

NATIONAL ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION.

between

UNITED STATES POSTAL SERVICE

AND

**AMERICAN POSTAL WORKERS UNION
AFL-CIO**

.CASE NO.: H0C-NA-C 38

. Reassignment into
. Bargaining Unit
.

BEFORE: Linda S. Byars

APPEARANCES:

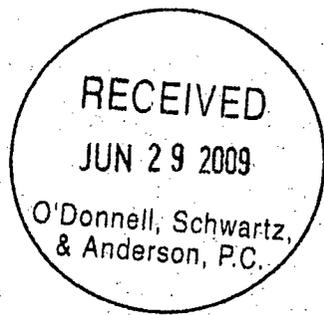
For the APWU: Lee W. Jackson

For the USPS: John W. Dockins
Mary Hercules

Place of Hearing: Washington, D.C.

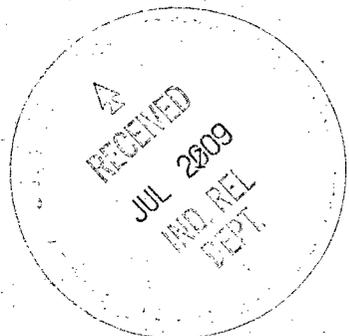
Date of Hearing: February 10, 2009

Post-Hearing Briefs: Post-Marked May 15, 2009



Award Summary

The record fails to demonstrate that the APWU relied on Article 12 at anytime prior to arbitration. The Postal Service's objection to proposing the issue in terms of Article 12 is sustained. Absent evidence that the Parties discussed the Grievance as a violation of Article 12, the Grievance is not an interpretive issue, and the issue as proposed by the APWU at arbitration is not properly before the Arbitrator. Therefore the Grievance is dismissed.



BACKGROUND

By letter dated October 5, 1992 addressed to Vice President, Labor Relations Joseph J. Mahon, Jr. and signed by Executive Vice President William Burrus, the APWU initiated a fourth step Grievance stating:

Pursuant to the provisions of the National Agreement this is to initiate a step 4 grievance contesting the right of the employer to reassign non-bargaining unit employees to the bargaining unit when there is a planned reduction of employees within the installation or craft. It is the position of the Union that non-bargaining unit employees cannot be placed in the bargaining unit while compliment (sic) reductions are planned.

Please schedule a meeting at your earliest opportunity. [Joint Exhibit No. 2, p. 5.]

In a response to Mr. Burrus dated April 5, 1995, Daniel P. Nagaru responded for the Postal Service as follows:

On January 31, 1995, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether there is a violation of the National Agreement when the Postal Service reassigns non-bargaining unit employees to the bargaining unit when there is a planned reduction of employees within the installation or craft.

The Union contends that non-bargaining unit employees cannot be placed in the bargaining unit when complement reductions are planned.

It is the position of the Postal Service that no national interpretive issue involving the terms and conditions of the National Agreement is presented in this case. However, inasmuch as the Union did not agree, the following represents the

decision of the Postal Service on the particular fact circumstances involved.

Article 3 gives management the right "to hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees." There is nothing in the National Agreement which limits this right in situations of planned complement reduction.

In view of the above considerations, this grievance is denied.

Time limits at Step 4 were extended by mutual consent. [Joint Exhibit No. 2, pp. 3-4.]

By letter dated April 6, 1995 and without any response to the Postal Service's April 5th letter, Mr. Burrus notified Mr. Mahon of the appeal to arbitration pursuant to the terms of the 1994 National Agreement. [Joint Exhibit No. 2, p. 2.] The Parties scheduled the Grievance for arbitration, and on February 10, 2009 the Grievance came before the Arbitrator for hearing. The Parties agreed that the record would remain open for post-hearing briefs, which were mailed to the Arbitrator on May 15, 2009.

OPINION

As a threshold issue, the Postal Service maintains that the issue, as presented in the Union's fourth step grievance appeal, is not "interpretive" as required in Article 15, Section 4.D.1 of the National Agreement, which states:

Only cases involving interpretive issues under this Agreement or supplements thereto of general

application will be arbitrated at the National level. [Joint Exhibit No. 1, p. 87.]

The Postal Service maintains that the APWU's failure to identify any contractual language to be interpreted prior to the arbitration hearing means that the issue presented by the APWU at arbitration is a new one, is not properly at arbitration, and requires dismissal of the Grievance.

Article 15, Section 3.D of the National Agreement states in relevant part:

It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the President of the Union. Such a grievance shall be initiated in writing and must specify in detail the facts giving rise to the dispute, the precise interpretive issues to be decided and the contention of the Union. Thereafter the parties shall meet in Step 4 within thirty (30) days in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. Should they fail to agree, then, within fifteen (15) days of such meeting, each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to such issues. [Joint Exhibit No. 1, p. 81.]

As recognized in other national level decisions submitted by both Parties, Article 15, Section 3.D and National Arbitration precedent require the Parties to "define the precise issues involved" as part of the procedures prior to arbitration. As often quoted from a 1984 decision by Arbitrator Benjamin Aaron and cited by the APWU, "It is now

well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed." [Case No. NC-E-11359, p. 3.] In the instant case, both the Postal Service and the APWU rely on this principle.

The APWU maintains that nothing in the Postal Service's Step 4 denial alerted it to the Postal Service's position that the Grievance is not interpretive due to a lack of specificity. However, the Postal Service's 1995 response to the Grievance clearly states that "no national interpretive issue **involving the terms and conditions of the National Agreement** is presented in this case." [Joint Exhibit No. 2, p. 3, emphasis supplied.] Moreover, and after quoting its general management rights under Article 3, the Postal Service response also states, "There is nothing in the National Agreement which limits this right in situations of planned complement reduction." [Joint Exhibit No. 2, p. 3.] Despite these early arguments by the Postal Service, the record fails to demonstrate that the APWU identified Article 12 as limiting management's rights to place non-bargaining unit employees in the bargaining unit when complement reductions are planned or discussed its rights under Article

12 with the Postal Service at any time prior to the arbitration hearing.

Unlike the case decided by Arbitrator Aaron, the evidence establishes in the instant case that the APWU was aware of the interpretive issue argument and the reasons for it. However, the evidence fails to establish that the Postal Service was aware of the contractual provision(s) relied on by the APWU in support of its position. There is no evidence in the record to show that, prior to arbitration, the APWU explained the reason or cited contractual authority for its assertion that non-bargaining unit employees cannot be placed in the bargaining unit when complement reductions are planned.

In the instant case, the Postal Service can credibly claim surprise when, for the first time at arbitration, the APWU identified Article 12 as the limiting provision. The APWU cannot claim surprise at the Postal Service's objection at arbitration to framing the issue in terms of Article 12. Absent evidence that the Parties even discussed the Grievance within the context of Article 12, it would be a violation of the spirit and intent of Article 15 for the decision in this case to turn on an interpretation of Article 12.

The APWU maintains that the Postal Service's procedural argument should be rejected as hyper-technical construction. As reasoned in the Aaron award with respect to the Article 15

requirements, "The spirit of the rule, however, should not be diminished by excessively technical construction." [Case No. NC-E-11359, p. 4.] However, requiring the grieving party to identify and discuss the contractual provision(s) on which it relies, prior to arbitration, can hardly be deemed, "excessively technical."

As the APWU points out, during the arbitration hearing and the discussion on framing the issue, the Arbitrator questioned the Parties concerning their discussions prior to arbitration. It is clear from the testimony of Greg Bell for the APWU and John Dockins for the Postal Service that they discussed the Grievance at some point after the January 31, 1995 meeting, probably in 2005. [Transcript pp. 23-26.] Although Mr. Bell testified that there was no claim from the Postal Service that the case was not arbitrable or clear, he did not assert that he and Mr. Dockins discussed the Grievance in terms of an Article 12 dispute.

Contrary to the APWU's argument, the Postal Service's Step 4 denial does not indicate that the Postal Service understood exactly what the October 5, 1992, Step 4 Grievance entailed. During its opening statement, the APWU stated the issue as:

The issue in this case is whether the Postal Service violates Article 12 of the National Agreement when it reassigns a nonbargaining unit employee to the bargaining unit when there is a planned reduction of employees within the

installation or within the craft. [Transcript pp. 31-32, as quoted in the APWU's Brief, p. 30.]

The APWU does not deny that its opening statement is the first mention of Article 12. This concession goes directly to the Postal Service's assertion at Step 4 that "no national interpretive issue involving the terms and conditions of the National Agreement is presented in this case," as well as its assertion that, "There is nothing in the National Agreement which limits this right in situations of planned complement reduction." [Joint Exhibit No. 2, p. 3.]

The Postal Service restated the issue in its 1995 response nearly word-for-word as presented by the APWU in its Grievance. However, contrary to the APWU's argument, such response does not demonstrate an understanding by the Postal Service that the APWU intended to base its claim on Article 12 or any specific provision of the National Agreement. Rather, the Postal Service's response demonstrates that it relied on its rights under Article 3 when the APWU failed to specify a contractual right limiting management rights. The record does not include any written response by the Union after the January 31, 1995 meeting for the purpose of developing the Grievance or to respond to Management's reliance on Article 3.

In summary, the record contains no evidence that the APWU identified Article 12 as the controlling provision in

the 1992 appeal itself, during the meeting on January 31, 1995, in any written statement after the January 31, 1995 meeting, or at any time during discussions with the Postal Service prior to arbitration. When, for the first time, the APWU presented the issue in terms of Article 12, the Postal Service properly made its objection to new argument.

The Postal Service advocate's objection to the APWU's reliance on Article 12 for the first time at arbitration includes the fundamental reason for the objection and for the Article 15 requirements:

If you're going to bring an interpretive issue, and we're going to ask an arbitrator, a third-party neutral to interpret our contract and tell us what it means, I think, at some point, in the moving papers, there's an obligation to identify with some degree of specificity what we're interpreting.

And that's the objection. That's the - that's what we raised in the Step 4 answer, and that's why we said then and we say now today that there is no National interpretive issue involving the terms and conditions of the National Agreement. [Transcript pp. 20-21.]

Not only does strict compliance with Article 15, Section 3.D of the National Agreement eliminate surprise evidence, enforcement of the provision ensures that the arbitration decision is made on the same facts and arguments the parties consider. The Parties' right to know and discuss in detail the evidence and argument before the same evidence and argument is presented to an arbitrator for decision is

crucial to the process and to the labor-management relationship.

The APWU maintains that Arbitrator Carlton J. Snow considered and rejected a Postal Service claim that because the Union's grievance did not rely on any particular contractual provision violated by the Postal Service there can allegedly be no interpretive dispute involved in the grievance. The grievance before Arbitrator Snow began on a specific fact situation in the Jacksonville, Florida post office, and the Postal Service alleged that the dispute was a "purely factual inquiry" and raised no interpretive issue.

Arbitrator Snow's decision contains no reference to an allegation by the Postal Service that the APWU did not identify a specific contractual provision for discussion by the parties prior to arbitration. To the contrary, his decision contains the following finding:

Contrary to management's assertion, however, the Union, in fact, has advanced a dispute about the meaning of specific language in the parties' agreement. The Union has pointed to Article 15.2.a which states:

The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union Representative. (See, Joint Exhibit No. 1, p. 58).

There also has been reliance on Article 17.2.A which states:

The selection and appointment of stewards or Chief Stewards is the sole and exclusive function of each Union. (See, Joint Exhibit

No. 1, p. 73). [Case No. H4C-3W-C 28547,
pp. 26-27.]

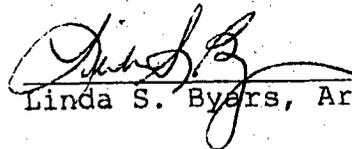
Arbitrator Snow's conclusion that the grievance was procedurally arbitrable and that the arbitrator had jurisdiction to hear the dispute on the merits was based on his finding, unlike the instant case, that the parties "inferred requirements from the language of the provision itself, along with the rest of the contract," and "assigned an ambiguous provision different meanings." [Case No. 4HC-3W-C 28547, pp. 28-31.]

The circumstances in the instant case are more closely aligned on the procedural issue with those in the case before Arbitrator Shyam Das and cited by both Parties. Arbitrator Das found that the APWU presented a significantly different issue at arbitration than the one presented in the grievance and at Step 4 of the grievance procedure, and for that reason he dismissed the grievance as not properly before him. [Case No. H4C-NA-C-72, p. 16.] Similarly, without evidence in the instant case that the Parties ever discussed the Grievance as an Article 12 violation, it would be improper and a violation of Article 15, Section 3.D of the National Agreement and National Arbitration precedence to consider and decide the Grievance on such a basis. Accordingly, the Arbitrator finds for the Postal Service and makes the following Award.

AWARD

The issue as presented by the APWU at arbitration is not properly before the Arbitrator. No national interpretive issue involving the terms and conditions of the National Agreement was part of the Grievance. Therefore, the Grievance is dismissed.

DATE: June 24, 2009


Linda S. Byers, Arbitrator