UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

73 M.S.P.R. 695

Docket Number AT-0752-96-0159-I-1

RAYMOND J. RICE, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: APR 9,1997

Dennis P. Koehler, Esquire, West Palm Beach, Florida, for the appellant.

Stephen W. Furgeson, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

Vice Chair Slavet issues a dissenting opinion.

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on May 15, 1996, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

Dissenting Opinion of VICE CHAIR BETH S. SLAVET

I respectfully dissent from the majority opinion because I disagree with the deference granted to the Mittenthal arbitration award, an arbitrator's interpretation of a collective bargaining agreement between the American Postal Workers Union (APWU) and the agency. The facts in this case are not controverted.

The appellant suffered an injury and in December 1994 was placed in a light-duty status. Initial Appeal File (IAF), Tab 1. Beginning on August 29, 1995, he was informed that he would be limited to no more than four hours of work per day as long as he remained on light duty. IAF, Tabs 18, 12(4d). The appellant filed a petition for appeal, alleging that because the agency did not provide him with full-time work from August 30, 1995 through October 16, 1995, he was subjected to a series of short furloughs.

The administrative judge found that the Mittenthal arbitration award, which held that under the APWU collective bargaining agreement full-time, regular employees of the Postal Service on light-duty assignments were not guaranteed an 8-hour workday or a 40-hour workweek, is entitled to deference in this case. Initial Decision (ID) at 5-6. He then found that under the provisions of the National Postal Mail Handlers Union (NPMHU) national collective bargaining agreement applicable here, the appellant as an employee in a light-duty status, had no entitlement to an 8-hour workday or a 40-hour workweek. Accordingly, he found that the appellant's placement in occasional nonpay, nonduty status did not constitute furlough actions, and dismissed his appeal for lack of jurisdiction. ID at 67.

Arbitration is a "bargained-for 'part of a system of self-government created by and confined to the parties.'" *Devine v. White*, 697 F.2d 421, 432 (D.C. Cir. 1983), *vacated on other grounds*, *Cornelius v. Nutt,* 472 U.S. 648 (1985). It resolves contractual disagreements between individual parties and is not binding upon others. *See Gonce v. Veterans Administration*, 872 F.2d 995, 997 (Fed. Cir.) (the preclusive effect of prior arbitration awards is for individual resolution, absent a provision in the governing contract that requires earlier awards to bind subsequent arbitrators), *cert. denied,* 493 U.S. 890 (1989). *See W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 764 (1983). Thus, arbitration plays a unique role in labor-management relations. *Benson v. Department of the Navy*, 65 M.S.P.R. 548, 554 (1994).

In *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988), the court found that there are cases where collateral estoppel may apply to preclude re-litigation of issues that had been submitted to binding arbitration. However, where an employee's interests were not represented in the arbitration proceeding and he was not

a party to it, the Board has declined to apply the doctrine of collateral estoppel. *See Aulik v. U.S. Postal Service*, 1 M.S.P.R. 501, 502 (1980). Further, even though an arbitration award may not be entitled to application of collateral estoppel, the Board has found that, nevertheless, it may be given deference by the Board.

The concept of deference as understood in light of *United Steelworkers of America v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960), hinges upon respect being paid to the bargain struck by the parties (and those represented by the parties) to a contract. That bargain is for an interpretation of the agreement existing between the parties by a neutral individual selected by the parties. *Id*. at 597. Here, the appellant is covered under the NPMHU national agreement with the agency, not the agreement between the APWU and the agency. Nonetheless, the majority grants deference to the Mittenthal arbitration award which interprets the APWU national agreement. This deference has been granted even though the Board's own standards concerning deference have not been met. *See Bannister v. General Services Administration*, 42 M.S.P.R. 362, 367-68 (1989). Specifically, before the Board determines whether deference is appropriate, it must find whether: (1) The issue to be resolved is identical to the one in the prior action; (2) the issue must have been litigated in the prior action; (3) determination in the prior action was necessary to the resulting judgment; and (4) the party against whom the doctrine is applied was fully represented below. *Id*.

Here, the case involves the application of an arbitrator's interpretation of one union's contract to an employee in a different union's bargaining unit. Because it is a different union's bargaining unit than the one involved in the Mittenthal award, the appellant's union was not fully represented in those proceedings. Accordingly, under the Board's own standards, deference should not be granted.

Furthermore, the application of the Mittenthal interpretation runs afoul of the Federal Circuit's guidance in *Horner v. Schuck*, 843 F.2d 1368 (Fed. Cir. 1988). In that case, the court states that "[t]o require the board to defer to arbitration decisions involving other employees or other union contracts would nullify the individual right of each respondent to appeal to the board." *Schuck*, 843 F.2d at 1378. The court went on to instruct that "it is clear that the scope of the board's review on appeal cannot be curtailed by prior unrelated decisions." *Id*. Nevertheless, the initial decision falls prey to such a mistake and finds deference appropriate.

Further, in granting deference to the Mittenthal award, the majority fails to note that in Mittenthal the APWU arbitrator looked not only to the actual contract language, but also to the past practice between the parties and the actions of a national level APWU official in relation to a previous grievance. *See* IAF, Tab 18, Ex. A at 6-7. The arbitrator found that these other considerations further weakened the APWU's position in that case. *Id*. The fact that the arbitrator looked to other considerations when reaching his decision, bolsters the view that the Mittenthal arbitration award was a resolution of issues personal to the APWU.

I would find that *Schuck* controls the case at hand. In *Schuck,* the court interpreted the APWU contract language and found that the collective bargaining agreement did not give the Postal Service the discretion to change the number of hours that preference-eligible veterans, who were regular full-time employees in light-duty assignments, were

to work each week. The court affirmed the Board's conclusion that the appellant had been subjected to a furlough. *Schuck*, 843 F.2d at 1377-78. In the instant case, the language in the NPMHU collective bargaining agreement is identical to that interpreted by the court in *Schuck*. Accordingly, like the court found in *Schuck*, I would find that the appellant was furloughed.

To the extent the majority relies upon *Gamble v. U.S. Postal Service*, 48 M.S.P.R. 228 (1991), to support its decision to grant deference to the Mittenthal award, that reliance is misplaced. In *Gamble,* the appellant was a member of the APWU bargaining unit, and as such, had been fully represented in the arbitration by his union. The Board was simply granting collateral estoppel effect to the arbitration award. The Board found that in bringing the matter at issue to national arbitration, the parties agreed that the Mittenthal interpretive arbitration award "would follow the principle of *stare decisis*, and that it would be binding on all employees represented by the APWU, and on all other arbitrators." *Gamble*, 48 M.S.P.R. at 231. The Board did not find that *Gamble* would be binding on all bargaining units, as the majority's decision finds in the instant case. Accordingly, I would find that *Gamble* does not control this case.

Furthermore, Board precedent also makes clear that such an approach is untenable. In *Romano v. U.S. Postal Service*, 49 M.S.P.R. 319, 323 n.6 (1991), the Board found that where an employee submitted an arbitration decision concerning another employee, the Board was not required to give deference to the interpretation of a collective bargaining agreement reached in prior arbitration decisions involving other employees. Thus, the Board found deference not appropriate where the employee was not a party to the prior arbitration decision. I have found no basis to distinguish *Romano* from the instant case where the appellant's bargaining unit was not a party to the Mittenthal arbitration. Accordingly, I respectfully dissent from the majority's decision to grant deference in this case.