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M E M O R A N D U M

TO: Moe Biller
William Burrus
Thomas Neill

FROM: Anton Hajjar

RE: Travel Time Grievance

DATE: February 22, 1985

Mittenthal held that Art.15.4.A.5 (". . . witnesses . . . shall be on employer time when appearing at the hearing . . .") means what it says, and precludes payment for travel to and from hearings. He said that it would take overwhelming evidence of past practice to overcome this "plain language". The USPS was able to show a few instances of non-acquiescence by management over the years, and the arbitrator also cited the unfortunate Connors settlement against us (p.6).

We hoped that Mittenthal would find that, in light of our strong evidence of past practice, it was not enough for management to discredit these instances as abberations contrary to policy, but would be required to show many actual instances of non-payment; i.e., hold that we made out a prima facie case of past practice that shifted the burden to them to rebut it. After all, they have the records. He didn't accept this evidentiary argument, however. Putting aside an advocate's partisanship, the decision was not unexpected and is not clearly wrong. It is a shame that his timing means we have to wait 3 years to fix this situation.

AGH:nlm

ARBITRATION AWARD

February 15, 1985

UNITED STATES POSTAL SERVICE

-and- Case No. H1N-NA-C-7

NATIONAL ASSOCIATION OF LETTER CARRIERS

-and-

AMERICAN POSTAL WORKERS UNION
Intervenor

Subject: Payment of Union Witnesses - Travel and Waiting Time For Arbitration Hearings

Statement of the Issue: Whether the Postal Service is required by the National Agreement to pay Union witnesses for time spent traveling to and from arbitration hearings and for time spent waiting to testify at arbitration hearings?

Contract Provisions Involved: Article 5; Article 15, Section 4A(5); Article 17, Section 4; and Article 19 of the July 21, 1981 National Agreement.

Appearances: For the Postal Service, Eric J. Scharf, Attorney, Office of Labor Law; for NALC, Richard N. Gilberg, Attorney (Cohen, Weiss & Simon); for APWU, Anton Hajjar and Philip Tabbita, Attorneys (O'Donnell & Schwartz).

Statement of the Award: With respect to travel time, the grievance is denied. With respect to waiting time at the hearing, the grievance is disposed of in the manner set forth in the foregoing opinion.

BACKGROUND

This grievance concerns Union witnesses who attend an arbitration hearing during their regular working hours. Such witnesses are paid for time spent testifying and reasonable waiting time at the hearing. The question in this case is whether they are also entitled to pay for time spent traveling to and from the hearing and all time waiting at the hearing. NALC and APWU claim that payment for such time is required by Article 15, Section 4A(5) of the National Agreement. The Postal Service disagrees.

Because this is an interpretive question initiated by NALC at Step 4 of the grievance procedure, there is no specific set of facts before me. It would be helpful therefore to describe in general terms how the parties handle Union witnesses. Ordinarily a Business Agent informs Management in advance of the names of the employees he intends to call as witnesses at a pending arbitration. He may confer with Management to determine when the witnesses should be released from work. But Management usually is in the best position to predict when witnesses will be needed. For most arbitrations involve disciplinary action and hence require the Postal Service to present its case first. Management estimates the length of its presentation and plans for Union witnesses accordingly. It tells supervision to release the witness at a certain time although occasionally the witness may request to leave earlier.

If the hearing is held in the same facility where the witness is working, no travel time issue is likely to arise. But if the hearing is somewhere else, the witness must often take a car, bus or train to the hearing site. After he arrives, he may have to wait a period of time before he is called upon to testify. This travel time to and from the hearing and waiting time at the hearing are the crux of this dispute.

Article 15, Section 4A(5) of the National Agreement addresses this subject:

> "Arbitration hearings normally will be held during working hours where practical. Employees whose attendance as witnesses is required at hearings during their regular working hours shall be on Employer time when appearing at the hearing, provided time spent as a witness is part of the employee's regular working hours." (Emphasis added)

NALC stresses the phrase "time spent as a witness" and contends that "witness" status begins when an employee is released from work to attend the arbitration and ends when the employee returns to regular work. It believes, accordingly, that "time spent as a witness" includes travel and all wait time. It further maintains that Article 15, Section 4A(5) should be construed in the Union's favor because of past practice. It alleges that the practice nationally has been to compensate Union witnesses for travel and all wait time. It claims that the Postal Service unilaterally discontinued this practice after the award in Case No. N8-N-0221 which held that Article 17, Section 4 did not entitle grievants to pay for time spent traveling to and from Step 2 meetings.

The Postal Service asserts that the phrase "time spent as a witness" cannot be read in isolation but rather must be related to the far more significant phrase, "when appearing at the hearing." It urges that the latter words plainly reveal the parties' intention to pay only for such time as witnesses are actually present "at the hearing", i.e., time spent testifying and reasonable waiting time. It denies that there has been a practice of paying witnesses in the manner claimed by NALC. It contends that Management policy nationally has been to pay witnesses only for time spent testifying and reasonable waiting time. It maintains that any instances of payment for travel time or all wait time would be deviations from its long-standing policy and practice.

It should be noted that although this case only involves witnesses at an arbitration hearing, the parties agree that grievants should be treated the same as witnesses for pay purposes.

DISCUSSION AND FINDINGS

Article 15, Section 4A(5) deals with employees whose "attendance as witnesses" is "required" at an arbitration hearing "during their regular working hours." It provides that such witnesses "shall be on Employer time when appearing at the hearing, provided the time spent as a witness is part of the employee's regular working hours." The underscored language is the primary test for determining when an employee-witness is "on Employer time." He is paid only "when appearing at the hearing." These words clearly refer to physical presence at the hearing. When an employee-witness is traveling from his work location to the hearing site or vice-versa, he is certainly not "...at the hearing." Thus, travel time is not compensable.

NALC seeks to avoid this conclusion by stressing the contract phrase, "time spent as a witness." It asserts that when an employee is traveling to the hearing to testify or returning to his work place after testifying, all of that is "time spent as a witness." It urges he should therefore be considered "on Employer time" and be paid when traveling.

The difficulty with this argument is that it ignores the relationship between principle and proviso in the sentence in question. The principle is that the employee-witness be paid "when appearing at the hearing." The proviso is simply a means of insuring that the employee-witness be paid for "appearing at the hearing" only to the extent that such appearance time occurs "during regular working hours." This proviso serves to narrow the principle upon which it rests*, to limit the application of Section 4A(5). It is a secondary test for determining when an employee-witness is "on Employer time." But NALC here seeks to make the proviso a primary test, to allow the proviso to enlarge the application of Section 4A(5). That certainly is not what the parties intended. Indeed, if NALC were correct, there would have been no need for the parties to say anything other than that the employee shall be "on Employer time" for all "time spent as a witness." That would in effect treat the principle and the critical words in Section 4A(5), "when appearing at the hearing", as mere surplusage. Such a reading of Section 4A(5) conflicts with the plain meaning of its terms.

These findings are supported by my earlier award in Case No. H8N-1A-C-7812 (also referred to as Case No. N8-N-0221). There, the issue was whether grievants are entitled to pay for travel time to and from Step 2 meetings. Article 17, Section 4 called for grievants to be paid in Step 2 "for time actually spent in grievance handling, including investigations and meetings with the Employer." The ruling was that this contract language does not encompass travel time. I stated:

> "...While the grievant is on a bus or train en route to the [Step 2] meeting, he is not engaged in the 'actual...handling...' of a grievance. He is traveling, nothing more. His 'grievance handling' begins only when he arrives at the meeting..."

* That is the normal function of a proviso.

Similarly, "time spent as a witness" in the Article 15, Section 4A(5) proviso begins when the employee arrives at the arbitration hearing and ends when he leaves. These words do not encompass travel time. They apparently were meant to be synonomous with time spent "appearing at the hearing."

Moreover, the parties were well aware of how to express a pay formula in terms which would embrace travel time. They stated in Article 17, Section 4 that "...the Employer will compensate any witnesses for the time required to attend a Step 2 meeting." Clearly, the "time required to attend..." includes travel time. The arbitration witness clause speaks of paying the employee "when appearing at the hearing" or for "time spent as a witness." It says nothing whatever about "time required to attend..." the arbitration hearing. It can hardly be interpreted to mean the same thing as the Step 2 witness payment clause.

NALC resists these conclusions in the belief that Article 15, Section 4A(5) must be interpreted in light of past practice. It maintains that Management has customarily paid travel time to employees required as witnesses at arbitration hearings. It urges that this long-standing practice has become an accepted part of the postal bargaining relationship and should be a controlling consideration in the disposition of this grievance.

This argument is not persuasive. To begin with, the principle set forth in Article 15, Section 4A(5) seems reasonably clear. I have already explained why this language plainly supports the Postal Service's view. Given my reading of Section 4A(5), it would require the strongest proof of past practice to interpret this clause in a manner contrary to its apparent intent, that is, to interpret this clause as authorizing pay for travel time. NALC and APWU have not met that test. They have introduced evidence that travel time was paid to arbitration witnesses on many occasions. But the Postal Service has introduced evidence that travel time was not paid on other occasions and, more importantly, that its policy has for years always been to deny payment for travel time. The most that can be said, on the present state of the record, is that there has been a mixed practice. It is clear, however, that the management group responsible for negotiating Section 4A(5) never acquiesced in any payment of travel time to arbitration witnesses.

It would serve no useful purpose to review all of the evidence introduced by the parties. But certain points made by the Postal Service should be noted. For those points together preclude a finding that the parties had in effect, through past practice, agreed that Section 4A(5) calls for the payment of travel time to arbitration witnesses.

First, there are several grievance answers in which the Postal Service unequivocally rejected the payment of travel time for arbitration witnesses. A NALC grievance (V-74-6217) requested payment for travel time to and from arbitration for a grievant-witness. That grievance was denied in Step 3 in 1974, the Postal Service asserting that "there is no requirement for the employer to pay for the witness' travel time." Another NALC grievance (NC-N-4440) requested payment for such travel time for a grievant-witness. That grievance was denied in Step 4 in 1977, the Postal Service asserting that "there is no contractual provision which allows for the payment of travel to and from the hearing site." The matter was appealed to arbitration but later withdrawn in 1980. The withdrawal letter*, signed by the parties, stated the Postal Service's position that "only time at the arbitration hearing is compensable."

APWU seems to have conceded the practice question in its resolution of a recent grievance (H1C-5F-C-20272). That grievance was settled in Step 4 in 1984, the parties agreeing that the Postal Service "is not contractually obligated to pay employees for the time spent traveling to and from the hearing location nor has such a policy been established by the Postal Service." Although this settlement was later repudiated by APWU on the ground that it had been misled by Management, the fact remains that an informed Union representative acknowledged that the Postal Service had never established a policy of paying travel time to arbitration witnesses.

All of this was confirmed by the testimony of various Postal Service Regional Managers. They instructed their local management people not to pay travel time to arbitration witnesses. Some of them communicated that message to Union

* This withdrawal was "without precedent." However, I refer to it here not to prove NALC conceded anything but rather to show the Postal Service was still asserting its view that Section 4A(5) did not authorize pay for travel time.

representatives. The Northeast Manager of Arbitration recalled a 1975 conversation with a NALC Business Agent who objected to the Postal Service's refusal to pay travel time and suggested that travel be minimized by scheduling arbitrations at local sites. An Eastern Manager recalled a NALC Local President complaining about the Postal Service being "cheap" for not paying travel time. It may well be that Management's instructions were sometimes (or often) misunderstood or ignored. But the resultant payments for travel time were certainly not made with the knowledge or approval of those responsible for Postal Service policy on Section 4A(5).

Moreover, the bargaining history is highly suggestive. NALC proposed in the 1978 negotiations* that the arbitration witness clause be changed to read, "...Employees whose attendance is required at [arbitration] hearings during their regular hours shall be on Employer time." These words would have granted pay for travel time for witnesses. The Postal Service rejected the proposal. If the NALC proposal simply reflected a long-established national practice, as NALC claims, there would have been no reason for the Postal Service to object to this change in contract language. Its objection suggests the practice was quite different. Either the practice was to deny travel time or there was a mixed practice. The Postal Service was obviously attempting to prevent the introduction of a new contractual rule, paid travel time for witnesses.

None of this is meant to detract from the force of the Union's evidence. Rather, the purpose is to illustrate my conviction that there was a mixed practice. To prevail here, the Unions would have to show a practice so uniform and so widely accepted as to warrant finding that the higher echelons of labor-management authority had agreed to apply Section 4A(5) in the manner urged by NALC and APWU. No such showing has been made. Therefore, practice cannot alter my earlier interpretation of Section 4A(5).

* I rely on bargaining history not to prove the meaning of Section 4A(5) but rather to help determine the nature of the disputed practice.

The remaining issue is whether arbitration witnesses are entitled to pay for all waiting time at the hearing as the Unions claim or only reasonable waiting time as the Postal Service claims.

The answer can be found, once again, in the language of Section 4A(5). The arbitration witness is "...on Employer time when appearing at the hearing." These words suggest that all time spent at the hearing is compensable. There is, however, one important qualification. The benefit in Section 4A(5) applies only to those "whose attendance is required at the hearing..." Suppose, for instance, a witness appears at the very start of the hearing some hours before he is expected to testify. His presence then may or may not be "required." The reason for his being there may be critical. If his knowledge of the case is vital and the Union advocate needs him by his side, surely his presence is "required." He would be entitled to pay for all waiting time. But if he is called to corroborate what others will be testifying to and he is merely an observer, his early presence is hardly "required." He would not be entitled to pay for all waiting time. The point at which someone's attendance is "required" is a question of fact. The relevant considerations are the judgment of the parties' advocates, the nature of the case, the relationship of the witness to the case, the testimony he is expected to give, and so on. This ruling is not altered in any way by past practice.

AWARD

With respect to travel time, the grievance is denied. With respect to waiting time at the hearing, the grievance is disposed of in the manner set forth in the foregoing opinion.

Richard Mittenthal

Richard Mittenthal, Arbitrator