65 FLRA No. 189

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 164
(Union)

and

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

0-AR-4693

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DECISION

June 8, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to a supplemental award of Arbitrator Jerry B. Sellman filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator issued an award (the initial award) sustaining the Union's grievance in part and denying it in part. Subsequently, the parties filed with the Arbitrator a joint petition for clarification. The Arbitrator issued a supplemental award finding that the Agency's proposal regarding the proper starting time for the day shift was in compliance with the initial award and did not violate the parties' collective bargaining agreement (the agreement) or 5 U.S.C. § 6101(a)(3).

For the reasons discussed below, we dismiss in part and deny in part the Union's exceptions.

II. Background and Arbitrator's Award

A. Background

This matter concerns work performed by bargaining unit Customs and Border Protection (CBP) officers who conduct inspections at land ports. The officers rotate between large ports and smaller ports. Initial Award at 6, 8. Each large port provides staffing for an outlying smaller port, and together the two ports constitute a single work unit. The smaller ports operate on a single fixed day shift from 9:00 a.m. to 5:00 p.m., while the large ports operate three shifts, including a day shift beginning at 8:00 a.m. and ending at 4:00 p.m. *Id.* at 8; Supplemental Award at 2.

The Union filed a grievance alleging that the Agency violated the agreement's bid, rotation, and placement (BRP) provisions when it refused to allow CBP officers to express both a shift and a port preference. When the parties could not resolve the grievance, the matter was submitted to arbitration. Initial Award at 2.

In the initial award, the Arbitrator sustained the portion of the Union's grievance claiming that the Agency violated the agreement's BRP provisions when the Agency refused to allow CBP officers to indicate a shift preference within their work units. *Id.* at 28; Supplemental Award at 3. The Arbitrator, however, denied the portion of the Union's grievance claiming that the Agency violated the BRP by not allowing officers to bid separately on the ports within each work unit. *Id.* In his award, the Arbitrator ordered the Agency to allow CBP officers to express a preference for a shift within their work units. Initial Award at 28-29. As neither party filed an exception to the initial award, that award became final and binding.

In attempting to implement the initial award, the parties disagreed regarding the proper starting time for the day shift. Supplemental Award at 1. The Agency proposed a collective day shift. The Agency's proposed collective day shift would encompass both the 8:00 a.m. to 4:00 p.m. shift at the large port and the 9:00 a.m. to 5:00 p.m. shift at the smaller port. *Id.* at 2. The Union claimed that such a collective day shift was in violation of the initial award and that CBP officers should be able to choose either the 8:00 a.m. to 4:00 p.m. or the 9:00 a.m. to 5:00 p.m. shift. *Id.* When the parties could not reach agreement on this issue, they filed a petition for clarification with the Arbitrator.

In the petition for clarification, the Union argued that the Agency's collective day shift proposal was in violation of the initial award. Exceptions, Attach., Clarification Petition. In addition, the Union, citing 5 U.S.C. § 6101(a)(3)(A) and (C), claimed that the CBP officers were entitled to state a preference for either the 8:00 a.m. or the 9:00 a.m. shift so that they could work the same hours each day.[1] *Id.* at 1-2. The Agency countered that adopting the Union's position would create separate de facto work units at the smaller ports in violation of the initial award. *Id.* at 2. The Arbitrator addressed the parties' petition for clarification by issuing the supplemental award.

B. Arbitrator's Supplemental Award

The Arbitrator did not frame the issue before him in the supplemental award. However, the Arbitrator addressed whether the Agency's collective day shift proposal complied with the initial award, the agreement, and the provisions of 5 U.S.C. § 6101(a)(3). *See* Supplemental Award at 1-2, 5. In resolving this issue, the Arbitrator credited the Agency's argument that it was prohibited from changing the hours at the smaller ports because those hours were established in the *Federal Register*. *Id.* at 2. Consequently, the Arbitrator found, the Agency could not change the day shift hours at the smaller ports to comport with the day shift hours at the large ports. *Id.* Therefore, the Arbitrator concluded, CBP officers would have to begin the day shift either at 8:00 a.m. or 9:00 a.m., depending on the port to which they were assigned. *Id.* at 3-4. The Arbitrator further determined that this did not violate the agreement's BRP provisions because those provisions contemplated a staggered shift to address the operational requirements of this specific region. *Id.* Accordingly, the Arbitrator concluded, the Agency's collective day shift proposal complied with the initial award and the agreement. *Id.* at 4.

The Arbitrator then addressed the Union's argument that the Agency's collective day shift proposal violated 5 U.S.C. § 6101(a)(3)(A) and (C). The Arbitrator rejected this argument. In rejecting the Union's argument, the Arbitrator relied upon the statute's exception, which allows an agency to avoid the statutory scheduling requirements if the agency head determines that the agency "would be seriously handicapped in carrying out its functions or that costs would be substantially increased . . . ." *Id.* at 4-5. The Arbitrator found that the statutory scheduling requirements would seriously handicap the Agency's ability to carry out its functions because the Agency demonstrated that it created the staggered day shifts to address the traffic flow in each port and to "carry out the operation and mission requirements of the . . . Agency[,] in this specific region[.]" *Id.* Therefore, the Arbitrator concluded, the statutory exception applied and consequently, the Agency's collective day proposal shift did not violate 5 U.S.C. § 6101(a)(3). *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the supplemental award is contrary to law because it permits the Agency to implement the collective day shift proposal in violation of 5 U.S.C. § 6101(a)(3). Exceptions at 4. First, the Union argues that a collective day shift is inconsistent with § 6101(a)(3)(A) and (C)'s statutory scheduling requirements that require the Agency to give CBP officers seven-days advance notice of any hours they are scheduled to work within a workweek. *Id.*

Next, the Union argues that the Arbitrator erred when he found that the statutory exception to § 6101(a)(3)'s scheduling requirements applied in this case. Specifically, the Union claims, the Agency was required to prove that the statutory scheduling requirements would have acted as a serious handicap to the Agency's operations or substantially increased the cost of its operations. *Id.* at 4, 15-16. However, according to the Union, the Agency argued only that the statutory scheduling requirements affected its "operational needs." *Id.* at 10, 13. The Union asserts that the statutory exception would be meaningless if all an agency had to do was declare operational needs to qualify for the exception. *Id.* at 18. Therefore, the Union claims, the Arbitrator misconstrued the law when he accepted the Agency's declaration of "operational needs" as being sufficient to establish that the Agency qualified for the statutory exception.

1. Section 6101(a)(3) provides in pertinent part:

> Except when the head of an Executive agency[] . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that—
>
> (A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
>
> . . . .
>
> (C) the working hours in each day in the basic workweek are the same . . . .

Id. Consequently, the Union argues, the supplemental award is contrary to law.

B. Agency's Opposition

As an initial matter, the Agency contends that the Union's exceptions are untimely and should be dismissed. Opp'n at 7. In this regard, the Agency asserts that the award was served on the parties on September 2, 2010, and therefore the Regulations in effect on September 2, 2010 applied. Consequently, the Agency argues, the Union's exceptions were due thirty days from the date the award was served, which was October 1, 2010. As the Union filed its exceptions on October 4, 2010, the Agency contends they should be dismissed. *Id.*

With respect to the merits, the Agency contends that the Union's exceptions raise issues that the Union did not raise before the Arbitrator. *Id.* at 5, 9-10. Specifically, the Agency claims that the Union never argued to the Arbitrator that the collective day shift proposal was not in compliance with the seven-day advance notice requirement set forth in 5 U.S.C. § 6101(a)(3)(A). The Agency also claims that the Union never argued before the Arbitrator that the Agency failed to qualify for the statutory exception. *Id.* at 9-10. The Agency further contends that the Union has not produced any evidence that the Agency has failed to comply with the seven-day advance notice requirement. *Id.* at 5, 9-10. Rather, the Agency claims, the Union's exceptions are based on speculation that, at some unknown time in the future, the Agency may inconsistently schedule employees in violation of § 6101(a)(3)(A) and (C). *Id.* at 11. Such speculation, the Agency argues, cannot be construed as support for the Union's exceptions. *Id.*

Moreover, the Agency argues, the Arbitrator correctly found that the statutory exception to 5 U.S.C. § 6101(a)(3) applies here. Specifically, the Agency claims, it sufficiently demonstrated that staggered shift times are necessary to address the traffic flow of the Agency's operations in this region. *Id.* at 9. Therefore, the Agency argues, the collective day shift proposal is in compliance with both the agreement's BRP provisions and § 6101(a)(3).

IV. Preliminary Issue

The Authority ordered the Union to show cause why its exceptions should not be dismissed as untimely. Order to Show Cause at 1. Section 7122(b) of the Statute requires that exceptions be filed within thirty days from the date of service of the award. 5 U.S.C. § 7122(b). Under the Authority's revised Regulations, the thirty-day period for filing exceptions begins to run the day after the date of service of the award. *See* 5 C.F.R. § 2425.2(b).[2]

In response to the Order, the Union provided documentation showing that the award was served on the parties by e-mail on September 2, 2010. Because the exceptions were filed after the date that the new Regulations went into effect, pursuant to 5 C.F.R. § 2425.2(b), the first day of the filing period began on September 3, 2010, the day after the award was served on the parties. As the thirtieth day fell on Saturday, October 2, 2010, the Union was required to file its exceptions by the following Monday, which was October 4, 2010. *See* 5 C.F.R. § 2429.21(a). The Union filed its exceptions on Monday, October 4, 2010. Accordingly, we find that the exceptions are timely.

V. Analysis and Conclusions

Under § 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[3] *See, e.g., U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389-90 (2010) (*FAA*) (agency could not argue for first time in its exceptions that law limited arbitrator's authority). Where a party makes an argument for the first time on exception that it could, and should, have made before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (agency exception barred by § 2429.5 where agency failed to argue before arbitrator that union's requested relief was contrary to law); *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000) (agency exception barred by § 2429.5 where agency failed to argue

2. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including §§ 2425.2 and 2429.21, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Union's exceptions were filed after this date, we apply the revised Regulations here. *See* 5 C.F.R. § 2425.1.

3. Section 2429.5 was also amended effective October 1, 2010. As discussed in note 2, because the Union's exceptions were filed after this date, we apply the revised Regulations here. In addition, we note that the revised version of § 2429.5 "merely incorporates into regulation" the Authority's practice under the prior version of § 2429.5. 75 Fed. Reg. 42,283, 42,289 (2010).

before the arbitrator that requested relief violated agency's management rights).

In the supplemental award, the Arbitrator determined that the Agency's collective day shift proposal was in compliance with the initial award, the agreement, and 5 U.S.C. § 6101(a)(3). Supplemental Award at 4-5. In reaching this conclusion, the Arbitrator found that the statutory exception to the scheduling requirements applied. *Id*.

The Union's primary exception to the supplemental award is that the Arbitrator misconstrued § 6101(a)(3)'s statutory exception when he applied it in this case. However, there is no indication in the record that the Union argued before the Arbitrator, as it does here, that the single statutory exception set forth in § 6101(a)(3) does not apply, even though the Union had the opportunity to do so. The Union cited § 6101(a)(3) in the clarification petition. Specifically, the Union cited subparts (A) and (C) of § 6101(a)(3) as support for its position that the Agency's collective day shift proposal violates both § 6101(a)(3) and the initial award. [4] Exceptions, Attach., Clarification Petition at 1-2. Therefore, the Union was sufficiently aware of § 6101(a)(3)'s provisions to have been able to make the corollary argument that § 6101(a)(3)'s single statutory exception is inapplicable to the facts of this case. Because the Union did not present an argument to the Arbitrator that the statutory exception does not apply, we find that § 2429.5 bars the Union from raising it before the Authority. Consequently, we dismiss the exception.[5]

VI. Decision

The Union's exceptions are dismissed in part and denied in part.

4. 5 U.S.C. § 6101(a)(3), including subparts (A) and (C), is set forth *supra* note 1.

5. As set forth above, we dismiss the Union's exception that the Arbitrator erred in finding that the statutory exception to § 6101(a)(3) applies. Therefore, the Union's arguments based on the remainder of § 6101(a)(3) cannot provide a basis for finding the award deficient. Accordingly, we deny that exception.