

C# 16161

A+B

REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

) **GRIEVANT:** Brenda Dantzler
(
) **POST OFFICE:** Cleveland, Ohio
(
) **USPS CASE NO:** C94N-4C-D 96035565
96025472
96035565/25472/25569/35570
) **NALC CASE NO:**
(
)

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service: Julianne Bindernagel

For the Union: Dennis A. Perk

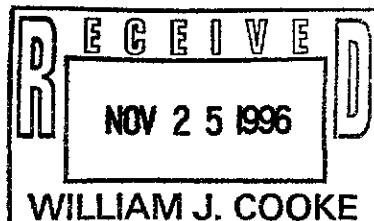
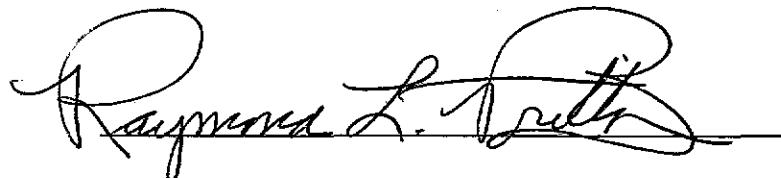
Place of Hearing: U.S. Post Office

Date of Hearing: July 26, 1996

AWARD:

For the reasons given, the Fourteen Day Suspension dated April 13, 1995, listed in the Letter of Charges (Joint Exhibit No. 2) which has not yet been heard in arbitration cannot be considered in the determination of the merits of Grievance Nos. C94N-4C-D 96035565, C94N-4C-D 960225472, C94N-4C-D 96025569 and C94N-4C-D 96035570 at this time.

Date of Award: November 13, 1996



ISSUE

Whether the matter before the Arbitrator at this time is procedurally defective?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the hearing, the Union took the position that the matter before the Arbitrator was procedurally defective at this time as the letter of charges (Joint Exhibit No. 2) listed a Fourteen Day Suspension dated April 13, 1995, that could not be used or cited as discipline as it had not as yet been heard in arbitration. Management disagreed with this position of the Union and it was viewed by the Employer as raising a new issue. As a result, management refused to go forward with the merits of the case and requested bifurcation. The Arbitrator granted the request of the Employer and the hearing of the four grievances was postponed until determination of the procedural issue by the Arbitrator.

It was agreed that the United States Postal Service (hereinafter referred to as "Employer") would submit a Brief to the Arbitrator by placing such Brief in the mails not later than August 10, 1996 and that the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") would submit a Reply Brief to the Arbitrator by placing such Brief in the mails not later than August 31, 1996. The Brief submitted by the Employer was received by the Arbitrator on August 12, 1996. On September 3, 1996, the Arbitrator was notified that the parties had agreed to an extension of the filing date of the Union Brief to September 14, 1996. The Reply Brief submitted by the Union was received by the Arbitrator on September 19, 1996.

SUMMARY STATEMENT OF THE CASE

Brenda Dantzler, (hereinafter sometimes referred to as "Grievant"), is a Full Time Letter Carrier at the Post Office in Cleveland, Ohio. The Grievant filed Grievance Nos. C94N-4C-D 96035565, C94N-4C-D 96025472, C94N-4C-D 96025569 and C94N-4C-D 96035570, and the four grievances were scheduled to be heard on July 26, 1996, at the postal facility located at 2200 Orange Avenue, Room 107, in Cleveland, Ohio. The first case that came on to be heard on that date, as listed on the Arbitration Scheduling Letter, was Case No. C94N-4C-D 96035565 which was a Notice of Removal dated October 30, 1995 for Failure To Maintain A Regular Work Schedule. The Notice of Removal cited a Letter of Warning in lieu of a 7 Day Suspension that was issued on February 7, 1995, for Failure to Maintain a Regular Work Schedule and a 14 day Suspension issued on April 13, 1995, for failure to Maintain a Regular Work Schedule. The Notice of Removal also cited two other elements of past record that were deleted from the removal at the request of the Union two days prior to the arbitration hearing.

On November 2, 1995, the Grievant was issued an Emergency Placement in Off-Duty Status, and a grievance was filed and processed through the grievance procedure. On November 27, 1995, the Grievant was issued a Notice of Removal for Conduct Unbecoming a Postal Employee, Provoking a Physical Altercation, and Failure to Follow Instructions. The Notice of Removal issued November 27, 1995, cited the following elements of past record: Notice of Removal - Failure to Maintain Regular Work Schedule issued 10/30/95; Letter of Warning - Unauthorized Curtailment of Mail, Delay of Mail issued 05/11/95; 14 Day Suspension - Failure to Maintain Regular Work Schedule issued 04/13/95; Letter of Warning in Lieu of 07 Days Suspension - Failure to Maintain Regular Work Schedule issued 02-21-95.

Provisions of the National Agreement effective August 19, 1995, to remain in full force and effect to and including 12 midnight November 20, 1998, (hereinafter referred to as "National Agreement") (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Grievance Procedure—Steps

* * *

Step 2:

* * *

(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. The parties' representatives shall cooperate fully in the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

* * *

(g) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. Any such statement must be included in the file as part of the grievance record in the case. The filing of such corrections or additions shall not affect the time limits for appeal to Step 3.

* * *

Step 3:

* * *

(b) The grievant shall be represented at the Employer's Regional Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any

case where the parties representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. In such event, the parties' representatives at Step 2 shall meet within seven (7) days after the grievance is returned to Step 2. Thereafter, the time limits and procedures applicable to Step 2 grievances shall apply.

(c) The Employer's written Step 3 decision on the grievance shall be provided to the Union's step 3 representative within fifteen (15) days after the parties have met in Step 3, unless the parties agree to extend the fifteen (15) day period. Such decision shall state the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2. Such decision also shall state whether the Employer's step 3 representative believes that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

* * *

Section 4. Arbitration

A. General Provisions

* * *

3. All grievances appealed to arbitration will be placed on the appropriate pending arbitration list in the order in which appealed. The Employer, in consultation with the particular Unions involved, will be responsible for maintaining appropriate dockets of grievances, as appealed, and for administrative functions necessary to assure efficient scheduling and hearing of cases by arbitrators at all levels.

* * *

ARTICLE 16 ***DISCIPLINE PROCEDURE***

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

* * *

Section 10. Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

POSITION OF THE PARTIES

The Position of the Union

It is the position of the Union that the removal notices are procedurally defective because the Fourteen Day Suspension, issued April 13, 1995, for Failure to Maintain a Regular Work Schedule, was cited and considered in this action. The Union contends that this Fourteen Day Suspension had been grieved and was pending arbitration and therefore had no standing in this proceeding. The Union further contends that management has violated Article 16, Section 1 as the citation and consideration by management of the April 1995, Fourteen Day Suspension, denied the Grievant her right to due process, thereby violating the principles of just cause.

The Position of the Employer

The Employer takes the position that there is nothing in the language of Article 16, Section 10, Employee Discipline Records, of the National Agreement to suggest that disciplinary action that has been grieved and appealed to arbitration, should not be considered in a subsequent disciplinary action. The Employer contends that Article 16, Section 10 only speaks to "initiated" discipline and that the elements of past record cited on both Notices of Removal, had been initiated and the discipline issued on February 21, 1995 and April 13, 1995, was "live" discipline when the October 30, 1995, Notice of Removal was issued. The Employer further contends that the October 30, 1995, Notice of Removal had been initiated prior to the issuance of the November 27, 1995, Notice of Removal and was properly cited.

OPINION

Basically for determination by the Arbitrator in the resolution of this matter is whether the citation and consideration by management of a Fourteen Day Suspension that had been grieved and was pending arbitration was proper.

In support of its position that disciplinary action that has been grieved and appealed to arbitration may properly be considered in a subsequent disciplinary action, the Employer relies upon the provisions of Article 16, Section 10, Employee Discipline Records, of the National Agreement. In this respect, the Employer specifically references the language therein which states that "The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years." As construed by the Employer, the operative word in this language is "initiated," and nothing is contained therein which even remotely suggests that disciplinary action that has been grieved and appealed to arbitration should not be considered in a subsequent disciplinary action.

While Article 16, Section 10 of the National Agreement, as noted by the Employer, contains nothing that prohibits management from taking into consideration disciplinary action that has been grieved and appealed to arbitration in a subsequent disciplinary action, this silence, notwithstanding the contention of the Employer to the contrary, does not necessarily clothe management with the right to do so. For, as read by the Arbitrator, Article 16, Section 10 has as its primary purpose employee protection through prohibiting the consideration by management of the records of a disciplinary action against an employee in any subsequent disciplinary action "... if there has been no disciplinary action initiated against the employee for a period of two years." The intent of this language, as viewed by the Arbitrator, is to remove the disciplinary record of an employee from consideration when no disciplinary action has been initiated against the employee within the prescribed time period. Neither expressly nor by implication is any license granted to the Employer to consider disciplinary action that has been grieved and is now pending arbitration. Thus, in using the Grievant's prior disciplinary action in arriving at its decisions to deny this grievance at Steps 2 and 3 of the grievance procedure and to substantiate its argument of progressive

discipline, even though this discipline has yet to reach final arbitrament, management, in the instant case, has denied the Grievant her procedural right of due process. As a result of this procedural denial of the Grievant's fundamental right of due process, the use by management of the April 13, 1995, Fourteen Day Suspension of the Grievant cannot properly serve in this action to support management's decision to remove the Grievant. While, as urged by the Employer, the discipline issued on February 21, 1995 and April 13, 1995, may have been "live" discipline when the October 30, 1995 Notice of Removal was issued, this does not alter the finding that management, in this instance, has failed to adhere to the basic principles of procedural due process.

Supportive of the foregoing construction of Article 16, Section 10 that discipline pending in the grievance procedure cannot be cited or considered in subsequent discipline is Case No. MC-S-0874-D involving the United States Postal Service and the National Post Office Mail Handlers, Watchmen, Messengers & Group Leaders. In the referenced case, as in the instant case, the arbitrator was asked to consider whether the citation by management in the Letter of Charges of a disciplinary action against the Grievant that was pending arbitration and that was used in its decision to discharge the grievant rendered the proceedings procedurally defective. In response thereto, the arbitrator in the cited case stated in relevant part as follows:

The Union is correct when it contends that the Postal Service improperly relied on a disciplinary action that was scheduled to be heard in arbitration. Until that appeal is finally adjudicated, it has no standing in this proceeding.

This language, it seems to the Arbitrator, is clear and unequivocal. Although the Union maintains that the cited case is a national award and therefore should be accorded the weight that a national level arbitration decision deserves and the Employer maintains that the cited award is a regional award and should be given no consideration as it was presented under misleading and false pretenses, it is deemed by the Arbitrator to be unnecessary that he determine whether the cited award has its genesis at the national or regional level. For, in either case, the language cited above in the referenced case comports with the Arbitrator's interpretation of the language here in question and should, in the absence of any countervailing evidence, be accorded controlling weight in the matter at hand. No other substantive evidence has been produced by the Employer that would justify a finding that the referenced case was presented by the Union under misleading and false pretenses.

It is further urged by the Employer that the Fourteen Day Suspension issued to the Grievant has been appealed to arbitration and is on an expedited arbitration list. Inasmuch as there are a greater number of expedited arbitration cases waiting to be heard, and the parties have agreed to schedule removal and suspensions of 14 days or more as expeditiously as possible, the removal cases are said by the Employer to have been scheduled first. The Employer maintains that at no point in time did the Union approach management and request that the grievance challenging the Fourteen Day Suspension be rescheduled or request that the arbitration of the removal grievances be postponed until after arbitrament of the Fourteen Day Suspension. Had the Union done so, according to the Employer, it would have been scheduled and heard. In this connection, the Employer cites the language in Article 15, Section 4.B.4 which states that: "Cases referred to arbitration, which involve removals or suspensions for more than 14 days, shall be scheduled for hearing at the Regional Level at the earliest possible date in the order in which appealed by the particular Union involved." The removal grievances were expeditiously scheduled, according to the Employer, and no violation of the terms of the National Agreement as stated in Article 15 or 16 occurred with respect to the elements of past record cited in the Notices of Charges.

It is indicated by the evidence submitted that the Employer has control over the scheduling of almost all the cases appealed to arbitration whether they are being sent to the Regular or to the Expedited Panel. However, while management may unilaterally control the scheduling of cases, it is necessary that in so doing each grievant not be denied his or her fundamental right to due process.

Finally, the Employer challenges the advancing by the Union of new arguments the day before and the day of arbitration. In this connection, the Employer references the language of Article 15, Section 2., Step 2: (d) and (g) as well as Article 15.2, Section 2. Step 3: (b) and (c) of the National Agreement. It is urged by the Employer that a careful review of the moving papers fails to reveal that any argument was ever presented regarding the fact that the Fourteen Day Suspension was grieved, the grievance denied, and an appeal taken to arbitration that was pending. Arbitrators, the Employer maintains, have consistently ruled that the parties are barred from introducing new evidence and new arguments not presented at earlier steps of the grievance procedure. Consequently, the Employer contends that the Union should be barred from raising the argument for the first time at arbitration that the removal notices issued to the Grievant are procedurally defective as this argument was never raised at previous steps of the grievance procedure.

Two arbitration awards are submitted by the Employer, i.e., Cases No. NC-E-11359 and E0T-2N-C-10635 in support of its position that new evidence and new arguments not presented at earlier steps of the grievance procedure are barred from introduction. While the Arbitrator is in general agreement with the statement of the arbitrator in Case No. NC-E-11359 that "It is now well settled that parties to an arbitration . . . are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure and that this principle must be strictly observed," this cannot properly be viewed as advancing the position of the Employer in the instant matter. Nor can the Employer's reliance on Case No. E0T-2N-C-10635 serve this purpose. In the latter case, the grievant was issued a Letter of Demand for overpayment and the Union did not raise its argument that the Letter of Demand was procedurally defective until the hearing. The arbitrator rightfully relied upon the above quoted language in Case No. NC-E-11359 and held that the Union's contention that the Letter of Demand was procedurally defective was not raised in a timely fashion. While in the instant case, the evidence sought to be introduced was likewise offered for first time at the hearing, the evidence sought to be introduced, unlike in the two cases cited by the Employer, involved the principle of due process which is jurisdictional and therefore may be raised at any time during the grievance and arbitration procedure.