REGULAR ARBITRATION PANEL

C #10282

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: Fannie Kennedy-James POST OFFICE: Chicago, IL CASE NO: C7N-4D-D 23111 Arbitration File 90-34

BEFORE: William Belshaw ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: James C. Ford

For the Union: Warren E. Fredrich

Place of Hearing: Post Office, 433 W. Van Buren St.
Room 311
Chicago, IL

Date of Hearing: September 6, 1990

AWARD: A consideration of the grievance on the merits is not precluded by any procedural disability. The removal of the grievant was not for just cause. The employer is directed to reinstate the grievant forthwith, upon proper application, and if reinstatement occurs, to place the grievant in a duty position concomitant with her physical capabilities and to compensate her according to the provisions herein.

Date of Award: September 20, 1990

William Belshaw
Attorney-Arbitrator

PUBLICATION PERMISSION:
DENIED

D I R E C T D E S I G N A T I O N

BEFORE
WILLIAM BELSHAW,
ATTORNEY-ARBITRATOR

UNITED STATES POSTAL SERVICE	)
	) Case No. C7N-4D-D 23111
and	) Arbitration File 90-34
	) Grievant: Fannie Kennedy-James
NATIONAL ASSOCIATION OF LETTER CARRIERS	)

AWARD

With reference to her most recent Postal Service employment, Fannie Kennedy-James was, until September 27, 1989, a City Letter Carrier assigned to the Morgan Park station, one of some 50 stations and branches that constitute a part of the Chicago Post Office. She was discharged for her inability to perform her assigned duties as a city carrier.

The hearing, concluded with final remarks, occurred at the main post office on September 6, 1990. It involved both a questionable procedural arbitrability issue and an important merit one.

APPEARANCES

The respective spokespersons were Messrs. James C. Ford, Labor Relations Representative-Field, and Warren E. Fredrich, Regional Administrative Assistant. Mr. Ford was from Chicago; Mr. Fredrich was from East Moline.

FACTS

The grievant had two Postal Service employment periods. She worked from October, 1967, until May, 1975, obviously a period of more than seven years; she then resigned. She was re-employed by the Service on February 16, 1985, and continued until her removal.

On August 19, 1985, Mrs. Kennedy-James, while employed as a carrier, sustained a back injury while on the job. She was subsequently treated, of course, principally by her personal physician, a John M. Palmer, M.D., who is apparently still her doctor. She also sought and received

compensation from the United States Department of Labor, Employment Standards Administration, Office of Workers' Compensation.

On March 10, 1987, the Labor Department disallowed her claim for continuing compensation benefits. The determination was based upon medical certifications--principally from the department's authorities--that her disability, although aggravated by the August, 1985, injury, could not be causally related solely thereto. As of April 21, 1989, however, Dr. John D. Givens, the Medical Officer at the main post office, certified that her degenerative lumbar spine disabilities, although they would prohibit her carrying mail, would not preclude her ability to perform light duty.

The evidence totality suggested that there were light duty positions available at Chicago in a work area described as Lock Box 80, although the Service obviously opted to remove the grievant, rather than to assign her clerk-type functions at that location. Its gut position--disregarding for the moment a procedural arbitrability contention, based upon a grievance-filing delay--was that Mrs. Kennedy-James did not have the requisite 5-year status entitling her to light duty consideration, the reference, of

course, being to the applicable contract's Article 13, Section 2, Subsection B, Sub-subsection 1.

There were, of course, many additional facts, including a number that related to the arbitrability aspect, but all of these were seen and were appropriately noted--if relevant--below.

ISSUES

With some hesitancy due to an interplay between the contractual requirements and the applications of the new "Let's Work Together Agreement", the parties nevertheless agreed upon the following issues, to be reached sequentially:

> "Is a consideration of the grievance on its merits precluded by any procedural disability?"
>
> "If not, was the removal of the grievant for just cause?"

DOCUMENTARY REFERENCES AND POSITIONS OF THE PARTIES

The relevant documentations for both parties, really, were Articles 13, 15 and 19 of the current collective bargaining contract. Article 13 was the portion dealing with the assignment

of injured employees, Article 15 was the grievance procedure section, and 19, of course, was the handbook-and-manual incorporation portion.

On the procedural issue, with the burden on the employer, and the primary concern being Article 15, the Service's position was that the grievant's "Let's Work Together Agreement" procedures ended sometime in the neighborhood of November 17, 1989. With the Step 1 meeting having come on December 28, 1989, the employer said that the 14-day period had expired, claiming contemporaneously that it had advised Robert L. McGhee, the union steward, of this contention.[1] Obviously, it wanted the benefits of 15(2).

The merit position of the employer was simple. All it contended was that the grievant did not have the "minimum of five years of postal service" required for permanent assignment to a light duty position, as per Article 13(2)(B)(1).

For the union, on the procedural aspect, the position seemed to be that the *new* LWTA system was not yet working on a strict timetable basis, coupled with the fact that notification of the LWTA third level meeting outcome did not reach the

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[1]The LWTA proceedings for the grievant were handled by a Claudette M. Willian(sic).

involved steward, Robert L. McGhee,until some five to eight days before the Step 1 was filed.

Merit-wise, with the grievant's service totality in excess of eleven years--counting both of her terms--it found no reason for the light duty denial. In this regard it cited documentation from both the personal and employer physicians supporting the grievant's qualification for light duty. It also said--and was not contested, really--that light duty clerk positions remained available.

The situation is posed.

OPINION

The Procedural Issue

With the Notice of Removal having come on or about August 27, 1989, the time-for-filing-grievance clock, under normal circumstances, would have commenced (*with* the 30-day caveat contained in the notice). There were here, however, exceptional circumstances, and they, for decisional purposes, justified a determination that a procedural judgment favoring the employer would be basically inappropriate.

The new and very-commendable "Let's Work Together Agreement" was effective March 20, 1989. From that date forward,

certainly, there were undoubtedly efforts by both parties to achieve a mutually-desirable result.

With the employer posture based solely on the apparent dates, plus only the notification to McGhee at Step 1 that the grievance was untimely, the union evidence was much stronger. *Without testimonial contradiction*, McGhee, the involved steward, testified that "There was supposed to be some time factor, but it does not work that way" (M5c), "we may not hear for months" (M5c), "when I get it, we set up the Step 1" (M5c) and "the time starts when management and the steward learn of the LWTA outcome" (M6c).[2] There was *no* effective managerial reply to these testimonies.

In addition to the likelihood that the new procedure *was* tentative, as most such efforts are, there was, above all, the basic arbitral preference for merit decisions where collective bargaining parties' relationships would be enhanced by merit considerations. The principle is particularly applicable here in light of both the facts and the *strong* contractual provisions providing light duty benefits for ill or injured regular workforce employees.[3]

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[2]The initials and numbers reflect testifiers' last names and official record pages. The letter "c" indicates the testimony was on cross-examination.

[3]Prior decisions validating merit, as opposed to procedural determinations, are numerous. For reference here, the parties have *C1C-4B-C 4788*, Grievant: Harold L. Fish (Belshaw, 1983), as expanded in *C4T-4A-D 11269*, Grievant: Lloyd C. Scott, (Belshaw, 1986).

The procedural conclusion, therefore, based on background, testimonies, contractual provisions and historical principles, is that merits must be seen.

The Merit Issue

On the merits, *everything* is for the union. A close examination of the applicable language, considered in relationship to the applicable facts, yields the conclusion that there were *two* different bases for the grievant's light duty entitlement. The key section, for here, is Article 13(2)(B)(1).

With the understanding that mutually-embraced language is to be addressed in the manner customarily contemplated by agreeing parties, the first full sentence of the indicated provision says that full-time regular employees with "a minimum of five years of postal service", *or* any such employee "who sustained injury on duty, *regardless of years of service*", can request light duty, assuming his permanent inability to perform regularly-assigned duty. (Emphasis supplied). The grievant in this case met *both* of the stated requirements.

In the first place, the language does not say "five years of *continuous* postal service". This view, apparently, was the one taken by the Service, when it should have both

noticed and conceded that the grievant had well *over* five years of postal service. Furthermore, the Service would seem to have *ignored* the entitlement provisions for light duty where situations such as that of the grievant--injury on duty, regardless of years of service--prevailed. The language conclusions, with amplification of the proper mode for their address, are fortified by the facts.[4]

The grievant had been working in a clerk category at the Chicago facility. Both her personal and the employer physician had certified that she was both qualified for and entitled to light duty (Union Exhibits 2, 11). Union Exhibit 1, from the tour superintendent, found the grievant's attendance and performance "outstanding", and highly recommended her for assignment to permanent light duty clerk work.[5] There was *nothing* from the employer.

There can be a final comment about the two employer citations. Both of these turned on the lack-of-five-years aspect. Neither of them had "continuous" service facts, and

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[4]Subsection B of Section 1 and then, particularly, Subsection C of Section 2, both make clear that it is the responsibility of both parties to give such situations as the instant one "the greatest consideration", "giving each request careful attention", commensurate with the office possibilities (which element was here academic).

[5]Mr. Norwood, the tour superintendent, testified that there were currently permanently-assigned previously-injured people who can still work, and said that he was fully aware of the grievant's desire to transfer to clerk status (N7c).

neither involved on-the-job injuries, making both worthless in relationship to the language specifications of 13(2)(B)(1).

The outcome is obvious.

DECISION

A consideration of the grievance on the merits is not precluded by any procedural disability.

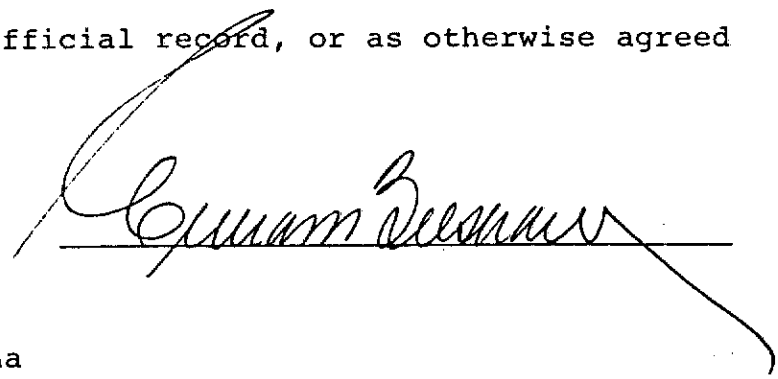
The removal of the grievant was not for just cause.

Accordingly, the employer should be, and it hereby is, directed to reinstate the grievant forthwith, provided she makes application therefor within seven (7) days of the date of this Award (absent unusual circumstances), and reports for work.

Upon reinstatement, if it occurs, the employer should be, and it hereby is, directed to place the grievant in a duty position concomitant with her physical capabilities, and compensate the grievant appropriately for the period of time she would have performed between the effective date of her removal (her cessation of employment) and the date of re-instatement, less all compensation or payments she may have received from other sources (provided such offsets relate to the time she would normally have performed), and to make her

whole in all other respects. The grievant should be, and she hereby is, directed to furnish the employer, on request, full information in these regards.

The parties should be, and they hereby are, directed to compensate the arbitrator for his fees and expenses in accordance with the applicable collective bargaining contract, or as prescribed by the official record, or as otherwise agreed upon between them.



Dated at Highland, Indiana
September 20, 1990

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