

C#09917

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT:
between) Bruce E. Spiegler
UNITED STATES POSTAL SERVICE) San Dimas, California
and) CASE NO. H7N-5P-C 1132
NATIONAL ASSOCIATION OF LETTER)
CARRIERS)

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: D. James Shipman
Field Director, Human
Resources
Des Moines Division

For the NALC: Richard N. Gilberg
Attorney (Cohen Weiss
& Simon)

Place of Hearing: Washington, D.C.

Date of Hearing: February 15, 1990

Date of Post-Hearing Briefs: March 13 and 19, 1990

AWARD: The grievance is dismissed.

Date of Award: March 26, 1990.

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CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.


Richard Mittenthal, Arbitrator

BACKGROUND

This case involves an employee who filed a grievance protesting his transfer from the carrier (NALC) craft to the clerk (APWU) craft, who was subsequently discharged from his clerk's position, and whose grievance objecting to the discharge was not appealed by the APWU beyond Step 3. The Postal Service maintains that because the discharge was made final, it has no obligation now to arbitrate the earlier transfer grievance. It claims that because the grievant is no longer an employee and no longer on the rolls in non-pay status, his earlier grievance is "moot" and must be deemed not arbitrable.

Spiegle began his career with the Postal Service in 1982. He was a carrier, apparently in the San Dimas, California post office. He suffered an illness (or injury) which resulted in his being placed on light duty status in December 1986. He was then generally assigned eight hours of light duty work each day. There were occasions, however, when he received less than eight hours and used sick leave or other available paid time off to maintain his normal monthly earnings. He believed that Management had eight hours of light duty work available for him on these occasions and that he was being improperly denied work within his limitations. He filed grievances on this matter on January 12, 1987 and August 14, 1987.

Spiegle also submitted a request on May 22, 1987, for "permanent li[ght]-duty due to unforeseen medical complications." Management responded on August 5, 1987, telling him that it was "unable to accommodate you in the San Dimas Post Office in a position within your limitations because there are no vacancies in the clerk or maintenance crafts." It offered him instead a part-time flexible job as a Distribution Clerk in the Alhambra post office, a job which involved different hours and days off and which required him to learn a city scheme. It noted in its letter that "should you fail to qualify [on this scheme] in the allotted time, you would be subject to termination."

Spiegle refused this job offer on August 11, 1987. Management replied that because of his refusal and because of his "inability to perform as a letter carrier", he was advised "to seek counseling for disability retirement benefits within 10 days...or be subject to termination from the Postal Service." Given these conditions, Spiegle changed his mind. He wrote the Postal Service on August 18, 1987, stating that he would accept the Distribution Clerk job offer. He added in a separate letter the same day:

...I accept the clerk position...under protest and extreme duress.

I am only accepting...because of...[Management's] letter...forcing me to inquire concerning disability retirement benefits, and [its] threat to terminate me otherwise.

I have also only accepted this position until the Union can resolve the dispute [the two grievances mentioned above] concerning the method, ways, and means my case has been handled, and can show there is a full time clerk position in the San Dimas office.

I am qualified for the clerk position in San Dimas...and I want it.

Management reassigned Spiegle to the Distribution Clerk job in Alhambra. It directed him to report there on August 31, 1987, and he did. Meanwhile, however, he contacted his NALC representative in San Dimas and filed a grievance protesting the transfer. This grievance, heard in Step 1 on August 31, 1987, alleged that Management had violated the National Agreement by "reassigning a permanent Light Duty employee" and requested that Spiegle be "return[ed]...to San Dimas", presumably as a carrier, and be compensated for any loss of earnings or other benefits.

The Postal Service views Spiegle's move from carrier to clerk as a voluntary transfer. NALC insists it was an involuntary transfer. For purposes of resolving the arbitrability issue in this case, I must assume that it was an involuntary transfer and that, if the merits of the dispute were heard, the transfer would be deemed a violation of the National Agreement.

Spiegle began his training as a Distribution Clerk on the Alta Loma manual scheme in September 1987 and had his 58th hour of training on January 9, 1988. His highest test score on the scheme was 45 percent. He was required to attain a minimum test score of 95 percent. Because of his failure to qualify, Management sent him a discharge notice on January 20, 1988, the termination to be effective March 4, 1988. During the intervening period, he was to be given the opportunity to qualify, i.e., to take the test, once on each scheduled workday. However, he did not qualify. He was finally terminated on May 25, 1988, for "failure to qualify on assigned scheme."

Spiegle filed a grievance on March 7, 1988, protesting his

discharge. APWU argued that Management violated the National Agreement "when Management did not assign employee to his own [carrier] craft and installation, and assigned employee to a [clerk] job which he was unable to perform." That grievance was heard in Step 3 in May 1988 and was denied by Management. APWU did not appeal to the next step and the discharge became final.

It should be noted that Spiegler's first two NALC grievances about Management's failure to provide him regularly with eight hours of light duty at San Dimas in the first seven months of 1987 was heard in regional arbitration in May 1989. That was one year after the APWU discharge grievance had been dropped. Arbitrator Lange granted these NALC grievances. No claim was made by the Postal Service in that proceeding that these NALC grievances were "mooted" by Spiegler's discharge having been made final in May 1988.

The instant arbitration concerns Spiegler's third NALC grievance complaining of his transfer from carrier to clerk in August 1987. The arbitration hearing in this case was held on February 15, 1990. The Postal Service urges that this grievance is not arbitrable because Spiegler's discharge became final in May 1988 and he no longer had any status as an employee as of February 15, 1990. NALC does not agree. It emphasizes the equities of the situation. It observes that if Spiegler's transfer to the clerk craft was itself a violation of the National Agreement and if he therefore should have been retained after August 1987 as a carrier on light duty, then he surely should not be deprived of his Postal Service employment because of his inability to qualify as a clerk. It asserts that Management is seeking to profit from its own wrong, that is, to confirm Spiegler's removal from the employment rolls for his failure to qualify for a job to which Management had improperly assigned him in the first place. It believes the special facts of this case justify a finding that the August 1987 grievance is arbitrable.

DISCUSSION AND FINDINGS

Two critical points underlie this dispute. One, emphasized by NALC and assumed to be correct by the arbitrator, is that Spiegler was involuntarily transferred from carrier to clerk in August 1987 and that this transfer was improper under the National Agreement. The other, emphasized by the Postal Service, is that before Spiegler's transfer grievance reached arbitration, he had been discharged and he no longer had any right to challenge this discharge. The question is whether Spiegler's transfer grievance can survive his later discharge

when the discharge has itself been made final and unappealable. NALC urges that the grievance does survive because had Management not improperly transferred Spiegler, he would have remained a carrier and would not have been placed on a job he could not satisfactorily perform. The Postal Service urges that the grievance cannot now be heard in arbitration because Spiegler no longer has any status as an employee.

To state the issue in the narrowest possible terms, that is, from the standpoint of the peculiar facts of this case, must the August 1987 grievance protesting Management's unwarranted transfer of Spiegler from San Dimas carrier to Alhambra clerk be considered not arbitrable in February 1990 because Spiegler's discharge from the clerk craft became final in May 1988?

Some history is essential to a full understanding of this problem. Before 1981, a number of cases had arisen where employees had been discharged, had grieved, had later resigned, and had then sought to have their grievances arbitrated. The Postal Service objected to the merits of the grievances being heard on the ground that the grievants no longer had any status as employees. It believed the grievances were "moot" or inarbitrable. All of these cases appear to have been resolved in the Postal Service's favor.

A fairly representative award was Arbitrator G. Cohen's ruling in Case No. C8V-4H-D 16320/16940. That case bears an even closer resemblance to the present dispute. There, the grievant was suspended for a lengthy period for misconduct, filed a grievance, returned to work, and subsequently resigned. The question was whether the suspension grievance could be arbitrated after the resignation. The arbitrator's answer stated in part:

Concerning the question of arbitrability, it is quite clear that Grievant's resignation became effective more than two months prior to the arbitration hearing. There are many cases that hold that only employees of the Postal Service are entitled to the benefits of the National Agreement. These cases further hold that employees who have retired, resigned, obtained disability retirement, or the like, have thereby lost the right to proceed under the arbitration and grievance provisions of the National Agreement immediately upon reaching the status of non-employment with the Postal Service.

No reason was presented here to depart from this holding. Grievant had resigned for his own reasons

and as a result of his own choice. He thereby lost the right to proceed as an employee of the Postal Service. He voluntarily abandoned whatever rights he had under the National Agreement by his resignation. (Emphasis added)

Discharge, unlike resignation or retirement, is an involuntary matter. The employee's status following a discharge was expressly dealt with in Article 16, Section 3:

In the case...of discharge, any employee shall ...be entitled to advance written notice of the charges...and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure... (Emphasis added)

The existence of this provision suggests that the parties realized that a discharged employee no longer on the rolls could well be viewed as having no right to have his grievance heard in arbitration. One purpose of Article 16, Section 3 was to prevent such a result. The language states that the discharged employee "shall remain on the rolls..." until his grievance is resolved. This means, of course, that if the grievance is resolved in Management's favor, if the discharge is upheld through failure of the Union to appeal or through an arbitration award, then the employee is taken off the rolls. At that point, he is no different than the pre-1981 employee who has resigned. He has no status as an employee and he has, according to the earlier awards, "thereby lost the right to proceed under the arbitration and grievance provisions..." Any pre-discharge grievance would presumably no longer be arbitrable.

The parties must have been aware of these grievance administration problems. Their concern over the standing of pre-separation grievances led to the following Memorandum of Understanding in October 1981:

¹ This excerpt is from the 1978 National Agreement. It is presently found in Article 16, Section 5 of the 1987 National Agreement.

It is agreed by the...Postal Service...National Association of Letter Carriers...and...American Postal Workers Union...that the processing and/or arbitration of a grievance is not barred by the separation of the grievant, whether such separation is by resignation, retirement, or death. (Emphasis added)

This Memorandum suggests that the parties recognized the need for a savings clause to prevent an employee's pre-separation grievances from being declared not arbitrable after his separation. The clear implication is that, absent such a clause, pre-separation grievances would not survive a separation. It should be emphasized that this savings feature applies only to separations attributable to "resignation, retirement, or death." A separation due to discharge, the situation in the present case, is not covered. If an employee's pre-discharge grievances are to survive his discharge, NALC must look somewhere else in the National Agreement to justify that result. But, as explained above, Article 16, Section 3 (now Section 5) keeps the discharged employee on the rolls only until such time as his discharge grievance is resolved. Thereafter, he is off the rolls and has no status as an employee. He then is no different from the pre-1981 employee who has resigned and has no right to have his pre-discharge grievances arbitrated.

This history, both arbitration awards and contract language, reveals that pre-discharge grievances were not meant to survive a discharge which had been made final through the grievance-arbitration machinery. Had the parties intended otherwise, they would have added discharge to "resignation, retirement, or death" in the Memorandum or they would have added to Article 16 a clause to the effect that a discharged employee would "remain on the rolls" until all of his grievances, not just his discharge grievance, were resolved. No such language was written into the Memorandum or Article 16. And NALC has pointed to no provision of the National Agreement or no long-established practice which would demand a different conclusion.

NALC's case rests essentially on equitable considerations. There is no question but that a strong equitable claim can be made in Spiegler's behalf. But the arbitrator cannot create exceptions to the plain meaning of the National Agreement on the basis of equity alone. It is for the parties, not the arbitrator, to address the matter of survival of pre-discharge grievances and to determine whether some special rule is appropriate for the unique problem posed by Spiegler's grievance.

Indeed, I have attempted to find some contractually permissible means of making Spiegle's transfer grievance arbitrable. One possibility was to treat the grievance as if it involved "separation" due to "resignation" from the carrier craft, thus placing it under the protection of the Memorandum. But the "resignation" contemplated by the Memorandum is clearly a "resignation" from Postal Service employment, not a movement from one craft to another. Another possibility was to treat the grievance as if it involved in effect a "discharge" from the carrier craft. For, if that were so, then Spiegle would still be on the rolls until his transfer grievance was resolved on the merits. That concept, however, seems far-fetched. A transfer from carrier to clerk, even when involuntary, can hardly be translated into a "discharge." There was no "discharge" action against Spiegle in August 1987.

For these reasons, I have no choice but to find that Spiegle's August 1987 transfer grievance did not survive his discharge or, more specifically, did not survive the point at which his discharge became final, May 1988. Hence, Management can properly assert that this transfer grievance was no longer arbitrable in February 1990 when the grievance was heard. Management did not waive this defense by failing to assert it in the May 1989 regional arbitration involving Spiegle's "light duty" grievance.

The NALC equity claim - "But for the Postal Service's breach of the contract, Spiegle would still be a postal employee in the carrier craft" - is itself open to question. Even if Spiegle had not been transferred from carrier to clerk, he would not necessarily still be a carrier. Management advised him in August 1987 that if he rejected the offer of the Distribution Clerk position, there were only two other options. First, he could apply for disability retirement benefits. Had he done so and had his application been approved, his employment with the Postal Service would properly have ended. He would not still be a carrier. Second, if he refused to apply for disability retirement, he was "subject to termination." Had he been terminated, perhaps he would not have grieved or perhaps his grievance would have been considered to be without merit. In either event, his employment with the Postal Service would properly have ended. He would not still be a carrier. Thus, even if the assumed "breach of...contract" had not taken

place, there is a real possibility that Spiegler would not be a carrier and would not now be on the rolls.²

One final comment is necessary. NALC says that APWU's failure to process Spiegler's discharge grievance beyond Step 3 relates only to his status as a clerk and should in no way prejudice NALC's right to redeem his status as a carrier. Its claim, in short, is that APWU's action with respect to the discharge grievance should not affect the arbitrability of the NALC grievance. The difficulty with this claim is that there is just one National Agreement (and one Memorandum) for both unions. Spiegler did not have dual employment status. He was an employee of the Postal Service. When he was discharged and his grievance protesting the discharge was later dropped, he was properly removed from the rolls. For the reasons already expressed, his pre-discharge grievance did not survive his removal from the rolls. To rule otherwise would require the arbitrator to rewrite the terms of either Article 16, Section 5 or the Memorandum. The award by Arbitrator Haber in Case No. C8C-4B-C 9920 is not persuasive, particularly inasmuch as the events in that case predate the Memorandum and the arbitrator did not really consider the history of this issue.

AWARD

The grievance is dismissed.



Richard Mittenthal, Arbitrator

² Moreover, it should be remembered that Spiegler was willing to work as a clerk in the San Dimas post office. He accepted a transfer, under protest, to a clerk's position in Alhambra. Had he learned his assigned city scheme, he would have had a career as a clerk.