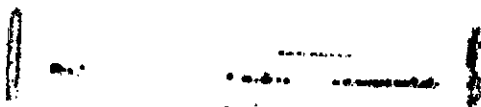
May 15, 1995

AWARD:

denied.

The grievances are

Date of Award: June 2, 1995



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CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.

Richard Mittenthal

 Richard Mittenthal
 Arbitrator

BACKGROUND

This dispute was prompted by Postal Management's action in declaring certain Local Memoranda of Understanding (LMOU) null and void. Management took this action because these particular LMOU were negotiated outside the 30-day period of local implementation set forth in Article 30-B of the National Agreement. NALC insists Management's behavior was improper. It believes that nothing in the National Agreement bars local parties from changing their LMOU whenever they wish to do so and that Management should not be permitted to nullify such changes on the ground that they occurred after the local implementation period.

NALC Branch #57 represents carriers in several Rhode Island communities. It has negotiated separate LMOU for Bristol, Barrington, and Warren. When the 1987 National Agreement was executed, the local parties in these communities had a 30-day period commencing October 1, 1987, to negotiate changes in their then existing LMOU. Negotiations took place in all three locations. New LMOU emerged within the 30-day period of local implementation. They were made effective as of October 1, 1987. They stated that each LMOU "shall continue in effect until such time as it is mutually agreed to negotiate a new agreement."

Some years later in early 1991 these local parties again entered negotiations. Substantial changes were made in their LMOU. I shall use Bristol as an example. Under Article 3 (Hours of Work, Overtime), a provision concerning overtime charges for those sick or on an extended leave of absence was deleted. Under Article 4 (Leave), the leave calendar was to be placed in circulation no later than January 15 (previously February 1) and requests for leave were deemed to be approved if supervision does not notify the carrier within 48 hours (previously 72 hours) of receipt of the request. A clause prohibiting the charging of certain time away from work against choice vacation periods was enlarged to include non-choice vacation periods as well. A new provision was added to cover the carrier who had either voluntarily passed up his leave selection or failed to make his selection in a timely manner. Other language in this Article was simplified or clarified.

Under Article 5 (Posting), the posting of a carrier assignment had previously been required in certain circumstances. Now such an assignment may or may not be posted at

the carrier's discretion. When a vacancy occurs, it must be posted within five days (previously seven days). And a new provision was added requiring that successful bidders for vacant assignments accept the non-workdays accompanying such assignment. Under Article 8 (Safety and Health Committee), a new provision called for equal representation on the committee with meetings to be held no less than once a month. Another new provision involved Management's commitment to meet with a NALC representative during emergencies and hazardous conditions to help determine guidelines for curtailment or termination of operations and to notify carriers of any such action. Still another new provision declared that mail delivery after dark is a safety hazard and will not be allowed.

Under Article 9 (Local Policy on Discipline), a new provision required Management to make every effort to schedule PTF carriers in advance and noted that such PTFs need not remain near their phones awaiting an assignment. Under Article 10 (Representation...), new provisions called for the Branch President to be notified of all personnel actions and granted Branch representatives the right to use post office telephones for official NALC business. Under Article 13 (Training a New Carrier), a new provision gave a carrier 30 days within which to familiarize himself with a new route and to become proficient. Under Article 14 (Inspection of Personnel Jacket), a NALC representative previously had the right to inspect a carrier's personnel jacket if accompanied by the carrier. New language permitted this inspection without the presence of the carrier provided the carrier gave his representative permission in writing to make the inspection. Under Article 20 (Seniority PTF Carriers), a rotating schedule for Sunday and holiday collections by PTFs had been maintained and posted. A new provision called for separate and distinct Sunday and holiday schedules. Under Article 21, new provisions were added with regard to employee lockers, choice of winter or summer apparel, and availability of a separate NALC bulletin board and an area for carrier literature.

This Bristol LMOU became effective February 28, 1991. Similar changes were made in the negotiation of new LMOU for Barrington and Warren in January 1991.

When Division Labor Relations became aware of these new LMOU, it concluded that the local parties had no right to enter into negotiations and execute these LMOU. It directed the Postmasters of the three communities in question to

advise Branch #57 that the new LMOU were "null and void" because they were in violation of Article 30 of the 1987 National Agreement. The Postmasters sent letters to that effect to Branch #57. The result was the three grievances now before the arbitrator.

The relevant terms of Article 30 (Local Implementation) read as follows:

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1987 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, 1987 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1987 National Agreement:

[Items 1 through 22]

* * *

C. All proposals remaining in dispute may be submitted to final and binding arbitration, with the written authorization of the national Union President. The request for arbitration must be submitted within 10 days of the end of the local implementation period. However, where there is no agreement and the matter is not referred to arbitration, the provisions of the former local memorandum of understanding shall apply, unless inconsistent with or in conflict with the 1987 National Agreement.

* * *

E. When installations are consolidated or when a new installation is established, the parties shall conduct a thirty (30) day period of local implementation, pursuant to Section B. 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.

DISCUSSION AND FINDINGS

The 30-day local implementation period under the 1987 National Agreement began on October 1, 1987. The local parties negotiated LMOU during that period. The next 30-day implementation period occurred under the 1990 National Agreement. It did not begin until October 1, 1991. The local parties, however, negotiated new LMOU in January-February 1991, some eight months before the latter implementation period. The issue, simply stated, is whether the local parties had the right under Article 30 to negotiate these new LMOU without regard to the local implementation period.

NALC answers the issue in the affirmative. It acknowledges that local parties are required, on request, to negotiate LMOU during the implementation period. But it argues that nothing in Article 30 bars the parties from choosing to negotiate at other times if they wish. Nor, it says, does Article 30 justify voiding any new LMOU negotiated outside the implementation period. It believes this position is supported by the past behavior of many local parties throughout the country, by a need for this kind of bargaining flexibility, and by a number of prior national level arbitration awards.

The Postal Service answers the issue in the negative. It contends that Article 30, in clear and unambiguous terms, prohibits local parties from negotiating new LMOU after the contractual implementation period. It states that there is just one 30-day implementation period and that local parties may not negotiate LMOU changes after that period. It concedes that certain minor adjustments in language, resulting from grievance settlements and other such happenings, may legitimately prompt changes in LMOU at some later time. It maintains, however, that the kind of substantial, widespread changes in LMOU which occurred here constitute a complete disregard of the restrictions imposed by Article 30. It urges that these restrictions, given the circumstances of this case, justify its action in voiding the LMOU in question.

The national parties plainly intended to insure the continuity and stability of LMOU through Article 30. They provided in 30-A that LMOU "shall remain in effect during the term of this [National] Agreement..." They recognized that LMOU could be "changed by mutual agreement" but only where such "mutual agreement" was reached "pursuant to the local implementation procedure..." And, as 30-B states, the "local implementation procedure" refers to a carefully defined 30-day period beginning on a date certain, typically 60 days after the execution of a new National Agreement. There is just one such implementation period listed in Article 30 of the 1987 National Agreement, namely, "a 30-day period...to commence October 1, 1987..." Any change in LMOU must take place during this 30-day period. To allow local parties to make later changes through "mutual agreement" would mean that "presently effective" LMOU had not, contrary to 30-A, "remain[ed] in effect during the term of this Agreement."

These findings can be readily applied to the facts of this case. At the time the 1987 National Agreement was executed, there were "presently effective" LMOU at the three Rhode Island post offices involved in this dispute. Those LMOU, according to 30-A, were to "remain in effect during the term of this [National] Agreement..." unless changed during the 30-day local implementation period which began on October 1, 1987. Changes were "mutually agree[d]" upon during this implementation period. The resultant LMOU, again according to 30-A, "shall remain in effect during the term of this [National] Agreement..." But they did not. They were substantially revised by the negotiation of new LMOU in early 1991 while the terms of the 1987 National Agreement still governed the relationship between the national parties. The next implementation period under the successor National Agreement did not occur until October 1, 1991, some eight months after the January-February 1991 changes. The continuity the national parties had bargained for was ignored by the local parties' premature negotiation of new LMOU. The local parties acted contrary to the restrictions found in 30-A.

It could be argued that the continuity contemplated by 30-A ("shall remain in effect...") concerns only the time between the execution of the National Agreement (here July 21, 1987) and the start of the local implementation period (October 1, 1987) and that local parties are free thereafter to change LMOU through "mutual agreement" whenever they wish. But that would be a strained and unrealistic interpretation. It is difficult to believe that the

national parties meant the promised continuity to apply to such a brief time span. Indeed, LMOU are to "remain in effect during the term of this [National] Agreement..." This promise is not just for a part of the contract "term" (a matter of months) but rather for the entire contract "term" (a matter of years). This would be perfectly clear where there is no "mutual agreement" during the implementation period and "presently effective" LMOU are simply carried forward from one National Agreement to the next. The fact that LMOU are revised during the implementation period is no reason to treat them any differently, that is, no reason to deny revised LMOU the continuity assured by 30-A.

No doubt some local parties have over the years made changes in their LMOU through "mutual agreement" outside the implementation period. They have done so without higher postal authority declaring the changes null and void under 30-A. None of this, however, is necessarily inconsistent with the interpretation I have given 30-A. To the extent to which such changes were relatively minor, in character or scope, one could properly say that the affected LMOU had essentially "remain[ed] in effect..." and no 30-A violation had occurred. It is only when the changes are substantial, in character or scope, that the affected LMOU cannot be regarded as having "remain[ed] in effect..."

As for the present case, I have already described the extensive changes made in the Bristol LMOU in February 1991. Articles 3, 4, 5, 8, 9, 10, 13, 14, 20 and 21 of that LMOU were impacted. Some provisions were altered; others were discontinued; and still others were added. The changes dealt with a wide variety of subject matter. Several time periods were shortened or lengthened. It is obvious that the Bristol local parties did much more than a mere amendment or two. They engaged in a full-scale negotiation of their LMOU. They did not allow the prior LMOU, the one negotiated in October 1987, to "remain in effect during the term of this [1987 National] Agreement..." They did exactly what 30-A sought to prevent. Given this violation of the 30-A restrictions, the Postal Service was within its rights in nullifying the February 1991 LMOU.

This same article-by-article analysis of the Barrington and Warren LMOU shows the same kind of widespread changes. These early 1991 LMOU, like the situation in Bristol, were the product of a full-scale negotiation. The local parties did not allow their prior LMOU, the ones negotiated in October 1987, to "remain in effect during the term of this

[1987 National] Agreement..." They did exactly what 30-A sought to prevent and the Postal Service was within its rights in declaring such LMOU null and void.

NALC emphasizes that there is nothing to prevent the national parties from renegotiating the National Agreement midterm if they wish to do so. It notes that this is true even though the National Agreement contains a "Duration" clause stating that its terms "shall remain in full force and effect to and including..." a specified future date. It believes the local parties have this very same freedom to renegotiate midterm if they wish to do so.

The difficulty with this argument is that the national parties and local parties do not have the same standing. The national parties may amend the National Agreement any time they wish provided their action is the product of "mutual agreement." However, the national parties placed strict limitations on local parties through 30-A. They stated that LMOU "shall remain in effect during the term of this [National] Agreement..." and that LMOU could be altered through "mutual agreement" only where such "mutual agreement" occurred pursuant to the implementation procedure. These restrictions could of course be waived by the national parties. But there was no such waiver here. Hence, the local parties were bound to honor 30-A and live with their October 1987 LMOU until the next implementation period when LMOU could once again be negotiated.

NALC relies heavily upon a national arbitration award issued in September 1981 in Case No. N8-W-0406. There, Helena, Montana Management refused to follow a LMOU clause requiring cases for a particular route to be "...re-labeled by the Regular Carrier or T-6 only." The Postal Service asserted that the Helena local parties had authority to negotiate only on the 22 items enumerated in 30-B, that they had no authority to negotiate on other subject matter, that they had nevertheless done so in agreeing to this re-labeling clause, and that this clause should therefore be deemed unenforceable. I gave the following explanation for rejecting the Postal Service's position:

This argument rests on a single sentence in Article XXX-B, "There shall be a 30-day period of local implementation...on the 22 specific items enumerated below..." These words simply state that the local parties are to negotiate on these 22 items. A familiar rule of contract construction provides, "To express one thing is to

exclude another." The Postal Service apparently relies on this rule in asserting that the local parties are not to negotiate anything other than these 22 items. Its position is that the local parties in Helena had no authority to negotiate the clause on re-labeling and that this clause must therefore be deemed null and void.

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

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

is exactly what happened in Helena when the local parties agreed to a re-labeling clause in the 1975 negotiations. They had the authority to negotiate such a clause.

NALC believes my argument on this award is clearly applicable to the present case. It contends that just as 30-B did not prohibit local parties from negotiating on subject matter outside the 22 items, so too 30-A does not prohibit local parties from negotiating LMOU outside the implementation period if they choose to do so. It maintains, referring to the prior award, that 30-B merely describes when local parties "are required" to negotiate LMOU, namely, the implementation period, and that although they "are not required" to negotiate at other times, they may do so if they wish.

The present case, however, is clearly distinguishable from N8-W-0406. The decisive language here is in 30-A, not 30-B. And 30-A states that LMOU "shall remain in effect during the term of this [National] Agreement..." and can be changed only through "mutual agreement pursuant to the local implementation procedure." This is a clear commitment to continuity. There was no comparable restriction with respect to the subject matter of LMOU. Article 30-B simply said, "There shall be a 30-day period of local implementation...on the 22 specific items..." Nowhere in 30-A or 30-B is there any suggestion that local parties were prohibited from agreeing to cover subject matter outside the 22 items. The purpose of these provisions, the contract language chosen to express that purpose, and the factual background of these cases prevent N8-W-0406 from being considered a controlling precedent.¹

One final comment seems appropriate. It is understandable why these Rhode Island local parties acted as


¹ Regional Arbitrator Roumell held in Case No. C1C-4G-C 17430 that "there is nothing in Article 30 that would prevent the local [Postal] Service to enter into Memoranda of Understanding even outside the local implementation period...". That award, however, made no attempt at any detailed analysis of this issue. Roumell drew this conclusion without any real explanation.

they did. The 1987 National Agreement was to expire on November 20, 1990. But because the national parties were unable to negotiate successfully a new Agreement and had to go through interest arbitration, the Agreement was extended until this arbitration was completed and a new Agreement was in place. That did not happen until June 1991. The implementation period would ordinarily have begun on February 1, 1991, but was delayed by the interest arbitration until October 1, 1991. The local parties, apparently impatient with this long delay, chose to negotiate new LMOU in January and February 1991. It is also understandable why local parties may choose to revise a LMOU after the implementation period. Such changes allow unexpected problems to be resolved in a mutually agreeable manner, particularly where the language of the LMOU becomes over the years a hindrance to fair treatment of carriers or an unnecessary burden to efficient postal operations.

For all the reasons expressed in this opinion, there has been no violation of the National Agreement.

AWARD

The grievances are denied.


Richard Mittenthal, Arbitrator