

NATIONAL ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION.

between	.	
	.	
UNITED STATES POSTAL SERVICE	.	
	.	
AND	.	CASE NO.: Q94C-4Q-C 97011378
	.	H0C-NA-C 45
AMERICAN POSTAL WORKERS UNION	.	Promulgation of
AFL-CIO	.	Rule Revisions to
	.	ASM 271.51 Vehicle
	.	Searches

BEFORE: Linda S. Byars

APPEARANCES:

For the APWU: Melinda K. Holmes

For the USPS: J. K. Hellquist

For the NPMHU: Kathleen Keller (observing)

Place of Hearing: Washington, D.C.

Date of Hearing: April 10, 2007

Post-Hearing Briefs: Post-Marked on or before August 1, 2007

Award Summary

The Postal Service's implementation of regulations and implementing instructions for the administrative inspection of vehicles entering non-public areas does not violate the Collective Bargaining Agreement. Therefore, the Grievances are denied.

BACKGROUND

By letter dated June 9, 1992, the Postal Service notified the APWU of a Federal Register notice and 39 CFR revision intended, ". . . to add vehicles and their contents to the list of property subject to inspection under 39 CFR." [USPS Exhibit No. 21.] By letter dated October 16, 1992, the APWU initiated a Step 4 grievance (Case No. H0C-NA-C 45) alleging a violation of Article 5 of the National Agreement and ". . . protesting the establishment of a rule permitting searches of postal employees' vehicles on postal property." [APWU Exhibit No. 3.] By letter dated December 15, 1993, the Postal Service responded noting that the field offices were directed not to conduct the searches authorized under the regulations until the implementation instructions were prepared and the APWU was given an opportunity for review and comment.

By memorandum dated September 2, 1993, the Postal Service notified its managers of the published regulation regarding vehicle searches on non-public postal premises and gave permission to the managers to post signs at all entrances to employee parking lots alerting employees to the regulation. However, the Postal Service advised its managers not to conduct any searches pursuant to the regulation. [APWU Exhibit No. 5.]

By letter dated August 12, 1996, the Postal Service notified the APWU of proposed changes to the Administrative Support Manual incorporating the CFR revision. The Postal Service provided the APWU a draft copy of the ". . . implementation instructions for inspection service and postal police officer guidance, as well as Section 271.51 of the Administrative Support Manual (ASM)" and noted its agreement to formulate implementation instructions prior to the enforcement of the regulation. [APWU Exhibit No. 7, Employer Exhibit No. 2.] By letter dated October 10, 1996, the APWU notified the Postal Service that it was initiating a Grievance (Case No. Q94C-4Q-C 97011378) at the Step 4 Level of the Grievance Arbitration Procedure pursuant to Article 15 and 19 of the National Agreement.

By letter dated March 24, 2000 noting a March 9, 2000 meeting with the Postal Service and an agreement with the Postal Service to combine Case Nos. H0C-NA-C 45 and Q94C-4Q-C 97011378, the APWU provided the following statement of its position:

We believe that the Postal Service's implementation of regulations, and implementing instructions for the administrative inspection (searches or sweeps) of vehicles entering non-public areas violates the collective bargaining agreement between the parties. It is the APWU's position that the USPS administrative searches or sweeps exceed any statutory grant of authority to conduct such searches, represent a unilateral action that affects conditions of employment, and is inconsistent with applicable laws and regulations. It is further the APWU position that

both the rule and the implementing instructions are vague and over broad.

The APWU contends that warrant less administrative searches without probable cause may be permissible under specific circumstances, but only when there is a statute that specifically authorizes such searches. The statutory provisions that the Postal Service is relying on do not grant postal authorities the right to conduct warrant less searches. Moreover, the APWU contends that general provisions spelling out postal authorities right to protect the mail and to protect customers and employees of the postal service is not a specific enough grant of authority to conduct warrant less [searches]. Where Congress authorized inspections but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. We believe that the Postal Service unilateral action violates employees Fourth Amendment protection against unreasonable search and seizure.

In addition, the case law that the postal service relies upon that allowed postal authorities to conduct warrant less searches of postal employees' lockers does not support its unilateral adoption of a scheme of warrant less administrative searches. This case is distinguishable from the instant matter because the locker searches were legal because postal employees had signed waivers allowing for warrant less searches without probable cause and because the collective bargaining agreement warrant less locker searches. [APWU Exhibit No. 9.]

Also, by letter dated March 31, 2000 the APWU notified the Postal Service of its appeal of the combined Grievances to arbitration pursuant to Article 15 of the National Agreement. [APWU Exhibit No. 10.] By letter dated April 27, 2000 the APWU provided a "follow-up to [the] March 9, 2000 Step 4 meeting" regarding the Grievances as well as a

"subsequent discussion regarding [the] matter" and stating the issue as, ". . . whether the Postal Service's implementation of regulations and implementing instructions for the administrative inspection (searches or sweeps) of vehicles entering non-public areas violates the Collective Bargaining Agreement." [APWU Exhibit No. 11.]

Following notification by the APWU of its appeal of the Grievances to arbitration, the Postal Service, in a letter dated August 25, 2000, denied the Grievances and provided a statement of its position including the following:

The first issue to be addressed in grievance HOC-NA-C 45 is whether the implementation of 39 CFR, Part 232.1 (b) (2), Conduct on Postal Property, is a grievable matter. The second issue to be addressed in grievance Q94C-4Q-C 97011378 is whether the revisions to Section 271, or the ASM, are fair, reasonable, and equitable.

The authority of the Inspection Service to amend 39 CFR is conferred by law, not by collective bargaining. Article 19 of the National Agreement does not grant the union a voice in the amendment of 39 CFR. The amendment is enforceable independent of the National Agreement. Union contentions about the Fourth Amendment, the amendment being overly broad, etc. are not relevant in this forum. The union's attempt to challenge the actual CFR and its legal authority under the guise of a grievance is beyond the scope of the authorized collective bargaining.

Further, the union's contention of prohibited unilateral action also is not on point. However, even if the Inspection Service had an obligation to discuss this matter with the union pursuant to Article 5, it is the Postal Service's position that this obligation was met. As early as June 1992 the Union was provided a copy of the Federal Register notice and the 39 CFR amendment. The parties subsequently met and corresponded

regarding this matter. The fact that the union disputes the law does not automatically imply an Article 5 violation.

The union does have certain collective bargaining rights under Article 19 concerning proposed changes to those parts of all handbooks, manuals and other published regulations that directly relate to wages, hours and working conditions. A dispute concerning changes to the Administrative Support Manual (ASM) directly relating to wages, hours, or working conditions is grievable to the extent that such changes must be fair, reasonable, and equitable. The union has only challenged the CFR and has not furnished support for their contention that the changes to the ASM are not fair, reasonable and equitable. As previously stated, 39 CFR, Part 232.1(b) already allows inspection of purses, briefcases, etc. Adding vehicles and their contents to the list of property subject to inspection is a logical extension of the existing regulation. Employees can voluntarily choose to not enter restricted nonpublic areas with their vehicle and may therefore avoid inspection. Once an individual makes the choice to enter the restricted nonpublic area by vehicle, consent to inspection is implied. Therefore the changes to the ASM establishing implementing procedures are fair, reasonable, and equitable. [APWU Exhibit No. 12.]

On April 10, 2007 the Grievances came before the Arbitrator at hearing. By letter dated May 2, 2007, the Postal Service proffered a letter dated June 9, 1992 asking that it be included as part of the record as USPS Exhibit No. 21. By letter dated June 5, 2007 the APWU objected to the Postal Service's motion to complete or reopen the hearing. In a conference call on June 12, 2007, the APWU did not object to the authenticity of the June 9, 1992 letter, and because it was referenced in exhibits provided by both

Parties and there was no claim by the APWU that it had not been received, it was admitted as USPS Exhibit No. 21.

At the request of the Parties, the record remained open for post-hearing briefs. The Postal Service mailed its brief on July 27, 2007, and the APWU mailed its brief on August 1, 2007. The Parties proposed the following Statements of Issue.

STATEMENTS OF ISSUE

APWU

Does the Postal Service's regulation permitting administrative searches of vehicles in employee parking lots violate the National Agreement? If so, what remedy? [APWU Post-Hearing Brief, p. 2.]

Postal Service

1. Were the proposed CFR changes, provided to the APWU on June 9, 1992, a violation of Article 5? (Case No. H0C-NA-C 45)

2. Were the proposed ASM changes, provided to the APWU on August 12, 1996, a violation of Article 19? (Case No. Q94C-4Q-C 97011378) [Postal Service Post-Hearing Brief, p. 2.]

OPINION

The Parties do not agree on the statement of issue, and the record demonstrates that the issues have changed over the course of the grievance process. Once the Grievances were combined, the Postal Service stated the issues in its August 25, 2000 letter to the APWU as follows:

The first issue to be addressed in grievance HOC-NA-C 45 is whether the implementation of 39 CFR, Part 232.1 (b)(2), Conduct on Postal Property, is a grievable matter. The second issue to be addressed in grievance Q94C-4Q-C 97011378 is whether the revisions to Section 271, of the ASM, are fair, reasonable, and equitable. [Joint Exhibit No. 2, p. 5.]

In its post-hearing brief, the Postal Service states the scope of the issue in HOC-NA-C 45 as "whether the proposed CFR changes provided to the APWU on June 9, 1992 are a violation of Article 5." [Postal Service Post-Hearing Brief, p. 3.] Also in its post-hearing brief, the Postal Service objects to the "issue of applying the criteria of internal contract language (Article 19) to external Federal law (CFR)" as well as to the APWU introducing a new argument at arbitration. [Postal Service Post-Hearing Brief, p. 3.] However, the Postal Service does not raise the earlier issue of whether or not Case No. HOC-NA-C 45 represents a grievable matter. In fact, at arbitration, the record does not support

a conclusion that either issue, as stated by the Postal Service in its August 25, 2000 letter, is currently before the Arbitrator.

Similarly, the APWU's position has evolved over the course of the grievance procedure. The APWU's position on the joined Grievances, as stated in its post-hearing brief, rests primarily on its argument that the regulation permitting administrative searches of vehicles in employee parking lots is a unilateral change to Article 20, prohibited by Article 5, and that the Postal Service is required to bargain to agreement over such a change.¹

Clearly, as the APWU maintains, the Postal Service did not bargain with the APWU to agreement on the issues presented by the Grievances. Also, as the APWU maintains, the condition on parking the Postal Service seeks to impose by regulation was not a part of the employee parking program when the operative National Agreement became effective. There is also no dispute that the regulation requires tacit consent to a vehicle search by every employee wishing to enter and park in an employee parking lot and that employees would be unable to use their parking lots unless they consent to having their vehicles searched. As the APWU expresses

¹ There is no evidence in the record that the APWU relied specifically on Article 20 prior to the arbitration hearing. However, the Postal Service raised no objection during the arbitration hearing or in its post-hearing brief to the APWU's reliance on Article 20 during its opening argument (Transcript pp. 22-23), and in its brief the Postal

the dilemma, ". . . if an employee does not want to consent to a search, he or she cannot use the benefit negotiated by the APWU in Article 20." [APWU's Post-hearing Brief, p. 13.] The regulation conditions employees' use of a contractually provided benefit, as the APWU maintains, and there is no apparent dispute over the APWU's position that the regulation directly affects a working condition.

Article 20 provides as follows:

Section 1. National Study Committee

The existing parking program will remain in effect. There shall be established at the national level, as a subcommittee of the national Joint Labor-Management Committee, a National Study Committee on Parking in order to improve the parking program at existing facilities and to recommend such programs for new facilities.

Section 2. Security

Recognizing the need for adequate security for employees in parking areas, and while en route to and from parking areas, the Employer will take reasonable steps, based on the specific needs of the individual location, to safeguard employee security, including, but not limited to, establishing liaison with local police authorities, requesting the assignment of additional uniformed police in the area, improving lighting and fencing, and, where available, utilizing mobile security force patrols.
[Joint Exhibit No. 1.]

To conclude, as the APWU submits, that Section 1 of Article 20 precludes any change to the "existing parking program" without negotiation ignores Section 2, which

Service submitted rebuttal arguments to the APWU's Article 20 position.

specifically addresses "Security" and recognizes the Postal Service's responsibility and right to "take reasonable steps, based on the specific needs of the individual location, to safeguard employee security" Such steps are subject to Article 19, requiring that implementing provisions directly relating to wages, hours or working conditions and applying to employees covered by the Agreement contain nothing that is in conflict or inconsistent with the Agreement and also meet the "fair, reasonable and equitable" standard. Given the specific language of Section 2 of Article 20 mandating security measures by management, Section 1 of Article 20 mandating that "the existing parking program remain in effect" cannot mean that the parking program must remain unchanged for the duration of the Agreement, as the APWU maintains at arbitration.² The existing parking program includes reasonable steps to safeguard employee security.

Citing Case No. H1C-NA-C 68 (Mittenthal 1987), the APWU maintains that the Postal Service is attempting to achieve through arbitration what it failed or elected not to try to achieve through bargaining. However, unlike the case before Arbitrator Mittenthal, the record in this case fails to support such a conclusion.³ In the instant case, the Postal Service achieved the right to "take reasonable steps, based

² This conclusion clearly distinguishes the instant case from Case No. H1M-NA-C 99 (Zumas 1987) cited by the APWU.

on the specific needs of the individual location, to safeguard employee security. . . ."

The APWU maintains that the evidence, as produced by the Postal Service, demonstrates that the purpose of the regulation had little to do with employee safety in parking lots. As the APWU points out in its brief, the Implementing Instructions state that the "administrative inspections are used only to enforce the property regulations of the Postal Service. . . . " [USPS Exhibit No. 2.] However, enforcing the property regulations of the Postal Service includes the purpose identified as "(1)" in the Implementing Instructions, i.e., "Prevent the introduction or possession of weapons and drugs on postal property." [USPS Exhibit No. 2.] Such purpose clearly relates to "employee safety and security purposes" as stated in the Implementing Instructions and supports the statement, "Administrative inspections are justified for employee safety and security purposes, not law enforcement." [USPS Exhibit No. 2.] Contrary to the APWU's assertion, it is not apparent from the evidence that the regulation is intended only for purposes other than the concern for employee safety in parking lots recognized in Section 2 of Article 20.

³ Arbitrator Mittenthal found that during negotiations the APWU proposed contractual language, rejected by the Postal Service, on the very issue that was before him. [Case No. H1C-NA-C 68 (Mittenthal 1987), p. 13.]

The APWU asserts that a national regulation on vehicle searches is not the type of step concerning the safety of the physical space of employee parking lots that is based on the needs of an individual location and is therefore not permitted by Article 20, Section 2. However, the Postal Service considered "the specific needs of the individual location" as provided for in Article 20, Section 2, when it set forth the following limitation in the Implementing Instructions:

Prior to the commencement of an administrative inspection, inspectors or postal police officers must first obtain approval from their Inspector in Charge. The Inspector in Charge will decide if there are safety or security concerns to warrant the conducting of an administrative inspection at a particular facility. [USPS Exhibit No. 2.]

The APWU further submits that the Postal Service's failure to provide advance notice to the APWU of the regulation before it was published was a separate violation of Article 19. The letter from the Postal Service to the APWU advising of a Federal Register notice and 39 CFR revision that added vehicles and their contents to the list of property subject to inspection is dated June 9, 1992. There is no evidence or argument in the record challenging the Postal Service's assertion in its letter dated August 25, 2000 (or in its letter dated August 12, 1996) that the amendment became effective on August 25, 1992. [Joint Exhibit No. 2, p. 4 and USPS Exhibit No. 2, p. 3.] Absent

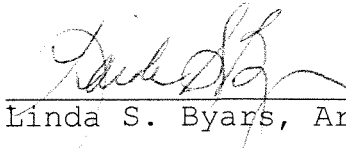
evidence that the date an amendment becomes effective is not the same as the date of issuance, the record demonstrates that the Postal Service provided notice of the change more than 60 days prior to issuance. More importantly, perhaps, is the absence of a challenge to the timeliness of the notice during the earlier steps of the grievance procedure.

The APWU does not challenge the revision based on the "fair, reasonable and equitable standard" contained in Article 19, but, as the APWU contends, there is more to Article 19 than the "fair, reasonable and equitable standard." There is also the requirement that such revisions be consistent with the Agreement. However, in this case the APWU failed to demonstrate that the revision was inconsistent with the Agreement. Accordingly, the Arbitrator finds for the Postal Service and makes the following Award.

AWARD

The Postal Service's implementation of regulations and implementing instructions for the administrative inspection of vehicles entering non-public areas does not violate the Agreement. Therefore, the Grievances are denied.

DATE: August 29, 2007


Linda S. Byars, Arbitrator