

73 FLRA No. 31

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-5747

DECISION

July 21, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

In this case, Arbitrator Mark J. Keppler issued an award finding the Agency properly withdrew from the Six Lane Commitment Agreement (SLCA) that established the rotational schedules and commitment assignments of border patrol officers. However, concluding that rescission of the SLCA and implementation of new schedules and assignments affected the officers' conditions of employment, the Arbitrator found the Agency violated the parties' national collective-bargaining agreement (national CBA) when it rescinded the SLCA and unilaterally implemented new schedules and assignments without bargaining with the Union over the impact of that rescission.

The Union filed exceptions to the award on exceeds-authority, nonfact, and essence grounds. Because the Union does not demonstrate the award is deficient on these grounds, we deny the exceptions.

¹ A "commitment" is the "time an officer is assigned to a specifically identified work location during their shift; that is, an assignment to a specific work location for a specified time period . . ." Exceptions, Attach. B, Union Post-Hr'g Br. (Union Post-Hr'g Br.) at 14.

II. Background and Arbitrator's Award

The Union and the Agency negotiated the SLCA, which set forth the rotational schedules and commitment assignments¹ for officers working at the Hidalgo Port of Entry. The Agency approved the SLCA on June 9, 2017. On September 12, 2017, the Agency sent a written notice to the Union withdrawing from and rescinding the SLCA because, according to the Agency, the SLCA conflicted with Article 13 of the new national CBA. The notice stated that, "beginning October 1, 2017, the Port of Hidalgo, and any port covered by the [SLCA], will discontinue all procedures and arrangements identified within that agreement, and will only follow the procedures and arrangements specifically identified in Article 13."² The parties executed the new national CBA the following month.

In 2018, the Agency notified the Union of its decision to implement two queue metering points at or near the international boundary line, including one metering point to inspect vehicular traffic and one metering point to inspect pedestrian traffic. The implementation of these new metering points changed the officers' rotational schedules and commitments that were once specified within the SLCA.³ Consequently, the Union filed a grievance arguing the Agency's unilateral implementation of new metering points and the resulting change to rotational commitments violated law and the parties' agreements. The parties were unable to resolve the issue and the matter was submitted to arbitration.

The parties submitted several issues to the Arbitrator,⁴ but were unable to reach an agreement on the issues. As such, the Arbitrator framed three issues, including: "[W]as the Agency's withdrawal from the [SLCA] and the implementation of the [new metering point] rotational commitments into the employee rotational schedule[s] a violation of the [national CBA]?"⁵

² Opp'n, Attach. 8, Courtesy Notice at 1.

³ See Award at 18-21.

⁴ *Id.* at 3-4 n.4.

⁵ Only one of the framed issues is relevant to the Union's exceptions. *Id.* at 3-4.

During arbitration, the Union argued the Agency violated Article 26⁶ of the national CBA when it unilaterally implemented the new metering points without giving the Union notice or an opportunity to bargain. The Agency countered that it properly withdrew from the SLCA in accordance with Article 13, Section 1(D) of the national CBA because the SLCA conflicted with the national CBA. However, the Union argued there was no conflict and thus the SLCA remained in effect following the execution of the national CBA.

As relevant here, Article 13, Section 1(D) of the national CBA allows the Union's local presidents and the Agency's port-of-entry directors to enter into "mutual agreement[s]" that vary from the rotation, bid, and placement procedures provided by the remainder of Article 13.⁷ These mutual agreements "must be placed in writing and signed by the parties, and will be binding until such time as either party provides written notice to the other of its intent to withdraw."⁸

Ultimately, the Arbitrator found the SLCA did not conflict with the national CBA. However, the Arbitrator concluded the Agency properly withdrew from the SLCA by providing written notice to the Union of its intent to withdraw because the SLCA was a "mutual agreement" governed by Article 13, Section 1(D).⁹ The Arbitrator also found that "[w]hile the Agency was not required to bargain over its decision to rescind the SLCA, it did have a legal obligation to bargain over the effects of that decision if it impacted . . . conditions of employment."¹⁰ Concluding the rescission of the SLCA and the implementation of the new metering points resulted in more than a de minimis change to the officers' conditions of employment, the Arbitrator determined the Agency was required to negotiate in good faith with the Union in accordance with Article 26 of the national CBA.

The Union filed exceptions to the award on August 5, 2021, and the Agency filed an opposition on September 2, 2021.

⁶ Article 26, Section 3(A), in relevant part, states, "[T]he Employer shall provide the Union with reasonable advance notice of intended changes where the reasonably foreseeable adverse effect of the change on the bargaining unit's conditions of employment is more than de minimis in nature and not covered by this Agreement or an existing agreement Such notice will inform the Union of the Employer's point of contact for purposes of all matters related to bargaining." Exceptions, Joint Ex. 1, National CBA (National CBA) at 118. Article 26, Section 10 states that "[l]ocal . . . agreements and past practices will stay in place unless they conflict with this [national a]greement or are renegotiated in accordance with law and this [a]greement." *Id.* at 121.

⁷ *Id.* at 31-32.

⁸ *Id.*

⁹ Award at 36-37.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's nonfact and essence exceptions.

The Union argues the award was based on a nonfact because the Arbitrator's finding that "the SLCA was a mutual agreement as defined under Article [13, Section 1(D)]. . . was wrong, and simply not based on any fact in the record."¹¹ The Union also argues the award fails to draw its essence from the national CBA because the SLCA is not a "mutual agreement" governed by Article 13, Section 1(D), but instead is a "collectively[-]bargained agreement governed by Article 26."¹² In its opposition, the Agency asserts that the Union's exceptions arguing the SLCA was governed by Article 26, not Article 13, should be barred from consideration because they were not raised before the Arbitrator.¹³ Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence that could have been, but were not, presented to the arbitrator.¹⁴

Contrary to the Agency's assertion, whether the SLCA remained in effect as a "local agreement" pursuant to Article 26 was an issue at arbitration. In its closing brief, the Union asserted the SLCA was a "local agreement between [the parties],"¹⁵ and the SLCA remained in effect because it did not conflict with the national CBA.¹⁶ Further, the Arbitrator acknowledged "the Union's Step Two grievance specifically references Article 26, Section 10 which states: 'Local . . . agreements and past practices will stay in place unless they conflict with [the national CBA] or are re-negotiated in accordance with law and [the national CBA].'"¹⁷ However, the Arbitrator found the SLCA was not a "local agreement" governed by Article 26, but was a "mutual agreement" governed by

¹⁰ *Id.* at 38.

¹¹ Exceptions Br. at 16.

¹² *Id.* at 18.

¹³ *See* Opp'n Br. at 22, 24.

¹⁴ 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.").

¹⁵ Union Post-Hr'g Br. at 13.

¹⁶ *Id.* at 18-19.

¹⁷ Award at 36.

Article 13.¹⁸ As the record reflects that the Union presented these arguments to the Arbitrator, we consider them.¹⁹

IV. Analysis and Conclusions

A. The Arbitrator did not fail to resolve a framed issue.

In its exceeds-authority exception, the Union argues the Arbitrator erred by failing to address an issue presented by both parties regarding whether “Article 26 required . . . the Agency to bargain with the Union over the implementation of the metering points, or if the Agency’s implementation of [the new metering points] complied with the requirements of Article 26.”²⁰

As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.²¹ Arbitrators have the authority to frame issues based on the subject matter submitted to arbitration where the parties fail to stipulate to them.²² When arbitrators frame the issues, the Authority examines whether the award is directly responsive to the issues the arbitrator framed.²³

Contrary to the Union’s contentions, the Arbitrator addressed the issue of whether the Agency complied with the requirements of Article 26. The Arbitrator framed one of the issues as: “[W]as the Agency’s withdrawal from the [SLCA], and the implementation of the [new metering point] rotational commitments into the employee rotational schedule a

violation of the [national CBA]?”²⁴ In response to this issue, the Arbitrator specifically referenced Article 26 of the national CBA²⁵ and ultimately found the Agency “failed in its obligation to engage in ‘impact and implementation’ bargaining” over its decision to unilaterally rescind the SLCA and implement the new metering points into the rotational schedule.²⁶ As a remedy, the Arbitrator “ordered [the parties] to immediately negotiate in good faith over the effects the Agency’s decision to rescind the SLCA and implement [the new metering point] rotational commitments . . . had on the [officers’] conditions of employment.”²⁷ Because the Arbitrator addressed the issue regarding Article 26, we deny the Union’s exceeds-authority exception.²⁸

B. The award is not based on a nonfact.

The Union claims the award is deficient because it is based on a nonfact.²⁹ 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.³⁰ However, an arbitrator’s contractual interpretations cannot be challenged as nonfacts.³¹

The Union argues the Arbitrator’s finding that “the SLCA was a mutual agreement as defined under [Article 13, Section 1(D)]. . . was wrong, and simply not based on any fact in the record.”³² The Union’s nonfact exception challenges the Arbitrator’s contractual interpretation that the SLCA is a “mutual agreement” governed by Article 13, Section 1(D).³³ Because challenges to the Arbitrator’s contractual interpretation do

¹⁸ *Id.* at 36-37.

¹⁹ *U.S. DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 766 (2020) (then-Member DuBester dissenting on other grounds) (finding the argument not barred by §§ 2425.4(c) and 2429.5 because the party raised it before the arbitrator); *U.S. Dep’t of VA, Med. Ctr., Ashville, N.C.*, 70 FLRA 547, 548 (2018) (then-Member DuBester dissenting on other grounds) (finding the argument was not barred by §§ 2425.4(c) and 2429.5 because the party sufficiently raised it before the arbitrator).

²⁰ Exceptions Br. at 12.

²¹ *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (Chairman DuBester concurring; Member Abbott dissenting) (citing *NTEU*, 70 FLRA 57, 60 (2016)).

²² *Id.*

²³ *Id.*

²⁴ Award at 3-4. The Union presented the following issue: “Whether the Agency violated . . . Article 26 . . . when it implemented the mid-bridge metering points at the international boundary near or at the middle of the international bridge(s)? If yes, what is the appropriate remedy?” Union Post-Hr’g Br. at 13. Similarly, the Agency presented the following issue: “Whether the Agency violated . . . Article 26 . . . when it implemented the [new metering point] assignments and work locations at the international boundary near or at the middle of the international bridge(s)? If yes, what is the appropriate remedy?” Exceptions, Attach. C, Agency Post-Hr’g Br. at 6.

²⁵ Award at 39.

²⁶ *Id.* at 49.

²⁷ *Id.*

²⁸ See *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (denying exceeds-authority exception where arbitrator’s determination was directly responsive to framed issue); *Haw. Fed. Emps. Metal Trades Council*, 70 FLRA 324, 325 (2017) (denying exceeds-authority exception where the award was directly responsive to the issue).

²⁹ Exceptions Br. at 13-17.

³⁰ *U.S. Dep’t of HHS, FDA, San Antonio, Tex.*, 72 FLRA 179, 179-80 (2021) (Chairman DuBester concurring) (citing *U.S. DHS, Citizenship & Immigr. Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (then-Member DuBester dissenting on other grounds)).

³¹ *SSA*, 71 FLRA 580, 582 (2020) (then-Member DuBester concurring) (citing *NTEU*, 69 FLRA 614, 619 (2016)).

³² Exceptions Br. at 16.

³³ See Award at 36-37 (finding the SLCA was an agreement governed by Article 13, Section 1(D)); *id.* at 37-38 n.18 (finding the reason for withdrawing was irrelevant because the only requirement of Article 13, Section 1(D) was that the Agency provided written notice of its intent to withdraw).

not provide a basis for finding the award deficient on nonfact grounds, we deny the Union's exception.³⁴

- C. The award does not fail to draw its essence from the parties' agreements.

The Union argues the award fails to draw its essence from the parties' agreements because "the Arbitrator's decision that the Agency could rescind the SLCA through notice pursuant to [Article 13, Section (1)(D)] was not a plausible interpretation of the agreement[s] . . . and evidences a manifest disregard of the [national CBA]."³⁵ According to the Union, "neither party believed or asserted that the SLCA . . . was an Article 13 mutual agreement that a party could rescind simply through notice, no evidence supported that interpretation, and any evidence on the record demonstrated that the SLCA was a collectively[-]bargained agreement governed by Article 26" of the national CBA.³⁶

The Agency disputes the Union's essence arguments.³⁷ Specifically, the Agency notes that the SLCA was expressly titled "Ports of Hidalgo, Texas – *Local Mutual Agreement*," and asserts that the Arbitrator's interpretation of that agreement is consistent with witness testimony.³⁸

The Authority will find an award fails to draw its essence from a CBA 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.³⁹

Article 13, Section (1)(D) states that mutual agreements are binding until "either party provides written notice to the other of its intent to withdraw."⁴⁰ Finding the SLCA was a mutual agreement, the Arbitrator applied the requirements for rescission of "mutual agreements" as outlined within Article 13 and concluded the Agency could

unilaterally rescind the SLCA through written notice of its intent to withdraw.⁴¹ Although the Union argues that the SLCA was not a mutual agreement within the meaning of Article 13, as the Agency notes, the SLCA was expressly entitled "Ports of Hidalgo, Texas – *Local Mutual Agreement*."⁴²

The Union's arguments provide no basis for finding that the Arbitrator's interpretation of the SLCA is irrational, unfounded, implausible, or in manifest disregard of either the SLCA or the national CBA. Accordingly, we deny the Union's essence exception.⁴³

V. Decision

We deny the Union's exceptions.

³⁴ See *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1168 n.19 (2020) (*FSA*) (then-Member DuBester concurring) (denying nonfact exception because it challenged arbitrator's contractual interpretation).

³⁵ Exceptions Br. at 18.

³⁶ *Id.*

³⁷ See Opp'n Br. at 23-25.

³⁸ *Id.* at 24.

³⁹ *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)); *FSA*, 71 FLRA at 1167 n.11 (citing *U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13 n.18 (2019)).

⁴⁰ National CBA at 32.

⁴¹ Award at 37.

⁴² *Id.* at 14 (emphasis added).

⁴³ See *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 72 FLRA 293, 295 (2021) (Member Kiko concurring; Member Abbott concurring) (citing *AFGE, Loc. 2382*, 66 FLRA 664, 666-67 (2012)) (denying essence exception where party failed to demonstrate arbitrator's interpretation was irrational, unfounded, implausible, or in manifest disregard of CBA); see also *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1264 (2020) (then-Member DuBester concurring) (denying essence exception because it was mere disagreement with the arbitrator's interpretation or application of CBA).