

72 FLRA No. 155

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2814
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C.
(Agency)

0-AR-5754

ORDER DISMISSING EXCEPTION

May 12, 2022

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

I. Statement of the Case

The Union filed an interlocutory exception to Arbitrator Laurence M. Evans's interim award. For the reasons discussed below, we dismiss the Union's exception because it does not demonstrate extraordinary circumstances warranting interlocutory review.

II. Background and Arbitrator's Award

The Union filed two grievances concerning the Agency's unilateral change to the mileage-reimbursement rate for employees who use privately owned vehicles for work. Both grievances allege, as relevant here, that the Agency violated the parties' agreement and committed an unfair labor practice (ULP) by failing to bargain over the change. The second grievance, which "incorporate[d] by reference" the allegations in the first grievance, also alleged that the Agency violated the parties' agreement and committed a ULP by failing to bargain over the impact and implementation of the change, and by unilaterally terminating the parties' agreement.¹

The parties consolidated the grievances (hereafter, the grievance), and the dispute proceeded to arbitration. The Agency filed a "[b]rief on [a]rbitrability,"² challenging the arbitrability of the grievance. In an interim award, the Arbitrator framed the issue as whether the grievance is arbitrable.

The Arbitrator construed the Agency's brief, in part, as a motion for summary judgment. According to the Arbitrator, "no genuine issue over any material fact" existed as to the grievance's allegation involving the Agency's obligation to bargain over its decision to terminate its previous mileage-reimbursement rate.³ Specifically, the Arbitrator found that the Agency had no duty to bargain with the Union pre-implementation over its decision because government-wide regulations set the rate. On this basis, the Arbitrator found that this portion of the grievance was not "arbitrable, as a matter of law."⁴

Next, the Arbitrator construed the Agency's brief, in part, as a motion to dismiss the grievance's allegations that the Agency failed to satisfy its obligation to bargain post-implementation of the change, and improperly terminated the parties' agreement. Finding these matters arbitrable, he directed the parties to schedule a hearing on the merits of the "arbitrable portions of the Union's grievances."⁵

¹ Exception, Attach. 2, Ex. 11, Union's Second Grievance at 1.

² Award at 1.

³ *Id.* at 9.

⁴ *Id.* at 13.

⁵ *Id.* at 14.

The Union filed an exception⁶ to the award on August 16, 2021.⁷

III. Analysis and Conclusion: The Union's exception is interlocutory, and it has not demonstrated extraordinary circumstances warranting review.

The Authority ordinarily will not resolve an exception to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.⁸ However, the Authority has determined that an interlocutory exception presents "extraordinary circumstances" that warrant review when its resolution will advance the ultimate disposition of the case by obviating the need for further arbitration.⁹

⁶ We note that it is unclear whether the Union requests an expedited, abbreviated decision in this case. See Exception Br. at 4 (requesting "expedited review of these [e]xceptions"); Opp'n Form at 5 (affirming that Union requested expedited, abbreviated decision under 5 C.F.R. § 2425.7). *But see* Exception Form at 6 (responding "no" to question of whether Union is requesting expedited, abbreviated decision under 5 C.F.R. § 2425.7). Under § 2425.7 of the Authority's Regulations, an expedited, abbreviated decision is appropriate when "an arbitration matter . . . does not involve allegations of unfair labor practices under 5 U.S.C. [§] 7116." 5 C.F.R. § 2425.7. Because this case involves a ULP allegation, we find that an expedited, abbreviated decision is inappropriate. *AFGE, Loc. 2338*, 71 FLRA 1039, 1040 (2020). Accordingly, to the extent that the Union requests an expedited, abbreviated decision, we deny that request.

⁷ The Agency filed its opposition to the Union's exception on September 16, 2021. The deadline to file an opposition is thirty days after the date that exceptions are served on the opposing party. 5 C.F.R. § 2425.3. Here, the Authority's Office of Case Intake and Publication ordered the Agency to show cause by October 7, 2021 why its opposition should not be rejected as untimely. Order to Show Cause at 2. On October 8, 2021, the Agency requested leave to file, and did file, a response to the order in which the Agency concedes that it filed its opposition one day late, but asks the Authority to find extraordinary circumstances warrant considering the Agency's untimely opposition. Because consideration of the Agency's opposition would not alter our ultimate decision, we assume, without deciding, that the opposition is properly before us. *AFGE, Loc. 2663*, 70 FLRA 147, 148 (2016) (Member Pizzella concurring). Accordingly, we need not consider the Agency's response to the order, or the Union's response to that filing.

⁸ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 494, 494 (2021) (VA) (Chairman DuBester concurring) (citing *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021) (CBP); *U.S. Dep't of Educ., Fed. Student Aid*, 72 FLRA 316, 316-17 (2021) (Chairman DuBester concurring); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 713-14 (2020) (*Army Corps*) (then-Member DuBester concurring)).

⁹ *VA*, 72 FLRA at 494 (citing *CBP*, 72 FLRA at 412; *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting)).

In its exception, the Union acknowledges that the Arbitrator did not completely resolve all of the issues submitted to arbitration.¹⁰ Therefore, we find that the exception is interlocutory.¹¹

The Union argues that "extraordinary circumstance[s]" warrant review because a ruling on its exception could obviate the need for further arbitration hearings.¹² Specifically, the Union asserts that continuing the litigation now would waste resources because it would refile its exception following the Arbitrator's subsequent award, and, according to the Union, the Authority would then find in the Union's favor and remand the matter to the parties.¹³

But the Union's exception challenges only the Arbitrator's finding regarding the pre-implementation bargaining issue, and does not address the remaining issues for which the Arbitrator directed the parties to a hearing.¹⁴ Thus, regardless of our disposition of the Union's exception, further proceedings are necessary in this case. Even if we were to grant the Union's exception and find that the Arbitrator prematurely ruled on the merits of the pre-implementation bargaining issue, the parties would then need to further litigate that issue. And if we were to deny the exception, further proceedings on the remaining issues are still required. For that reason, resolving the Union's exception would not obviate the need for further proceedings.

Consequently, the Union has failed to demonstrate extraordinary circumstances that warrant review, and we dismiss the Union's interlocutory exception.¹⁵

IV. Decision

We dismiss, without prejudice, the Union's exception.

¹⁰ Exception Br. at 5 (noting that the award "permit[ed] some portions of the [g]rievances to proceed to hearing").

¹¹ *Army Corps*, 71 FLRA at 714 (exceptions interlocutory where arbitrator resolved arbitrability as threshold matter but had not yet resolved merits).

¹² Exception Br. at 5.

¹³ *Id.*

¹⁴ *Id.*; see also Award at 13-14.

¹⁵ *VA*, 72 FLRA at 494-95 (dismissing interlocutory exception where granting exception regarding arbitrability issue would not obviate need for arbitration proceedings on merits of grievance).

Chairman DuBester, concurring:

I agree with the Decision to dismiss, without prejudice, the Union's exception.

Member Abbott, concurring:

I agree with the substance of the decision in so far as it correctly applies our current standard for interlocutory review. Applying the plain language of the standard, interlocutory review should be dismissed.

However, I continue to have issues with the broad scope of the current interlocutory review standard. It provides that we will not resolve an exception to an award unless the award constitutes a resolution of *all* the issues submitted to arbitration.¹ Though I believe that this standard is better than our previous standard, it simply does not go far enough. The current standard should be used to narrow the scope of issues in dispute at arbitration. This promotes the efficiency of the process and could even mitigate arbitration costs in time, effort, and money. I recognize that unresolved issues will remain that may warrant further arbitration; however, excluding issues that have been resolved would streamline the arbitration process and adhere to “obviating the need for further arbitration.”²

Excluding resolved issues and proceeding to hearing on remaining issues is not an unusual process within the legal system. In fact, civil procedure provides a mechanism for this exact purpose: summary judgment.³ Parties often seek and courts routinely grant motions for both summary and partial summary judgment. The purpose of both is to either avoid unnecessary trials or simplify trials by eliminating issues in order to narrow the scope of disputes prior to trial. The Supreme Court explained, “[the] [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.”⁴

Securing the just, speedy, and inexpensive determination of matters should also be considered with respect to interlocutory review. If we are able to promote an efficient and effective process by narrowing the scope of issues, we would adhere to the spirit of the interlocutory review standard—to obviate the need for further arbitration—and also spare parties and taxpayers the cost of unnecessary or extensive hearings.

¹ *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 494 (2021) (Chairman DuBester concurring) (citing *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021) (*CBP*) (emphasis added).

² *Id.* (citing *CBP*, 72 FLRA at 412; *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting)).

³ Fed. R. Civ. P. 56.

⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal citations omitted).