73 FLRA No. 78

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 149
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
HIDALGO, TEXAS
(Agency)

0-AR-5820

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DECISION

January 13, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Mark J. Keppler issued an award finding the Agency properly rescinded the parties' "Six Lane Commitment Agreement" (SLCA) and that no SLCA provisions remained in effect after the rescission. The Union filed exceptions to the award on exceeded-authority, contrary-to-law, nonfact, and essence grounds. We dismiss the essence exception, in part. We deny the remaining exceptions because the Union does not demonstrate the award is deficient.

II. Background and Arbitrator's Award

On June 7, 2017, the parties executed the SLCA, which concerned the "rotational schedule for employees assigned to any primary[-]vehicle passenger processing area" at the Hidalgo, Texas Port of Entry.[1] In rotating employees between non-vehicle and vehicle processing assignments, the SLCA provides that employees' "primary [vehicle passenger processing] assignments will be limited to no more than six (6) separate [thirty-]minute primary vehicle assignments during any regularly scheduled work shift."[2] In order to adhere to this maximum, Section 4 of the SLCA (Section 4) provides that the Agency "[m]ay use any employee assigned to any other work unit to back-fill any passenger[-]rotational schedule."[3]

On September 12, 2017, the Agency notified the Union that it was rescinding the SLCA, effective October 1, 2017, because the SLCA conflicted with the national collective-bargaining agreement (2017 NCBA) that would go into effect on October 1. Specifically, the Agency stated that the SLCA impacted the Agency's ability to address the traffic volume coming into the port and conflicted with Article 13 of the 2017 NCBA (Article 13). On October 25, 2017, the Union grieved the rescission.

In March 2019, the Agency established a vehicular-traffic lane and a pedestrian-traffic lane, which resulted in employees working more than six primary vehicle lane assignments in their regular shift. The Union filed another grievance on November 15, 2019, concerning the assignments and rescission of the SLCA. Subsequently, the Union invoked arbitration for the 2017 and 2019 grievances, and the Arbitrator consolidated those grievances.

As relevant here, the Arbitrator framed the issues as whether "Section 4 . . . remain[ed] in effect after October 1, 2017, [and] if not, did the remaining sections of the SLCA remain in effect after October 1, 2017?"[4]

[1] Award at 9 (quoting Exceptions, Attach. JE 5, SLCA (SLCA)). The Arbitrator issued an earlier award involving the same parties and the SLCA. The Authority denied exceptions to that award in *NTEU, Chapter 149*, 73 FLRA 133, 133-34 (2022) (*Chapter 149*). There, the issue was whether the Agency's withdrawal from the SLCA and implementation of a new rotational schedule violated the new national collective-bargaining agreement (2017 NCBA). *Id.* at 133. The Arbitrator found the SLCA was a "mutual agreement" governed by Article 13, Part A, Section 1.D. of the 2017 NCBA and the Agency properly withdrew from the SLCA by providing written notice to the Union of its intent to withdraw. *Id.* at 134.

[2] Award at 9 (quoting SLCA § 1).

[3] *Id.* Section 4 states: "In the event that all officers assigned to Primary complete six (6) primary vehicle assignments, or in the event of unanticipated emergent situations and/or bonafide budgetary constraints: the Agency, with notice to the Chapter President . . . , may use any employee assigned to any other work unit to back-fill any passenger rotational schedule so as to ensure that no officer works more than the six (6) primary lane vehicle assignments as identified within this agreement." SLCA at 1; *see also* Award at 9 (quoting SLCA).

[4] Award at 3, 21-22. The Arbitrator also found that the grievance in *Chapter 149* did not make the Arbitrator "functus officio" or bar the instant grievances because the issues in this case were similar, but not identical, to those in the *Chapter 149* grievance. *Id.* at 22-23. Neither party challenges these determinations.

To resolve that issue, the Arbitrator first determined that the SLCA was a mutual agreement as defined in Article 13, noting that the parties "literally titled" the SLCA "Local Mutual Agreement."[5] The Arbitrator found that Article 13 defines "mutual agreement" as "the ability of the local parties . . . to vary from the procedures set forth in this policy only if both parties agree to do so voluntarily."[6] The Arbitrator also noted Article 13, Part A, Section 1.D., which "establishes the role of local mutual agreements . . . that concern the bid, rotation and placement procedure" for employees.[7] The Arbitrator determined that the SLCA "had its origins in Article 13" because it "concerns the employees' 'rotational schedule.'"[8] In reaching this conclusion, the Arbitrator rejected the Union's argument that the SLCA was not a mutual agreement because it had been subject to agency-head review under § 7114(c) of the Federal Service Labor-Management Relations Statute (Statute).[9]

The Arbitrator also stated that the Agency was not required to prove the SLCA was in conflict with the 2017 NCBA as "a precondition to withdrawing from" the SLCA because Article 13 provides that mutual agreements "are only 'binding until such time as either party provides written notice to the other of its intent to withdraw.'"[10] The Arbitrator concluded that the Agency properly rescinded the SLCA when it provided written notification to the Union of its intent to do so.

Lastly, the Arbitrator determined that Section 4 could not be severed from the SLCA because the 2017 NCBA did not contain a severability clause and he could not impose such a clause under the terms of the 2017 NCBA. The Arbitrator concluded that the Agency's written notice of intent to withdraw from the SLCA "was notice to withdraw from the entire SLCA," and that "neither Section 4 . . . nor the other sections of the SLCA, remained in effect after October 1, 2017."[11] Consequently, the Arbitrator denied the grievances.

The Union filed exceptions on June 7, 2022, and the Agency filed an opposition on June 17, 2022.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's essence argument, in part.

The Union argues the award fails to draw its essence from the 2017 NCBA because it "disregards the explicit language stating that withdrawals are effective at the beginning of the annual bid cycle."[12] Therefore, the Union asserts that the Agency could not unilaterally withdraw from the SLCA effective October 1, 2017, because the beginning of the next annual bid cycle after the Agency's notice of intent to withdraw was August 1, 2018.[13] The Agency contends that the Union raised this argument "for the first time in its [e]xceptions."[14]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or issues that could have been, but were not, presented to the arbitrator.[15] The Agency asserted at arbitration that the applicable bid cycle ended on September 30, 2017 and, therefore, the withdrawal was effective on October 1, 2017.[16] The Union could have presented its argument regarding the bid cycle and the effective date of withdrawals to the Arbitrator. However, nothing in the record indicates the Union did so. As such, we do not consider that argument, and we dismiss the Union's essence exception, in part.[17]

[5] *Id.* at 26.
[6] *Id.* at 4-5; Exceptions, Attach. JE 4, 2017 NCBA (2017 NCBA) at 31-32.
[7] Award at 25.
[8] *Id.* at 26 (quoting SLCA).
[9] *Id.* at 26 & n.10.
[10] *Id.* at 26 & n.11 (quoting Art. 13).
[11] *Id.* at 28; *see also id.* at 26 (citing the *Chapter 149* award).
[12] Exceptions Br. at 38.
[13] *Id.* at 38-39.
[14] Opp'n Br. at 26.
[15] 5 C.F.R. § 2425.4(c) ("[A]n exception may not rely on any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented to the arbitrator."); *id.* § 2429.5 ("The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . arbitrator.").
[16] Exceptions, Attach., Tr. 1 (Tr. 1) at 26-27 (asserting that the Agency "agrees with the Arbitrator's prior ruling that, as a mutual agreement, the Agency could withdraw from the agreement at the end of a bid cycle, which is the end of the fiscal year. The end of the fiscal year 2017 was September 30th, 2017. And so, as of October 1st, 2017, the Agency had withdr[awn] from the agreement.").
[17] *U.S. Dep't of State, Passport Serv.*, 73 FLRA 201, 202 (2022) (dismissing essence arguments agency could have, but did not, present to arbitrator).

IV. Analysis and Conclusions

A. The Union does not demonstrate that the award exceeded the Arbitrator's authority.

The Union argues that the Arbitrator failed "to address whether the Agency violated the Statute."[18] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[19] Where the parties fail to stipulate the issue, arbitrators may formulate the issue on the basis of the subject matter before them, and the Authority accords that formulation substantial deference.[20] The Authority has explained that "[i]n the absence of a stipulation that includes an unfair[-]labor[-]practice (ULP) issue, an arbitrator is not obligated to address and resolve such an issue."[21] Where an arbitrator has framed the issues, the Authority examines whether the award is directly responsive to the issues the arbitrator framed.[22]

Here, the parties did not stipulate to the issues, the Union's proposed issues did not mention the Statute,[23] and the Arbitrator did not include any alleged violation of the Statute in the framed issues.[24] Consequently, the Arbitrator was not required to resolve the Union's claim that the Agency violated the Statute.[25] As the award is directly responsive to the Arbitrator's framed issues, we deny the Union's exceeded-authority exception.[26]

B. The award is not contrary to law.

The Union argues the award is contrary to law because the Arbitrator's determination that the Agency could unilaterally rescind the SLCA is contrary to the Statute.[27] The Union further argues that the Arbitrator should have applied the same standard an administrative law judge would have applied in resolving whether the Agency violated the Statute.[28] However, these arguments are based on the Union's argument that the Arbitrator was required to resolve a ULP issue, which we have rejected above. Because the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Statute, the Union's arguments provide no basis for

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[18] Exceptions Br. at 37. We note the Agency's assertion that the Union did not present an unfair-labor-practice (ULP) argument before the Arbitrator. Opp'n Br. at 23-24. However, the Union alleged in the 2017 grievance that the Agency violated § 7116(a)(1), (2), (5), (6), (7), & (8) of the Statute by failing to follow the SLCA and unilaterally implementing a new rotational schedule. Exceptions, Attach. JE 10 at 2-3. Therefore, we assume, without deciding, that this argument is properly before the Authority.

[19] *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (*Chapter 66*) (Chairman DuBester concurring; Member Abbott dissenting) (citing *NTEU*, 70 FLRA 57, 60 (2016) (*NTEU 2016*)).

[20] *AFGE, Loc. 1101*, 70 FLRA 644, 645-46 (2018) (*Local 1101*) (Member DuBester concurring) (citing *AFGE, Council of Prison Locs. #33, Loc. 0922*, 69 FLRA 351, 352 (2016)).

[21] *AFGE, Council 215*, 66 FLRA 771, 774 (2012) (*Council 215*) (citing *NTEU*, 63 FLRA 198, 198 (2009) (*NTEU 2009*)); *see also Ass'n of Civilian Technicians, N.Y. State Council*, 61 FLRA 664, 666 (2006) (*ACT*).

[22] *Chapter 66*, 72 FLRA at 71 (citing *NTEU 2016*, 70 FLRA at 60).

[23] The Union's proposed issues were whether: (1) "the Agency has proven by a preponderance of the evidence that Section 4 of the June 7, 2017, local [SLCA] conflicts with Article 13, Section 5 of the NCBA October 1, 2017"; (2) "the remaining sections of the [SLCA] remain in effect"; and (3) "the Union has proven by a preponderance of the evidence that the Agency violated the [SLCA]." Award at 3 n.1 (quoting Tr. 1 at 6); *see also* Exceptions, Attach. B, Union Post-Hr'g Br. at 15.

[24] Award at 3 ("I have framed the issues in this case as: (1) is this matter arbitrable, (2), if so, did Section 4 of the Local Six Lane Commitment Agreement (SLCA) remain in effect after October 1, 2017, (3) if not, did the remaining sections of the SLCA remain in effect after October 1, 2017, (4) if so, did the Agency violate the SLCA[,] and (5) if so, what is the appropriate remedy?").

[25] *Council 215*, 66 FLRA at 774 (arbitrator not obligated to resolve ULP claims not included in framed issue); *NTEU 2009*, 63 FLRA at 200-01 (finding arbitrator did not exceed authority where framed issue did not include ULP claims as union did not have "statutory right" to resolution of ULP claims) (citing *ACT*, 61 FLRA at 665-66); *see also Local 1101*, 70 FLRA at 645-46 (arbitrator not required to address any statutory claims where parties did not stipulate to the issue and framed issue included only contractual violations); *AFGE, Loc. 505, Nat'l Immigr. & Nationalization Serv. Council*, 60 FLRA 774, 776 (2005) (where arbitrator framed issue as contractual violation, arguments addressing alleged statutory violations do not provide basis for finding award deficient).

[26] *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (citing *AFGE, Nat'l Border Patrol Council, Loc. 2724*, 65 FLRA 933, 935 (2011)) (denying exceeded-authority exception where arbitrator's determination was directly responsive to framed issue).

[27] Exceptions Br. at 34.

[28] *Id.* at 35. As noted previously, *supra* note 18, the Agency argues that the Union did not present a ULP argument before the Arbitrator. For the reasons noted there, we assume, without deciding, that the Union's argument is properly before us.

finding the award deficient.[29] Accordingly, we deny the Union's contrary-to-law exception.[30]

C. The award is not based on nonfacts.

The Union claims the award is deficient because it is based on two nonfacts.[31] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[32] However, the Authority will not find an award deficient where the parties disputed the alleged nonfact before the arbitrator.[33] Additionally, an arbitrator's contractual interpretations cannot be challenged as nonfacts.[34]

First, the Union argues the award is based on a nonfact because the Arbitrator found the SLCA was a mutual agreement under the 2017 NCBA.[35] Because the Union is challenging the Arbitrator's contractual interpretation as a nonfact, and the parties also clearly disputed whether the SLCA was a mutual agreement before the Arbitrator,[36] this argument provides no basis for finding the award deficient.[37]

Next, the Union argues the award is based on a nonfact because the Arbitrator applied the 2017 NCBA's "contractual meanings or definitions to words used by the parties in the SLCA" instead of the definitions in the parties' 2011 national collective-bargaining agreement (2011 NCBA), which was in effect at the time the parties executed the SLCA.[38] Because this argument challenges the Arbitrator's contractual interpretation, it does not provide a basis for finding the award deficient on nonfact grounds.[39]

We deny the Union's nonfact exception.

D. The award does not fail to draw its essence from the 2017 NCBA.

The Union asserts that the award fails to draw its essence from the 2017 NCBA for several reasons.[40] The Authority will find an award fails to draw its essence from the parties' agreement when the excepting party establishes 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.[41]

The Arbitrator found the SLCA was a mutual agreement under Article 13 of the 2017 NCBA because the parties "literally" titled it as such and it concerned the employees' rotational schedules.[42] The Union argues that the award is deficient because the SLCA was executed before the 2017 NCBA and, therefore, the Arbitrator should have interpreted the terms in the SLCA based on the 2011 NCBA.[43] However, the Arbitrator determined that the 2017 NCBA provisions governed the parties' dispute based on the plain language of Article 3, Section 3 of the 2017 NCBA, which states: "This Agreement supersedes all previous agreements and past practices in conflict with it. Otherwise all practices and agreements will continue until otherwise modified by the parties."[44] The Union fails to demonstrate that the Arbitrator's determination that the 2017 NCBA, rather than the 2011 NCBA, controlled the dispute is irrational,

[29] *Ass'n of Civilian Technicians, N.Y. State Council*, 60 FLRA 890, 891 (2005) ("because the [a]rbitrator was not obligated to address and resolve whether the [a]gency's actions violated the Statute, the [u]nion's claim that the [a]gency's conduct constituted [ULPs] provides no basis for finding the award deficient" (citing *AFGE, Loc. 1367*, 60 FLRA 187, 190 (2004) (Chairman Cabaniss dissenting)).

[30] *See AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 n.20 (2022) (denying contrary-to-law exception based on the same arguments as rejected essence exception) (citing *U.S. Dep't of VA, Denver Reg'l Off.*, 70 FLRA 870, 871 n.16 (2018) (Member DuBester concurring))).

[31] Exceptions Br. at 22-28.

[32] *NAIL, Loc. 11*, 73 FLRA 328, 329 (2022) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022) (*HHS*)).

[33] *HHS*, 73 FLRA at 96 (citing *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018) (Member DuBester concurring; Member Abbott concurring)).

[34] *Chapter 149*, 73 FLRA at 135 (citing *SSA*, 71 FLRA 580, 582 (2020) (Member DuBester concurring)).

[35] Exceptions Br. at 22-27.

[36] Award at 17-19, 25-26.

[37] *See Chapter 149*, 73 FLRA at 135-36 (rejecting nonfact challenge to Arbitrator's determination that the SLCA was a mutual agreement because the exception challenged the Arbitrator's contractual interpretation).

[38] Exceptions Br. at 27-28.

[39] *Chapter 149*, 73 FLRA at 135-36 (citing *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1168 n.19 (2020) (*Educ.*) (Member DuBester concurring)).

[40] Exception Br. at 28-33.

[41] *Chapter 149*, 73 FLRA at 136; *U.S. Dep't of HHS*, 72 FLRA 522, 524 n.19 (2021) (Chairman DuBester concurring) (citing *Ass'n of Admin. L. Judges, IFPTE*, 72 FLRA 302, 304 (2021) (Member Abbott concurring)); *Educ.*, 71 FLRA at 1167 n.11 (citing *U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13 n.18 (2019)).

[42] Award at 25-26.

[43] Exceptions Br. at 27-28, 31.

[44] Award at 27 n.12 (quoting 2017 NCBA).

unfounded, implausible, or in manifest disregard of the agreement.

The Union also argues the Arbitrator misinterpreted the terms "bid, rotation, and placement" in Article 13 to conclude that the SLCA is a mutual agreement.[45] According to the Union, the SLCA "does not concern the bid, rotation, and placement" of employees as defined in Article 13 because "the SLCA does not concern the *annual movement* of [employees] from work unit to work unit."[46] However, Article 13's definition of "mutual agreement" states that the parties may "vary from the procedures set forth in this policy only if both parties agree to do so voluntarily;"[47] it does not state that a mutual agreement can only concern annual movements. Additionally, the Arbitrator noted that Article 13 defines a "placement" as including an employee's "schedule."[48] Because the SLCA expressly states that it concerns employees' rotational schedules, the Arbitrator determined that it was a "local mutual agreement" under Article 13.[49] The Union does not identify any wording specifying that the term "rotation" refers *only* to annual movements. Contrary to the Union's assertions,[50] Article 13 refers generally to rotations that "*follow*[] the annual bidding process."[51] Accordingly, the Union's argument does not demonstrate the Arbitrator's interpretation is irrational, implausible, unfounded, or in manifest disregard of Article 13.[52]

Next, the Union asserts the award is deficient because Article 13 "limits the topics to which the parties may reach 'mutual agreement'" to those "explicitly" identified, and that the topic of the SLCA – "rotation to and between various jobs within a work unit" – is not included in those topics.[53] The Union argues that the "clear inclusion" of certain topics in Article 13 "must be taken as an exclusion of all others."[54] While the provisions cited by the Union state that the parties may alter certain matters through mutual agreements, the Union does not identify any language limiting mutual agreements to these matters exclusively.[55] Consequently, the Union's argument does not establish that the Arbitrator's determination that the SLCA is a mutual agreement under Article 13 fails to draw its essence from the 2017 NCBA.

Accordingly, we deny the Union's essence exception.[56]

V. Decision

We partially dismiss and partially deny the Union's exceptions.

[45] Exceptions Br. at 32-33.
[46] *Id.* at 32 (emphasis added).
[47] Award at 25 (quoting Article 13).
[48] *Id.* at 26 (quoting Article 13).
[49] *Id.* at 26.
[50] Exceptions Br. at 31-32.
[51] Award at 5 (quoting Art. 13, § 1.J.) (emphasis added).
[52] *Id.* at 26 (internal quotation marks omitted); *see U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179, 180 (2021) (*FDA*) (mere disagreement with arbitrator's interpretation is not grounds for finding award fails to draw its essence from parties' agreement (citing *Bremerton Metal Trades Council, Int'l Bhd. of Boilermakers, Loc. 290*, 71 FLRA 1033, 1035 (2020))).
[53] Exceptions Br. at 29-31 (citing Art. 13 §§ 1.D.2., 1.E., 1.F.; 3.A.5., 3.A.8., 3.A.10.; 5.B.2.; 6.A.1.).
[54] *Id.* at 29 (citing Elkouri & Elkouri, *How Arbitration Works* 497 ([5]th Ed. 1997)).
[55] *Id.* at 29-31.
[56] *Chapter 149*, 73 FLRA at 136 (citing *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 72 FLRA 293, 295 (2021) (Member Kiko concurring; Member Abbott concurring)); *see also FDA*, 72 FLRA at 180.