C#16371

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between AMERICAN POSTAL WORKERS UNION and UNITED STATES POSTAL SERVICE	GRIEVANT: K. Hack POST OFFICE: Manasota, Florida CASE NO.: HOC-3W-C 4833

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Union: Mr. Cliff Guffey
For the Employer: Mr. Howard Kaufman

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: May 4, 1993

POST-HEARING BRIEFS: May 5, 1994

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that national level arbitration is not an appropriate forum for resolving the grievance addressing the adequacy of the hazardous materials training program at the Manasota, Florida facility. The parties, however, have not challenged the arbitrability of the grievance concerning washup time for Letter Sorting Machine Operators. Accordingly, the parties shall proceed at the national level to arbitrate the merits of the "washup time" grievance, and a national arbitrator has jurisdiction under the parties' agreement to proceed to the merits of that part of the grievance. The arbitrator shall retain jurisdiction in the matter for 90 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: July 20, 1994

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION BETWEEN AMERICAN POSTAL WORKERS UNION AND UNITED STATES POSTAL SERVICE (K. Hack Grievance) (Case No. HOC-3W-C 4833)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 through November 30, 1990. A hearing occurred on May 4, 1993 in a conference room of the Employer located at 475 L'Enfant Plaza in Washington, D. C. Mr. Cliff Guffey, Assistant Director of the Clerk Division, represented the American Postal Workers Union. Mr. Howard Kaufman, Senior Counsel, NLRB, 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 advocates fully and fairly represented their respective parties. Ms. Lisa Walker of Aaron Reporting Services, Inc. reported the proceeding for the parties and submitted a transcript of 97 pages.

There were no challenges to the substantive arbitrability of the dispute. The Employer, however, challenged the procedural arbitrability of the matter. The parties elected to bifurcate the hearing in order to resolve the question of arbitrability before proceeding to the merits of the case. The arbitrator officially closed the hearing on May 5, 1994 after receipt of post-hearing briefs in the matter.

II. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 14 SAFETY AND HEALTH

Section 8. Local Committee Responsibilities

D. In installations where employees represented by the Unions accept, handle and/or transport hazardous materials, the Employer will establish a program of promoting safety awareness through communications and/or training, as appropriate. Elements of such a program would include, but not be limited to:

1. Informational postings, pamphlets or articles in Postal and Regional Bulletins.

2. Distribution of Publication 52 to employees whose duties require acceptance of and handling hazardous or perishable items.

3. On-the-job training of employees whose duties require the handling and/or transportation of hazardous or perishable items. **This training will include, but is not limited to, hazard identification; proper handling of hazardous materials; personal protective equipment availability and its use; cleanup and disposal requirements for hazardous materials.**

4. All mailbags containing any mazardous materials, as defined in Publication 52, will be appropriately identified so that the employee handling the mail is aware that the mailbag contains one or more hazardous material packages.

5. Personal protective equipment will be made available to employees who are exposed to spills and breakage of hazardous materials.

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 4. Arbitration

D. National Level Arbitration

1. Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National level.

III. STATEMENT OF THE ISSUES

The parties authorized the arbitrator to state the issue. The Employer stated the issue as follows:

(1) Whether LSM Operators are engaged in "dirty work" when an LSM Operator handles mail that meets the definition of hazardous material which would entitle the operator to washup time?

(2) Whether the Manasota facility's hazardous material awareness program is adequate under Article 14 of the National Agreement?

The Union has formulated the issue before the arbitrator as follows:

(1) Whether LSM Operators are entitled to washup time after handling hazardous materials?

(2) Whether the Employer has implemented a hazardous material handling program consistent with requirements of Article 14.8.D?

The issues before the arbitrator are as follows:

(1) Is the grievance procedurally arbitrable?

(2) If so, are LSM Operators entitled to washup time after handling hazardous materials?

(3) If the matter is arbitrable, is the hazardous materials training program as implemented at the Manasota facility consistent with Article 14.8.D of the parties' collective bargaining agreement? If not, what is an appropriate remedy?

IV. STATEMENT OF FACTS

In this dispute, the Employer challenged the procedural arbitrability of the grievance and contended that the grievant failed to raise an interpretive issue of general applicability as required by Article 15.4.D.1 of the parties' collective bargaining agreement. This is a procedural question which cannot be effectively answered without some consideration of the merits of the case. Some background information about

the dispute will place it in context.

The grievant is an operator of a letter sorting machine. On November 4, 1991, an envelope marked "Diagnostic Specimen" became jammed in the grievant's LSM console. A mechanical part on the LSM console punctured the envelope, and a custodian trained in handling hazardous material reported to the letter sorting machine to examine the package. It was learned that the envelope contained a fecal sample.

The Employer stated that the sample never spread from the envelope nor came in contact with the grievant. The custodian who examined the envelope determined that the specimen was not hazardous. The envelope was resealed in a "patchup bag" and returned to the mail stream.

Despite the custodian's determination that the package was not hazardous, the grievant remained concerned for her health and safety. She requested that the custodian clean the LSM console. The grievant also requested that the Employer provide her with washup time after the incident. It would appear that management granted both requests.

The grievant filed her complaint in November of 1991, and the Employer denied the grievance at all steps of the process. After the Step 3 hearing on November 10, 1992, the Employer removed the grievance from the regional arbitrator. A decision on the merits of the case has not been issued by an arbitrator. The Employer elevated the case to Step 4 because management concluded that the grievance involved an

issue of contract interpretation which is generally applicable to employees of the Postal Service.

In the hearing before the arbitrator on May 4, 1993, the employer argued that any question regarding the adequacy of the hazardous materials training program at Manasota, Florida is not procedurally arbitrable. The Employer contended that questions about the adequacy of the program failed to implicate a question of contractual interpretation with general application. Thc Employer, however, reaffirmed its position that the issue concerning washup time for LSM Operators involved a national interpretive issue of general application pursuant to Article 14.4.D.1 of the parties' agreement. When the parties agreed to bifurcate the hearing, the arbitrator concluded the matter after receiving evidence submitted by the parties on the issue of procedural arbitrability.

V. POSITION OF THE PARTIES

The Employer:

The Employer maintains that the issue concerning implementation of a hazardous materials training program at the Manasota facility is not procedurally arbitrable. It is the belief of the Employer that the issue fails to raise a national interpretive issue of general application as required by the parties' collective bargaining agreement. The Employer

maintains that Article 15.4.D.1 precludes an arbitrator from hearing the merits of such a dispute at the national level.

It is the position of the Employer that the merits of the case involve merely the determination of a factual dispute. According to the Employer, the issue in dispute is concerned with applying unique facts at a local facility to language in the parties' agreement. The Employer, therefore, believes that application of language in the parties' agreement does not involve a matter of contract interpretation but, rather, requires merely resolving a question of fact, which question is properly resolved at the regional level.

The Employer argues the Union has failed to establish that procedures in use at the Manasota facility are reflective of a national policy on hazardous material training. By failing to show that procedures used at the Manasota facility are followed throughout the country, the Employer asserts that the issue on the merits in this case requires that facts be applied to the parties' agreement in order to determine whether or not personnel at the Manasota facility had complied with the agreement. The Employer maintains that this is solely a question of fact without national implications.

Beginning at Step 3 of the grievance procedure, the Employer took the position that the issue involving washup time for LSM Operators constituted a national interpretive issue. (See, Employer's Exhibit No. 1, p. H). It is the belief of the Employer that, "if the Union desires to arbitrate the issue of whether the LSM Operator is entitled to

washup time, then they have raised 'the existence of a widespread organizational problem' . . . and the Postal Service is prepared to arbitrate the issue." (See, Employer's Post-hearing Brief, 12).

B. The Union:

The Union maintains that issues before the arbitrator are procedurally arbitrable. It is the position of the Union that the issue concerning washup time for LSM Operators has not been challenged by the Employer and, therefore, is properly before the arbitrator. The Union also contends that the general applicability of any resolution of the issue requires that it be arbitrated at the national level. The Union, however, contends that facts of the issue are so intertwined with the merits of the case that, regardless of the applicability of the issue regarding implementation of the hazardous materials program, the two issues should be heard together at the national level.

It is the position of the Union that the issue addressing implementation of the hazardous materials training program at the Manasota facility presents an issue of contract interpretation and that the interpretation is generally applicable to the entire work force. The Union also contends that procedures used at the Manasota facility are reflective of the Employer's

national policy toward hazardous materials training and that it, therefore, requires a determination at the national level to decide whether such a policy is consistent with the parties' national agreement.

Moreover, the Employer allegedly does not have standing to challenge the procedural arbitrability of issues before the arbitrator in this case because the Employer itself elected to remove the issues to the Step 4 proceeding. Additionally, the Union contends that the Employer is estopped from challenging procedural arbitrability because management first raised the issue of arbitrability at the arbitration hearing. The Union believes there was an obligation of the Employer to challenge arbitrability at initial stages of the process.

VI. ANALYSIS

A. The Nature of the Process

The parties have decided that their collective bargaining agreement is the main instrument of control in their relationship. They have devised a grievance procedure that requires certain disputes to be resolved at the national level. Their system has been carefully designed to include national and regional level arbitration. Classes of cases are channeled to each sphere, and a successful operation of the parties' agreement depends on correctly recognizing particular cases as specific examples of the general classes described in their agreement and, then, assigning the cases to the right classification.

It is not surprising that the parties continue to debate the correct classification for a particular case, despite their long contractual relationship. Even with general rules in place, it is not unusual for uncertainties to persist regarding the application of rules in a particular case. There are limitations inherent in the nature of language and imperfections in human communication that restrict the guidance of general rules, and general rules themselves require interpretation. Although the contractual design used by the parties fosters freedom in their relationship, general rules in the parties' system of dispute resolution continue to require interpretation because of the finitude of the most piercing contract draftsperson.

As a general rule, the parties have agreed that disputes involving "interpretive issues" will be arbitrated at the national level. Such a general rule does not lend itself to a syllogistic analysis, and it is necessary for an arbitrator to weigh many complex factors in the parties' contractual relationship to implement their intent. Uncertainty in some cases is the price to be paid for gaining a general rule that works well in most disputes between the parties. By using a general rule that works well in the ordinary case, the parties have retained considerable discretion for themselves and have avoided a mechanistic application of rigid rules in their dynamic relationship. The parties have designed a system that strikes a balance between absolute certainty and unfettered discretion to resolve each case in a vacuum.

The purpose of thrusting an arbitrator into a linguistic dispute of this sort is to ascertain the meaning of contractual language used by the parties. The purpose is not interpolation nor evisceration. The parties' contractual words are presumed to have meaning, and an arbitrator must try to find it in a specific case while honoring the duty of restraint. In making a contractual interpretation, an arbitrator is obligated to operate within the relatively narrow limits of implementing the parties' bargain and not writing a new contractual provision.

B. An Interpretive Issue of General Application?

In Article 15.4.D.1 of the parties' agreement, they have determined that:

> Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National level. (See, Joint Exhibit No. 1, p. 69).

In this case, determining whether the dispute presented an interpretive issue of general application requires a detailed analysis of the underlying conflict. The Employer has argued that the grievance in this case merely involved an application of the parties' agreement to a factual event. It is the belief of the Employer that such a fact specific case involved a factfinding process the parties have delegated to a regional arbitrator. According to the Employer, the Union failed to prove that the hazardous material training program implemented at the Manasota, Florida facility is inconsistent with other programs used throughout the United States.

It is the contention of the Employer that the Union failed to prove the existence of an interpretive issue meeting the test of "general applicability" set forth in Article 15.4.D.1 of the parties' agreement. Moreover, the Employer argued that the Union demonstrated no need to seek an interpretation of the parties' agreement. In other words, the Employer has concluded that contractual language of the parties' agreement is not in dispute but, rather, that it is the implementation of a program already in place at a particular facility which is being challenged in this case.

The Union has responded that questions about the hazardous materials training program at this specific facility presents an interpretive issue of general applicability. According to the Union, implementation of the hazardous materials training program across the country does not meet the parties' intended standard; and practices at the Manasota facility mirror the Employer's failure to comply with those standards. Accordingly, the Union has concluded that these facts create an interpretive issue that can be resolved at the national level. It is the belief of the Union that the arbitrator must interpret the parties' National Agreement in order to determine the extent of the parties' bargain and applicable standards by which to judge the adequacy of the Employer's hazardous materials training programs.

A preponderance of the evidence submitted to the arbitrator, however, failed to demonstrate that the training program at the Manasota facility is reflective of the national standard. As proof that the Manasota program exemplifies the national standard of the Employer, the Union submitted a letter from Mr. Reginald Yurchik, an official in labor relations for the Employer, in which Mr. Yurchik stated:

> It is the position of the Postal Service that employees of the Manasota facility have received hazardous materials awareness training and washup time consistent with the Postal Service policy and Occupational Safety and Health Administration (OSHA) standards governing hazardous materials and bloodborne pathogens. (See, Union's Exhibit No. 1(c)).

More than demonstrating that the Manasota program reflected a national standard of the Employer, the letter merely illustrated the nature of the dispute between the parties. The Employer conceded that the portion of the letter applicable to washup time involved an interpretive issue. The Employer has a national policy of denying washup time to LSM Operators. The portion of the letter addressing the hazardous training program, however, merely stated that the Employer's hazardous materials training program is consistent with OSHA standards. This constituted only a factual assertion.

Arbitrator Mittenthal has dealt insightfully with the distinction between questions of contractual interpretation and an application of facts. Arbitrator Mittenthal stated:

> The grievance before me does not require the interpretation of the language of any of these Article 14 provisions or the language of OSHA. Rather, it calls for the application of this language to the facts of this case or, more specifically, for a determination as to whether it is "unsafe" for the FSM to be operated without the access panels being fastened to the machine housing. This is a question of fact, not a question of contract interpretation.
>
> While I suspect this is the distinction the parties had in mind in Article 14, Section 4D(a), I note that they referred only to "interpretive issues under this Agreement . . ." The question of fact before me is, broadly speaking, an "interpretive issue . . . under this Agreement." But if that were a correct reading of Section 4D(1), then practically all disputes would be subject to national level arbitration. That could hardly have been what the parties intended. (See, Case No. H1T-4H-C 28439, p. 3 (1985, emphasis in the original).

The question of fact in the case before Arbitrator

Mittenthal centered on the Union's claim that operation of a Flats Sorter Machine without fastened bolts on the access panels constituted an unsafe condition as defined by the parties' agreement. The issue before Arbitrator Mittenthal is not fundamentally distinguishable from the one in this case in that it asks the arbitrator to evaluate a specific factual circumstance in order to make a determination about whether unique facts of that situation meet requirements of the parties' agreement. Arbitrator Mittenthal's analysis must inform the arbitrator's decision in this case.

The factual issue before this arbitrator is whether the Manasota facility implemented a hazardous materials program consistent with Article 14 of the parties' agreement. There are no contractual standards to interpret. There is no question about the extent of the training each employe must receive. The question is merely whether the Employer has implemented a hazardous materials training program in Manasota. This is a question of fact and does not constitute an interpretive issue of general application.

C. Timeliness of the Objection to Procedural Arbitrability

Alternatively, the Union has argued that, even if the grievance should be adjudged not procedurally arbitrable, the Union should be permitted to present additional evidence because its due process rights have been violated. According to the Union, it did not have an opportunity adequately to rebut the Employer's challenge to procedural arbitrability because management first raised the issue at the Step 4 hearing. Such a position, however, failed to be persuasive.

The arbitrator previously concluded that "a party may change its position about procedural arbitrability at the arbitration hearing if that party now believes that no national interpretive issue has been raised by the grievance." (See, Case No. H7N-1A-C 25966, p. 15 (1992), citing Case Nos. H4C-4A-C 7931; H4C-4C-C 13068; H4C-4K-C 33596; and H4C-3B-C 48957). While arbitration decisions in the same industry under the same agreement between the same parties are highly persuasive, another valuable source of guidance is found in private sector decisions.

Numerous arbitrators have concluded that a party's right to challenge arbitrability is not lost because it is raised for the first time at an arbitration hearing. The parties have agreed that only interpretive issues of general applicability may be appealed to national arbitration, and there has been no express exclusion in the parties' agreement of the opportunity to exercise this right merely because it is

activated in the arbitration hearing. In other words, there is no evidence suggesting that asserting such a right in arbitration is inconsistent with the parties' commitment to arbitration as a dispute resolution mechanism.

Arbitrator Joseph Gentile has concluded that "evidence must be substantial, clear and convincing that the actions by this Employer could reasonably be construed as an implied acquiescence or tacit consent to not enforce the pertinent section" of the grievance procedure. (See, Vogue Coach Corp. 72 LA 1156, 1159 (1979)). He would require a high quantum of proof to find the parties intended to deny an employer the right to challenge arbitrability at the arbitration level of a grievance procedure. Likewise, another arbitrator has concluded that:

> Since an arbitration hearing is basically a 'de novo' proceeding, the party is not precluded from raising an issue or a defense despite the fact that it was not raised at a preliminary step. The fact that it may "surprise" the opposing side may require the scheduling of another hearing date to enable the surprised party to introduce evidence on the new matter, but the fact remains that if one side discovers a novel position on the eve of arbitration, he is free to present it. (See, City of Meriden, 71 LA 699, 701 (1978)).

Other arbitrators have reached a similar ruling. (See, e.g., International Paper Co., 70 LA 71, 74 (1978)). In a case before the eminent Clark Kerr, a party had agreed to submit a dispute to arbitration only later to challenge the arbitrator's jurisdiction. President Kerr stated:

> Contrary to a contention by the Union, the Company has the right to raise the question of arbitrability before the arbitrator, even though it had

> earlier agreed to submit the dispute to arbitration. Willingness to submit a dispute to an arbitrator named in the contract cannot be considered as a waiver of the argument of lack of jurisdiction by the arbitrator. (See, Commercial Pacific Cable Co., 11 LA 219, 220 (1948)).

Finally, Arbitrator John Sembower suggested that, apart from contractual provisions, a stipulated issue might also prevent a party from challenging arbitrability in an arbitration hearing. He stated:

> If the parties had indeed arrived at an understanding as to the issue to be presented to the arbitrator in this instance, and then jointly presented the same, that might be deemed to be such a waiver, but they did not do so.
>
> Once waived, the right [to challenge arbitrability] would be lost forever in any given instance, but unless and until it was waived, it seems clear that the jurisdictional bar, if it exists, could be asserted at any stage of the proceedings. (See, Caterpillar Tractor Co., 534, 537 (1962)).

The arbitrator is as bound by an agreement between the parties as are they. It should be noted that the jointly signed Scheduling Letter to the arbitrator stated that:

> This scheduling Letter does not constitute a waiver by either party of any issue of arbitrability or timeliness as it relates to the appeal and certification requirements of Article 15 of the agreement. It is for the sole purpose of bringing this case before an arbitrator. (See, Union's Exhibit 1(A)).

D. Are the Issues Inextricably Intertwined

The Union asserted that factual issues involved in the dispute are inextricably intertwined with the challenge to arbitrability and require resolution in a single proceeding. Courts have noted that procedural questions can be significantly intertwined with underlying substantive controversies making it difficult to decide one issue without resolving the other. As the U.S. Supreme Court has stated:

> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum. They develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it. (See, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 556-57 (1964)).

The Union argued that, because the issue concerning washup time must be heard at the national level, the issue involving the hazardous materials training program should also be heard at the national level. According to the Union, the factual basis underlying substantive issues in this case are so interrelated with the procedural issues that duplication of resources and witnesses will occur if the issues are separated.

Such an argument, however, is wide of the mark. The test regarding whether there is an inextricable intertwining of substantive and procedural issues is whether or not the procedural issues can be understood and resolved without totally understanding the underlying substantive dispute. In other words, does a resolution of challenged arbitrability hinge on a decision on the merits of the case?

It is recognized that the procedural challenge to arbitrability in this case implicates the ultimate issue on the merit because the two matters have common roots. But the issues involve distinctly separate questions which can be understood and resolved apart from each other. The issue involving washup time requires proof of the parties' contractual intention. The issue involving the hazardous materials training program would warrant only factual inquiries to determine whether the Manasota facility developed a proper hazardous materials training program. In other words, there is a sufficient divergence of the issues to warrant their separation. Although some witnesses and proof may be duplicative, there is no evidence that the underlying rationale will overlap to the extent necessary to deny a regional arbitrator an opportunity to hear the case. Such a result is more consistent with the bargain struck by the parties.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that national level arbitration is not an appropriate forum for resolving the grievance addressing the adequacy of the hazardous materials training program at the Manasota, Florida facility. The parties, however, have not challenged the arbitrability of the grievance concerning washup time for Letter Sorting Machine Operators. Accordingly, the parties shall proceed at the national level to arbitrate the merits of the "washup time" grievance, and a national arbitrator has jurisdiction under the parties' agreement to proceed to the merits of that part of the grievance. The arbitrator shall retain jurisdiction in the matter for 90 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

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Professor of Law

Date: July 20, 1994