

C#10798

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration ) GRIEVANT: Phillip Zamarron  
between ) POST OFFICE: Jacksonville, FL  
UNITED STATES POSTAL SERVICE ) MANAGEMENT CASE NO: S7N-3R-D 31574  
and ) NALC GTS NO: 13139  
NATIONAL ASSOCIATION OF LETTER )  
CARRIERS, AFL-CIO )

BEFORE: Robert W. Foster, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Barbara Kawchak, Labor  
Relations Assistant

For the Union: Chuck Windham, Regional Administrative  
Assistant

Place of Hearing: Jacksonville, FL

Date of Hearing: January 4, 1991

AWARD:

The grievance is not arbitrable.

Accordingly, the grievance is dismissed for lack of  
jurisdiction.

Date of Award: April 23, 1991

*Robert W. Foster*  
Robert W. Foster

Matthew Rose, NALC  
National Business Agent

REAPPROVED  
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REVIVED

Region 9

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ISSUE

Whether the grievance is arbitrable?

PERTINENT CONTRACT PROVISIONS

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure--Steps

Step 2:

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

(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 Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon

...

Section 3. Grievance Procedure--General

B. The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the

grievance to the next Step of the grievance-arbitration procedure.

PROCEDURAL BACKGROUND/SUMMARY OF THE EVIDENCE

This grievance arose from the issuance of a Notice of Proposed Removal to grievant on May 17, 1990, followed by a Letter of Decision dated June 17 terminating his employment, effective June 25. This action was based on the charge of participating in a contra-convalescent activity while incapacitated from duty as a result of an on-the-job injury incurred on March 5, 1990. After a letter agreement extended the time limits for presenting Step 1 grievances on both actions, the grievance was timely filed claiming that management has not proven the charge and requesting that grievant be made whole.

On July 25, 1990, Management Step 2 designee, Labor Relations Assistant Kawchak, sent a notice to Shop Steward McGowan at the Jax Beach Station of a Step 2 hearing scheduled for 8:30 a.m., August 7, at the GMC. Steward McGowan signed the form acknowledging receipt of the notice on July 26 and returned it to Labor Relations. McGowan retained the memorandum advising of the time and location of the Step 2 hearing.

Ms. Kawchak appeared at the GMC for the Step 2 hearing, but Mr. McGowan was not present. According to Kawchak's testimony, McGowan did not call her and when she saw McGowan three days later, he stated that he had not looked at the memorandum designating the GMC as the place for the Step 2 meeting and did not ask for a rescheduled meeting at that time. Kawchak further stated that McGowan is an experienced steward who argues hard and is a stickler

for insisting that procedures are followed properly. This witness sponsored into evidence two grievances filed by McGowan in 1988 asking that management cease and desist the practice of failing to hear Step 1 grievances within the 14 day time limit.

McGowan, who has been a steward at the Jax Beach Station for about eight years, testified that it is common practice for the parties to extend time limits by agreement. Although he received the memorandum scheduling the Step 2 hearing, he failed to notice that the designated place was the GMC. Since such grievance meetings had been held at the Jax Beach Station in the past, and never at the main office, McGowan stated that he assumed that was the case in this instance. He sponsored into evidence a number of memos scheduling Step 2 hearings, all of which designated the Jax Beach Station as the location.

When Ms. Kawchak did not appear at the Jax Station by 11:00 a.m., McGowan left to carry his route and told the supervisor to call him back when Kawchak came to the station. According to McGowan, he attempted to make one call to Ms. Kawchak when he returned to the station after completing his route at 4:15 p.m. on that day, but got a busy signal. McGowan ended his tour at 5:00 p.m. and charged the last 45 minutes as Union time.

The local Union vice-president testified that, while he served as a steward at the Jax Beach Station processing grievances, the Step 2 hearings were always held at that station. This witness stated that it was usual to extend the time limits for processing grievances, although he agreed that this was always done before the

time expired. He recalled one instance when management refused to extend the time once it had expired.

While management addressed the merits of the grievance in its Step 2 denial issued on August 17, it was further claimed that "the grievance is procedurally defective as it was waived when the Union representative failed to appear for the Step 2 meeting." On August 29, the Union appealed to Step 3. Management's original Step 3 decision dated October 2 denied the grievance on the merits without mentioning the question of waiver. On October 5, management issued an amended decision superseding the October 2 decision, stating that the grievance is considered waived by the Union's failure to pursue this matter at Step 2. On October 11, the Union requested arbitration on the original Step 3 decision. The Union withdrew the original certification from the arbitration process by notice dated October 15. The Union then recertified the grievance and requested arbitration on management's October 5 decision. In that posture, the case was referred to the instant arbitration for resolution of the arbitration issue in accordance with the following stipulation:

The parties agree that the only issue to be presented to the arbitrator is that of arbitrability. If the grievance is found to be arbitrable, the arbitrator will retain jurisdiction for a hearing on the merits to be scheduled at a later date.

#### SUMMARIZED POSITION OF THE PARTIES

##### The Employer

The Employer points out that the Union withdrew the grievance on October 15 at a time when the Union had the Employer's October

5 third step answer denying the grievance on the ground of waiver because the Union had failed to pursue this matter at Step Two. The Employer contends that once the grievance was withdrawn, it cannot be recertified.

The Employer cites Article 15, Section 3B of the National Agreement in support of its position that the grievance is waived by the Union's failure to pursue the case at Step Two. The Employer points to the scheduling letter designating the location for the August 7, Step Two hearing as the GMC, and claims that the time expired on that day when Steward McGowan failed to appear. The Employer further contends that there is no practice of extending time requirements after the time has expired.

Thus, the Employer contends that the grievance must be dismissed as non-arbitral, in accordance with a number of arbitration cases cited by the Employer.

#### The Union

The Union points out that it certified the grievance for arbitration and denies management's claim that the certification was cancelled when management issued a new decision on October 15 since the Union must move on the last decision received.

In rejecting the Employer's claim of waiver because there was no Step Two meeting on August 7, the Union claims that management cannot identify where Article 15 requires this result. The Union also points out that management took Union Stewart McGowan by surprise in designating the GMC as the Step Two hearing location, rather than the usual place of Jax Beach Station where such

hearings had been held in the past. The Union also faults management for failing to meet its responsibility to call the station when the steward did not come to the meeting. The Union also claims that no prejudice resulted from the delay in holding the Step Two meeting.

Accordingly, the Union concludes that the contract does not require waiver and that management acted in an arbitrary and capricious manner when it unilaterally changed the usual hearing site and then claimed waiver when the Union steward did not appear. The Union submits a number of arbitration decisions in support of its position that forfeiture of a grievance must be established by clear and convincing evidence, that arbitrability is presumed and that to dismiss a grievance on a technicality would "exalt form over substance."

#### DISCUSSION AND OPINION

Although there was some confusion that arose from the Union's withdrawal of the grievance and management issuing a new third step denial on October 15, 1990, unquestionably the Employer preserved its assertion made at Step Two that the grievance was waived while addressing the merits as an alternative ground for denial. Thus, with the stipulated agreement of the parties, the arbitrator will address the threshold, jurisdictional question of whether the grievance is arbitrable.

In the context of these facts, the phrase "prescribed time limits of the steps of this procedure" refers to the Step Two hearing scheduled by management for August 7 at the GMC. It is an

undisputed fact that, although the Union steward received written notice of the meeting well in advance, he did not appear on that day. Indeed, although he claims to have made one unsuccessful attempt to contact labor relations by phone later on that day, it is a further undisputed fact that Steward McGowan didn't make actual contact with Ms. Kawchak until some three days later. While the Employer's failure to act within the prescribed time limits has the effect of moving the grievance to the next step under the provision of Article 15, Section 3C, the failure on the part of the employee or the Union is "considered as a waiver of the grievance" by the express language of Section 3B. Accordingly, these factual circumstances serve to satisfy management's burden of proof and thereby create a prima facie case of non-arbitrability.

Nevertheless, the question remains whether management should be precluded from calling time limits on the Union under the surrounding circumstances of this case. It is true that lax enforcement of time limits in the past that lulls one of the parties into the reasonable expectation that compliance with time limits will not be enforced may result in such a waiver. That is not the case here, however. The unanimous testimony of both Employer and Union witnesses established that all extensions of time limits in the past occurred before the time ran out, never after time limits expired.

The Union makes the valid point that Steward McGowan's failure to read the schedule notice is mitigated by the fact that he expected the hearing to be held at the Jax Beach Station because

that is where these hearings had been conducted in the past. But the problem with the Union's attempt to turn these circumstances into an excuse for failing to meet the contract condition for pursuing the grievance to arbitration is that management had the right to designate the GMC as the hearing location by using the usual notice form sent to the steward. Moreover, it was reasonable for the management designee to expect that the experienced steward would read the notice and arrange to meet at the designated time and place without any further affirmative obligation to track down the Union designee and bring him to the hearing.

Contrary to the Union's suggestion, a showing of prejudice is not an element in claiming a waiver of the grievance for failure to comply with time limits. As indicated earlier, this is a matter of jurisdiction requiring the arbitrator to enforce the agreed upon contract terms and dismiss the grievance where the specific conditions attached to a consideration of a case on the merits have not been complied with.

After reading and analyzing all of the arbitration decisions submitted by both parties, I have found none that conflicts with the conclusion that the factual circumstances of the instant case compels dismissal of the grievance on the ground of waiver. For example, this arbitrator associates himself with such statements as "arbitrability is presumed" and that "if there is any margin of doubt as to arbitrability, resolve the issue in terms of hearing the matter on its substantive merits." Moreover, cases finding the grievance arbitral despite technical defects that did not result in

prejudice are distinguishable from the instant circumstance of failure to meet prescribed time limits.

Arbitration cases cited by the Employer recognize, as this arbitrator has said many times before, that the limitation on the arbitrator's jurisdictional authority to apply contract language to the facts of record, applies with equal force to procedural as well as substantive matters. Where there is failure to meet the contractual time limits without appropriate justification, the arbitrator simply has no choice but to dismiss the grievance without consideration of the merits as contractually mandated.