C-23261

****

In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE	)	
	)	
and	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	**Q98N-4Q-C01090839**
	)	**Publication 71**
	)	**Arbitrability**
and	)	
	)	
NATIONAL POSTAL MAIL HANDLERS UNION (Intervenor)	)	

****

Before: Dennis R. Nolan, Arbitrator, USC Law School, Columbia, SC 29208-0001.

Appearances:

For the Employer: Larissa Omelchenko Taran, Attorney, USPS, Washington, DC.

For the NALC: Thomas N. Ciantra, Cohen, Weiss and Simon, LLP, New York, NY.

For the NPMHU: Page Kennedy, Bredhoff & Kaiser, P.L.L.C., Washington, DC.

Place of Hearing: Washington, D.C.

Date of Hearing: October 5, 2001

Date of Award: April 28, 2002

Relevant Contract Provision(s): Articles 3, 5, 10 (Section 5), and 19

Contract Year: 1998-2001

Type of Grievance: Contract Interpretation

Award Summary: The dispute is arbitrable.

Dennis R. Nolan, Arbitrator

OPINION

I. Statement of the Case

The NALC filed this Article 19 appeal on February 8, 2001 to challenge certain revisions made by USPS to Publication 71. The parties could not resolve the dispute in the grievance process, so the NALC demanded arbitration. The National Postal Mail Handlers Union (NPMHU) eventually intervened. The first scheduled hearing date, in Washington, DC on October 5, 2001, was devoted to arguments about arbitrability. All parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Because the arguments on the arbitrability dispute were too complex to resolve from the bench, all parties filed lengthy post-hearing briefs, the last of which arrived on April 10, 2002.

The Postal Service claimed that the NALC had not raised the issue of whether the revisions conflicted with ELM 513.36 in the earlier steps of the grievance procedure. It therefore argued that the NALC could not do so at the arbitration hearing. The NALC disputed that assertion. Unlike the other arbitrability objections, which are purely interpretive matters, this raised a factual dispute. After some discussion on how best to proceed, the parties agreed that the Postal Service, as the objecting party, could request a second hearing to receive evidence about the arguments raised below (Tr. 99). In due course, the Postal Service notified me that there would be no hearing but neither the Employer nor NALC explained why. Each now blames the other and seeks to profit from the lack of evidence in the record. The Postal Service's brief asserts (at page 16) that the NALC "canceled the hearing" and concludes that the Employer's objection is therefore unrebutted and "establishes a procedural defect in the Union's Article 19 appeal." The NALC's brief asserts (page 2) that the Postal Service "abandoned its claim that the NALC failed to raise" the alleged conflict.

II. Statement of the Facts

Late in 2000, the Postal Service informed postal unions and others that it proposed to revise Publication 71, *Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act*. After some discussions with unions and the Department of Labor's Wage and Hour Division, it issued the final version on February 6, 2001. Two days later, the NALC filed this Article 19 appeal. That appeal concisely states the NALC's objections by alleging that Publication 71 revisions dealing with an employee's documentation of the reason for an absence conflict with Articles 5 and 19 of the National Agreement, with EL-311, Personnel Operations, and with the Family and Medical Leave Act (FMLA) itself.

Because this phase of the arbitration deals only with arbitrability, it is unnecessary to discuss the NALC's objections in detail. Briefly, though, the NALC alleges that the new version of Publication 71 could result in denial of leave when an employee fails to provide specified documentation while ELM 513.36 requires documentation for short-term absences "only when the employee is on restricted sick leave or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service." In practice, it argues, that provision has long allowed employees to take leave of three days or less for a medical condition without having to

provide documentation unless the Postal Service has a reasonable factual basis for questioning the employee's absence. It proffers that evidence in a hearing on the merits would show that the Postal Service has reversed that practice since it issued the revised Publication 71 and now requires documentation for short-term absences even where there is no reason to doubt the employee's reason for requesting leave.

III. The Issue

Is this Article 19 appeal arbitrable?

IV. Pertinent Authorities

1998-2001 AGREEMENT

ARTICLE 3
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations: . . . .

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ARTICLE 10
LEAVE

Section 5. Sick Leave

The Employer agrees to continue the administration of the present sick leave program, which shall include the following specific items:

A. Credit employees with sick leave as earned.

B. Charge to annual leave or leave without pay (at employee's option) approved absence for which employee has insufficient sick leave.

C. Employee becoming ill while on annual leave may have leave charged to sick leave upon request.

D. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

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. . . .

Notice of such proposed changes that directly relate to wages, hours or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it 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. . . .

EMPLOYEE AND LABOR RELATIONS MANUAL (2000)

513.36 **Sick Leave Documentation Requirements**

513.361 **Three Days or Less**

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service. Substantiation of the family relationship must be provided if requested.

513.362 **Over Three Days**

For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work or of need to care for a family member and, if requested, substantiation of the family relationship.

515 Absence for Family Care or Serious Health Condition of Employee

515.1 Purpose of 515. This section provides policies to comply with the Family and Medical Leave Act of 1993. Nothing in this section is intended to limit employees' rights or benefits

available under other current policies (see 511, 512, 513, 514), or collective bargaining agreements. . . .

515.55 Employee Incapacitation. An employee requesting time off under this section because of his or her own incapacitation must satisfy the documentation requirements for sick leave in 513.31 through 513.38 or for leave without pay in 514.4. If absence exceeds 21 calendar days, evidence of ability to return to work with or without limitations must be submitted. If additional medical opinions are required, they are administered as described in 515.54.

PUBLICATION 71 (2001 Revision)

IV. Documentation on Request for Absence

Supporting documentation is required for your absence request to receive final approval. Documentation requirements may be waived in specific cases by your supervisor. *However, failure to provide requested documentation could result in a denial of FMLA-protected leave.*

V. The Parties' Positions on Arbitrability

A. The Postal Service

1. The Postal Service's first argument against arbitrability is that the Article 19 appeal is procedurally flawed.

(a) According to the Employer, Publication 71 is not a handbook, manual, or regulation as Article 19 uses those terms. It is, rather, only a document required by the FMLA to provide individual notice to employees of the FMLA's provisions. It is, in other words, part of the FMLA statutory framework, not of the collective bargaining framework. The Postal Service relies an award by Arbitrator Howard Gamser, H8C-NA-C 61 (December 27, 1982). In that decisions, the arbitrator found that a document issued by the Postal Service (EL-501) was not a handbook, manual, or regulation because it did not attempt to alter the ELM's leave regulations. Publication 71 stands in the same situation.

(b) The Postal Service made no substantive "change" to Publication 71 2001. It simply reorganized and repeated certain language. To support an Article 19 appeal there must be a significant change in one of the listed types of documents. Contrary to the Unions' assertions, an alleged change in Postal Service practice is insufficient to justify an Article 19 appeal.

(c) The main issue raised at the hearing by the NALC, an alleged conflict between Publication 71 and ELM 513.361, was not raised in previous proceedings. The NALC's cancellation of a planned hearing to receive evidence of prior discussions demonstrates its inability to prove that the parties had discussed the issue below.

(d) Finally, the appeal is time barred. Article 19 allows a union to demand arbitration within 60 days of receiving notice of a proposed changed. Here, both Publication 71 and the ELM provisions had been in effect at least since 1994, yet the Union did not file its appeal until early in 2001.

2. The Postal Service's second argument is that the core of the Union's case would require interpretation of the FMLA and its implementing regulations. That, it claims, is beyond the authority of an arbitrator. Relying on a 1983 decision by Arbitrator Richard Bloch, the Postal Service asserts that an arbitrator may only interpret collective bargaining agreements. Responding to the Unions' anticipated arguments that the Agreement's provisions are closely related to those of the statutes and that arbitrators routinely resolve FMLA disputes, it draws a distinction between *interpreting* a statute and *applying* it. Arbitrators may do the latter but not the former. Another postal union, the APWU, has sued the Postal Service over its changes in Publication 71. That suit demonstrates that the dispute is a legal one that belongs in court.

B. The NALC

1. The NALC begins by addressing the Postal Service's argument that an arbitrator may not interpret statutes and regulations. Even if this case turned on construction of the FMLA, it argues, it would still be arbitrable. The Agreement itself (Article 5) obliges the Employer not to take any actions affecting terms or employment that are "inconsistent with its obligations under law." Similarly, Article 3 on management rights limits the Employer to actions that are "consistent with applicable laws and regulations." Postal Service arbitrators have consistently interpreted laws, including the FMLA, when necessary to resolve grievances. Moreover, the Postal Service itself admitted that authority in settling at the national level Case No. F94N-4F-C 96032816 (P. Whitley). A settlement agreement in May of 1998 provided that "pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations."

2. The NALC then turns to the argument that Publication 71 is not a handbook, manual, or regulation within the meaning of Article 19. Even by a simple dictionary definition it is a "regulation" because it is "an authoritative rule dealing with details or procedure." The "details or procedures" at issue govern documentation requirements under ELM 515. ELM 515 does not itself set out documentation requirements; rather, it refers the employee back to the notice that is Publication 71. Form letters later issued by the Postal Service make this clear. They expressly direct the employee seeking leave to provide documentation pursuant to Section IV of Publication 71.

3. Third, the NALC argues that the changes in the 2001 version of Publication 71 were material modifications. In particular, the earlier version of the publication simply said that documentation was required before a leave request could receive final approval; the revision emphasizes that leave requests are governed by Publication 71's documentation requirements rather than by those of the ELM. That shift in emphasis is confirmed by the Postal Services' new practice of distributing Publication 71 as the official statement concerning necessary

documentation and by the Employer's new insistence on documentation even for short-term absences.

C. The NPMHU

Many of the NPMHU's arguments track those of the NALC and thus need not be repeated. It emphasizes the regulatory nature of Publication 71's documentation section by noting that it includes repeated mandates — that is, it requires employees to provide certain carefully detailed information. The publication is not merely a "derivative" document because no other Postal Service document contains those requirements. As a "rule or order that directs employee behavior," Publication 71 is a "regulation" under any reasonable meaning of that word. In the case decided by Arbitrator Gamser on which the Postal Service relies, the Employer disclaimed any intent to alter existing regulations or to change employee behavior. Here, in contrast, the Postal Service declined to make such a statement.

The NPMHU's other main point is that Postal Service arbitrators may interpret laws and regulations when necessary to resolve grievances. It notes that the issue in this case is not whether Publication 71 violates the FMLA but whether it conflicts with the ELM. Even if interpretation of the FMLA were required, an arbitrator can do so because the Agreement incorporates statutory or decisional law.

VI. Discussion

Although the issue in this proceeding is extremely narrow, the parties take it very seriously. Their submissions on arbitrability alone occupy 100 pages of a hearing transcript, three and a half inches worth of exhibits, 62 pages of briefs, plus assorted attached arbitration awards. Careful digestion of this mass of material reveals five disputed questions, which I will address in turn.

A. Is Publication 71 a handbook, manual, or regulation?

Article 19 permits the NALC to challenge changes in "handbooks, manuals and published regulations of the Postal Service." Both Unions rely on the last of those terms, asserting that Publication 71's documentation section is a "regulation." The Agreement does not define that term, so we have to assume the parties intended it to have its normal meaning as a general rule intended to direct behavior.

The Postal Service describes Publication 71 as simply "a document required by the FMLA to satisfy the individual notice requirements of that statute." It may indeed be that, but a notification required by a statute can also function as a general rule to direct employee behavior. The two, in short, are not mutually exclusive. Whether a notice serves that second function obviously depends on the facts of the case.

In this regard, the Employer's reliance on the Gamser award is misplaced. The EL-501 at issue in that case was simply a guide for supervisors, not for bargaining unit employees. Even though it looked like a handbook, was submitted to the Union as if it were a handbook, bore a handbook number, and was referred to by the Employer as a handbook, the Postal Service's cover letter specifically disclaimed any attempt to "alter existing Postal Service regulations." After noting the Postal Service's ambiguity as to whether EL-501 was an "authority" for interpreting the Agreement, Arbitrator Gamser said that the Employer could not have it both ways. Either EL-501 was an "internal management communication to supervisory and managerial personnel, outside the bargaining unit" or it was a separate "authority" on which management could rely. He relied on the Employer's disclaimer and directed it to "promulgate an official document" stating that EL-501 was not to be regarded "as a handbook having the force and effect of such a document issued pursuant to Article 19."

Publication 71, in contrast, did not come with a disclaimer of regulator force. In fact, the Postal Service expressly declined at the arbitration hearing to stipulate that the document was not intended to change existing rules. Moreover, Publication 71 goes to employees rather than just to their supervisors. It thus cannot be a simple "internal management communication." Finally, Publication 71 contains specific directions that employees must follow in order to obtain FMLA leave.

In sum, Publication 71 clearly meets the normal definition of a regulation and is therefore subject to an Article 19 appeal.

B. Did the 2001 Revision of Publication 71 Amount to a Material Change in that Document?

Article 19 permits appeals of "proposed changes that directly relate to wages, hours or working conditions." In the absence of any special contractual definition, "changes" must be given its normal meaning. We can safely assume that the parties used that word to apply to *material* changes; reissuance of an old document with a new typeface, correction of typographical errors, or changes in organization that have no practical effect would not give the Union an occasion for revisiting dormant complaints.

As to whether the 2001 revision constituted a material change, the evidence is limited. There were some wording changes but none of them flagrantly modifies an existing rule. To some extent, however, the Postal Service's objection begs the critical question. Even a small change in wording might have large practical consequences. If the union challenging a revision makes a plausible argument that the new words affect terms of employment, then the question of whether it is correct goes to the merits of the dispute, not to its arbitrability. To put it differently, the "change" hurdle in Article 19 is a very low one.

The heart of the NALC's objection involves one sentence the Postal Service added in 2001 to the beginning of Section IV of Publication 71: *"However, failure to provide requested documentation could result in a denial of FMLA-protected leave"* (emphasis in the original). On

one hand, that sentence is extremely similar to language contained in both the 1997 and 2001 introductory paragraphs: "Failure to provide such notice or documentation could result in denial of leave or other protections afforded under the Act." Putting old language in a different place or repeating it in two or more places normally would not amount to a material change. On the other hand, in rare cases location or frequency of wording may matter especially if (as here) the new words differ from the old ones.

The 2001 changes in Publication 71 initially seem minor and may well have no practical effect. Nevertheless, they are just important enough that the Unions should have the opportunity to demonstrate their impact in a hearing on the merits.

C. Is the Grievance Timely?

The Postal Service's timeliness objection piggybacks on its assertion that the 2001 version of Publication 71 merely carried forward the changes made in 1994 and 1997. If it did so, then obviously an appeal in 2001 would be far too late. Having found that the Unions cleared the "change" hurdle, I must also find that the challenge to the changes is timely. That the Unions may not have shown daylight when clearing that hurdle does not affect the timeliness of their jump.

D. Did the NALC Raise the Claim of a Conflict Between the Revised Publication 71 and ELM 513.36 Earlier in the Grievance Procedure?

I assume simply for the sake of argument that a union processing an Article 19 appeal must raise all issues before reaching the arbitration step. The next question is which party bears the burden of proof on that point once the Employer raises an arbitrability objection. Must the Postal Service must prove the Union's failure to raise the issue earlier, or must the Union prove that it did so? That somewhat abstract question is critical here because the record contains no evidence on either side of the issue. The allocation of the burden of proof will therefore decide the matter.

An arbitrability objection is a form of affirmative defense. Accordingly, the party raising the objection must prove its assertion. That is true whether the arbitrability dispute is substantive or (as here) procedural. A party claiming that the Agreement does not apply to the grievance must show that it does not. A party claiming that the grievance is untimely must show that it was filed after the appropriate deadline. Similarly, a party claiming that a particular issue had not been raised earlier must show that was the case. The Postal Service failed to do so. The record contains only a bare assertion contained in its counsel's opening statement.

By failing to present any evidence on the parties' earlier discussions, the Postal Service waived its opportunity to prevail on this basis. Whether or not the Union previously discussed the alleged conflict with ELM 513.36, it is not barred from doing so now.

E. May an Arbitrator Interpret a Statute and Its Implementing Regulations?

Before the middle 1960s, it was rare for a party to raise a legal issue in labor arbitration. Parties understandably assumed that the purpose of arbitration was solely to interpret or apply the collective bargaining agreement. Certain language in Supreme Court opinions seemed to support that understanding. Once Congress began to regulate employment relationships more carefully, though, the separation of "legal" and "contractual" questions became harder to maintain. Scholars, arbitrators, and advocates began a long-lasting debate about whether labor arbitrators could or should apply external law when resolving contractual grievances.[1]

To the extent that those debates produced a consensus, it was that arbitrators could not rely *solely* on the dictates of external law. More generally, most arbitrators shied away from legal questions if they could solve the case at hand in some other way. Many added comments to the effect that an arbitrator's proper role was simply to interpret the applicable contract. Usually, though, they reserved the possibility that external law might be applicable in an appropriate case.

Writing while those debates were fresh in mind, distinguished Postal Service arbitrators (who were, not incidentally, often leading members of the National Academy of Arbitrators) followed that pattern. In a 1982 APWU case (H8C-4A-C-11834), Arbitrator Ben Aaron wrote that "the arbitrator's function is to interpret and apply the Agreement." In "the circumstances of this case," he said, "there is not necessity to look to the external law." The clear implication of his last statement was that in some other cases there might be such a necessity. Similarly, in a 1983 Federation of Postal Police Officers case (FPSP-NAT-81-006), Arbitrator Richard Bloch held that "a claim premised solely upon the Fair Labor Standards Act would be outside the Arbitrator's jurisdiction." His addition of the adverb "solely" indicates that an arbitrator might have jurisdiction over a "mixed" case involving both statutory and contractual issues.

As the years passed and arbitrators more frequently faced legal issues, it became apparent that there were some undeniable holes in the wall of separation between "law" and "contract." One obvious exception to the general rule is that parties who incorporate external law in their contract, either expressly or by paraphrase, necessarily expect their arbitrators to interpret and apply the incorporated law. That may sometimes require examination of implementing regulations and relevant judicial precedent.

---

[1] See, for example, Bernard Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, 20 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1 (1967); Robert G. Howlett, The Arbitrator, the NLRB, and the Courts, 20 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 67 (1967); Richard Mittenthal, The Role of Law in Arbitration, 21 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 42 (1968); Michael I. Sovern, When Should Arbitrators Follow Federal Law?, 23 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 29 (1970); and Theodore J. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and Its Progeny, 30 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 29 (1977).

A second exception may be less obvious but is firmly established as a canon of contract interpretation. It is reasonable to assume that parties intend their agreements to be legal and legally enforceable. Given two interpretations of a disputed term, then, an arbitrator should adopt the one that is consistent with applicable law rather than the one that would be illegal. That exercise, too, might require examination of implementing regulations and relevant judicial precedent. A good example is a 1987 APWU case (H1C-NA-C 101) cited by the Postal Service on a different point. Arbitrator Dan Collins carefully examined the Rehabilitation Act, cases interpreting that Act, and the position of the EEOC regarding its meaning when deciding an Article 19 challenge. He concluded that the Postal Service did not violate Article 19, but reached that conclusion only after interpreting and applying external legal authority.

All of this is a roundabout way of reaching the Postal Service's objection that, because one NALC argument might require interpretation of the FMLA, the grievance is not arbitrable. In fact, neither Union's brief advanced the argument anticipated by the Postal Service. The mere possibility that the Unions might raise a legal issue in a hearing on the merits hardly suffices to bar them from arbitration. Nor does a pending suit on Publication 71 brought by the APWU demonstrate that court is the only place in which the FMLA may be of use. As the Supreme Court once held, it is quite possible to use the same legal arguments in different forums, arbitral and judicial. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

The Postal Service's fall-back position, that an arbitrator may "apply" but may not "interpret" a law, relies on an impossible distinction. More often than not, it is necessary to interpret the law precisely in order to apply it; to put it simply, before one can apply a law, one must know what the law means.

I find that the presence or possibility of an argument involving external law does not make a case inarbitrable.

AWARD

For the reasons stated, none of the Postal Service's arbitrability objections is meritorious. The dispute is therefore arbitrable.

Dennis R. Nolan, Arbitrator and Mediator

April 28, 2002
Date