

C#0323D

COPY

ARBITRATION AWARD

February 16, 1982

UNITED STATES POSTAL SERVICE
Sarasota, Florida

-and-

Case No. H8N-3W-C20711

NATIONAL ASSOCIATION OF LETTER
CARRIERS

Subject: Representation - Steward's Right of Discovery -
Access to Supervisor's Discussion Notes

Statement of the Issue: Whether the Postal Service's action in refusing to provide a steward with a supervisor's personal notes of discussions he'd had with an employee was, under the circumstances of this case, a violation of the National Agreement?

Contract Provisions Involved: Article XVI and Article XVII, Section 3 of the July 21, 1978 National Agreement.

<u>Grievance Data:</u>	<u>Date</u>
Grievance Filed:	August 26, 1980
Step 2 Meeting:	September 10, 1980
Step 3 Meeting:	October 1980
Step 4 Meeting:	April 28, 1981
Appeal to Arbitration:	May 12, 1981
Case Heard:	November 10, 1981
Briefs Submitted:	January 18, 1982

Statement of the Award: The grievance is denied.

BACKGROUND

This grievance protests the Postal Service's action in refusing to provide a steward with a supervisor's personal notes of discussions he'd had with a letter carrier. NALC insists that this refusal was a violation of the steward's right of discovery under Article XVII of the National Agreement. It asks that the Postal Service be required to disclose the "discussion records" for the carrier in question and "future grievants, when requested by an authorized Union representative in the investigation of possible grievances."

W. Barker is a letter carrier in the Sarasota, Florida post office. His absences became a source of concern to management in early 1980. His supervisor, E. Rainey, spoke to him on May 13 and July 24, 1980, about his attendance record. Rainey wrote down on a piece of paper, after each of these discussions, the date and subject matter covered. He retained these notes for his own use, probably in his desk or a file cabinet. He did not place these notes in Barker's personnel folder.

Rainey made another check on Barker's attendance several weeks later. He concluded that there had been no improvement. He therefore placed Barker on "restricted sick leave" on August 14, 1980. His letter to Barker stated that whenever he requests sick leave he must "submit a medical certificate for [sick] leave approval" and that his failure to do so "could result in [his] absence being charged to absent without leave." It added that his name would be removed from the "restricted sick leave" list when "a decided improvement in [his] sick leave record" had occurred.

The Employee & Labor Relations Manual (Section 513.371) describes the procedure which supervisors must follow in placing employees on "restricted sick leave". It reads in part:

".371 Reasons for Restriction. Supervisors ...who have evidence indicating that an employee is abusing sick leave privileges may place an employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

- a. Establishment of an absence file as outlined in Handbook F-21...
- b. Review of the absence file by the immediate supervisor and by higher levels of management.
- c. Review of the quarterly listings, furnished by the PDC, of LWOP and sick leave used by employees...
- d. Supervisor's discussion of absence record with the employee.
- e. Review of the subsequent quarterly listing. If listing indicates no improvement, the supervisor is to discuss the matter with the employee to include advice that if next listing shows no improvement, employee will be placed on restricted sick leave. (Emphasis added)

Barker objected to being placed on "restricted sick leave." He apparently felt his absenteeism did not justify this action. He went to his steward, W. Vickers, with his complaint. Vickers made an investigation. He spoke with Supervisor Rainey who told him he'd had discussions with Barker on May 13 and July 24, 1980. He asked Rainey for his notes of these discussions. Rainey refused to provide them.

Rainey's refusal prompted the instant grievance which was filed by Steward Vickers on August 26, 1980. Vickers alleged that Rainey's refusal to allow him to examine the discussion notes was a violation of Article XVII, Section 3 (Representation - Rights of Stewards). That provision states:

"...The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied." (Emphasis added)

The other relevant provision of the National Agreement is Article XVI (Discipline Procedure):

"...For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of a prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities." (Emphasis added)

It should be noted too that Barker filed a grievance on August 27, 1980. He alleged that he had been improperly placed on "restricted sick leave." His complaint was resolved in Step 2 of the grievance procedure with the understanding that he would "be removed from Restricted Sick Leave list on October 15, 1980 provided he does not use any further sick leave by that date."

DISCUSSION AND FINDINGS

A steward has the right of discovery under Article XVII, Section 3. That right is expressed as follows: "The steward ...may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists..."

Steward Vickers made a "request" of Supervisor Rainey for certain papers. He asked Rainey for his personal notes of discussions he'd had with employee Barker about the latter's absences. Rainey refused. The Postal Service supported Rainey's refusal, arguing that he had no obligation to divulge his notes under the circumstances of this case. It

insists Article XVII, Section 3 is not applicable here.
NALC disagrees.

This dispute turns on two questions of contract interpretation. The first is whether a supervisor's "personal notations" of an Article XVI discussion with an employee constitute "documents, files and other records" within the meaning of Article XVII, Section 3. NALC says they do; the Postal Service says they do not. I shall assume, without deciding the point, that NALC's view is correct. Hence, because Rainey's "personal notations" were "...other records", they could be subject to the steward's discovery.

The second and crucial question is more difficult to describe. It involves the problem of whether the right of discovery under Article XVII, Section 3 is conditional or absolute. The Postal Service contends that the steward must show that the records he seeks are "necessary" to his investigation before he can insist upon his right of discovery. It believes that absent such a showing, Management may properly refuse to disclose the records sought. NALC, however, maintains that "once the process of discovery is triggered by the steward's determination that the materials are 'necessary' to his investigation and [by his] request [for] such materials, Management must make them available to the Union." It states that the decision as to what is "necessary" for the steward's investigation is a matter reserved by Article XVII to the discretion of the Union. It alleges that the steward, having thus invoked his right of discovery, has an absolute right to the records he wishes.

I

The answer to this disagreement is found in the second paragraph of Article XVII, Section 3. The first sentence in this paragraph establishes the right of discovery. A steward "may request...documents, files and other records necessary..." to a grievance investigation; he "shall", upon such request, "obtain access" to these materials. Notwithstanding this broad language, the right of discovery is not unlimited. The second sentence in the paragraph makes that perfectly clear. It reads: "Such requests shall not be unreasonably denied." The parties thus contemplated that not all steward requests would be granted. Some would be denied. And those denials would be justified so long as they were not "unreasonable[e]." This second sentence undermines NALC's argument because it plainly implies that steward requests may be denied where there is a reasonable basis for the denial.

The parties made no attempt in the National Agreement to define what would be a reasonable basis for a denial. But they did suggest what they had in mind by the manner in which they described the right of discovery. The steward is given access to "...other records necessary for processing a grievance or determining if a grievance exists."* His right is limited to what is "necessary." Hence, if he asks for materials which are unnecessary, Management would be within its rights in refusing to disclose such materials. Management would have a reasonable basis for its denial.

Necessity, of course, is not the only criterion. Any or all of the circumstances of this case might relate to the reasonableness of Management's action in denying the steward access to records.

For these reasons, my conclusion is that the right of discovery is not absolute. Management may deny a steward's request where its denial is not "unreasonabl[e]."^{**} Given this interpretation of Article XVII, Section 3, we are left only with a question of fact. Did the Postal Service have a reasonable basis for denying Steward Vickers' request for Supervisor Rainey's discussion notes? Or, to put the matter in terms of the contract language, was the Postal Service's denial of the steward's request "unreasonabl[e]" on the facts presented? In resolving this question, I have made no judgment about the burden of proof. I have not assumed that NALC must show the denial was "unreasonabl[e]" or that the Postal Service must show its denial was reasonable.

I I

Before dealing with this question of fact, some brief observations about a supervisor's discussion notes are in order.

This subject is covered by Article XVI. Management is expected to discuss an employee's "minor offenses" with him. Those discussions involve the employee and the supervisor, no one else. They are not considered discipline. However, the supervisor (the employee as well) is free to make "a personal notation of the date and subject matter" of the discussion for his "personal record." No such "personal notation" is to be placed in the employee's personnel folder. Nor is it to be "cited as an element of a prior adverse record in any subsequent disciplinary action against an employee."

* NALC reads this provision as if the word "necessary" were not present.

** This finding is not affected by the Article XVI bargaining history.

The "personal notation" nevertheless has some uses. According to Article XVI, it may be "relied upon to establish that employees have been made aware of their obligations and responsibilities." Suppose, for instance, that a supervisor and an employee discuss the latter's absenteeism and the supervisor prepares a "personal notation" of the discussion. Suppose too that the employee is later disciplined for absenteeism but denies ever being spoken to about his attendance record. Under these circumstances, the Postal Service could use the "personal notation" to prove that the employee had been made aware of his "obligations and responsibilities." Or, on a purely informal basis, the supervisor could always refer to a "personal notation" as a means of refreshing his recollection of the "subject matter" of a past discussion with an employee. It should be apparent, however, that the "personal notation" has a very limited usefulness.

I I I

With this background on "personal notations", I turn to the question of whether the Postal Service's denial of Steward Vickers' request for Supervisor Rainey's notes of discussions with Barker was "unreasonable".

The Employee & Labor Relations Manual describes two different procedures through which an employee can be placed on "restricted sick leave." Supervisor Rainey followed the lengthier procedure which demanded, among other things, discussing Barker's absence record with him, reviewing his record in the next quarterly listing, discussing his record with him again if there had been no improvement, and advising him at such time that he would be put on "restricted sick leave" if he showed no improvement on the next listing.

Rainey placed Barker on "restricted sick leave" on August 14, 1980. Barker grieved. His grievance was evidently written by the Chief Steward who made two arguments in Barker's behalf: (1) that "the Union does not know if the sup[ervisor] has discussed this with the grievant at least twice" and (2) that "the grievant's sick leave [record] has improved greatly since the end of May to Aug. 12, 1980."

Several points should be stressed. First, contrary to the statement in Barker's grievance, Steward Vickers knew that Rainey had two discussions with Barker about his absence record. Vickers had been told that by Rainey and apparently by Barker himself. There was never really a dispute on this matter. Hence, Vickers did not need Rainey's

"personal notations" to determine whether there had been the required number of discussions. Second, nothing in the evidence indicates that Vickers was denied Barker's absentee data. Barker's grievance specifically refers to the number of absences between December 1979 and August 1980 on a month-by-month basis. Clearly, the absentee data needed to determine whether there had been any improvement was available to Vickers at all times. Had Management refused to provide such data, Vickers could have obtained it through his right of discovery. Those absentee figures were the kind of Postal Service "...files and other records" contemplated by Article XVII, Section 3.

Third, neither Vickers nor NALC claimed that Rainey had failed to give Barker the required "advice" as to the consequences of his failure to improve. This was never an issue in this case. Presumably, Barker told Vickers he had been given such "advice." Vickers therefore did not need Rainey's "personal notations" to determine whether this phase of the "restricted sick leave" procedure had been followed. Fourth, nowhere is there any suggestion that Vickers and Barker had different accounts of their discussions. There was no credibility question. Vickers did not need Rainey's "personal notations" to resolve any doubts as to whom he should believe. Finally, Vickers had full access to Barker who had just as much knowledge of these discussions as Rainey.

Under these circumstances, my ruling must be that the Postal Service's denial of Steward Vickers' request was not "unreasonable" and that there has been no violation of Article XVII, Section 3. This finding has been influenced, to a large extent, by the fact that Vickers sought "personal notations" which were clearly not "necessary" to his "processing a grievance or determining if a grievance exists."

I V

One other NALC claim requires a brief answer. It asserts that Steward Vickers asked another supervisor for his "personal notations" of his Article XVI discussions with employee Hanewinkel in late August 1980 and that he was given the supervisor's discussion notes. It compares this response with Supervisor Rainey's response and complains that "selective disclosure is inherently unfair and discriminatory."

One of the difficulties with this argument is that there is no real evidence with respect to the Hanewinkel situation.

Perhaps the number of discussions between the supervisor and Hanewinkel was in dispute; perhaps there was a credibility issue; perhaps Vickers' request was "necessary" to his investigation of that complaint. In short, the Hanewinkel case may be distinguishable from the present Barker case. But even if it were not, the mere fact that one supervisor grants a steward's request for discovery while another does not is hardly a sufficient basis for ruling that Management is guilty of "discriminatory" actions forbidden by the National Agreement.

AWARD

The grievance is denied.

Richard Mittenthal
Richard Mittenthal, Arbitrator