**71 FLRA No. 197**

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
KANSAS CITY, MISSOURI
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 66
(Union)

0-AR-5586

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DECISION

October 5, 2020

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting in part)

Decision by Member Abbott for the Authority

## I. Statement of the Case

In this case, we reiterate the distinction between an arbitrator's award that interprets the terms of a negotiated collective-bargaining agreement (CBA) and one that modifies its terms. The role of the arbitrator is to interpret not to modify.

Arbitrator Michael D. Gordon found that the Agency violated the parties' agreement and applicable federal regulations by denying the grievants' requests for administrative leave. As remedies, he ordered the Agency to grant administrative leave to the grievants for any leave that was taken on August 4, 2017 following a hazardous incident and to comply with the parties' agreement in the future.

The Agency argues that the award is contrary to 29 C.F.R. § 1960.46(a) and that it fails to draw its essence from Article 27, Section 2 of the parties' agreement. We deny these exceptions because they fail to raise any deficiencies in the Arbitrator's application of either § 1960.46(a) or Section 2. The Agency also argues that the Arbitrator exceeded his authority by awarding remedies other than administrative leave. We deny these exceptions because the award is directly responsive to the issues as he framed them.

The Agency also argues that the award fails to draw its essence from the parties' agreement. We grant this exception, in part, because the Arbitrator modified the parties' agreement by imposing an additional term that was not specifically provided for in the agreement. Consequently, we deny the Agency's exceptions in part.

## II. Background and Arbitrator's Award

On August 4, 2017, the grievants, who opened and initially sorted incoming mail, were working in a mail extraction area (Extraction 1) at the Agency's facilities. Around 8:30 a.m. an envelope was opened and one of the grievants nearly fainted. The remainder of the grievants experienced disorientation, nausea, burning eyes, and dizziness. Several of the grievants were then transported to the hospital by stretchers and/or wheelchairs. Eventually, the supervisor on duty initiated lockdown procedures in Extraction 1 and the local fire department hazmat team arrived on the premises to investigate.[1] After nearly two hours, the local fire department declared "all clear."[2] Agency management told those grievants who had not been removed for medical treatment that the Agency would authorize liberal sick, annual, and leave without pay. Approximately eighteen of those employees chose to take sick, annual, or leave without pay. In contrast, the Agency gave the four grievants who were sent to the hospital administrative leave for the remainder of their shift after the incident on August 4, 2017.

[1] A hazmat chemist tested the envelope and found no unusual substances. Award at 14. However, the Occupational Safety and Health Administration (OSHA) investigated and "determined [that] employees could be exposed to all sorts of chemical and biological agents at any time." Opp'n, Union Ex. 6 at 1. OSHA also found that "[a]lthough the mail goes through a very thorough process and [is] swept by dogs, some items still get through to the employees." *Id.*

[2] Award at 14-15.

Thereafter, the Union filed a grievance alleging that the Agency violated Article 27, Section 1(A)[3] and Section 2[4] of the parties' agreement by failing to maintain a safe and healthful working environment. The Union also alleged that the Agency violated the parties' agreement by improperly denying administrative leave, by failing to advise the grievants of their Federal Employees' Compensation Act (FECA) rights regarding the incident, and by refusing to provide copies of the Occupational Safety and Health Administration (OSHA) report to the Union. The Agency denied the grievance and arbitration ensued.

The Arbitrator framed the issue as whether "the Agency violate[d] the Agreement and/or applicable rules and regulations regarding an incident in Extraction 1 on August 4, 2017 . . . ."[5] In particular, he determined that the grievants had a reasonable "fear that continuation of their shift posed a threat to health and safety that could not be effectively redressed through normal procedures."[6] Furthermore, the Arbitrator found that some of the grievants had experienced symptoms from the incident, that all of the grievants were aware that work was halted after the incident, and that a hazmat team was called to investigate the incident. Therefore, the Arbitrator found that the Agency violated Section 2 of the parties' agreement by denying the grievants' requests for administrative leave. The Arbitrator also determined that administrative leave is a proper remedy for an agency's "failure to provide a safe and healthful workplace under Article 27."[7] Accordingly, he ordered the Agency to convert the leave the grievants originally took on August 4, 2017 to paid administrative leave.

Pursuant to the parties' agreement, the Arbitrator also determined that the grievants were entitled to "be informed of, and assisted with, their FECA rights."[8] The Arbitrator also found that "the Union is owed all health and safety accident reports that result in loss of work time," and that such "[d]isclosure should be prompt."[9] Due to the varied nature of the remedies requested by the Union, he directed the parties to refer any unresolved matters to a safety advisory committee composed of representatives from both parties.[10]

The Agency filed exceptions to the award on January 21, 2020. The Union filed an opposition to the Agency's exceptions on January 31, 2020.

## III. Analysis and Conclusions

### A. The Agency fails to demonstrate that the Arbitrator erred by awarding the grievants administrative leave.

The Agency argues that the award fails to draw its essence from Section 2 of the parties' agreement,[11]

[3] Article 27, Section 1(A) of the parties' agreement states the following:

> The Employer will, to the extent of its authority and consistent with the applicable requirements of Title 29 of the Code of Federal Regulations, as well as other applicable health and safety codes and standards, i.e., General Services Administration (GSA), provide and maintain safe and healthful working conditions for all employees and will provide places of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. The Union will cooperate to that end and will encourage all employees to work in a safe manner.

Award at 3.

[4] Article 27, Section 2 states that

> [t]he Employer recognizes the existence of certain employee rights in accordance with 29 C.F.R. § 1960, among them the right to be free from reprisal, including charge to leave, when employees decline to perform their assigned tasks because of reasonable beliefs that, under the circumstances, the tasks pose an imminent risk of death or serious bodily harm, coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures established by the Employer.

*Id.*

[5] *Id.* at 2.

[6] *Id.* at 31.

[7] *Id.* at 33.

[8] *Id.* at 34 (citing Article 27, § 10 of the parties' agreement); *see also id.* at 17 n.9 (finding that the Agency did not provide the OSHA report to the Union until after the Union had invoked arbitration).

[9] *Id.* at 34; *see also id.* at 37 ("In the future, the Agency shall promptly provide the Union copies of all health and safety accidents (including hazard related emergencies) that result in loss of work time.").

[10] *Id.* at 37 (citing Article 27, § 3 of the parties' agreement).

[11] Exceptions Br. at 11-16. The Authority will find an arbitration award is deficient as failing to draw its essence from a 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 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. *SSA*, 71 FLRA 580, 581 n.9 (2020) (Member DuBester concurring).

and that it is contrary to 29 C.F.R. § 1960.46(a).[12] The Agency notes that "Article 27, Section 2, grants [bargaining-unit] employees no additional right that they did not already have under 29 C.F.R. § 1960.46(a),"[13] and that both require the grievants to reasonably believe that there is "an imminent risk of death or serious bodily harm" such that they are entitled to administrative leave for the remainder of August 4, 2017.[14] Because the Arbitrator did not find that the grievants were exposed to hazards that may cause "imminent. . . serious bodily harm," the Agency asserts that the Arbitrator's findings do not satisfy the legal standards in either Section 2 or § 1960.46(a).[15]

Here, the Arbitrator's award is not contrary to § 1960.46(a). While the Agency parses the language of the award in its exceptions, the Arbitrator applied the proper standard by finding that the grievants reasonably believed they were exposed to "*serious* health risks" such that they had "reason to fear that continuation of their shift posed a threat to health and safety that could not be effectively redressed through normal procedures."[16] The Arbitrator also found that the grievants reasonably believed the health risks were "imminent" and "immediate and pressing rather than merely likely" because the grievants were aware that work was halted for over two hours after the incident, that other grievants, all co-workers, had been brought to the hospital on wheelchairs and stretchers, and that a hazmat team was called to investigate the incident.[17] Moreover, because the Agency does not challenge any of the Arbitrator's findings as nonfacts, it has failed to demonstrate that any of the Arbitrator's findings and legal conclusions are contrary to law.[18] Therefore, we deny this exception.[19]

The Agency also fails to demonstrate that the Arbitrator's application of Section 2 constitutes a manifest disregard for the parties' agreement.[20] As stated above, the Arbitrator applied the proper legal standard when he found that the grievants reasonably believed they were exposed to an "imminent" risk of serious bodily harm.[21] Therefore, because the Agency fails to highlight any deficiencies in the Arbitrator's application of Section 2, all of the Agency's arguments to the contrary constitute mere disagreement with the Arbitrator's application of the parties' agreement and provide no basis for finding the award deficient.[22] Therefore, the Agency fails to demonstrate that the Arbitrator erred in applying Section 2 of the parties' agreement and we also deny this exception.

[12] The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

[13] Exceptions Br. at 16.

[14] *Id.* at 11-16.

[15] *Id*.

[16] Award at 31-32 (emphasis added); *see also* 29 C.F.R. § 1960.46(a) ("These rights include, among other, the right of an employee to decline to perform his or her assigned task because of a reasonable belief that, under the circumstances the task poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting. . . .").

[17] Exceptions Br. at 11; *see* Award at 31-32; *NFFE, Local 29*, 29 FLRA 726, 732 (1987) (finding that the "imminent" risk under 29 C.F.R. § 1960.46(a) "must also be immediate and pressing rather than merely likely").

[18] *See U.S. Dep't of HUD*, 71 FLRA 616, 619 n.28 (2020) (Member DuBester concurring) (finding that the agency's plain disagreement with the arbitrator's application of a legal standard lacked merit); *AFGE, Local 2338*, 71 FLRA 343, 344 (2019) ("Under [de novo review], the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts."); *see also AFGE, Local 3310*, 71 FLRA 395, 397 (2019) (Member DuBester dissenting) ("Because the Union fails to challenge the Arbitrator's findings as nonfacts, we defer to the Arbitrator's factual findings.").

[19] *NTEU, NTEU Chapter 51*, 40 FLRA 614, 628 (1991) ("Contrary to the Agency's assertion, restoration of leave is an appropriate remedy under the Back Pay Act, 5 U.S.C. § 5596, when an employee has incurred the use of leave as the result of an unjustified or unwarranted personnel action.").

[20] The Agency argues that the Arbitrator did not have the authority to award any remedies because he did not find the Agency violated Section 1(A) of the parties' agreement by failing to "maintain safe and healthful working conditions." Exceptions Br. at 21-22. The Agency also argues that the arbitrator erred in referring outstanding remedial issues to the safety advisory committee because he did not find a violation of Section 1(A). *Id.* at 25. However, in determining whether the Agency violated the parties' agreement, the Arbitrator referenced the Agency's obligations under Sections 1(A) and 2. Award at 30. Additionally, the Arbitrator found that the Agency violated Section 1(A) by stating that administrative leave is a proper remedy for an agency's "failure to provide a safe and healthful workplace under Article 27." *Id.* at 33. Because the Arbitrator found violations of Sections 1(A) and (2), we dismiss these exceptions.

[21] *See supra* note 13.

[22] *SSA*, 71 FLRA 352, 353 (2019) (Member DuBester concurring) (denying the agency's exceptions because they merely disagreed "with the arbitrator's interpretation and application of a collective[-]bargaining agreement").

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by addressing issues that were not submitted to arbitration.[23] Specifically, the Agency argues that the Arbitrator erred by ordering the Agency to provide any relevant health and safety accident reports to the Union and to assist the grievants with pursuing their FECA rights.[24]

Here, the parties did not stipulate to the issues and the Arbitrator framed the pertinent issue as whether "the Agency violate[d] the Agreement and/or applicable rules and regulations regarding an incident in Extraction 1 on August 4, 2017 . . . ."[25] In resolving this issue, the Arbitrator cited several relevant sections of the parties' agreement,[26] and found that the Agency violated the parties' agreement by failing to promptly disclose an OSHA report and by failing to assist some of the grievants in filing FECA claims related to the incident.[27] Consequently, the award is directly responsive to the issues the Arbitrator framed and the Agency fails to demonstrate that the Arbitrator exceeded his authority in this regard.[28]

C. The Arbitrator improperly modified the parties' agreement in part.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator modified the parties' agreement and imposed an additional term that is not specified in the parties' agreement,[29] by ordering the Agency to "promptly" provide the Union with any relevant health and safety accident reports and to "assist" the grievants in potentially filing a FECA claim.[30]

Where the parties' agreement provides for prospective relief or such relief is necessary to remedy a contractual violation, arbitrators may direct limited prospective relief by ordering an agency to comply with a

[23] Exceptions Br. at 22-24, 26-28. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1633*, 64 FLRA 732, 733 (2010). Although there are limits to the deference accorded arbitrators in federal-sector arbitrations, *see U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 663-64 (2020) (Member Abbott concurring; Member DuBester dissenting), absent a stipulation of the issues by the parties, arbitrators generally will be accorded substantial deference in the formulation of issues to be resolved in a grievance. *U.S. Dep't of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699, 700 (2020) (*Haley Hosp.*) (Member DuBester dissenting).

[24] Exceptions Br. at 22-24, 26-28.

[25] Award at 2.

[26] *Id.* at 3-4 (reciting Agency's obligation to disclose OSHA violations to the Union under Article 27, Section 1; Agency's obligation to provide employees information about filing FECA claims under Article 27, Section 10; and Agency's obligation to provide the Union with health and safety accident reports under Article 27, Section 12).

[27] *Id.* at 16 n.8, 34.

[28] *Haley Hosp.*, 71 FLRA at 700 ("Consequently, the award is directly responsive to the issues the Arbitrator framed and she was not required to address the detail requirement issue."). The Agency also argues that the Arbitrator exceeded his authority because "he ordered this conversion of approved leave to administrative leave regardless of whether that employee actually feared for his/her safety . . . ." Exceptions Br. at 19. However, the Arbitrator expressly excluded certain grievants from receiving administrative leave because they were not present in Extraction 1 when the incident occurred. Award at 36 n.15. Moreover, the Arbitrator found that most of the grievants reasonably believed there was a serious health risk and the Authority will not find an award deficient because a party disagrees with the weight and credibility that an arbitrator ascribed to evidence and testimony. *AFGE, Local 3310*, 71 FLRA 395, 397 (2019) (Member DuBester dissenting). Therefore, there is no merit to the Agency's exception and it is denied.

[29] The parties' agreement states that "[t]he arbitrator will have no authority to add to, subtract from, alter, amend, or modify any provision of this Agreement, or impose on either the Employer or the Union any limitation or obligation not specifically provided for under the terms of this Agreement." Exceptions, Ex. 1, Collective Bargaining Agreement (CBA) at 141.

[30] Exceptions Br. at 22-24, 26-28. The Authority will find an arbitration award is deficient as failing to draw its essence from a 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 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. *SSA*, 71 FLRA 580, 581 n.9 (2020) (Member DuBester concurring).

violated contract provision in conducting future actions.[31] Here, the Arbitrator did not modify the parties' agreement or impose an additional term when he simply ordered the Agency to comply with the specific requirements of the parties' agreement when it assists bargaining-unit employees with their FECA claims.[32] Additionally, the Arbitrator interpreted relevant provisions of the agreement when he determined that the Agency violated the agreement when it failed to disclose an OSHA report to the Union until after arbitration had been invoked.[33] Therefore, the Agency has failed to demonstrate that the Arbitrator's interpretation of the parties' agreement is implausible in this regard.

However, the Arbitrator improperly imposed an additional term not agreed to by the parties when he required the Agency to "promptly" disclose all future relevant health and safety accident reports to the Union.[34] The Authority has held that an award does not draw its essence from the parties' agreement when an arbitrator modifies, rather than interprets, a CBA by imposing additional terms to the plain wording of a bargained contract provision.[35]

Therefore, although we uphold the Arbitrator's finding that, in order to comply with the parties' agreement in the future, the Agency must "provide the Union copies of reports of all health and safety accidents that result in loss of time from the job,"[36] we modify the award and strike the requirement to do so "promptly."[37]

## IV. Decision

We deny the Agency's exceptions in part.

[31] *U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 547 (2016) (Member Pizzella dissenting). *But see U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 718 (2012) (Dissenting Opinion of Member Beck) (arbitrator exceeds his authority when he awards a "sweeping, prospective remedy [that] is neither necessary nor appropriate due to the limited nature" of the issue).

[32] *See* Award at 37.

[33] *See id.* at 34 ("Disclosure should be prompt and, unlike here, if prejudice can be shown from tardy performance, tangible remedies may be available to the Union and/or its bargaining unit."); *U.S. Dep't of Transp., FAA, Airways Facility Serv., Nat'l Airway Sys. Eng'g Div., Okla. City, Okla.*, 60 FLRA 565, 569 (2005).

[34] Award at 34; *see* CBA at 98.

[35] *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (Member Abbott concurring; Member DuBester dissenting) (finding that the arbitrator "impermissibly created a new contract term"); *U.S Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (Member DuBester dissenting) (holding that an agreement's silence on a matter does not authorize an arbitrator to modify, rather than interpret, the parties' agreement to create "a brand new contract provision"); *see also Keebler Co. v. Milk Drivers & Dairy Empls. Union, Local No. 471*, 80 F.3d 284, 288 (8th Cir. 1996) (award failed to draw its essence from the parties' agreement where "the arbitrator was not construing an ambiguous contract term, but rather was imposing a new obligation upon [the employer] thereby amending the collective[-]bargaining agreement").

[36] *See* CBA at 98; *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571-72 (2011) (finding that a different interpretation of a particular article does not automatically render the arbitrator's interpretation implausible).

[37] *See* Award at 37.

**Member DuBester, dissenting in part:**

I agree that the Agency has failed to demonstrate that the Arbitrator erred by awarding the grievants administrative leave or that he exceeded his authority by addressing issues that were not submitted to arbitration. However, I disagree with the majority's conclusion that the Arbitrator improperly modified the parties' agreement by ordering the Agency to "promptly" provide the Union with any relevant health and safety accident reports.[1]

As I have previously noted, the Authority and federal courts have recognized that arbitrators have "broad discretion . . . to fashion remedies under the essence standard."[2] Applying this standard, the Authority has found that a remedy fails to draw its essence from an agreement when an arbitrator's interpretation of that agreement conflicts with its express provisions.[3] But the Authority has also held that "when an arbitrator interprets an agreement as imposing a particular requirement, and the parties' agreement is silent with respect to that requirement, that does not, *by itself*, demonstrate that the award fails to draw its essence from the parties' agreement."[4]

Article 27, Section 12 of the parties' agreement (Section 12) provides that "[t]he Employer will provide the Union with a copy of reports of all health and safety accidents that result in loss of time from the job."[5] The Arbitrator found that under this provision, "the Union is owed all health and safety accident reports that result in loss of work time."[6] He further found that, "[g]iven the nature of hazard related emergencies and the mutual benefit of this knowledge to future safety conditions . . . bio-hazard information" was included "within the meaning of 'accident.'"[7] Noting the Union's evidence that the Agency had extensively delayed or outright failed to provide the Union with the relevant health and safety accident reports in the past,[8] and that timely disclosure was necessary for the Union to enforce the health and safety provisions in the parties' agreement,[9] he concluded that the Agency's disclosure of such reports should be "prompt."[10]

Especially given the particulars of this case, the Arbitrator's order requiring prompt disclosure of the reports falls well within his remedial discretion. Accordingly, I would deny the Agency's essence exception.

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[1] Majority at 7 (citing Award at 37).

[2] *AFGE, Local 1738*, 71 FLRA 505, 508 (2019) (Dissenting Opinion of Member DuBester) (citing *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 393 (2019) (Separate Opinion of Member DuBester); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrators bring their "informed judgment to bear in order to reach a fair solution to a problem [which] . . . is especially true when it comes to formulating remedies [where] . . . the need is for flexibility in meeting a wide variety of situations")).

[3] *U.S. Dep't of the Treasury, IRS*, 60 FLRA 506, 508 (2004) (*IRS*) (finding that first remedy conflicted with the express wording of the parties' collective-bargaining agreement). *But see NTEU, Chapter 83*, 68 FLRA 945, 948 (2015) (Member Pizzella dissenting) (denying essence exception where remedy did not conflict with wording of the parties' collective-bargaining agreement).

[4] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (emphasis added) (citing *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson*)); *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 57 (2011) (citing *Johnson*, 58 FLRA at 414); *see also AFGE, Local 2923*, 61 FLRA 725, 727-28 (2006) (remedy requiring union to include certain details in reports where agreement did not specify the content of the reports did not fail to draw its essence from the agreement); *IRS*, 60 FLRA at 508 (finding that second remedy was not prohibited by parties' agreement and award was not deficient under essence grounds based on that remedy); *U.S. DOL (OSHA)*, 34 FLRA 573, 576 (1990).

[5] Award at 4.

[6] *Id.* at 34.

[7] *Id.*

[8] *Id.* at 17 & n.9 (noting that the Agency failed to provide OSHA reports from the incident until the arbitration), 19, 24 (noting the Union's arguments that it needs the information in such reports to "help the Union, as necessary, enforce existing promises and negotiate new ones" and that the Agency attempted to "mislead the Union about OSHA documents"); *see also* Opp'n at 32-33 (noting that interpreting Section 12 as imposing no timeframe would mean that "the Agency could wait months or even years before providing the Union copies of accident reports resulting in time off the job and still be in compliance with the [agreement]" and that "[s]uch an interpretation would render meaningless the contractual requirement to provide the Union copies of accident reports, in light of the shared interest in maintaining a safe and healthy workplace as noted in Article 27.").

[9] Award at 24.

[10] *Id.* at 34.