

ARBITRABILITY

CARRYING A CONCEALED WEAPON, FELONIOUS ASSAULT AND
POSSESSION OF A FIREARM WHILE COMMITTING A FELONY.

ARBITRABLE

RA-6717D-75
Joseph Singles
Pontiac, MI
NCC 13,547D

ARTICLE XV, SECTION 2

ARTICLE XVI-JUST CAUSE

ARTICLE XVI, SECTION 4

IN ARBITRATION

EMERGENCY SUSPENSION
 REMOVAL

TEMPORARILY SUSTAINED

UNITED STATES POSTAL SERVICE,

) Case No. 5 DET 3323b/NCC-13547-D;

and

) Grievance No. 78-11;

NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO,
JOSEPH SINGLES, Grievant.

) Arbitrator's File 78-32-288;

)

) Date of Hearing:
November 20, 1978,
Pontiac, Michigan.

C#01427
A+B

O P I N I O N

Issues

1. Was the emergency suspension received by Grievant for just cause?
2. Is Grievant's termination arbitrable?
3. If Grievant's termination is arbitrable, was Grievant terminated for just cause?

Facts

Grievant and his sister had an estate problem which required them to hire an attorney. They had had several attorneys, the last one of whom they had paid \$3,500 for legal services in connection with the estate. In Grievant's opinion, the attorney had given little or no satisfaction for the fee.

The attorney claimed a balance due him of some \$700, and because Grievant and his sister felt that they were improperly represented, they had refused to pay the balance which the attorney claimed was due.

As a result of their refusal to pay the remaining portion of the attorney's fee, the attorney sued them for the money. Grievant

and his sister hired another attorney to defend them on the \$700 claim and to counterclaim for them to recapture at least some of the \$3,500 previously paid. The case was set for hearing in District Court in Michigan on February 23, 1978.

After Grievant and his sister waited for quite some time in Court on that day, it became clear that neither Grievant's attorney, nor the attorney for his former attorney, was going to show up. The judge thereupon dismissed both the claim and the counterclaim.

Grievant was enraged by the court's action. He drew a small-caliber automatic pistol which he had been carrying, and rushed at his former attorney. He was eventually subdued by his sister, the judge, and the police in the court room.

Grievant was charged with carrying a concealed weapon, felonious assault, and possession of a firearm while committing a felony. Under Michigan law, all of these charges are felony charges for which a sentence of imprisonment could result.

The incident was reported in the local newspaper in great detail, although no mention was made of Grievant's employment by the Postal Service. As a result, on February 25, 1978, when Grievant reported for work, he was informed that he was suspended indefinitely because of the court room incident. Grievant filed a grievance protesting his emergency suspension on March 10, 1978.

On March 17, 1978, Grievant received a notice of termina-

tion which was to become effective April 21, 1978.

On June 9, 1978, Grievant and his Union sent a notice to the Postal Service appealing to arbitration the emergency suspension and Grievant's removal.

Some time prior to the date of the hearing held herein, the Postal Service notified Grievant and his Union that the only issue it considered to be arbitrable was the emergency suspension because it considered the appeal of Grievant's discharge to be untimely. However, at the arbitration hearing, one Union official indicated that Grievant's discharge was discussed and protested during the grievance step procedures.

The letter appointing the arbitrator herein, dated September 22, 1978, stated that the appointment "does not constitute a waiver by either party of any issue of arbitrability or timeliness as related to appeal and certification requirements of Article XIV of the Agreement".

At the time of Grievant's emergency suspension, he had been an employee of the Postal Service for 22 years and nine months. He had received several commendations for proficiency in various phases of postal service work. He had received one suspension for taking a leave of absence without permission, which leave was apparently with regard to the legal matter which eventually gave rise to his emergency suspension and later to his discharge. He had also been reprimanded on one occasion.

Fellow employees had testified to Grievant's excellence as a letter carrier. Grievant's parish priest also testified as to Grievant's exemplary conduct as a family man and church member.

Discussion and Opinion

Although a procedural issue was raised in connection with the grievance concerning Grievant's ultimate discharge, there is no procedural issue regarding Grievant's filing of a protest of his indefinite suspension. That issue will be dealt with first, since it occurred first in point of time.

The indefinite emergency suspension provisions of the National Agreement are probably unique in labor contracts. As a result, many of the cases cited by Grievant in his lengthy and well-written brief are not appropriate. Most of the cases deal with the ultimate issue of discharge, and that is probably because there are almost no other labor agreements which provide for emergency suspension.

Therefore, the cases which have been cited do not illuminate this issue. Generally, however, it has been held by arbitrators that under the emergency suspension power given to the Postal Service, the Postal Service has a right to suspend an employee indefinitely and immediately without advance notice if it finds that the employee was charged with a crime for which the Postal Service would have reasonable cause to believe he was guilty and which could result in a sentence of imprisonment. Every one of those

criteria are present in this case.

The only point on which this arbitration differs is as to what constitutes "reasonable cause to believe". Some arbitrators hold that the mere filing of charges is sufficient. Others, including myself, believe that the Postal Service must possess at least a minimum of evidence showing the guilt of the employee charged. To require less of the Postal Service is to place entirely too much reliance on the prosecuting authorities.

But in either event, because of their serious nature, the charges placed against Grievant are obviously of a type that could result in his imprisonment. Since they occurred in a court room in public view, with witnesses, the Postal Service could reasonably believe that he was guilty. Under those circumstances, the Postal Service does not need to wait for his conviction to suspend him. All of the criteria have been met for his emergency suspension, and the Postal Service acted within its rights in taking the action which it did with regard to the emergency suspension.

The next issue to be resolved is Grievant's termination. The Postal Service has raised a procedural point charging that Grievant never filed a grievance concerning his termination until the Step 2-B appeal to arbitration. That, of course, occurred several months after Grievant's letter of termination of March 17, and would be past the time for appeal under the Collective Bargaining Agreement and hence procedurally defective.

Grievant argues that, in actuality, as soon as the termination was filed and in conjunction with his appeal of his emergency suspension, the parties discussed the two actions of the Postal Service against him as a group. Grievant further argues that for him to have grieved the emergency suspension and not his termination would be an exercise in futility, because, had he prevailed on the indefinite suspension and lost on his termination, he would still be without a job, and hence would have gained a meaningless victory.

He urges that, because of the circumstances of the two matters and the fact that they were discussed jointly, the Postal Service should be estopped at this point from having his grievance denied on procedural grounds.

The Postal Service contends that, when the emergency suspension, and later termination, clauses are invoked by the Postal service, procedure by the employee must be two-fold. First, a grievance of the suspension must be filed, and then a grievance of the dismissal must likewise be filed. The Postal Service is correct in this regard, and I have so held. S. SPRING, S COL 1574b/MC-C-2391-B. However, this argument assumes that there is no grievance as to the dismissal. The essence of Grievant's case here is that he did grieve his dismissal, though not in the formal terms required by the Collective Bargaining Agreement; that it was accepted by the Postal Service and he acted accordingly.

I find from a review of the record that Grievant is correct. There is evidence that the parties did discuss Grievant's discharge along with his emergency suspension. While the record is not as complete as could be desired due to the fact that Grievant himself never testified because of the pending criminal charges, it still contains enough evidence to indicate that a protest of his discharge occurred simultaneously with the protest of his emergency suspension. I therefore feel that appeal of Grievant's discharge is procedurally proper.

In urging that his discharge was not for just cause, Grievant makes several points. The first is that the conduct complained of by the Postal Service took place on Grievant's own time, off work premises, and hence does not affect his employment. This is general arbitration law, and Grievant cites several cases on this point, including some Postal Service cases. But, as has been previously noted, the Postal Service Collective Bargaining Agreement is probably unique in some facets. One of the differences embodied in the Postal Service Agreement and work rules is that employees are required specifically to obey the law, both state and federal. Most Collective Bargaining Agreements in private industry assume this to be the case, and do not specifically require it as a condition of employment. In the Postal Service, however, compliance with the law is an actual condition of employment. Therefore, the Postal Service can take greater cognizance of

their employees' actions outside of work hours than is generally the case.

Another point made by Grievant is that, even if an employee's actions outside his job can be considered, such actions must have some impact on the employee's relations with the public, his work efficiency, or constitute a threat to Postal Service operations, property, or personnel.

Grievant's conduct leading to his discharge could be considered by fellow employees as a potential threat to their safety. Grievant attempted to attack someone with a weapon who had obviously enraged him. Because Grievant had carried the weapon to the scene, it had to be a premeditated action. Other employees could wonder whether, under similar circumstances, Grievant posed a threat to them should they happen to displease him. Therefore, on that ground, the charges against Grievant could have an adverse effect on other personnel. It is fair to note, however, that at least one of his fellow employees testified that he felt no threat from Grievant even though he knew of Grievant's action.

Grievant cited several arbitration decisions in which attacks on others by an employee were held not to be grounds for discharge from the Postal Service. One involved an attack on a spouse with a gin bottle, and another involved an attack on fellow employees with paint and oil. Those cases may be distinguished

from this case in that they involved using objects close at hand and, to a certain extent, would not have been premeditated. Further, the objects used in the attacks - in one case, a gin bottle, and in the other, paint and oil - are not generally considered lethal weapons, as is a handgun. Therefore, a distinction could be made based on the seriousness of the attack.

Several other points should be mentioned because they bear on the ultimate decision. At the time of his discharge, Grievant had been with the Postal Service for 22-3/4 years. During that period of time, he had received only one reprimand involving a minor matter, and one suspension (involving absence). In the same period of time, he had received at least two commendations. It is quite obvious from this that Grievant had a long and honorable period of employment with the Postal Service. Some benefits should accrue as a result of such dedicated service. One of those benefits should be a reluctance to take quick action of an adverse nature. He is entitled to consideration.

Another facet in this case - also pertaining to Grievant's long service - is that, at the time of his discharge, the charges against him had been pending for only about two weeks. There was no indication anywhere in the record - as there could not have been - as to the eventual outcome of these charges. Grievant stood accused, but at the time of the hearing had not been convicted, and, as a matter of fact, did not testify because of the

pendency of the charges.

While the Postal Service is not precluded from discharging an employee while charges are pending, discharge before determination of the charges seems premature where the charges do not directly relate to Postal employees, business or property. All of which leads me to conclude that, under the circumstances, the action taken by the Postal Service was overly hasty.. Grievant was discharged on March 17, 1978, for an incident that occurred on February 23, 1978 - barely a three-week span of time. In my view, that is unnecessarily rapid for such serious action as discharge. The Postal Service would not have been hurt in any way if it had left Grievant on emergency indefinite suspension until either the charges had been determined or until sufficient court action had occurred to indicate with more certainty to the Postal Service just what the eventual outcome of the charges would be. A employee of Grievant's tenure and record is entitled to that consideration.

I therefore rule that the grievance as to Grievant's discharge is temporarily sustained.

Let me clarify that ruling: The emergency indefinite suspension is still in effect. The discharge is set aside so that the Postal Service may take into account the factors mentioned above, including the eventual outcome of the criminal charges and also Grievant's long and faithful service. I realize

that, ordinarily, arbitrators rule that a discharge is either right or wrong. The effect of the ruling here is to decide neither at this point, but to leave the matter open to permit the Postal Service to make a decision based on subsequent events and on Grievant's past record, as to whether Grievant should be discharged. Grievant will still retain his right to protest at that time should he feel the decision to be adverse.

In summary: The grievance as to the indefinite emergency suspension is denied. The grievance as to the discharge is temporarily sustained in order to allow the Postal Service to reconsider its decision. In view of the nature of this ruling, the Arbitrator will retain jurisdiction should further proceedings in the matter be deemed necessary.

The costs are assessed equally.

Dated this 30th day of March, 1979.



GERALD COHEN
Arbitrator
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