C# 15480

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between AMERICAN POSTAL WORKERS UNION and UNITED STATES POSTAL SERVICE	)	CASE NO.: H4C-3W-C 8590

BEFORE: Professor Carlton J. Snow

APPEARANCES:

For the U.S. Postal Service: Mr. J.K. Hellquist

For the Union: Ms. Susan L. Catler

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: November 20, 1992.

POST-HEARING BRIEFS: February 18, 1993

Article

15.4.B(7)

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that Article 15.4.B(7) provides each party with the procedural right to file a post-hearing brief after notifying the other party and the arbitrator of its intent to do so. The grievance is denied. It is so ordered and awarded.

DATE: March 31, 1993

Carlton J. Snow

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
AMERICAN POSTAL WORKERS UNION) ANALYSIS AND AWARD
)
AND) Carlton J. Snow
) Arbitrator
UNITED STATES POSTAL SERVICE)
(Case No. H4C-3W-C 8590))
(Post-Hearing Briefs Grievance)

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 through November 20, 1990. A hearing occurred on November 20, 1992 in a conference room of the USPS Headquarters Building located at 475 L'Enfante Plaza in Washington, D.C. Ms. Susan L. Catler of the O'Donnell, Schwartz, and Anderson law firm in Washington, D.C. represented the American Postal Workers Union. Mr. James K. Hellquist, Labor Relations Assistant, represented the United States Postal Service.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The hearing was transcribed by a reporter for Diversified Reporting Services, Inc. The arbitrator received a transcript of 88 pages. The advocates fully and fairly represented their respective parties.

The parties agreed that the matter properly had been submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. They submitted the matter on the basis of evidence presented at the hearing as well as arguments set forth in post-hearing briefs. The arbitrator officially closed the hearing on February 18, 1993 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Does Article 15.4.B(7) which states that "either party at the hearing may request to file a post-hearing brief" provide each party with the procedural right to file a post-hearing brief after notifying the other party and the arbitrator of its intent to do so?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

15.4.A.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. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

15.4.B.7. Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Regional level arbitration, except either party at the National level may request a transcript, and either party at the hearing may request to file a post-hearing brief. However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing.

15.4.C.3. The hearing shall be conducted in accordance with the following:

a. the hearing shall be informal;
b. no briefs shall be filed or transcripts made;

. . . .

IV. STATEMENT OF FACTS

In this case, there has been a disagreement about the correct interpretation of contractual language in Article 15.4.B(7) of the parties' National Agreement. At the conclusion of an earlier rights arbitration hearing before another arbitrator, the Employer informed the Union of its intention to file post-hearing briefs. The Union objected to filing post-hearing briefs in that case on the basis of efficiency. The parties were unable to resolve their disagreement, and they ultimately submitted the matter to the arbitrator for resolution. The arbitrator in the earlier case determined that post-hearing briefs were unnecessary and ruled that the Employer could not file a post-hearing brief in the matter. The Employer appealed that decision to Step 4 of the grievance procedure for resolution of the issue with regard to whether the parties have a contractual right to file post-hearing briefs in regular regional arbitration cases after notifying the other party and the arbitrator of an intent to do so. Being unable to resolve their differences, the matter proceeded to arbitration at the national level.

V. POSITION OF THE PARTIES

A. The Union

It is the position of the Union that language in Article 15.4.B(7) is clear and unambiguous, and the Union maintains that the plain meaning of the language should be adopted. According to the Union, the plain meaning means that a party may request permission from the arbitrator to file a post-hearing brief, but the arbitrator has authority to deny the request. That is the plain meaning of "either party at the hearing may request to file a post-hearing brief," and the Union believes it should be implemented.

The Union contends that the plain meaning of the language is supported by the context in which the parties placed it. According to the Union, the sentence immediately following the language at issue demonstrates that the parties were capable of drafting language which provided for a unilateral, procedural right of a party. The sentence immediately follow ing states:

> However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present arguments at the conclusion of the hearing. (See, Joint Exhibit 1, pp. 67-68, emphasis added, and Union's Post-hearing Brief, p. 6).

According to the Union, interpreting the phrase "may request" in the disputed language to give the parties an absolute right to file a post-hearing brief, in effect, would interpret the phrase "may request" completely out of Article 15.4.B(7).

It is also the belief of the Union that bargaining

history supports its interpretation of the disputed language. First, the Union argues that an earlier award by Arbitrator Aaron did not dispose of the issue before this arbitrator. According to the Union, the Aaron award merely determined that the parties had a right to request a verbatim transcript in regular regional arbitration proceedings without the consent of the other party. It is the contention of the Union that, in the case before this arbitrator, it is not saying both parties must consent to the filing of post-hearing briefs. Rather, the Union is arguing that the arbitrator has the authority to deny a party's request to file a post-hearing brief.

The Union also believes that bargaining history shows impartial Chairperson Sylvester Garrett urging the parties to adopt language that would prohibit the parties from filing post-hearing briefs in regular arbitration hearings unless the arbitrator requested briefs. The Union believes that the parties' rejection of that position does not support the Employer's interpretation of contractual language but, instead, demonstrates the parties adopted language which provides that a party may request leave to file a post-hearing brief, but the arbitrator retains authority to deny that request.

Additionally, the Union contends that the testimony of witnesses at the arbitration hearing failed to support the Employer's interpretation of the disputed language. It is the belief of the Union testimony from witnesses merely illustrated that, in most cases, the parties are able to

reach agreement on whether to file post-hearing briefs and that, therefore, the issue normally was not submitted to an arbitrator for resolution. According to the Union, the Employer presented no evidence of any arbitrator having ruled that regional arbitrators lack authority to preclude post-hearing briefs.

The Union contends the general rule, supported by reference to U.S. Supreme Court case law, is that arbitrators determine procedural rules to be followed by parties at arbitration hearings. That is, "when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." (See, Union's Post-hearing Brief, 3, quoting United States Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 40 (1987)). It is the position of the Union that the contractual language at issue in this case does not withdraw from arbitrators their well-recognized authority to determine procedural rules but, rather, codifies their authority by requiring a party to "request" permission from the arbitrator before filing a post-hearing brief.

B. The Employer

It is the position of the Employer that Article 15.4.B(7) grants both parties a right to submit a post-hearing brief in any regular regional arbitration case without the consent of the other party or permission from the arbitrator, after proper notification to the other party and the arbitrator. The Employer maintains that a 1985 national level arbitration award issued by Arbitrator Aaron is dispositive in the case. Arbitrator Aaron interpreted similar language in Article 15.4.B(7) with respect to the contractual right to request a transcript at regular regional arbitration hearings, and he concluded that the language granted a procedural right to each party to have the hearing transcribed, provided appropriate notice had been given to the other party.

It is the position of the Employer that this arbitrator is precluded from interpreting the language of Article 15.4.B(7) with respect to filing post-hearing briefs in any way that is contrary to the Aaron award. As the Employer sees it, "what the Union would like this arbitrator to do in this case is to rule that the words 'may request' mean something different than the words 'may request' mean eight words further on down the sentence. Arbitrator Aaron's ruling in that case disposed of the issue as to what 'may request' means for Article 15.4.B(7) in both instances of filing, as well as having transcripts in an arbitration proceeding." (See, Employer's Post-hearing Brief, 4).

The Employer maintains that, even if Arbitrator Aaron's

award is not dispositive of the issue before this arbitrator, the bargaining history of the parties as well as their past practice under the disputed provision supports management's interpretation of Article 15.4.B(7). The Employer contends the testimony of its witnesses established that, in regular regional arbitration cases, the Employer always has submitted post-hearing briefs whenever it determined briefs to be necessary, after notification to the other party. This allegedly has been done without first requesting permission from the arbitrator to do so. According to the Employer, the fact that the language in Article 15.4.B(7) has remained the same throughout the 1984-87 as well as the 1987-90 collective bargaining agreements means that the Aaron award interpreting the language now has been incorporated by the parties into the National Agreement. It is the position of the Employer that the bargaining history between the parties shows the Union proposed that Article 15.4.B(7) be read to mean both parties must consent to filing post-hearing briefs unless the arbitrator requested them, but the Employer rejected the Union's proposal. It is the contention of the Employer that the Union now is attempting to achieve through arbitration what it failed to obtain at the bargaining table.

VI. ANALYSIS

A. The Plain Meaning Rule of Interpretation

The dispute in this case involves an interpretation of Article 15.4.B(7) of the parties' National Agreement. It states:

> Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Regional level arbitration, except either party at the National level may request a transcript, and either party at the hearing may request to file a post-hearing brief. However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing. (See, Joint Exhibit No. 1, pp. 66-67, emphasis added).

A fundamental objective of interpreting contracts is to give effect to the intent of the parties, and the Union has argued that this goal is best achieved here by applying the plain meaning rule of contract interpretation. In other words, the Union has argued that the phrase "may request" should be interpreted according to the ordinary meaning of those words. The ordinary meaning of "request" is "to ask for something or for permission or authority to do, see, hear, etc., something; to solicit; and is synonymous with beg, entreat and beseech." (See, Union's Post-hearing Brief, 6).

During the last four decades in the United States, there has been a shift in judicial and scholarly attitudes toward the plain meaning rule. The eminent contract scholar, Samuel Williston, as well as the first Restatement of Contracts took the position that, in an effort to understand the meaning of

language, it was appropriate to consider prior negotiations only if the language of the parties' contract was unclear and ambiguous. As Section 230 of the first Restatement stated, "Oral statements by the parties of what they intended the written language to mean are excluded, though those statements might show the parties gave their words a meaning that would not otherwise be apparent." Justice Oliver Wendell Holmes, a proponent of the viewpoint set forth in the first Restatement, once stated that he would be willing to look outside a contract for extrinsic evidence to prove that "'ten dollars' meant in Canadian dollars, but it [the extrinsic evidence] would not be allowed to show the parties meant twenty dollars." (See, Mellon Bank, 619 F.2d 1001 (3rd Cir. 1980)). This approach to contract interpretation would look beyond the four corners of the document only when the contract is ambiguous on its face.

The Restatement (Second) of Contracts, however, has moved away from the restrictive plain meaning rule championed by Williston. Section 202(1) of Restatement (Second) of Contracts states:

> Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable, it is given great weight. (See, p. 86 (1981), emphasis added.)

It is not necessary to prove an ambiguity in the contractual language of the parties before evaluating the totality of circumstances that created the language. The language of the parties is understood only in context. As the Restatement

(Second) of Contracts has instructed:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) (interpretation of an integrated agreement) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usage of trade, and the course of dealing between the parties. (See, p. 126 (1981)).

The parties' collective bargaining agreement is the most important codification of their contractual intent, but modern contract theory permits reference to the negotiation history of the parties in an effort to show the meaning of language in their agreement.)See, "The Plain Meaning Rule in Labor Arbitration," LV Fordham Law Review 681 (1987).

B. Bargaining History

The Employer submitted a number of exhibits from contract negotiations for the 1984-87 collective bargaining agreement. One such exhibit consisted of final minutes for the 1978 negotiations. (See, Employer's Exhibit No. 9). During those negotiation meetings, the parties extensively discussed the subject of post-hearing briefs in regular regional arbitration cases. In 1978, the Employer proposed the following language for Article 15.4.B(7):

> Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Regional level arbitration, except either party at the National level may request a transcript, and either party at the hearing may request to file a post-hearing brief. However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing. (See, Employer's Exhibit No. 8, pp. 16-17).

In response to the Employer's suggestion with regard to post-hearing briefs, the Union in 1978 submitted the following counter proposal:

> ~~Normally,~~ there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Regional level arbitration, unless otherwise mutually agreed ~~except either party at the National level may request a transcript, and either party at the hearing may request to file a post-hearing brief.~~ However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing. (See, Employer's Exhibit No. 9, pp. 18-19).

The Union's proposal called for bracketed words to be deleted and underlined words to be added to the proposal.

Mr. James Conway, Chief Spokesperson for the Employer in 1978, refused to accept the Union's counter proposal. He critiqued the Union's proposal by observing that "you,[the Union] are asking us to give up an independent judgment" regarding whether to file a post-hearing brief in a particular case. (See, Employer's Exhibit No. 9, p. 23). Mr. Conway offered the following explanation for the Employer's position with regard to filing post-hearing briefs. He stated:

> We feel the language as proposed on Page 18, Item (7) is logical and think either party should have the option of requesting a transcript or post-hearing brief with control at the National level, so that there are no abuses by either parties. We see no reason to surrender the right of the Employer to have that option. We are saying that normally there will be none, but we are opening up the option of either party to request it, and therefore, we are not proposing to change our position in that respect. (See, Employer's Exhibit No. 9, p. 21, emphasis added).

The parties stipulated before this arbitrator that the disputed contractual language has not changed since the 1984-87 collective bargaining agreement and that the parties adopted the Employer's proposal.

C. Meaning of the Bargaining History

Bargaining history submitted to the arbitrator strongly supports the Employer's position that the parties' retained the right to file post-hearing briefs on request at regular regional arbitration hearings. Although the parties may have used the phrase "may request," there is clear and convincing evidence that the Employer informed the Union at the bargaining table of its understanding that the language meant either party may file a post-hearing brief as a matter of right, after properly notifying the other party of an intent to do so and without the arbitrator's permission. The law is no stranger to words in a contract having a meaning different from that set forth in the dictionary. (See, e.g., Allied

Steel and Conveyors, Inc., 277 F.2d 907 (1960),(where the court interpreted "should" to mean "may.")

In the parties' agreement, there has been no express denial of a right to file a post-hearing brief. Juxtaposing the language in Article 15.4.B(7) with the language in Article 15.4.C(3), it is clear that the parties were capable of drafting language expressly prohibiting any filing of post-hearing briefs. (See, Joint Exhibit No. 4, p. 67). If the parties had intended to prohibit post-hearing briefs unless permitted by the arbitrator, they were capable of doing so. As one court has observed:

> Where the bargain is the result of elaborate negotiations in which the parties are aided by counsel, in such circumstances it is easier to assume that a failure to make provision in the agreement resulted not from ignorance of the problem, but from agreement not to require it. (See, General Foods Corp., 365 F.2d 77, 79 (1966)).

D. The Impact of Past Practice

Restatement (Second) of Contracts has taught that it is appropriate to interpret words of an agreement in light of all the circumstances, and an important circumstance giving strong evidence of the meaning of the parties is found in the way they have implemented their bargain. As Section 202(4) of Restatement (Second) states:

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection

to it by the other, any course of performance accepted or acquiesced in without objection is given great weight within the interpretation of the agreement. (See, p. 86 (1981)).

The Employer's interpretation of language in Article 15.4.B(7) conforms to the parties' practice under the provision. Mr. Martin Rothbaum, Labor Relations Program Analyst Principal for the Northeast Region, testified about the practice of the parties. He indicated that he personally has handled at least a thousand arbitration cases in the Northeast, Central, Eastern, and Southern Regions. He testified as follows with respect to the practice of filing post-hearing briefs at regular regional level arbitrations:

QUESTION: When you arbitrate cases in these locations, have you ever had an occasion to file a brief?

ANSWER: Yes sir.

QUESTION: Who made that decision to file a brief?

ANSWER: I did.

QUESTION: Was it made in conjunction with agreement with the Union?

ANSWER: No sir. Where we felt it was necessary to file a brief, I made that determination and told the arbitrator I intended to do so.

QUESTION: Did you consult with the arbitrator to ask permission if you could file a brief?

ANSWER: No sir. (See, Tr., 57).

A number of advocates report to Mr. Rothbaum, and later in his direct examination, he offered the following observation:

QUESTION: Could you reflect on what you know the practice to be from working with these other advocates and directing them in regards to the filing of post-hearing briefs?

ANSWER: Well, not only do we teach it, but we also engage, if there was ever a problem, to give direction, that we have the right to file a brief if we feel it necessary to do so, and the Union has the right to file a brief if they feel it necessary to do so. (See, Tr., 58).

Several other witnesses testified the same as did Mr. Rothbaum, including representatives from each of the regions.

Although the Union is accurate in its contention that none of the witnesses had ever submitted the issue of post-hearing briefs to an arbitrator for resolution, evidence submitted to the arbitrator was clear in showing that the parties did not believe an arbitrator's permission was necessary before filing a post-hearing brief, as long as the other party properly had been notified. The practice described in the evidence conforms to the Employer's interpretation of language in Article 15.4.B(7), and such evidence further supports a conclusion that the parties did not intend arbitral permission to be necessary in order to be able to file a post-hearing brief. It is clear from the evidence that the parties intended each party to retain a unilateral right to file a post-hearing brief in regular regional arbitration cases on proper notification without the other party's consent or an arbitrator's permission.

The Employer argued that Arbitrator Aaron's award is binding precedent on this arbitrator and established that the parties intended the phrase "may request" in Article 15.4.B(7) to mean that each party would have a right to a verbatim transcript as well as a right to file a post-hearing brief in

regular regional arbitration cases on proper notification to the other party. Arbitrator Aaron interpreted the phrase "may request" in the context of Article 15.4.B to mean "notification." He observed:

> It also seems clear that the word "request" does not mean what it normally does in a different context; rather, in this provision [Article 15.4B(7)] it means "notify." (See, Case No. H1C-NA-C 52, p. 7 (1985)).

Arbitrator Aaron's award, however, does not constitute a precedent for the grievance before this arbitrator. The issue before Arbitrator Aaron was as follows:

> Does Article 15, Section 4.B(7) of the National Agreement preclude either party from ordering a verbatim transcript of a regular arbitration hearing at the regional level without the consent of the other? (See, Case No. H1C-NA-C 52, p.1 (1985)).

The issue before Arbitrator Aaron is not the issue before this arbitrator. Arbitrator Aaron's award was issued in 1985. During that proceeding, the Employer again informed the Union of its understanding that Article 15.4.B(7) provides each party with a unilateral right to file a post-hearing brief on proper notification. The parties negotiated a new contract in 1987, and the language in Article 15.4.B(7) remained unchanged. This fact further supports the arbitrator's conclusion that the parties' intent underlying Article 15.4.B(7) was to preserve for each party a unilateral right to file a post-hearing brief in regular regional arbitration cases.

The Union in its post-hearing brief cited several

decisions of the United States Supreme Court as well as a number of arbitration cases for the proposition that arbitrators have an inherent authority to set procedural rules to be followed at arbitration hearings. The Court has been clear that, "once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." (See, John Wiley & Sons v. Livingston, 370 U.S. 543, 547 (1964)). The arbitrator certainly would not presume to challenge the soundness of the Court's decision. The parties in this case, however, have themselves chosen to vary the judicial guideline.

In the absence of a contractual provision to the contrary, an arbitrator has inherent authority to decide procedural questions raised at the arbitration hearing. At the same time, the arbitrator has no authority to contradict procedural rules that the parties themselves have bargained for and made a part of their collective bargaining agreement. The parties are free to set the procedural rules for arbitrators to follow. In this case, the parties have bargained for a right to file post-hearing briefs in regional arbitration cases on notifying the other party. An arbitrator may not deny the parties that contractual right.

Article 15.4.A(6) of the parties' agreement states that "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." (See, Joint Exhibit No. 1, p. 65). On the basis of bargaining history as well as the past practice of the party, it is reasonable to conclude that the parties intended to retain to themselves the unilateral right to file post-hearing briefs in regular regional arbitration cases on proper notification to the other party of an intent to do so. Under Article 15.4.B(7), an arbitrator does not have authority to deny a party the right to file a post-hearing brief on proper notification to the other party.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that Article 15.4.B(7) provides each party with the procedural right to file a post-hearing brief after notifying the other party and the arbitrator of its intent to do so. The grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

Date: March 31, 1993