

GEORGE BOWLES 4/18/83 Won
Art. 15 - Arbitrability
5-Day Susp - Unsatisfactory Attendance

MN-80-26

@ 970

UNITED STATES POSTAL SERVICE
MINNEAPOLIS POSTAL DATA CENTER
FT. SNELLING, MINNESOTA

VS.

AMERICAL POSTAL WORKERS UNION
POSTAL DATA CENTER LOCAL
FT. SNELLING, MINNESOTA

RE: CASE #: MN-80-26
GRIEVANT: G. Erickson
ISSUE: 5 day suspension

APPEARANCES

UNION

Lawrence J. (Larry) Gervais, National Vice President, Clerk Craft
Jerry Fabian, National Representative
James Adams, Administrative Aide, Maintenance Craft
Gloria J. Erickson, Grievant

EMPLOYER

Richard E. Beyer, Labor Relations Representative
Jean M. Anschutz, Acting Manager E & LR
Allan E. Conklin, Retired

Issue I

Is the suspension of Gloria J. Erickson arbitrable?

The Employer urges that the Grievance is not arbitrable since it was not certified to arbitration within the contractual provided time period. Under the provisions of Article XV of the 1978 agreement, the parties established a two-stage process for handling grievances at the national level - a referral to arbitration and then a certification to arbitration. The referral is provided in Article XV, Section 2B:

The parties shall thereafter meet at the national level within fifteen (15) days in an attempt to resolve the issues to be presented to the arbitrator. In the event the parties are unable to agree upon the issues to be presented to the arbitrator, each party shall present proposed issues to the arbitrator.

The certification is found in the same section at the third paragraph:

The Union will certify in writing to the Employer at the national level any case it wishes scheduled for arbitration within fifteen (15) days after the pre-arbitration meeting above.

Reliance is also placed upon Section 2B of Article XV, the fourth paragraph reading:

The failure of the aggrieved party or his representative to present the grievance within the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance.

Finally, the Employer cites Article XV, Section 2C on the power of the Arbitrator:

All decisions of the arbitrator 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 the arbitrator.

Before the Arbitrator, the Union pointed out that the Employer had not raised arbitrability until the day before the hearing and, therefore, has waived its right to so assert non-arbitrability. In opening statement, the Union stated that the parties at the national level had not followed a fifteen day limitation. What has developed, at the national level, is that the parties meet for definition and discussion of the issues at a mutually agreeable date and also discuss possible settlement. Then, the practice has been to render a written decision where the Employer puts forth its position. In practice, this has not been accomplished within the fifteen day contractual limits of the Agreement. It has been recognized, it is claimed, that the Union may arbitrate after the rendering of the Employer's decision - a statement of the results of pre-Arbitration discussions. In brief, it is said, by actions and by wordage of the Employer letter, the Parties have established a date from which a time for appeal is made.

In the Erickson case the pre-Arbitration discussion was held on June 28, and the Company letter summary was received July 6 with the Union requesting Arbitration the same day. The pre-Arbitration meeting was ongoing until July 17, and the time period began to run on July 17. The practice of the parties, it is said, either written or stated, is to allow the Appeal

to go forward after the receipt of the Employer's pre-Arbitration decision. It is argued that the employee is trying to find a loophole but has forfeited its right to raise the arbitrability issue.

James I. Adams, Administrative Aide, Maintenance Division, for the Union testified in person and explained the procedure that has been employed. He stated that the parties had not followed the fifteen day pre-Arbitration time limit. They agreed on a mutually agreeable date for discussion of the issues and a possible settlement; the issues are defined, and the merits of the case are reviewed. Then there is a practice for the Employer to render a written decision, the results of the pre-Arbitration discussion, or the statement of Employer position. The procedure has not been accomplished and completed within fifteen days. Mr. Adams is sole administrator in the division for the Union. He took over the job in January 1981. The case is dormant until the Employer notifies the Union, and a date is set for discussion. This period can run from thirty to ninety days. After discussion a check is made with the people to be affected, and a decision made. The Union, specifically Mr. Adams, gets a letter from his counterpart, Patsy J. Hackward, Labor Relations Representative, Labor Relations Department, setting forth the Employer position. The practicalities of the administration of the Contract language were explained by Mr. Adams. There were some 200 pending cases and it was impossible to meet the time period. The Employer has not raised the time limit issue before.

In respect to the particular case, he recalled speaking with Patsy Hackward. The Grievant's condition was talked over. On July 7 he called Patsy Hackward and told her the settlement is out and the Union "would move the case forward to Arbitration". Patsy Hackward was going to check with the Postal Data Center with respect to a counter-offer. There was a face-to-face meeting on June 30. As to the force of the Employer letter, he stated that it "offered the Union an opportunity to go to arbitration even if the time limits had not been observed". He testified that the Union, through him, has not certified a case before the Employer letter.

The Adams-Hackward meetings occur about every two months. Consistently, the time limits have not been met in Washington; once the Union receives the Employer letter, the decision, the period under the Agreement begins to run. The meetings that occur every two months run for a half to one day.

Through a telephone conference call, the testimony of Robert Hubbell, Labor Relations Executive, Contract Administrative Division, was taken by the Employer. While he does not dispute the factual testimony of Union witness Adams, Mr. Hubbell said he could not speak as to how the Union regarded the letter.

Discussion

The issue of time limits at the various steps or levels of the Grievance Procedure up to Arbitration has frequently been the subject of arbitral decision. Certainly, promptness is one of the most important aspects of grievance settlement,

and failure to settle grievances with a fair dispatch may cause unrest and dissatisfaction. Time limits may prevent stalling and accumulation of cases, with the consequent pressing of stale claims. Cases dealing with the interpretation of contractual time limits are most frequently resolved against forfeiture of the right to process a grievance; and even in those instances where the time limits are clear, late filing will be excused if the circumstances are such that it would be unreasonable to require strict compliance. Moreover, if both parties have been lax in the observance of time limits in the past, the Arbitrator hesitates to enforce strict time limits until or unless notice has been given by a party of the intent to demand strict adherence. As in most cases of contract rights and responsibilities, time limits may be extended or waived by a special written agreement or by a clear oral agreement.

This Arbitrator does not believe that it is sound to deny a claim of non-arbitrability based on a failure to meet the time limits simply because the merits of the Grievance have been discussed. Certainly, neither party should be disadvantaged by a good faith effort to resolve a grievance, even where there are claims of a failure to meet contractual time limits.

Contractual provisions for notice of appeal to arbitration are not a mere formality. The forfeiture may be avoided where the parties in the past have mutually accepted a loose interpretation of contractual time limits, or a reasonable excuse is provided to establish a good faith mistake or difference of opinion. A reasonable excuse has been found where it would be

futile to request arbitration within the prescribed limits. Principles of waiver and estoppel have been employed in some cases.

It must be emphasized that underlying the Arbitrator's approach is a recognition that his jurisdiction or power is limited. In the present case, he is expressly prohibited from altering the agreement of the parties. As Arbitrator Lewis M. Gill observed in Lancaster Malleable Castings Company, cited by Owen Fairweather in Practice and Procedure in Labor Arbitration, BNA 1973: "The parties can waive a contractual provision by mutual agreement but an Arbitrator can not." Arbitrator Clarence M. Updegraff in John Deere Tractor Co., 3 L.A. 737, observed:

"Time limitations have a part to play similar to those in adjustment of legal rights. Statutes of limitations exist to limit or terminate all sorts of legal rights and procedures since, though 'the law abhors forfeitures' it proceeds upon the principle that, if rights are not pursued while the disputes are reasonably recent or fresh, justice may fail because evidence has disappeared, witnesses have moved off and been lost, or collateral rights entitled to recognition have appeared which rest upon the established status quo."

The Arbitrator has examined carefully Postal Service cases decided by highly esteemed Arbitrators including William Haber, Gerald Cohen, Bernard Cushman, R.G. Gamser and Marvin J. Feldman, all cited by the Employer.

What is pivotal and decisive in this case is what the parties have done, not only in this case but in other cases over a period of time. One must not lose a sense of the practicalities of the situation, the climate of the exchanges between representatives of the parties. There was an administrative problem, some 200 cases at the most and 175 at a minimum, that

were to be processed. Both parties came as close to the fifteen day third step requirement as possible, but with the volume of the cases and with the pre-Arbitration discussions once a month, it became difficult to meet the fifteen day limitation. For well over a year the parties have employed the same administrative arrangement. Critically, after receipt of the Employer letter or decision the Union decides whether or not it will proceed. The letter has been routine between the parties for approximately one and a half years. Produced in evidence by the Union were six other cases in addition to the instant case where the sequence of exchanges has been similar.

There, then, is the actual language of the Employer communication. The letter of Patsy J. Hackward, Labor Relations Representative, Labor Relations Department, dated July 15, 1982 to Mr. Adams, read in part:

"At issue in this case is whether or not management suspended the Grievant Gloria Erickson for just cause in accordance with the provisions of Article XVI of the PDC Agreement.

A further review of this grievance has established that the grievant had failed to maintain a regular work schedule for an extended period of time as charged in the notice of suspension issued to her, on or about December 1, 1980.

Please notify us if the APWU wishes to proceed to arbitration with this grievance and a hearing will then be scheduled."

The letter of Moe Biller, General President to the Union, requesting that "proper steps be taken to certify the case to arbitration indicated" was dated July 16, 1982. Of course, Mr. Biller in his June 10, 1981 letter advised that the Union requested arbitration.

There is nothing to show that the parties did not proceed in the usual way in this instance, with the Union awaiting the response of the Company before formally making a definitive step on certification. Certainly, neither party was under obligation to prompt or advise the other party as to the running of time periods. Nor is there evidence that either party was contriving to lull the other into a sense of false security. The discussions were normal-arms-length and cordial communications familiar in grievance bargaining. The plain and undisputed fact is that the parties, faced with a backlog, had devised an additional administrative way of handling the cases on a so-called "batch" basis. The realities are that for a number of reasons time limits were not observed on certification nor were time limits observed in the Employer third step answer. In totality, it is the view of the Arbitrator that the parties by their conduct and way of handling the cases since at least May 1982 had agreed to toll the running of the fifteen day period for certification until the receipt of the Employer letter or "decision". Such an agreement is implied, in fact, from the actual words and actions of the parties. It is not held that a fixed and binding practice for all cases in a variety of circumstances was established. The ruling is limited to the facts of the present case. Accordingly, the Arbitrator holds that the Grievance is arbitrable.

The Merits

Issue II

Was the seven day suspension of Gloria J. Erickson for just cause?

Essential Facts

The Grievant was disciplined for excessive absenteeism. There is proven unsatisfactory attendance with past disciplinary actions. The Employer views the case as one where the medical condition was not beyond the control of the Grievant, and that the particular action was appropriate since the Employer "wanted to impress upon her that her attendance record could lead to dismissal - that it was a serious matter". There is no question that the Grievant's job was an important one with responsibility for some seventeen payroll connections in seven states.

The Union emphasizes that the Grievant was cooperative with the Employer, authorizing the release of her records with the Employer in possession of full medical information from her Fitness for Duty examination, but with the Grievant faced with medical opinions that were not unanimous and with a natural hesitation on surgery.

The case is a most interesting one. The medical facts are clearly set forth in the considerable record made available to the Arbitrator. Controversy arises as to what was appropriate under those medical facts, keeping in mind the responsibility

of the Employee for regular attendance and the principle that discipline be for just cause. The Employer reasons that a course of action could not be forced upon the Grievant but she had an obligation to do something; that once the individual is aware of what can be done there is then a sound basis for a decision by the Employee. The Union, the Employer urges, is arguing against progressive discipline; the action of the Employer was not arbitrary, capricious or unreasonable with the Employer holding off separation to await additional medical information, recognizing that the then-current condition of the Grievant prevented her from reporting with any regularity, even though many employees relied upon her.

The Union reasons that discipline should be corrective, not punitive, and here the Grievant was faced with a substantial medical problem - she was following medical advice, seeking not one but several opinions. In result then, the Union argues, the Employer has substituted its judgement for the advice of her competent medical doctors. The Employer should have held the suspension in abeyance to give the Grievant a chance to make a decision.

In rebuttal, the Employer points out that serious consultation began after the discipline took place and after the Employer let the Grievant know that her attendance would affect her employability.

Discussion

The Arbitrator has examined several times the whole of the medical evidence presented at the hearing by the parties, including testimony of the Grievant herself. It must be found that it is sheer conjecture and speculation as to whether the five day suspension induced or motivated the Grievant to take definitive steps. One can infer, by way of a guesstimate that the Company's action "nudged the Grievant to do what she did. Similarly, one can infer by way of guesstimate that the Grievant would have done as she did do without the suspension. Happily, surgical resection was undertaken, was successful, and the Grievant restored to health. This is a case that calls not for the broad axe but for the scalpel. The Arbitrator would not hold that an Employer may not give time off to an Employee, involuntarily, where there is a medical condition. That is stating the proposition much too broadly. Decisive are the actual facts existent at the time the suspension took place. On December 17, 1980, Dr. Knaack recommended a resection. He also advised a second opinion. On December 18, 1980, a Fitness for Duty Examination was arranged for December 23, 1980. That examination and the findings noted a "possible surgical resection" with the further observation that if resection was not possible, the absences would continue. Dr. Goldberg on January 6, 1981 found among other things that surgery certainly was recommended. On a further examination Dr. Goldberg on May 21, 1981 said that the Grievant was "probably a candidate for resection". Dr. Goldberg's observa-

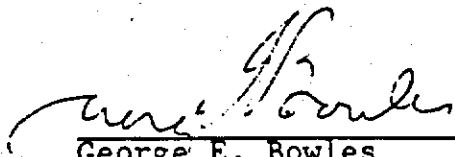
tion was guarded, "It is tough to argue against the laparoscopy with a proven diagnosis of sigmoid diverticulitis. I think that she probably is a candidate for resection, since she has been on bran and her symptoms have persisted. Thank you again for referring this nice patient."

On June 2, 1981 the Grievant wrote Dr. Goldberg a long letter asking good questions. She asked the doctor to discuss the amount of time "we are looking at for surgery, prior surgery, approximate hospital stay after surgery, and the most important, at home recovery after release from the hospital". She asked that his letter also note the "possibility the situation could reoccur after surgery - back to the same condition I am now in". The June 2, 1981 letter of the Grievant' noted that she was scheduled to be admitted on June 16 to Abbott - Northwestern Hospital and with surgery scheduled for June 18. Finally, on June 9 Dr. Goldberg wrote the Grievant in part, "Your case is not a simple one since there is no emergency or life-threatening reason to have surgery. However, with the continued pain and discomfort that you have, it certainly looks like you would benefit from having a resection of this involved bowel. I also discussed with you all the risks of the operation and the possibility that this situation could recur after surgery. One usually sees a recurrence rate of less than ten percent following this type of surgery."

The notice of suspension of the Grievant for irregular/unsatisfactory attendance was dated December 1, 1980. The suspension notice was temporarily postponed on December 8, 1980.

On January 2, 1981 the letter of abeyance was cancelled with the suspension to run from January 5, 1981 through January 9, 1981. It is seen that the suspension took place after a Fitness for Duty Examination had been arranged on December 18, 1980 for examination December 23, 1980. It was Dr. H. Knaack who recommended a reference to Dr. Stanley Goldberg. He wrote "because of her youth and the seriousness of such procedure I have advised a second opinion...". It was on December 23, 1980, again, that the Grievant was examined by another doctor at the Airport Medical Clinic, Dr. David Zanick. Dr. Goldberg's first report, of course, was dated January 6, 1981.

It, therefore, appears clear to the Arbitrator that the Grievant not only was cooperating with her Employer through the Fitness for Duty Examination but also was seeking not one but successive medical opinions as to her condition. It should not be overlooked that the resection was serious major surgery and guardedly recommended with no assurance of success. The personal medical decision that the Grievant faced was a difficult and troubling one. At the time the suspension was made effective, indeed at the very time it was made effective, the Grievant was taking diligent and repeated steps to obtain the best medical advice available to her as a basis for final decision. Disciplinary suspension under these facts was found premature and harsh. It was not for just cause. The Grievance therefore, is granted, and the Grievant shall be made whole for the time lost.


George E. Bowles
Arbitrator

April 5 1983