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CLARKES & COMPANY  
NBA - NALC

### OPINION AND AWARD

This is a contract interpretation case. On March 13, 1981 Full-Time Letter Carrier Graham McAfee grieved as follows at Step 1:

"On January 23, 1980 grievant was given instructions in a letter to report for an in-service physical exam to a doctor in Wichita the next day, January 24, 1980. Grievant was examined by the doctor and pronounced "unfit for duty", due to condition described in attached document. Grievant was given application for disability forms by [Postmaster] John Lancaster and was advised to apply for same. Grievant requested to be put back to work but was denied by O.I.C. Eleanor Forbes, and present Postmaster Donna Krug. After repeated denials by Civil Service Commission to grant the disability, grievant was returned to work on March 2, 1981. He used up his sick leave and annual leave from January 24, 1980 to June 13, 1980. Grievant was then carried as LWOP until March 2, 1981. Union contends that griev-

ant lost all pay and benefits during this ordeal because of management initiating the action through no desire of grievant. Grievant was conned and pressured into filing for disability retirement.

Corrective action requested is the grievant be made whole for all pay and benefits lost as a result of management's action."

Management responded on April 6, 1981 at Step 2 as follows:

"The subject grievance was discussed with you on March 30, 1981 in accordance with Article XV, Section 2 of the 1978 National Agreement.

On March 2, 1981, you requested in writing to return to work. You were scheduled for duty on March 2, 1981, the same day you made the report. In your request of March 2, 1981, you made reference to a letter dated December 4, 1980, from Mr. Bill Jones, Director, Employee Labor Relations, asking you if you were going to request to report to work. The Postal Service did not receive your answer until March 2, 1981. Reviewing the facts of this grievance, I find no support for your corrective action requested. I declare this grievance is denied."

At the hearing before the Arbitrator, the Service attempted to raise the issue of timeliness pointing out that Step 1 of the grievance procedure did not take place until March 13, 1981 and that when the written grievance was filed on March 19, 1981 it dated the precipitating act as occurring on January 23, 1980. The Service relied on Article XV which provides as follows:

"Section 2. Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the union

first learned or may reasonably have been expected to have learned of its cause. ...

Section 3. (b). The failure of the employee of the Union in Step 1., or the Union thereafter, to meet the described 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 in which the employee or Union fails to meet the prescribed time limits, whichever is later, such objection to the progressing of the grievance is waived."

In this case as can be readily seen from management's Step 2. answer, the entirety of which is set forth above, management did not raise the issue of timeliness and therefore has waived it. If properly raised it would have been a meritorious defense. But raising it for the first time at Step 3, as management did herein, is too late. The matter accordingly will be determined upon its merits.

To a great extent this is a documentary case. Because of complaints from McAfee that he was unable to carry his route without pain and without utilizing a two wheeled or four wheeled cart to avoid carrying the usual carrier's bag across his chest management, as was its right under the contract, caused McAfee to report for a fitness for duty examination. The result of the examination, conducted by Dr. R. H. Egelhof on January 24, 1980, was that McAfee was "found to be unfit for continued employment as a city carrier."

As a result of a discussion with Postmaster Lancaster on January 25, 1980, concerning the report McAfee decided to exercise his option to file an Application For Retirement with the Civil

Service Retirement System. Accordingly he did so on January 28, 1980. The application was supported by the Fitness For Duty examination report and by the Superior Officer's Statement. Since McAfee was found by the examining physician to be unfit for duty and did not chose to challenge that assessment since his personal physician agreed, McAfee was not employed after receipt of Dr. Egelhof's report. In due course on May 14, 1980 McAfee was advised by letter from the Office of Personnel Management that:

"Your application for retirement under the disability provisions of the Civil Service Retirement Law has not been approved because total disability for useful efficient service in the above position is not shown.

A careful review and evaluation by the Office of Personnel Management's Medical Staff of all evidence submitted in your case failed to establish that you have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position from which you are seeking retirement. Since the retirement law does not authorize benefits based on partial disability, your application cannot be approved at this time."

The letter further advised McAfee that he had a right to request re-consideration of its decision if he chose to do so and stated the procedure for doing so.

On July 10, 1980 McAfee formally sought re-consideration and his application was again supported by the Postmaster.

On October 31, 1980 McAfee was advised by letter from the Office of Personnel Management that:

"The record showed that your disability retirement application was signed on January 28, 1980. The objective medical evidence submitted in your case failed to establish that you were totally disabled within the meaning and intent of the Civil Service Retirement Regulations and thereupon the claim was disallowed. On May 14, 1980 you were sent notification that your claim was denied. You requested re-consideration of this action by letter dated July 10, 1980 which was accepted to initiate a review of your claim. The requirements of the last position occupied, that of City Carrier are noted. We have evaluated all of the information that was presented. ...

An analysis of all of the facts, the total medical evidence in the file, leads us to the conclusion that additional medical examinations are not indicated and allowance of your claim is not warranted."

The letter advised McAfee that he had a right to appeal the decision if he wished to do so and the procedure for doing so.

On December 4, 1980 Bill Jones, Director of Employee and Labor Relations, wrote to McAfee:

"The recent correspondence you provided me from the Office Of Personnel Management, regarding reconsideration of your request for disability retirement, provided you with appeal rights.

Please advise if you intend to appeal the decision or if you intend to request re-assignment to the roll of United States Postal Service at Great Bend, Kansas."

McAfee's response was to file an appeal which was heard by the Merit Systems Protection Board on February 5, 1981. McAfee and a representative of the Union appearing in his behalf attended the hearing. McAfee testified to his total disability at that time and said that he was unable to perform any work assigned without pain. McAfee testified that he wished to return to work but was unable to do so because he could not get his own personal physician to certify that he was fit for duty because of the nature of his work as a City Carrier. The hearing officer advised McAfee that if he felt he could work with certain assistances such as a two wheeled cart to take his mail to his car and a four wheeled cart to distribute his mail on the route that he should make a request of his employer to permit him to carry the mail in that fashion and that if the Post Office unreasonably refused that request he could question that refusal. This colloquy took place with the Union representative present.

On February 20, 1981 the Merit System Protection Board denied the appeal stating:

"As appellant admitted a good portion of his duties required him to drive a vehicle. Nothing indicates that his ability to drive has been affected by his medical condition. Further more, appellant also conceded that he could perform the duties of his position using a four wheel cart. The appellant's representative argued that the agency did not particularly want the appellant to use the cart during the winter periods. This assertion by the appellant's representative, however, does not constitute evidence that the appellant did not efficiently perform the duty of his position by utilization of such a cart. Accordingly, in view of all the evidence of record, I cannot

conclude that the decision of the Office Of Personnel Management denying appellant's application for disability retirement was improper."

Upon receipt of this decision McAfee telephoned Postmaster Krug to ask that he be returned to work. Postmaster Krug responded that McAfee should put his request in writing. McAfee complied with the request by a letter dated March 2, 1981. Upon receipt of the request Krug telephoned McAfee and told him he could report for duty immediately.

In its brief the Union contended that McAfee was forced by then Postmaster Lancaster at Great Bend to file for retirement. In his testimony McAfee stated that the Postmaster gave him three options following the receipt of the examining physician's report that McAfee was unfit for duty on January 25, 1980, namely that he could contest the finding by a letter stating that he was fit for duty from his own physician, or that he could accept the finding and resign or that he could file an application for disability retirement. Since McAfee was of the opinion that his personal physician had the same view of his case as the examining physician and he felt further employment would be injurious to his health he voluntarily chose to file an Application For Retirement.

McAfee was no child at the time, he was 33 years old, he had been with the Post Office for thirteen years, and he knew that he had the Union representation if he desired it. The Union simply failed to prove its contention that either McAfee was conned into filing the disability retirement application or forced by the Postmaster to file it. The evidence reveals that McAfee knew he had the above

options, that he considered them and that he determined in his own best interest to file the Application For Disability Retirement.

McAfee next contended that immediately after he received his first notice that his Application For Disability Retirement had been rejected on or about May 14, 1980, that he requested Officer in Charge Eleanor Forbes of the Great Bend Post Office to return to work and made the same request at the same time to Supervisor of Employment Service Jodine Elwick in Wichita. Forbes denied any such request to return to work at that time or at any time by McAfee. Elwick also denied any such conversation with McAfee at that time.

I credit these denials in view of the fact that on June 10, 1980 McAfee filed an appeal of the denial of his application still contending he was totally disabled from working as a City Carrier. It is difficult to believe that he would at one and the same time assert to the Officer In Charge that he was able to work and at the same time continue to contend that he was totally disabled from such work. Such a tactic would have seriously undermined his appeal. I therefore find that McAfee did not make any request to return to work at this time.

McAfee next testified that some time in October of 1980 he requested of Postmaster Donna Krug that he return to work and also made the same request of Supervisor Elwick in Wichita. Both denied any such conversation with McAfee at that time. Again, since at this very time McAfee was vigorously contesting the denial of his Application For Disability Retirement, and forcefully asserting his total inability to perform any job within his classification as a City



Carrrier, it is doubtful that McAfee would have had eroded his position by an assertion contrary to it. In any event, since both management's position and his own position were in agreement that he was physically unfit for duty there would have been no basis for the Post Office to have restored him to duty at that time since its own records showed him to be unfit for duty.

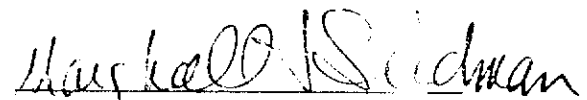
McAfee next contended that he sought to return to work by request of Postmaster Krug and Supervisor Elwick on or about December 4, 1980 following the denial of his request for reconsideration of the denial of his application for disability retirement. Postmaster Krug testified that about that time she received a telephone call from McAfee advising that his application for reconsideration had been denied and requesting advice as to what he should do. Krug told McAfee that she was not familiar with the subject matter and advised him to get in touch with Supervisor Elwick in Wichita who was an expert in the area which McAfee said he would do.

Supervisor Elwick testified that she received such a call from McAfee about that time and advised McAfee that he could either further appeal the matter, or if he were willing to give up his right to appeal, he could seek to return to work by submitting a letter seeking employment to the Postmaster at Great Bend. Elwick memorialized this conversation and this advice by writing a letter addressed to McAfee on December 4 setting forth these options. Both Krug and Elwick were emphatic in their testimony that at no time in his conversation with them about this time did McAfee state that he wished to return to his job.

It is clear both that thereafter McAfee did further appeal and that he did not write a letter to the Postmaster seeking to return to work. Therefore, I credit the testimony of the Service's witness that McAfee made NO oral request to return to work at this time.

It was only after receiving the determination of the Merit System Protection Board sustaining the action of the Office of Personnel Management denying McAfee's Application For Disability Retirement on February 20, 1981 that McAfee for the first time decided to give up any further appeal rights he had and made an oral request of Postmaster Krug that he return to work. When Postmaster Krug received this oral request she advised McAfee to put it in writing which McAfee did on March 2, 1981. Admittedly this was the first time McAfee made such a request in writing. Immediately upon receipt of the request dated March 2, 1981 Postmaster Krug put McAfee back to work.

Under the above facts and circumstances, and for the above reasons, I find that the Postmaster did not coerce McAfee into seeking a disability retirement and that from the time McAfee voluntarily submitted his Application For Disability Retirement on January 28, 1980 until the time that he requested reinstatement to his job in writing on March 2, 1981 that McAfee diligently pursued his effort to obtain a disability retirement and did not offer himself for work for that reason. Accordingly, McAfee's grievance must be, and accordingly is, dismissed.



Marshall J. Seidman,  
Arbitrator

Dated on August 5, 1982 at Indianapolis, Indiana.