PROBLEMS WITH ARBITRABILITY

Jim McCarthy, Director, Clerk Division
Rob Strunk, Assistant Director, Clerk Division
Mike Morris, Assistant Director, Clerk Division
Pat Williams, Assistant Director, Clerk Division

Instructors: Tom Maier, NBA, Steve Zamanakos, NBA, Steve Lukosus, NBA, Brian Dunn, NBA, Paul Hern, NBA

7/8/2005

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AVOIDING SUBSTANTIVE AND PROCEDURAL MANAGEMENT CHALLENGES

UNDERSTANDING ARBITRABILITY

So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other.

John Salmon, Jurisprudence 476

SUBSTANTIVE LAW

THE PART OF THE LAW THAT CREATES, DEFINES, AND REGULATES THE RIGHTS, DUTIES AND POWERS OF PARTIES.

Black's Law Dictionary (Seventh Edition)

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PROCEDURAL LAW

THE RULES THAT PRESCRIBE THE STEPS FOR HAVING A RIGHT OR DUTY JUDICALLY ENFORCED, AS OPPOSED TO THE LAW THAT DEFINES THE SPECIFIC RIGHTS OR DUTIES THEMSELVES.

BLACK'S LAW DICTIONARY (SEVENTH EDITION)

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IN OTHER WORDS

SUBSTANTIVE ARBITRABILITY CHALLENGES THE AUTHORITY OF THE ARBITRATOR TO HEAR OR RULE ON A MATTER.

PROCEDURAL ARBITRABILITY CHALLENGES THE PROCESS BY WHICH THE MATTER WAS BROUGHT TO ARBITRATION.

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Article 15 Section 5.A.6

All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

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ARBITRABILITY
E90C-4E-C 94023547

PROCEDURAL

vs

SUBSTANTIVE

STEVE ZAMANAKOS

7/8/2005 8

The courts have recognized two challenges relative to the Union's right to arbitrate alleged violations of the Collective Bargaining Agreement. These are known as:

Procedural Arbitrability

&

Substantive Arbitrability

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PROCEDURAL ARBITRABILITY

In this type of challenge, the employer will argue that the grievance has not been processed properly. Examples are:

- Timeliness – Initial filing, late appeal,etc
- Steward Certification – steward not properly certified per article 17 for an office, branch or even tour
- Past Practice/Laches – Union has accepted a practice for lengthy period of time without objection

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SUBSTANTIVE ARBITRABILITY

In this challenge, the employer will argue the allegation of the grievance is outside the scope of the collective bargaining agreement. Examples are:

- Probationary employees – just cause
- Discussions
- LMOU challenges outside the scope of the 22 items listed in article 30
- Representing casual employees

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Western Area Regular Arbitration

United States Postal Service
(Service or Management)

-vs-

CLASS ACTION
ARBITRABILITY

American Postal Worker Union, AFL-CIO
(Union)

Arbitrator's
Opinion and Award

File Number: **E90C-4E-C94023547**
Heard: August 27, 1997
Arbitrator:
Vern E. Hauck, Ph.D.
Arbitrator
Site:
Conference Room
Postal Facility
201 East Pikes Peak Avenue
Colorado Springs, Colorado 80903
Appearances:
For Service -- Pam Zimmerman, Chair
For Union --
Steve Zamanakos, Chair

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POSITION OF THE SERVICE:

The Service maintains that the work performed by the Human Resource Specialists is not exclusively bargaining unit work. According to Management, the Union's Class Action grievance referenced above is barred from arbitration on the basis of *Res Judicata*. The Service argues that the national level awards of Arbitrator Snow preempt this regional arbitral forum, that Arbitrator Snow's awards must apply in this Class Action case, that the doctrine of *Res judicata* bars re-litigation of the same cause of action between the same parties where there is a prior judgment. Management says that Arbitrator Snow has provided a definition of bargaining unit work, which is the core clerk functions of processing the mail and window service.

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OPINION OF THE ARBITRATOR

Turning to the area of substantive arbitration specifically, a number of problems in interpretation emerge. To begin, the U.S. Supreme Court rulings leave the determination of substantive arbitrability to the Courts and the Arbitrator has no desire to preempt any other forum of its jurisdiction. Notwithstanding, the Arbitrator finds that the parties themselves decided that they desire that the Arbitrator in this case determine whether or not the grievance procedure referenced by their contract covers this dispute. Article 15, Section 1 reads:

[A] Grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement (see Joint Exhibit 1).

The grievance at hand involves a dispute, difference, disagreement or complaint about the application of the contract to the conditions of employment faced by the bargaining unit. Accordingly, the Arbitrator now considers the issue of substantive arbitrability.

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Thirty-seven years ago, the U.S. Supreme Court Set forth guidelines to be followed in disputes about substantive arbitrability. The Court instructed that:

An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute [see *Warrior and Gulf*, 80 S.Ct. 1347 (1960)].

While it has been modified somewhat since then, the basic and long-standing tenant of the U.S. Supreme Court still being followed by arbitrators is that an agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. The Court directed that doubts concerning the substantive arbitrability of a dispute should be resolved in favor of arbitration. This doctrine of presumptive arbitrability standard continues to prevail.

I see *Lincoln Mills*, 40 LRRM 2113 (1957); *Steelworkers Trilogy of* 1960 and progeny.

As long as a contract arguably covers a particular grievance, it is proper to allow an

Arbitrator to hear the dispute (see *National Arbitration Panel*, H7C-3D-I) I 3422 (Snow,1991) and *Class Action*, D9OC-ID-C92017650 (Loeb, 1996).

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AWARD:

Having considered all evidence submitted by the parties on this matter, the Arbitrator concludes that the grievance is arbitrable. The Arbitrator has jurisdiction to consider the merits of the dispute. It is so ordered and awarded.

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J00C-4J-D 03042985

NON-CERTIFICATION OF STEWARD AT STEP 1

Arbitrator Jerry Fullmer
Ft. Wayne, IN

Union Advocate PAUL HERN

7/8/2005 17

ISSUE:

Is the Union's grievance concerning the removal of the Grievant, on November 19, 2002 procedurally arbitrable?

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BACKGROUND:

- This case involves the removal of an employee for "unacceptable conduct". However, the Employer successfully argued bifurcation at the hearing in spite of the Union's objections.
- The Employer argued that the Steward was not certified to represent the Grievant.
- The Arbitrator "grudgingly" heard only the procedural aspects of the case.

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BACKGROUND CONTINUED

- [The supervisor] did not raise an issue as to [the steward's] status as a proper Union Representative during the course of the Step 1 meeting or in the quoted "Management Response".
- In writing the Step 2 denial the Employer responded in relevant part, "...Finally, the grievance is defective in that the union's Step 2 designee was not certified to represent the grievant..."

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Relevant Contract Provisions

Article 1 Section 1

Article 15 Section 2

Article 17 Sections 1 and 2

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The Employer Position

Article 17, Sections 1 and 2 establish a clear system in which stewards are to be designated.

The Steward representing the Grievant at Step 1 was not certified in writing to do so.

The Union attempted to show a past practice of Employer tolerance. But, this effort failed because the testimony was vague and uninformed.

Arbitration authority is to the effect that the Employer does not waive its arbitrability position even by not presenting it through the entire course of the grievance procedure.

The arbitrator must follow the parties agreement as written.

The Union Position

The Union is the recognized representative of the employees.

The Union complied with Article 17.2 by furnishing a written "Certification" letter. The steward was certified as a Step 1 Steward for all Clerks and he was the Clerk Craft Director.

Even if there are ambiguities in the Certification, the past practice at the Ft. Wayne installation is to allow the use of Stewards at different locations when they are needed. The Employer provided no evidence or testimony to rebut this.

The Employer raised this issue for the first time at Step 2, not Step 1. The Employer's position on arbitrability was waived by not presenting it at Step 1.

The Arbitrator's Discussion

The issues may be divided into three categories.

One concerns the merits of each parties position as to whether the Steward *was* certified to act on behalf of the Grievant.

A second concerns whether, if he was not, it necessarily means that the grievance was not arbitrable.

The third concerns whether the facts indicate that the Employer's conduct at the first step waived its rights to assert inarbitrability at the subsequent steps of the grievance procedure.

The Waiver Sub-Issue

(The Arbitrator's logic and reasoning led him to conclude that he only needed to address the waiver issue in deciding the arbitrability of the matter.)

The Grievant received her Notice of Removal on 11/25/02. The 14-day time period for filing started with that date. The Step 1 meeting was held on 12/5/02, presumably "day eleven" of the 14 day period.

Management's written Step 1 response does not indicate that there was any contention made at the Step 1 meeting to the effect that the Steward was not certified to represent the grievance and that the grievance was therefore not arbitrable.

The Waiver Sub-Issue Con't.

There were two participants in the meeting. The Steward testified that the Supervisor did not raise the "certified/arbitrability" issue verbally in their discussion. The Supervisor testified eventually that she did ***not*** expressly raise the "certified/arbitrability" issue during the course of her discussion with the Steward at Step 1. Rather, she testified that she ***had*** raised the issue with Labor Relations between the time of the Steward's investigation and the Step 1 meeting.

The conclusion from the above is that the Employer did not raise the "certified/arbitrability" issue at Step 1 of the grievance procedure.

When the Steward and the Supervisor met at Step 1, there were 4 days left on the 14 day period when the Union could file a timely grievance.

The Waiver Sub-Issue Con't.

If the Supervisor had unambiguously presented the "certified/arbitrability" position to the Steward at their meeting, the Steward would have had a choice. He could have recused himself and sent for the Steward certified to represent Clerks at that station. Or, he could have insisted on continuing with his presentation of the grievance at Step 1, at the risk of later having the grievance held to be inarbitrable in arbitration if he was wrong in his interpretation of the "Steward Certification".

ARBITRATOR'S DECISION

GRIEVANCE ARBITRABLE. PARTIES TO PROCEED WITH THE SCHEDULING OF A HEARING ON THE MERITS.

OTHER REGIONAL CITES

G98C-1G-C 01063602, Guttshall, May 3, 2002

G90C-1G-C 95010816, King, June 20, 1996

H90C-4H-D 94002001, Hardin, June 21, 1995

S7C-3R-D 19422, Hardin, September 25, 1989

D04C-1D-D 97115400, Miles, January 18, 1999

B00C-4B-D 03071232 Removal Violation of Last Chance Agreement

Arbitrator Michael J. Pecklers
Auburn ME

Union Advocate Stephen J. Lukosus

Issue:

1. Is the grievance procedurally arbitrable? (USPS)
2. Was the Notice of Removal procedurally defective, as the Grievant was not provided with a thirty (30) day notice? (APWU)
3. Did the Grievant violate the terms of his Last Chance Agreement?

7/8/2005 31

Background:

Grievant was removed from the Postal Service effective December 2, 2002. Following discussions with his Union representatives, the parties entered into a last chance Agreement (LCA) on January 6, 2003.

On January 17, 2003 the Grievant was again removed, effective January 23, 2003 for violation of the LCA, stating (in relevant part):

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Background Continued

...Paragraph #10 of the agreement stated that you would incur no instances of AWOL as defined in the ELM. ...On January 9, 2003 you were scheduled to report to work at 0300. You failed to report for work and did not call to report that you would not be in for work. At 0495 you called to report that you were sick and could not report for work. ...You will remain in an off-duty with pay status until the effective date of your removal. ...You may have the right to file a grievance within 14 days of your receipt of this notice.

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Background Continued

The Relevant portions of the LCA are as follows:

...The parties further agree that this Agreement constitutes the Grievant's *Last Chance*.

...any violation of the terms or conditions of the Agreement by the Grievant will result in the reissuance of his removal.

...In the event that the removal is reissued, the Grievant agrees to forego any appeal of the removal action in any forum, including grievance/arbitration, Merit Systems Protection Board, or under EEO complaint processing procedures.

...On behalf of the APWU, it is agreed to withdraw all grievances related to any discipline issued to the Grievant and to refrain from filing any future grievances relative to the removal of the Grievant or any issues contained within the agreement.

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Revelant Contract Provisions

Article 15 Section 2

Article 16

Article 19
ELM 513, ELM 666

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Management's Position (Arbitrability)

The Employer argued that the Grievant failed to report to work and he failed to call in until some two hours after his scheduled reporting time. He was charged with AWOL for that period. The removal was at that point reinstated because the LCA contained a specific provision prohibiting AWOL. Despite the provisions expressly waiving grievance appeal rights, the APWU filed a grievance on the re-issuance of the removal, again alleging it was not for just cause.

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Union's Position (Arbitrability)

The Union claimed the removal was procedurally defective based on:

...The Grievant was not provided with a 30 day notice as required by Article 16.5.

...The Grievant was given only 3 days advance notice from the time he received the removal, violating Article 16.6.

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Arbitrator's Opinion Arbitrability

Initially, the Employer's spirited threshold application, which is tantamount to a motion to dismiss the grievance must be addressed. Simply put, Management points to the clear language of paragraph #15 of the LCA in addition to the paragraph above the Union's signature line to support the proposition that both the Grievant and the Union knowingly waived access to the contractual grievance procedure. It relies on the contention that if relevant language is clear and unambiguous, it ought to be applied as it appears without recourse to other indications of intent.

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Arbitrator's Opinion Arbitrability

The Employer has also provided persuasive authority for its position, in the form of Regular Regional Panel awards, which are on point. ...In the instant case, the cited arbitration awards are essentially in equipoise, as the Union has additionally cited numerous cases to buttress the premise that a valid waiver of the Grievant's contractual appeal rights did not take place.

Under these circumstances, mechanical application of the doctrine of stare decisis should be avoided in favor of the 'independent judgment theory,' which claims,

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Arbitrator's Opinion Arbitrability

"[W]hen an arbitrator is faced with prior, inconsistent interpretations, each of which is reasonable, the rationale for the incorporation theory wanes because the parties have achieved neither consistency nor finality. Certainly the parties do not intend to incorporate into their collective bargaining agreement clauses which cancel each other out."

Arbitrator's Opinion Arbitrability

Notice is taken that the Employer has not provided me with any National Award, which is on point. Therefore, the case citation provides merely persuasive authority.

The LCA itself provides stark testimony as to the unequal bargaining positions of the parties. It is extremely well written, and comprehensive, and attempts to eliminate by administrative fiat every imaginable right of appeal. On its face, it could serve as a textbook example of an adhesion contract.

Arbitrator's Opinion Arbitrability

Based upon these factors, and under the instant circumstances, the Grievant did not voluntarily make a knowing waiver of his contractual appeal rights in the LCA. And with all due respect to the Local President, I firmly believe that he was ill-equipped to counter the considerable expertise of the drafter(s) of the LCA. The issue of the Local Union's ability to waive certain fundamental due process rights contained in the National Agreement must also be answered in the negative. The foregoing mandates a finding that the portion of paragraph 15 of the LCA which requires the Grievant to forego any appeal of the removal action in grievance arbitration is void and unenforceable.

Arbitrator's Opinion Arbitrability

For its part, the Union has argued that the Employer's action is procedurally infirm by virtue of the fact that the Grievant was not afforded 30 days notice, as provided by Article 16.5 of the National Agreement. This operates as an affirmative defense, but as a practical matter, serves as a threshold procedural challenge to arbitrability. On this count, the APWU maintains: That the Grievant is not being removed for absences related to the prior NOR so an additional 30 day notice is required.

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Arbitrator's Opinion Arbitrability

Based upon my review of all record evidence, a finding of fact must issue that the Union has established a prima facie showing by a preponderance of the credible evidence. ...The burden of proof now shifts to the Employer to attempt to prove its affirmative defenses. It has failed to do so. ...The Employer violated Article 16.5 of the National Agreement by failing to afford the Grievant the full 30 day notice period. A further finding is also required that this serves as a fatal flaw, mandating the Grievant's reinstatement.

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Arbitrator's Conclusions

1) The grievance is procedurally arbitrable.

2) The Notice of Removal was procedurally defective, as the Grievant was not provided with a 30 day notice.

3) The Grievant did not violate the terms of his Last Chance Agreement, dated January 6, 2003.

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G94C-4G-C 97116324

CASUALS IN LIEU OF...

Arbitrator Ruben R. Armendariz
Harrison Arkansas

Union Advocate Robert D. Kessler
Presented by Brian Dunn

Issue:

Is the grievance arbitrable? If so, did the Postal Service violate Article 7.1.B.1 of the National Agreement in the manner in which it hired and utilized casuals as set forth in the instant grievance? If so, what should be the appropriate remedy?

Background:

Arbitrator Armendariz heard both the procedural challenge and the merits of the dispute.

The Union filed a class action grievance on Tour 1 alleging the Employer violated Article 7.1.B.1 claiming that casuals are being employed in lieu of full and part-time career employees. As a remedy, the Union requested that all casuals be removed immediately and make all career employees whole for all lost wages at the overtime rate due to the employment of casuals. On 8/5/97, the Supervisor denied the grievance as "untimely," stating that casuals have been used for approximately the last 5 years and would take away management's flexibility.

Background Continued

The Union continued their position at Step 2 providing a more detailed analysis of the improper use of casuals but complaining that after making a request to review information during the investigative stage, the Employer informed them that it would comply but at a cost of $3600.00 an hour. The Union further contended that the grievance was timely because it was a continuing violation. Finally, the Union argued that the Employer withheld vacant full-time positions from being filled and hired casuals to supplement the lost hours.

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Background Continued

The Employer took the position that it was not in violation of Article 7 and that positions can be withheld according to Article 12. Further, that casuals were hired per the District Instruction due to automation and that casuals may be scheduled in advance but are told at times the night or day before what time to report. Finally, positions were withheld in accordance with Article 12 and Article 12 takes precedence over Article 7.

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Background Continued

At Step 3 the Union continued to argue that casuals have been for at least 9 months and according to Management 5 years, been used or hired, in lieu of career employees. They further argued the $3600.00 cost per hour of reviewing relevant information and that local management had requested career employees but the District gave them casuals instead.

Management claimed that the file supported their contentions, not the Union's and further that the grievance was procedurally defective, untimely.

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Arbitrability

The APWU took the position that the Employer's arbitrability challenge based on 17.2.B was both untimely and invalid. The Employer's position was clearly procedural rather than substantive in nature.

National Arbitrator Mittenthal, H7T-3W-C 12454, stated in his footnotes that only a procedural claim may be waived through silence. The Employer never argued improper steward certification. Therefore, by virtue of their silence, the Employer waived this procedural issue at Step 2.

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Arbitrability Continued

The Employer argued that an issue of arbitrability can be brought up for the first time at the hearing and also cited Mittenthal, H7T-3W-C 12454.

They argued that the Tour 1 Steward and Vice-President was not properly certified to represent Clerks on Tours 2 and 3.

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Arbitrator's Opinion

Pursuant to Arbitrator Mittenthal's opinion, this Arbitrator finds that the Employer can raise an arbitrability defense claim at arbitration. Because the issue at hand involves procedure and the interpretation and application of the contractual language contained in Article 17.2A and 17.2B, it appears to this Arbitrator that the Employer waived through its silence within the grievance steps (15.2(d), their argument of improper steward certification. Steward certification is clearly a procedural arbitrability issue and not a substantive arbitrability issue. Thus, this grievance is arbitrable on its merits.

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Merits

Because the Arbitrator heard both the arbitrability and the merits in the same hearing, he ruled that the Employer had also violated the Agreement on the merits as well. He applied the Das Award.

Interestingly, he also ruled that the Employer, during a portion of the overall time frame, had hired casuals correctly during an Article 12 withholding period.

He found that the Union persuasively argued "work preservation".

Arbitrator's Award

The Employer is directed to cease and desist in the hiring of casuals. The Employer is directed to compensate the overall bargaining-unit at the overtime rate for the total number of hours worked by casuals beginning 14 days previous to the filing of this grievance (July 23, 1997) and, minus any hours documented as work hours performed by 21 day Christmas casuals pursuant to Article 7.1.B.4., and minus any hours documented as work hours commencing in year 2002 of bargaining unit positions triggered for the hiring of casuals as temporary replacements.

Other Regional Cites on the Arbitrability Issue

G00C-4G-C 03054406, Otis King

D90C-4D-C 94025448, Irwin Dean

G98C-1G-C 01063323, August

I94C-1I-C 97052028 Improper Holiday Scheduling

Arbitrator Elliott H. Goldstein
Omaha, NE

Union Advocate Tom Maier

7/8/2005 58

Issue:

1. Does the Award issued by Midwest Area Regular Arbitration Panel Arbitrator James P. Martin in USPS Case No. I94C-1I-C 96061624, a Class Action dealing with the identical parties and involving the Omaha, NE Postal Facility, issued March 30, 2000, constitute a binding in favor of the Union?
2. Did the USPS's failure to properly respond to the Union's request for information, as it was contractually required to do, constitute a fatal lack of due process, thus requiring a remedy that the Class grievance be sustained?

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Issue Continued:

3. On the merits, whether the Service violated the 1994 National Agreement when it forced full-time regular employees in this bargaining unit who did not desire to work the Veterans Day holiday to work before Management utilized casual employees, transitional employees (if any), and part-time flexible employees to the maximum hours permitted under the labor contract?

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The James P. Martin Award, I94C-1I-C 96061624

Over the President's Day holidays for 1996, Management forced a number of Full-Time Regulars to work the holiday. The Union claimed that PTF's, temporary employees and casuals were not worked to the maximum ...

The union filed a request for information for five items, to wit:

- request a list of all PTF's, TE's and casuals on Tours 1, 2, and 3, for PP-05-06.
- request all 3971's for all tours and sections for the same days.

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I94C-1I-C 96061624 Continued

- Request if all volunteers, PTF's, TE's and casuals worked on President's Day holiday.
- Request to review the President's Day holiday schedules and worksheets for days number 1, 2, and 3, week number 1, pp-05-96.
- Request to review all end of day reports and condition reports for all OCRs, BCs, DBCs, flat sorters, and MPLSMs for days number 1, 2, and 3, week number 1, pp-05-96.

None of the five items requested were provided to the Union.

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I94C-1I-C 96061624 Continued

Relevant Contract Provisions:

Article 17.3
Article 31

7/6/2005 63

I94C-1I-C 96061624 Continued

This grievance will be allowed in its entirety because of the egregious nature of Management's violation of Articles 17 and 31.

...During the processing of the grievance, not only did Management deny the Union access to the documents and information it requested, but it had the incredible temerity to deny the grievance as set out in the Step 3 denial: 'The Union has failed to provide any additional evidence or info to support a contractual violation, therefore, this grievance is denied.'

I94C-1I-C 96061624 Continued

...In fact, some of the testimony was astounding, almost beyond belief.

The function of Management, in response to the contractual requirements in Article 31 and Article 17.3, is to provide to the Union information that it requests...

...It is found as a fact, due to the non-controvertible nature of the Union's case based upon the failure of Management to comply with the Agreement, which had the effect of denying the union due process, that Management failed to work the PTFs, TEs and casuals to the maximum extent possible, including overtime, in order to avoid forcing Full-Time Regulars to work.

I94C-1I-C 96061624 Continued

Award:

That the grievance shall be and hereby is allowed, based upon a total lack of due process for the Union's rights established under the Agreement...

I94C-1I-C 97052028 Continued

Applicable Contract Provisions (in relevant part):

Article 17

Article 31

7/8/2005 67

I94C-1I-C 97052028 Continued

...I do not fully subscribe to Arbitrator Martin's conclusions in the two cases cited to me by the APWU and so strongly relied upon by them as having a res judicata effect in this Class grievance...

Martin found that the failure to honor the request for information essentially removed the management right to challenge the Union's contractual contentions and/or in the Class grievance caused Martin to find a total lack of due process 'for the Union's rights' sufficient to cause Martin to sustain that Class grievance based on that deficiency alone.

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I94C-1I-C 97052028 Continued

...I am not sure that I am authorized to effectuate a remedy such as Martin has done without a separate grievance or an NLRB charge or at least a request prior to arbitration for the Arbitrator to order the supplying of information...

I do not take this as a hard and fast position, since I have not been faced with the extreme facts contained in some of the precedent awards supplied to me by the Union.

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I94C-1I-C 97052028 Continued

I do agree with Arbitrator Martin and the other arbitrators cited to me by the Union that it is ludicrous for this Employer to take the position that no violations of the contract have been made out, either at Step Three or at the arbitration level, when it has in fact not responded to the RFI properly filed by the Union and approved by Management, as is the case here. ...It would be a sham to permit the Employer to take the position that the Union has not given specifics or details to support claims of contractual violations, when the information that would permit such proofs was in control of the Employer, was properly requested of it by the Union, and was in fact not supplied by Management.

I94C-1I-C 97052028 Continued

In such a case what I would see as a minimum fair and equitable remedy would be a finding that the facts by the Union must be presumed to be true, unless the Employer is able to show cause why it did not make contract information available to the Union.

I94C-1I-C 97052028 Continued

Having determined that there are genuine procedural deficiencies based on a failure to properly respond to the approved RFI, I must conclude that the gaps or deficiencies in the general assertions regarding scheduling made by the Union must be considered to be established.

I94C-1I-C 97052028 Award

Based on the foregoing, incorporated herein as if fully rewritten, this Class Action is sustained.

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Additional Argument

Article 15 Section 2, Step 2(d)

At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. ...The Employer representative shall also make a full and detailed statement of facts and contractual provisions upon. ***The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31.***

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Arbitrability

E98C-1E-D 00193254

Separation of the probationary employee

Steve Zamanakos

7/8/2005 75

National Arbitration Panel
In the Matter of Arbitration
between
United States Postal Service **Case No. Q98C-4Q-C 99251456**
and
American Postal Workers Union and
National Association of Letter Carriers - Intervenor
Before: Shyam Das
Appearances:
For the Postal Service: Larissa Omelchenko Taran, Esquire
For the APWU: Susan L. Catler, Esquire
For the NALC: Keith E. Secular, Esquire
Place of Hearing: Washington, D.C.
Dates of Hearing: February 28, 2001
April 4, 2001
Date of Award: September 10, 2001
Relevant Contract Provision: Article 12.1.A
Contract Year: 1998-2000
Type of Grievance: Contract Interpretation

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AWARD

The grievance is resolved on the following basis:

1. Article 12.I.A denies a probationary employee access to the grievance procedure to challenge his or her separation on the grounds of alleged noncompliance with the procedures in Section 365.32 of the ELM.
2. **A dispute as to whether or not the Postal Service's action separating the employee occurred during his or her probationary period is arbitrable because that is a precondition to the applicability of Article 12.1.A.**

Shyam Das , Arbitrator

7/8/2005 77

BACKGROUND Q98C-4Q-C 99251456

This case arises under the 1998-2000 National Agreement between the American Postal Workers Union (APWU) and the Postal Service. The National Association of Letter Carriers *(NALC)* has intervened in support of the position taken by the APWU. The dispute involves the interpretation of Article 12.1.A of the National Agreement, which provides as follows:

The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period, the employer will not be separated for prior scheme failure.

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Finally, the Postal Service explains that the reason it does not dispute that notice of separation must be provided to a probationary employee within a 90-day period is that Article 12.1.A defines the probationary period as 90 days. That is an enforceable contract provision, unlike the remaining elements in Section 365.32 of the ELM cited by the Unions that are superseded by Article 12.I.A.

The Unions, of course, are correct in asserting that there must have been a separation before the end of the employee's probationary period in order for Article 12.1.A to apply. Absent such a separation, the probationary employee becomes a permanent employee and can only be discharged or removed for just cause in accordance with Article 16. The discharge of a permanent employee, in contrast to the separation of a probationary employee, is subject to the grievance-arbitration procedure.

The Unions also are correct in pointing out that Article 12 does not define what constitutes a separation. That definition is provided, however, in Section 365.11 of the ELM which states:

Separations are personnel actions that result in employees' being removed from the rolls of the Postal Service.

The one issue that legitimately can be raised in a case where the Postal Service claims that a grievance is barred by Article 12.I.A, is that the separation action did not occur during the probationary period. The Postal Service acknowledges this, as it must because, Article I2.1.A has no application if the separation action does not occur during the probationary period.

DAS SUMMARY

The Union cannot argue just cause, or

challenge technical errors, but

Das permits a challenge distinction between separation or removal.

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ELM - Separation Vs Removal

365 Separation
365.11 Definition
Separations **are personnel actions that result in taking the employee off the rolls of the Postal Service.**
The effective date of separation is the last day the employee is carried on the rolls.
365.3 Separations — Involuntary
365.31 Removal
365.311 Definition
Removal **is an action involuntarily separating an employee, other than an employee**
serving under a temporary appointment or a career employee who has not completed the applicable probationary period, for cause.
365.32 Separation-Disqualification
365.321 Applicability
This type of *separation* applies only to employees who have not completed
their probationary period.

365.323 Probationary Period
Separation-disqualification must be effected during the probationary period.
365.326 Effective Date
The *effective date* of separation must be before the end of the probationary period and must not be retroactive.

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REGULAR ARBITRATION PANEL
In the Matter of the Arbitration

between — Grievant: Hanley

UNITED STATES POSTAL SERVICE — Post Office: Phoenix P&DC

and — **USPS** Case No.: E98C-1E-D 00193254

AMERICAN POSTAL WORKERS UNION, AFL-CIO
BEFORE: Jan Stiglitz, Arbitrator
APPEARANCES:
For the U.S. Postal Service: Robert Slider
Labor Relations Specialist
For the Union: **Steve Zamanakos**
National Business Agent
Place of Hearing: Phoenix, AZ
Dates of Hearing: September 13, 2002
Date of Award: November 3, 2002
Relevant Contract Provision: Article 12.1 .A; Article 19; ELM Section 365.32
Contract Year: 1998-2000
Type of Grievance: Discipline
Award Summary
This case involves the question of whether a probationary employee was separated from service *prior* to the end of her probationary period. The Postal Service claims that verbal notice was sufficient to effectuate separation under Article 12.1 .A and was given prior to the end of grievant's probationary period. The union claims that written notice is required and that the Postal Service failed to prove that grievant received such notice prior to the end of her probationary period. I agree with the union and find that grievant was not separated from service prior to the end of her probationary period.

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ISSUE

Did the Postal Service separate Hanley from its employ prior to the expiration of her probationary period?'

The Postal Service maintains that Hanley was separated from service prior to the expiration of her probationary period and is not entitled to grieve her discharge. The APWU maintains that the requisite separation from service did not occur until after the end of Hanley's probationary period. As a result, Hanley became a permanent employee and may grieve her discharge.

Most of the underlying facts are not in dispute.

Pamela Hanley was appointed as a probationary employee on April 8, 2000. (Jt. Exh's. 8 and 10) During her tenure with the Postal Service, she worked at the Phoenix Processing and Distribution Center.

Pursuant to Article 12.1A, Hanley was required to serve a 90 day probationary period.

The parties do not agree on when the 90 day period ended. The Postal Service argues that

Hanley's probationary period ended on July 7, 2000. The APWU agues that it was scheduled to

end on July 6, 2000. I agree with the union. If April 8 was Hanley's first day of employment, her

90th day would have been July 6. That is also the date on the Postal Service's Notification of

Personnel Action (Exh. 10), given to Hanley at the start of her employment.

On July 3, 2000, Sharon Gatlin, Hanley's supervisor, made the decision to terminate Hanley's employment with the Postal Service. At approximately 10:30 p.m., Gatlin verbally notified Hanley of her decision and sent her home.

After Hanley left, Gatlin prepared a written notice of removal. Gatlin then mailed one copy of that removal letter via ordinary mail and a second copy via certified mail. (Exh's. 3 and 4.) Both letters were properly addressed to Hanley's home, which is less than 10 miles from the Phoenix Processing and Distribution Center.

There is no direct evidence regarding the date the letter sent via regular mail was delivered. There was testimony that the delivery standard for Phoenix was "overnight" and there was testimony that the letter sent by regular mail was not returned to the post office.

There is no evidence regarding when the first attempt was made to deliver the notice sent via certified mail. The Postal Service did not introduce a Form 3849 (Delivery Notice) and the carrier did not testify. However, the return receipt indicates that Hanley signed for and picked up the letter from the Ahwatukee Station on July 11, 2000.

Sometime thereafter Hanley filed a grievance. The matter was properly pursued through the grievance procedure. (Jt. Exh. 2.)

The problem in applying the Das award to the instant case is that Arbitrator Das did not explain what he meant by "separation action" or how that can be defined without regard to the "procedures." The phrase "separation action" suggests the existence of some step or set of steps on the part of the Postal Service. *The* Das award does not explain which steps are essential to the very existence of a "separation action" and which steps are merely "procedures," which can be dispensed with by the Postal Service and which do not provide a basis for challenging whether the termination action occurred within the 90 day probationary period.

However, according to Arbitrator Das, I still have the authority (and duty) to determine whether the "separation action" occurred prior to the expiration of Hanley's probationary period. Unfortunately, Arbitrator Das does not explain what constitutes a "separation action." Is it merely the decision in the mind of her supervisor? *is* it complete upon verbal notification? Does a "separation action" require a written notice? If so, is the separation action complete upon dropping a written notice in the mail? As I see it, the existence of a "separation action" is inextricably intertwined with procedure and the Das award gives little guidance regarding what is essential to the "action" and what is mere "procedure."

Arbitrator Das does note and rely upon the definition of "separation" contained in ELM section 365.11: "Definition: *Separations* are personnel actions that result in employees' being removed from the rolls of the Postal Service."

Since the critical decision I am required to make is *when* a separation action occurred, the resolution of the substance v. procedure problem may be informed by looking at ELM section 365.327, entitled "Effective Date." ELM section 365.327 provides:

The effective date of separation by disqualification must be before the end of the probationary period but may not be retroactively effective. The notice of separation must be given to the employee before the end of the probationary or trial period.

Although reasonable minds could differ, it appears to me that "*the* notice of separation" in ELM 365.327 refers to the written notice requirement in ELM section 365.326. As a result, I conclude that the combination of ELM sections 365.326 and 365.327 create "written notice" as a core substantive element of a "separation action."

Similarly, I find that the phrase "given to the employee" in ELM section 365.327 requires more than mere mailing. It requires some direct evidence that the employee actually received the notice.

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The Postal Service argued that it cannot force an employee to pick up certified mail or open his or her mailbox. However, nothing here should be read to suggest that an employee can avoid the effect of notice and separation by failing to accept delivery. Here, the Postal Service failed to show that either the notice of certified mail or the letter sent by regular mail had actually been placed in Hanley's mailbox prior to the end of her probationary period. There are no delivery notations on the Form 3849 delivery notice and no letter carriers were called to testify.

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KEYS TO SUCCESS

The employee must pass the 90th day.

The separation notice must be in writing.

The written notice was not received within the probationary period.

If all of the above is met, the employee is entitled to a removal notice and article 16 protections.

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C00C-4C-C 02232669
Article 1.6B, TACS

Arbitrator Margo R. Newman
Portsmouth, Ohio

Union Advocate Paul Hern

7/8/2005 91

Issue:

Did Postal Service management violate the National Agreement since July 1, 2002 by transferring timekeeping and other related duties from a clerk duty assignment to supervisors in Portsmouth, Ohio, and, if so, what is the appropriate remedy?

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Background:

After the July, 2002 implementation of TACS at the Portsmouth facility, the Union initiated a grievance alleging that management removed timekeeping duties from the clerk craft, which had always performed them in that office, in violation of Articles 1 and 37, and requested that these duties be placed back in the craft, that management cease and desist from doing bargaining unit work and make employees whole for hours of timekeeping lost.

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Background Continued

...The Union initially contends that the grievance must be sustained on procedural grounds based upon the Employer's failure to provide the requested documentation and a written Step 2 response, which constitutes an admission of the facts set forth in the grievance. ...The Union next argues that there is a binding local past practice at Portsmouth of having bargaining unit employees perform all timekeeping duties, and the Snow award recognizes that such practice can be determinative of the issue.

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Relevant Contract Provisions:

Article 1 Section 6
Article 19
F14 Time and Attendance
Article 37

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Arbitrator's Opinion

In determining whether the Employer violated the National Agreement by transferring timekeeping and other related duties from a clerk duty assignment to supervisors under the TACS system in Portsmouth in July 2002, I must first deal with the procedural issue raised by the Union with respect to the effect of the Employer's failure to furnish requested information or a written Step 2 decision in this case.

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Arbitrators Opinion Con't.

The record establishes that the Union made repeated requests for information concerning the TACS training given to supervisors, which was supplied, as well as a listing of the TACS timekeeping duties performed by supervisors and their job descriptions, which were never furnished by the Employer.

The effect of the Employer's failure to furnish this information negates any contention on its part that the Union failed to sustain its burden of proof as a result of its inability to set forth specifically the work in dispute, the manner and method of performance of the timekeeping functions under TACS and/or the amount of time actually spent by supervisors performing timekeeping.

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Arbitrators Opinion, Con't.

Management's failure to provide a Step 2 written decision is a separate matter.

The language of Article 15.2 Step 2 indicates a clear intention that the parties are to discuss fully the facts of each grievance toward finding an early resolution, if possible, and impress on the Employer an obligation to 'make a full and detailed statement of facts and contractual provisions relied upon.' ...Precedent makes clear that the consequences of such failure to respond include preventing management from presenting evidence and arguments not previously raised in support of its action later on and admitting that the facts recited in the grievance are true.

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Arbitrator's Opinion, Con't.

The record supports the conclusion that at the Step 1 and 2 meetings, local management only relied upon the national nature of the TACS program and its understanding that supervisors were to perform timekeeping under it as the basis for denial of the grievance.

No specifics concerning the operation at Portsmouth were raised by management, and no claim of operational efficiency was made in either meeting. There was no written response at either step.

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Arbitrator's Opinion, Con't.

Therefore I conclude that while the Postal Service's procedural shortcomings do not require my sustaining the grievance per se, the effect of not giving the Union information on the TACS timekeeping duties performed by supervisors and not raising operational efficiency in a Step 2 decision or Step 3 response forecloses the Postal Service from relying upon practicality or good faith reasons of operational efficiency arguments in this case.

Arbitrator's Opinion, Con't.

In this case, the Union has established that a local past practice existed at Portsmouth where the timekeeping functions at issue were included in a clerk duty assignment and were performed by a clerk.

It is unclear exactly how much timekeeping work remains at Portsmouth after the implementation of TACS, how much was discontinued as a result of this change in technology, and how much of the work originally performed by the distribution/timekeeper clerk position remains.

Arbitrator's Opinion, Con't

The affected employee(s) and/or the Union shall be made whole by payment of monies calculated at the straight time wage rate associated with the distribution/timekeeper position at Portsmouth multiplied by the number of hours spent by supervisors performing timekeeping tasks.

Arbitrator's Award

The grievance is sustained. The Postal Service violated Article 1.6B by transferring timekeeping and other related duties to supervisors at Portsmouth upon the implementation of the TACS system on July 1, 2002. It shall cease and desist therefrom, return timekeeping duties remaining after TACS to a clerk craft duty assignment and make any affected employee(s) whole in the manner set forth herein.

A94C-1A-C 98015755 ETAL Employer Unilaterally Eliminated Incoming Phone Calls

Arbitrator George R. Shea, Jr.
Flushing, NY

Union Advocate L. Pascal
Presented by Steve Lukosus

ISSUE:

Are the underlying grievances in these matters arbitrable under the provisions of Article 15 of the parties' National Agreement?

BACKGROUND

The parties agreed to consolidate the matters for purposes of hearing and disposition of the issue of arbitrability. The parties further agreed to bifurcate the hearing on the issue of arbitrability from the hearing on the merits of the underlying grievances.

The grievances were filed when management unilaterally eliminated incoming phone calls on the public phones in the Flushing, NY P&DC.

BACKGROUND CONTINUED

The Union argued disparate treatment between bargaining unit and non-bargaining unit employees.

The Employer argued that it is under no obligation to allow employees to receive private calls on public phones, that it ties up phone lines unnecessarily, that it is unfair to employees waiting to use the phones and to reduce the constant interruptions to its operation.

Relevant Contract Provisions

Article 15 Section 1

A grievance is defined as a dispute, difference, disagreement or complaint between the parties relative to wages, hours, and conditions of employment. A grievance shall include but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Relevant Contract Provisions Con't.

Article 15 Section 5.A.6

All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

Relevant Contract Provisions Con't.

Article 3

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

C. To maintain the efficiency of the operations entrusted to it.

The Union Position

The underlying grievances in these matters are arbitrable, in that, (a) they involve a complaint by employees which involve their working conditions; (b) the Employer's contested action is inconsistent with the Employer's obligations to the hearing impaired; and (c) the Employer's argument that the matter is not arbitrable is a new argument not previously raised in the grievance procedure and as such should not be considered by the Arbitrator.

The Employer Position

The underlying grievances in these matters are not arbitrable; in that, (a) the grievances do not involve a complaint concerning the wages, hours or working conditions, as those terms are used in the Agreement; (b) the grieved actions constitute a contractually proper exercise of managerial rights under Article 3; and (c) the action does not constitute disparate or discriminatory treatment of employees by the Employer.

Arbitrator's Opinion

The parties mutually agreed that the Arbitrator determine the substantive arbitrability of the underlying grievances in this matter separately from any determination of the merits. The Union contended that the Employer's argument regarding the non-arbitrability of the grievances is a new argument, initially raised at arbitration and should not be accepted by the Arbitrator. ...Arbitrators and courts have consistently held that the issue of the jurisdiction of an arbitrator over the subject matter of a grievance is open to challenge at any time.

Arbitrator's Opinion, Con't.

The determination of the arbitrability of the instant matters requires the Arbitrator to determine (a) the existence of a dispute; and (b) whether or not that dispute involves wages, hours or working conditions.

Based on the Union's statement of the grievances and the Employer's denial of the grievances on factual and contractual grounds, other than arbitrability, the Arbitrator determines a dispute exists between the parties.

Arbitrator's Decision

For the reasons more fully set forth in the attached Opinion, the Arbitrator determines that the above captioned matters are arbitrable.

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J94C-4J-D 97091751 Removal for Failing to Report for a FFD

Arbitrator William F. Dolson
Ann Arbor, MI

Union Advocate Michael O. Foster
Presented by Brian Dunn

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Issue:

1. Can substantive arbitrability be raised for the first time at the arbitration?

2. If number 1 is decided in the affirmative, is the grievance arbitrable?

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Background:

On January 21, 1997, the Employer issued the Grievant a Removal charging her with repeated failure to report for Fitness-For-Duty examination.

The Notice stated that Johnson 'will be removed from the Postal Service on March 7, 1997...' She was not a work at the time and never did return to work. She never filed a grievance.

The Union filed a grievance at Step 1 on her behalf protesting the Removal on May 13, 1997.

Background Continued

The grievance was summarily denied at Step 1. The Step 2 Postal Service designee did not issue a Step 2 decision claiming he did not entertain the grievance for the reason that the Grievant was no longer an employee entitled to access to the grievance/arbitration procedure.

The Employer raised timeliness for the first time at Step 3 claiming that the grievance was not filed at Step 1 until May 13, 1997, thereby making it procedurally defective.

Arbitrator's Opinion

Regarding the first part of the stipulated issue, National Arbitrator Richard Mittenthal, put that issue to rest in Case No. H7T-3W-C 12454. He opined in that Award that the Employer is free to raise a substantive arbitrability defense for the first time at the arbitration hearing. Accordingly, I conclude that the answer to the first part of the stipulated issue should be and is answered in the affirmative.

Arbitrator's Opinion

Regarding the substantive arbitrability question raised in the second part of the stipulated issue, the Employer contends that only "employees" of the Postal Service have access to the grievance/arbitration procedure in the National Agreement. It maintains that the Grievant was an ex-employee at the time the grievance was filed.

Arbitrator's Opinion

The Postal Service cited two National Arbitration Panel Awards as controlling.

Bernstein, H1N-4E-C 9678, did not apply as it was the grievant who was late in filing a Step 1, rather than the Union as in the instant case. Berstein specifically declined to opine on the question of whether the Union would have had the right to file a grievance on behalf of a grievant under these circumstances.

Arbitrator's Opinion

The second "controlling" award was issued by Mittenthal in case H7N-5P-C 1132. In that Award, the employee, after his discharge became final, continued to pursue a grievance with a job transfer issue which had been filed before his discharge.

The Arbitrator rejected this Award as well on the grounds that it was not a discharge grievance, rather a transfer grievance after the employee was discharged.

Similarly, the Arbitrator rejected all of the Employer's Regional cites as well claiming they were not on point.

Arbitrator's Opinion

The record shows that at the time the Removal was issued, the Union was not concurrently notified (as they were required to do under the jointly negotiated LMOU) of that action.

Moreover, on March 19, 1997, the Union, pursuant to Article 31 requested information regarding the present personnel status of the Grievant and was told in written reply, it was "pending."

Arbitrator's Opinion

The Arbitrator further ruled that when the Union filed the grievance on behalf of the Grievant (on May 13, 1997), the grievance related back to the date the Union initiated activity to determine whether to file a grievance I.e., March 19, 1997 (when it requested the Postal Service to indicate her present personnel status). On that date, she was still an employee on the rolls.

Arbitrator's Award

1. Substantive arbitrability can be raised for the first time at the arbitration hearing.

2. The grievance is arbitrable.

I90C-4I-C 95068123 Removal for Opening First Class Mail

Arbitrator Linda DiLeone Klein
Hugoton, KS

Union Advocate Tom Maier

Issue:

1. Is the grievance arbitrable?
2. Was the grievant coerced into resigning?
3. If so, is the grievant subject to discipline based upon the allegation that she opened mail addressed to her ex-husband?

Background:

The grievant is a distribution clerk with approximately 16 years of service.

In late May 1995, she was observed by a co-worker as she opened a bank statement, looked at various checks, returned the checks to the envelope and resealed the envelope. The incident was reported to the Postmaster who, in turn, notified the Postal Inspectors. The bank statement in question was addressed to her ex-husband.

Background:

The Postal Inspectors conducted an investigation into the grievant's conduct and they interviewed her on June 14, 1995. Following the interrogation, the inspectors gave the Postmaster an "oral report of what had been determined."

The Postmaster then had a discussion with the grievant wherein she acknowledged opening her ex-husband's bank statement.

He then gave her two options on June 14, 1995; he could suspend her pending further investigation with the probability of removal if in fact she opened the mail at issue, or he would accept her resignation.

Background:

The Postmaster gave the grievant 10-15 minutes to decide what to do; he left her alone in his office and when he returned, the following written statement was on his desk:

> I opened a piece of mail that was not mine. I resign as of June 14, 1995 from the Hugoton Post Office as an employee. I am sincerely sorry for this.

Background:

The Hugoton Office is located in southwestern Kansas and it is a small facility; the bargaining unit employees are represented by a District Coordinator who lives in the central part of the state. This representative was not a part of the interview process which occurred on June 14, 1995. When she became aware of the grievant's situation, she initiated a grievance on her behalf.

Employer Contentions

The Employer contends that the grievance is not arbitrable. The grievant voluntarily resigned her position effective June 14, 1995 and she was no longer an employee on June 27, 1995 when the grievance was filed.

She did not attempt to withdraw the resignation and it was binding as submitted. After June 14, the grievant no longer had access to the grievance procedure.

Employer Contentions

The grievant was not compelled to submit her resignation; she may have been faced with unpleasant alternatives, however, there was no coercion or intimidation involved in the decision-making process. There is no contract language which prevents Management from giving an employee an option or an opportunity to resign instead of being discharged.

Employer Contentions

Even if it could be concluded that the grievant's resignation was not voluntary, the Employer submits that the only appropriate remedy would be to allow her to withdraw said resignation, to allow the Employer to continue its investigation, and to find that the grievant may still be subject to disciplinary action.

Union Contentions

The grievant's resignation was forced by the actions of the Postal Inspectors and the Postmaster.

The Postmaster actively and persistently sought her resignation.

The resignation was submitted and became effective on the same day the Inspectors and the Postmaster intimidated the grievant.

She had no time to reflect on her situation or consult with any representative.

Arbitrator's Opinion

The first two issues are intricately interwoven. If it can be shown that the grievant's resignation wa voluntary and that she freely elected to resign after considering all of her options, then she has no "grievance and appeal rights." However, if there is sufficient evidence of managerial impropriety in the form of coercion and if the Arbitrator can conclude therefrom that the grievant's resignation was not voluntary, then she cannot be barred from the grievance procedure.

Arbitrator's Opinion

The Arbitrator finds that the grievance is arbitrable and that the grievant was in effect compelled to resign.

There is no Union Representative at the Hugoton installation, and there was evidence to suggest that the grievant was unfamiliar with her rights and the resources available to her; in her 16 years of service, she had never been disciplined.

Arbitrator's Opinion

Even though the Inspectors had not yet spoken to the grievant's ex-husband to confirm the grievant's assertion that she had his permission to open his mail, they photographed and fingerprinted her and asked for the names and addresses of her children.

The Postmaster further intimidated the grievant. She essentially had no choice but to resign. The Arbitrator is of the opinion that any reasonable person in her situation would have felt compelled to resign as well.

Arbitrator's Opinion

The grievant was interviewed on June 14, told that she had broken the law on June 14, and fingerprinted and photographed on June 14. On that same day, she was given 10-15 minutes to consider her circumstances and then she resigned; her resignation was effective the same day. She had no chance to decide on a course of action, and this suggests coercion.

Arbitrator's Opinion

On its part, the Postal Service cannot be precluded from continuing its investigation into the grievant's conduct; the Postal Service cannot be precluded from issuing discipline simply because it had been determined that the grievant was compelled to resign her position.

Clearly, the Postal Service had intentions of disciplining the grievant as of June 14, 1995 and the within decision on arbitrability and coercion cannot be a bar from such action at this time.

Arbitrator's Award

The grievance is arbitrable. The grievant's resignation was "coerced", therefore, it shall be withdrawn. She may be subject to disciplinary action. If such action is not taken within 30 days, she shall be reinstated without loss of seniority. There shall be no monetary award under any circumstances.

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