67 FLRA No. 60

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION
OFFICE OF MARINE AND AVIATION OPERATIONS
MARINE OPERATIONS CENTER
(Agency)

and

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 80
(Union)

0-AR-4918

DECISION

February 10, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Andrew M. Strongin found that the Agency violated the parties' collective-bargaining agreement when it changed an Agency regulation without taking steps to ensure that the Union actually knew about the proposed changes. We must decide two questions.

The first question is whether the award is based on a nonfact that the Union lacked "constructive notice" of the proposed regulatory changes.[1] The answer is no. Even assuming that the Arbitrator clearly erred in finding that the Union did not have "constructive notice,"[2] there is no basis to conclude that, but for that error, the Arbitrator would have reached a different result.

The second question is whether the Arbitrator's interpretation of the parties' agreement as requiring the Agency to ensure that the Union actually knew of the proposed changes fails to draw its essence from the parties' agreement. Again, the answer is no. Even if the agreement does not explicitly require the Agency to do what the Arbitrator directed, that does not demonstrate that the award fails to draw its essence from the agreement.

II. Background and Arbitrator's Award

The Agency assigns its employees to quarters on its vessels according to an Agency regulation (the vessel-quarters policy), which the Agency planned to change in a manner that could adversely affect electronics technicians represented by the Union (technicians). The Agency emailed the proposed policy changes to the Union and several other unions representing its employees. The Agency's email requested comments, and although two unions responded with comments, the Union did not. After the Agency implemented the changes and applied them (the new policy) to technicians, the Union filed a grievance alleging that the Agency violated Article I, Section 3(B) of the parties' agreement (§ 3(B)). That section provides, in pertinent part:

> The parties agree that no . . . changes to existing regulations . . . on matters affecting personnel policies, practices, or working conditions of bargaining[-]unit employees shall be implemented by the [Agency] without prior consultation with the Union. Reasonable time for review and response shall be provided the Union.
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> . . . .
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> 2. In the absence of consultation, prior regulations shall remain in effect until reasonable time for consultation has been given.[3]

When the grievance was unresolved, the parties proceeded to arbitration. Although the Arbitrator did not expressly frame the issues, he identified the following questions for resolution: (1) whether the grievance was timely filed; (2) whether the changes to the vessel-quarters policy are "'change[s] to existing regulation' . . . subject . . . to the consultation procedure established by" § 3(B);[4] and (3) whether the Union's silence following a proposed change "should be taken . . . as a waiver of the Union's consultation rights," or as an indication that the Union did not "receive timely notice of the proposed change."[5]

As to the grievance's timeliness, the Arbitrator found no dispute that, although the Agency emailed the proposed policy changes to the Union's business manager

[1] Exceptions at 1, 11.
[2] *Id.*

[3] Award at 6 (quoting § 3(B)).
[4] *Id.* at 5.
[5] *Id.* at 6; *see also id.* at 9 (essentially restating the same question).

using his longstanding email address and asked the Union for responsive comments, the Union did not provide any. Nevertheless, the Arbitrator found "no evidence to demonstrate that the Union in fact received" any email regarding the proposed changes.[6] Further, the Arbitrator was "ultimately . . . not persuaded that the Union had either actual or constructive knowledge [of] . . . the proposed changes or [their] subsequent implementation" until the month before the Union filed the grievance.[7] So he found the grievance timely filed under the agreement's thirty-day deadline.

Turning to the merits, the Arbitrator found that the changes to the vessel-quarters policy were subject to § 3(B)'s consultation procedure. In that context, the Arbitrator concluded that it was unreasonable for the Agency to treat the Union's silence in response to the proposed changes as a waiver of its § 3(B) consultation rights, at least where the Agency could have "forestalled" implementing the "[non-]time-sensitive" new policy long enough to seek "overt confirmation" that the Union received the proposed changes.[8] Under such circumstances, the Arbitrator found that the agreement must be "reasonably construed . . . [to] require[] the Agency to adopt some . . . confirmation procedure" to "safeguard the Union's consultation right."[9]

The Arbitrator found that, because the Agency implemented the new policy without ever confirming the Union's receipt of the proposed changes, the Agency violated § 3(B). Based on § 3(B)(2), he directed the Agency to remedy its contractual violation by restoring the former vessel-quarters policy "pending reasonable time for the parties to engage in the contractual consultation process."[10]

The Agency has filed exceptions to the award, and the Union has filed an opposition to those exceptions.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact that the Union lacked "constructive notice" of the proposed regulatory changes.[11] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[12]

The Arbitrator found that the parties' agreement required the Agency to "tak[e] reasonable steps to ensure that the Union *in fact* received . . . notice" of proposed regulatory changes by seeking some "overt confirmation . . . of *receipt*."[13] Consequently, even assuming that the Arbitrator clearly erred in finding that the Union did not have "constructive notice," there is no basis to conclude that, but for that error, the Arbitrator would have reached a different result.[14] Thus, the Agency's argument does not provide a basis for finding that the award is based on a nonfact.

In its nonfact exception, the Agency also argues that "constructive notice is central to the issue[] of timeliness."[15] To the extent that this argument challenges the Arbitrator's finding that the grievance was timely filed, the Authority has held that the timeliness of a grievance is a procedural-arbitrability determination that cannot be directly challenged through a nonfact exception.[16] Therefore, this argument does not provide a basis for finding the award deficient.

B. The award draws its essence from the agreement.

The Agency argues that the award fails to draw its essence from the agreement because it requires the Agency to take actions beyond those specified in the agreement, and it "ignores an established past practice" that the Agency fulfilled its notice obligations under § 3(B) simply by emailing proposed changes to the Union.[17]

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[18] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining

[6] *Id.* at 10.
[7] *Id.* at 5 (citing Collective-Bargaining Agreement, Art. I, § 11(D)).
[8] *Id.* at 11.
[9] *Id.*
[10] *Id.* at 12.
[11] Exceptions at 1-2, 11-13.

[12] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*).
[13] Award at 11 (emphases added).
[14] *See NFFE*, 56 FLRA at 41.
[15] Exceptions at 13.
[16] *E.g.*, *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 604-05 (2012); *AFGE, Local 2172*, 57 FLRA 625, 627 (2001).
[17] Exceptions at 15.
[18] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[19] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[20] In addition, where an arbitrator interprets an agreement as imposing a particular requirement, the agreement's silence with respect to that requirement does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement.[21] Moreover, when resolving exceptions to an Arbitrator's findings regarding a past practice, the Authority addresses whether a past practice *exists* under the nonfact framework.[22]

Although the Agency argues that the Arbitrator implausibly and irrationally interpreted § 3(B) as requiring the Agency to take actions that the agreement's text does not require, as stated above, the agreement's silence respecting such requirements does not demonstrate that the award fails to draw its essence from the agreement.[23] Regarding the Agency's contention that the Arbitrator improperly failed to recognize a "past practice" regarding notice under § 3(B), as also stated above, in the arbitration context, the Authority applies a nonfact analysis to assess arguments concerning whether a past practice exists. Here, the Agency does not assert that the Arbitrator's failure to find that a past practice exists is based on a nonfact and, thus, does not demonstrate that the award is deficient in this regard.[24] And because the Agency's arguments do not demonstrate that the Arbitrator's interpretation of § 3(B) is irrational, unfounded, implausible, or in manifest disregard of the agreement, they do not establish that the award fails to draw its essence from the agreement.[25]

IV. Decision

We deny the Agency's exceptions.

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[19] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).
[20] *Id.* at 576.
[21] *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*).
[22] *Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 1012, 1017 (2012) (*Broad. Bd.*) (citing *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 976 (2010)).
[23] *See Johnson Med. Ctr.*, 58 FLRA at 414.
[24] *See Broad. Bd.*, 66 FLRA at 1017 (where agency disputed arbitrator's conclusion regarding existence of past practice, but did not assert it was based on nonfact, agency did not establish deficiency in award).
[25] *See OSHA*, 34 FLRA at 575.