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In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE	)	
	)	
and	)	**Case No. Q11N-4Q-C 13100328**
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	
	)	

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Before: Dennis R. Nolan, Arbitrator

Appearances:

For the USPS:	Katherine S. Attridge, USPS Attorney, Washington, DC
For the NALC:	Keith E. Secular, Cohen Weiss and Simon, LLP, New York, NY
For the Intervenor:	Matthew Clash-Drexler, Bredhoff & Kaiser, P.L.L.C., for the National Postal Mail Handlers' Union
Place of Hearing:	Washington, D.C.
Date of Hearing:	August 11, 2015
Date of Award:	February 3, 2016
Relevant Contract Provision(s):	Articles 10 and 15; ELM 436 and 512
Contract Year:	2011-2016
Type of Grievance:	Contract
Award Summary:	USPS properly brought this dispute to national level arbitration because it involves the interpretation of ELM provisions incorporated into the national Agreement. Because the record in this case is slender and the predictable variety of situations raising this issue is so wide, a global decision on the power of parties to negotiate remedial settlements or on the power of arbitrators to award remedies involving annual leave would be premature. I therefore

remand this grievance to the local level for further proceedings.

Dennis R. Nolan

Dennis R. Nolan, Arbitrator

OPINION

I. Statement of the Case

The NALC filed Grievance No. Q11N-4Q-C 13100328 to enforce a local settlement. The parties could not resolve the dispute in the grievance process, so the NALC demanded arbitration. The arbitration hearing took place in Washington, DC on August 11, 2015. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties filed lengthy post-hearing briefs, the last of which arrived on November 6, 2015.

II. Statement of the Facts

This case presents a very narrow question of contract interpretation. Before that question can be resolved, it will be necessary to address a procedural question of whether national level arbitration is the proper forum for resolving the issue. The original grievance was filed in Concord, California, following a local settlement of an employee's claim for limited duty after suffering a job-related injury. The settlement of that grievance put the Grievant back to work with back pay and lost benefits, including credit for annual leave.

This second grievance involves the NALC's assertion that management failed to comply with the settlement. The NALC's claim that management violated the settlement concerns restored annual leave. Article 10 grants employees the right to annual leave. ELM Subchapter 510 specifies how leave is earned. While the use of annual leave is normally up to the employee who earned it, employees must, except in emergencies, obtain a supervisor's approval before taking leave.

Leave that an employee would have earned while improperly kept off work by management is a normal part of a settlement or of an arbitration award. ELM 436.1 entitles employees who suffered an unjustified or unwarranted personnel action to back pay and other employment benefits the employee would have earned, subject to limitations prescribed in 436.2. Subsection 436.2.d. provides that recredited leave "may not exceed the maximum amount of leave to which the employee was eligible." The one exception to that rule is that leave recredited by the EEOC or the MSPB is uncapped.

ELM Section 512.321(a) caps the amount of leave that can be carried over to the next year at 440 hours. In normal circumstances, an employee will lose any accrued leave over that limit. But what happens when an reinstated employee's restored annual leave exceeds that limit? Neither the Agreement nor the ELM clearly resolves that question. Recognizing that Section 512.321(a) might present a problem, the NALC asked that the Grievant receive a lump sum payment to compensate for any leave forfeited as a result of the cap.

That is the substantive issue. The procedural issue is whether that dispute constitutes an interpretive matter subject to national arbitration or merely a local dispute that should be resolved at the Area level, including the possibility of regular arbitration. Article 15, Section 4.D.1. provides that "Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National level."

III. The Issue

The parties agree that the substantive issue presented by the grievance is this: Whether an employee who receives back pay as the result of a grievance settlement or arbitration award may be entitled to compensation for annual leave that exceeded the maximum amount of hours that may have been carried over into the next leave year.

They disagree over whether that issue is appropriate for national level arbitration as an interpretive case.

IV. Pertinent Authorities

ARTICLE 10
LEAVE

Section 1. Funding

The Employer shall continue funding the leave program so as to continue the current leave earning level for the duration of this Agreement.

Section 2. Leave Regulations

The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement.

Section 3. Choice of Vacation Period

A. It is agreed to establish a nationwide program for vacation planning for employees in the regular work force with emphasis upon the choice vacation period(s) or variations thereof.

B. Care shall be exercised to assure that no employee is required to forfeit any part of such employee's annual leave.

C. The parties agree that the duration of the choice vacation period(s) in all postal installations shall be determined pursuant to local implementation procedures.

D. Annual leave shall be granted as follows:

1. Employees who earn 13 days annual leave per year shall be granted up to ten (10) days of continuous annual leave during the choice period. The number of days of annual leave, not to exceed ten (10), shall be at the option of the employee.
2. Employees who earn 20 or 26 days annual leave per year shall be granted up to fifteen (15) days of continuous annual leave during the choice period. The number of days of annual leave, not to exceed fifteen (15), shall be at the option of the employee.
3. The subject of whether an employee may at the employee's option request two (2) selections during the choice period(s), in units of either 5 or 10 working days, the total not to exceed the ten (10) or fifteen (15) days above, may be determined pursuant to local implementation procedures.
4. The remainder of the employee's annual leave may be granted at other times during the year, as requested by the employee.

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure - Steps

Step B:

(e) If either party's representative at Step B or the NBA or Employer's Area representative thereafter maintains that the grievance involves an interpretive issue under the National Agreement, or some supplement thereto which may be of general application, the issue will be discussed with the appropriate National Union/Management Representatives at the Headquarters Level. If either party's National Representative determines the issue to be interpretive, a written notice will be sent to the other party specifying in detail the facts giving rise to the dispute, the precise interpretive issues to be decided and the initiating party's contention. The grievance(s) shall be held at the Step B level pending discussion at the national level or the outcome of a National Arbitration award. . .

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. . . .

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. . . .

ELM

436 Back Pay

Reference Note:

For additional material concerning the subject matter found in 436, refer to:
- Management Instruction EL-430-2012-4, *Back Pay,* or its replacement.

436.1 Corrective Entitlement

An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect that terminated or reduced the basic compensation, allowances, differentials, and employment benefits that the employee normally would have earned during the period. For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.

436.2 Limitations

Limitations to corrective entitlement are as follows:

a. Any amount that the employee earned in a new employment or in an enlarged part-time employment to replace Postal Service employment must be determined and offset against the amount of the reimbursement to which he or she would be entitled.

b. Back pay is allowed, unless otherwise specified in the appropriate award or decision, provided the employee has made reasonable efforts to obtain other employment, as follows (see also 436.42f).

(1) Job applicants not hired by the Postal Service must immediately make reasonable efforts to obtain other employment.

(2) Separated employees, or employees on indefinite suspension, are allowed 45 days before they must make reasonable efforts to obtain other employment.

Exception: Postal Service employees eligible for veterans' preference are not required to make reasonable efforts to obtain other employment while pursuing an administrative appeal with the Merit Systems Protection Board (MSPB).

c. No back pay is allowed for any period during which the person was not ready, willing, and able to perform the duties of the postal position.

d. Leave that is recredited as a result of the corrective action may not exceed the maximum amount of leave to which the employee was eligible (see 512.321).

Exception: Uncapped annual leave is recredited as a result of the reversal or modification of a removal by the Equal Employment Opportunity Commission or, for employees eligible for veterans' preference, by the MSPB.

436.3 Corrective Action

The installation head or other appropriate authority determining that a previous decision was unjustified or unwarranted initiates and directs the corrective action to be taken to ensure appropriate earnings to the employee for the period affected.

512 Annual Leave

512.1 General

512.11 Purpose

Annual leave is provided to employees for rest, for recreation, and for personal and emergency purposes.

512.12 Definitions

The following definitions apply for the purposes of 510:

a. *Leave year* — the year beginning with the first day of the first complete pay period in a calendar year and ending on the day before the first day of the first complete pay period in the following calendar year.

b. *Accumulated leave* — the total unused leave that remains to the credit of the employee at the beginning of any leave year.

c. *Current leave* — leave that an employee earns by biweekly pay periods during the current leave year.

d. *Accrued leave* — leave that is earned but is unused by an employee during any period during the current leave year.

512.32 Maximum Carryover

512.321 Maximum Carryover Amounts

The maximum carryover amount, i.e., the maximum amount of previously accumulated annual leave with which an employee may be credited at the beginning of a year, is as follows:

a. *Bargaining Unit Employees.* The maximum leave carryover for bargaining unit employees is 55 days (440 hours).

V. The Parties' Positions

A. The NALC

The NALC argues that capping leave carry-overs at 440 hours would be unjust when management itself is responsible for the employee's failure to use the extra hours. Wrongfully separated employees usually cannot use leave for the purposes specified in ELM 512.11. In such cases, some regular panel arbitrators have directed the Postal Service to restore the leave forfeited by the 440 hour limit or to compensate the employee for the forfeiture.

Management's arguments for denying such remedies are unpersuasive. While Section 436.2(d) provides that recredited leave cannot exceed the maximum amount to which the employee was entitled, that does not bar appropriate remedies by arbitration or by settlement. Subchapter 436 establishes the baseline elements of back pay and benefits that the Postal Service itself must provide, but it does not prevent an arbitrator from supplementing those elements. Management Instruction EL-430-201204, referenced in Subchapter 436, is only an instruction to management, not to arbitrators. Attachments to that Management Instruction clearly state that the tables in those attachments do not override a settlement or a decision. Even if 436.2(d) did limit the leave that an arbitrator could recredit to the employee, it does not by itself prevent monetary compensation for the forfeited leave.

In addition to several regional awards, Arbitrator Benjamin Aaron's 1984 national level award in a case involving the Postal Service, NALC, and APWU (NALC Exhibit 25) allowed arbitrators to fashion appropriate relief for wrongly punished employees, including interest even though the ELM did not at the time provide for interest.

The Postal Service's second argument is that the status quo ante rule is generally accepted in arbitration as a limitation on remedies, and that rule would bar any relief from forfeiture of annual leave. While the NALC does not agree with management's position, management is free to present that argument to a regular panel arbitrator. National arbitration is limited to violations of the Agreement and appropriate supplements; it does not also cover principles that are allegedly accepted in arbitration.

The status quo ante argument thus does not present an "interpretive issue" subject to national level arbitration. Management did not identify any provision of the Agreement whose meaning is in dispute. The national level arbitrations to which the Postal Service points do not support its

argument. Even if they did, that principle is not an interpretive level within the scope of this grievance and must therefore be decided at a regional arbitration. In Steven Briggs's 2003 award, the parties took positions opposite to those they argue here. The arbitrator sustained the Postal Service's argument that the Union could not bring a case to national level arbitration in order to establish its right to seek a monetary remedy in regional arbitration. A national award on that issue, he wrote, would be "premature and inappropriate."

If the arbitrator does address the merits of the NALC's claim in this case, he should affirm that a regular panel arbitrator may award the remedy sought by the NALC. The NALC cites substantial arbitral and other authority in support of its position.

B. The NPMHU

The Intervenor did not participate in the presentation of the grievance, but its attorney wrote separately to emphasize the breadth of arbitrators' remedial authority as the Supreme Court recognized in its 1960 *Enterprise Wheel* decision. Postal Service arbitrators at both the national and regional levels have taken the same position. Among other things, they awarded interest on back pay in appropriate cases and have awarded compensation for forfeited leave. The purpose of annual leave, for rest, recreation, and personal an emergency purposes, often cannot be met by a wrongfully terminated employee. An arbitrator should be free to craft an appropriate remedy in such cases.

C. The Postal Service

The Postal Service argues that this dispute is properly arbitrable at the national level because it involves interpretation of ELM 436 and 510, both of which are incorporated in the Agreement through Articles 10 and 19. The underlying question is whether the ELM provisions relating to back pay prohibit the remedy sought by the NALC.

Regarding the merits of the dispute, the Postal Service argues that ELM 436.2(d) prohibits arbitrators from awarding annual leave in excess of what the employee would have been entitled to under the maximum carryover provisions. Any such award would conflict with 436.2(d).

The purpose of ELM 436's back pay provisions is to return the employee to the position he would have been in had the unjustified personnel action not occurred — the *status quo ante* principle. The NALC's position would put an employee who receives back pay in a better position than if he or she had worked during the back pay period.

VII. Discussion

The description of this case's history in Part II and the presentation of the parties' positions in Part VI comprehensively state the issues and arguments in this case. There is no need to revisit them at length.

First, regarding the procedural issue. National level arbitration is reserved for "interpretive issues under this Agreement or supplements thereto of general application" (Article 15, Section 4.D.1.). The phrase "under this Agreement" includes documents incorporated into the Agreement as well as the words of the Agreement itself. Article 19 expressly incorporates those parts of handbooks, manuals and published regulations that "directly relate to wages, hours or working conditions" of covered employees. Annual leave benefits whether initially earned or later awarded through awards or settlements are part of the employees' "working conditions." ELM Subchapter 510, referred to in Article 10, Section 2 of the Agreement, is just one express incorporation. Other ELM provisions relating to leave are implicitly incorporated through Article 19.

A dispute over the interpretation and application of an ELM provision relating to working conditions is therefore clearly appropriate for national level arbitration.

The second question, whether an employee who receives back pay as the result of a grievance settlement or arbitration award may be entitled to compensation for annual leave that exceeded the maximum amount of hours that may have been carried over into the next leave year is not so simple. The problem is that the controlling principles are not entirely consistent. The "make whole" standard for remedies, which is reflected in ELM 436.1, would seem to argue against forfeitures of contractual benefits. A reinstated employee who forfeits some benefits does not, by definition, receive the "employment benefits that the employee normally would have earned during the period." On the other hand, the status quo ante standard urged by the Postal Service could mean that an employee who is awarded annual leave over 440 hours in an arbitration or settlement could, at least in some cases and circumstances, be better off than a comparable employee who was not wrongfully prevented from working.

Situations posing a conflict between ELM 436.1 and 436.2(d) are likely to be highly fact specific. For example, an award of annual leave early enough in a contract year to permit its use during that year presents a different situation from an award of annual leave too late in the year to be usable. Similarly, an employee who chooses not to use available leave is clearly in a different position than an employee prevented from using leave by management action. The examples in the NALC's brief of cases in which employees might not be able to use awarded annual leave through no fault of their own are likely to be rare but hardly unique. Different situations may call for different remedies. That is precisely why the Supreme Court in *Enterprise Wheel* singled out the arbitrator's broad discretion in constructing remedies for contractual violations and why Arbitrator Aaron and others have recognized it in Postal Service cases.

The very fact-specific nature of these cases is a powerful argument that a single sweeping determination at the national level would be premature. That Section 436.2.(d) expressly limits the corrective entitlements in 436.1 does not completely resolve the problem. As the NALC points, out, there may be alternative remedies like compensation in lieu of excess annual leave that might not contradict 436.2.(d) because such an award might not be a "carryover" limited by 512.321. All that we can be sure of at this point is that the record of this case is too slender to permit a single answer to a multi-faceted question.

I will therefore remand the case to the local level for further proceedings, to include regular panel arbitration if necessary. If, after gaining further experience, either party believes that parties negotiating settlements or arbitrators issuing corrective entitlement awards have violated the Agreement, a further appeal to national level arbitration might be necessary. At that point, all parties and the national level arbitrator will have a better basis for a definitive ruling.

AWARD

USPS properly brought this dispute to national level arbitration because it involves the interpretation of ELM provisions incorporated into the national Agreement. Because the record in this case is slender and the predictable variety of situations raising this issue is so wide, a global decision on the power of parties to negotiate remedial settlements or on the power of arbitrators to award remedies involving annual leave would be premature. I therefore remand this grievance to the local level for further proceedings.

Dennis R. Nolan

Dennis R. Nolan, Arbitrator

February 3, 2016
Date