

C# 09732

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT: E. PAWARSKI
between) K. ERTEL
UNITED STATES POSTAL SERVICE) POST OFFICE: BUFFALO, N.Y.
N4V-IR-C-28830
and) MANAGEMENT CASE NO. N4V-IR-C-32729
UNION CASE NO. D-1031-STM and
D-1043-STM
AMERICAN POSTAL WORKERS UNION)
(AFL-CIO)

BEFORE: ROBERT L. MITRANI, ARBITRATOR:

APPEARANCES:

FOR THE U.S. POSTAL SERVICE: JEROME J. BROZELL
MGR., EEO

FOR THE UNION: JOHN SMITH
M.V. DIV.

PLACE OF HEARING: BUFFALO, N.Y.

DATE OF HEARING: JULY 6, 1989

AWARD:

THE POSTAL SERVICE VIOLATED THE NATIONAL AGREEMENT WHEN IT FAILED TO RENDER FORM 1768 WITHIN THE APPROPRIATE TIME LIMITS TO THE GRIEVANTS. THE FORM 1768 INVOLVED IN THIS CASE ARE TO BE REMOVED FROM THE APPROPRIATE FILES OF E. PAWARSKI AND K. ERTEL. THE ARBITRATOR IS LEAVING IT UP TO THE PARTIES AS TO WHETHER OR NOT THEY WISH TO SEQUESTER THESE FORMS IN SOME OTHER FILE.

Robert L. Mitrani
ROBERT L. MITRANI, Arbitrator

DATE OF AWARD:

JULY 12, 1989

IN THE MATTER OF THE ARBITRATION)
BETWEEN)
UNITED STATES POSTAL SERVICE)
AND) OPINION AND AWARD
AMERICAN POSTAL WORKERS UNION) ROBERT L. MITRANI
(AFL-CIO))
REGIONAL CASE NO. N4V-IR-C-28830)
N4V-IR-C-32729)
LOCAL GRIEVANCE: D-1031-STM and)
D-1043-STM)
GRIEVANTS: E. PAWARSKI)
K. ERTEL)

This case was heard on Thursday, July 6, 1989 in Buffalo, New York, before Arbitrator, Robert L. Mitrani, pursuant to the National Agreement between the parties. The Arbitrator is on the regular regional arbitration panel and this was a regular arbitration assignment.

APPEARANCES

U.S.P.S.

JEROME J. BROZELL
MANAGER, EEO

A.P.W.U.

JOHN E. SMITH
NAT'L. BUS. AGENT, M.V. DIV.

(A) ISSUE

Did the United States Postal Service violate the National Agreement when they failed to render Form 1768 within the appropriate time limits and if so, what should the remedy be?

The parties agreed that the issue is the same for both grievants (E. Pawarski and K. Ertel).

(B) BACKGROUND

The advocates for both sides presented their entire cases and witnesses were not necessary. However, each advocate was given the opportunity to question the other advocate if necessary.

The parties agreed that the Form 1768 was not given to the grievants until after 10 working days or 14 calendar days of the respective accidents. Mr. K. Ertel had his accident on December 9, 1986 and Mr. E. Pawarski had his accident on April 16, 1986.

The date of Pawarski's 1768 was June 4, 1986 and Ertel's 1768 was dated February 5, 1987.

The Union's position is that Article 19 (Handbooks and Manuals) is part of the contract. The Postal Service violated the handbooks and manuals involved in this case. Article 19 reads as follows:

**"ARTICLE 19
HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions."

In presenting its position, the Union read from a prepared opening statement. The following are excerpts from that statement:

"More specifically, we will demonstrate how Management has violated Section 842.254, Subsection D of the Employee and Labor Relations Manual in that the language is clear and unambiguous. This section states that Form 1768 must be done within 14 calendar days following an accident.

This language has been consistently brought forward from one revision to the next in the Employee and Labor Relations Manual. This language is not indigenous to this Handbook alone for it also appears in the M52, Section 255.3, Subsection C, and clearly enunciates that 'this must be done in time to inform the driver by the 10th working day following the accident even though it would appear that there could be a dispute over the actual days.' Because, is it 10 days or 14 days? In actuality, they are the same. To explain a little, in the latter, it addresses 10 working days, the former, 14 calendar days, which are both two weeks' time duration.

The M52 became obsolete on January 4, 1988. It was replaced with the Handbook designation as P0701. This Handbook does not contain the same language as the old M52 does. However, it does cite in Section 246 that information concerning

drivers' awards and contests can be found in Section 842.2 of the Employee and Labor Relations Manual of which I spoke earlier."

The language of 842.254 states the following:

"842.254 Duties. Using the National Safety Council Safe Driver Award Rules as the only guide, the committee must meet to:

- a. Review each accident report and related material.
- b. Determine if drivers continue to be eligible for safe driving awards during the current year.
- c. Record decisions on Form 1768. Safe Driver Award Committee Decision. Before a committee decision is rendered, the overall supervisor of activity or service must discuss the facts with the driver involved.
- d. Provide the driver with a full explanation of the committee's decision, including applicable safe driver award rules for future compliance and appeal rights. This must be done within 14 calendar days following an accident."

The union emphasized the specific language of section (d) above.

The following is taken from the M-52 which was in effect at the time of this case:

"255.3 Duties

Using the National Safety Council Safe Driver Award Rules as the only guide, each committee member will:

- a. Review each accident report and related material.
- b. Determine if drivers continue to be eligible for safe driving awards during the current year.
- c. Record decision on Form 1768, Safe Driver Award Committee Decision. This must be done in time to inform the driver by the tenth working day following an accident."

The Union also referred to the following language:

"255.5 Decision

The safety representative will give the employee concerned a full explanation of the committee's decision. He will also review with him applicable safe driver award rules for future

compliance and administering all appeals of committees decisions."

The Union claims that not only were the 1768's given to the grievants in a very late manner but the management never told them about the appeal procedures.

It is the Management's position that there has been no violation of the spirit or letter of Article 19. The Safe Driver Award Committee did no harm to the grievants and the Committee did follow the National Safety Council Safe Driver Award Rules.

The Safe Driver Award Committee gives an annual award in accordance with National Safety Council rules. The purpose of the Committee is educational in nature and this purpose has been accomplished. The grievants cannot be made "whole" because they did not suffer anything.

Furthermore, none of the handbooks or manuals referred to by the Union mentions anything about a remedy. There can be no remedy involved in this case.

The Management also stated that there was no bad faith involved in this case. One of the members of the Committee had retired and in the normal course of business, it is not easy to replace someone immediately. Furthermore, there are mitigating circumstances such as the Christmas holidays and rush period, as well as other extenuating circumstances.

The purpose of the Committee is to handle the annual awards. No matter when it made its decision in this case involving Pawarski and Ertel, the Committee's decision would have been the same. Therefore, the Union's grievance is irrelevant. The Committee's decision was only related to the Awards and the Committee's decision was the same --no matter when it would have completed the 1768. The end result of the Committee's action in no way was effected by the dates of the 1768's.

The Committee followed the purposes and intent of Article 19. It has an educational purpose and this was met. The Committee's decision and when it was given to the grievants had no ill effect on them. There would have been no difference if it was given to them within 14 calendar days.

(C) DISCUSSION

The Service's advocate raised some very interesting arguments. One of them was that no harm was done to the grievants. There have been a number of arbitration awards regarding alleged violations of Article 19 and whether or not the grievants have been harmed. The Arbitrator has done extensive research on this matter. A recent arbitration decision that expresses a widely held opinion was recently issued by Arbitrator Wayne E. Howard on March 16, 1989. Case No. E7C-2B-C-15779, USPS/APWU, West Chester, Pa. In that award, Arbitrator Howard stated the following:

"Indeed, the Service does not deny that the Letter of Demand was procedurally defective, but merely contends that the grievant cannot show any adverse consequences from the procedural defect. There is nothing in the instructions, however, which require the grievant to show adverse consequences in order to enforce the instructions which are clear and unambiguous. These instructions become enforceable rights of the employees under Article 19 of the National Agreement. For the arbitrator to require that the employee show injury from the failure of the Service to conform to its own instructions as a requirement necessary to invalidate the Letter of Demand would establish a structure of incentives which would encourage the Service to violate its own rules and regulations which have become enforceable obligations under the National Agreement. This the arbitrator is not prepared to do.

On these narrow grounds, the Letter of Demand was improper under the Agreement, and the Service must be directed to re-tract it."

A similar opinion was stated by Arbitrator Carol Wittenberg on May 2, 1989. Case NIC-IN-C-43206, USPS/APWU, Paterson, N.J. In her award, Arbitrator Wittenberg stated the following:

"In so finding, the Arbitrator is not persuaded by the Postal Service's contention that Grievant was not harmed by the error since he grieved the employer's actions. The employer's obligation to conform to its own rules and regulations is not excused by a claim of no harm. The Postal Service has the same obligation as its employees to follow its rules and regulations set forth in manuals and handbooks which are enforceable under the Agreement."

The undersigned Arbitrator agrees with the two opinions indicated above. There is an obligation for the Service to follow the procedures and regulations it has outlined in its handbooks and manuals. There must be a presumption that the procedures have a

specific purpose and the time requirements are of the utmost importance. It is interesting to note that 842.254(d) and 255.3 both use the word "must" as far as notifying the driver. For example (d) states the following:

"d. Provide the driver with a full explanation of the committee's decision, including applicable safe driver award rules for future compliance and appeal rights. This must be done within 14 calendar days following an accident."

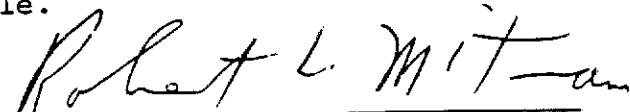
This is very strong language and leaves no room for doubt.

A second issue raised by the Service is that the Committee in fact carried out its function in accordance with the appropriate manuals and it accomplished its purpose. Furthermore, no matter when the 1768's were issued, nothing would have changed. Although this may be true, the fact remains that the contract language must be followed. The Arbitrator nor the Service can ignore clear contract language. The Service also claims that the manuals involved in this case mention nothing about a remedy. However, when a violation of the contract has occurred, it is proper for an arbitrator to render an award with an appropriate remedy. This is a well established principle in labor arbitration. The Arbitrator can appreciate mitigating circumstances causing a delay regarding the 1768's. But if an extension of time is needed, the parties can certainly discuss this.

Although the Service made some very interesting arguments, the Arbitrator must be guided by the contract. Clear and unambiguous contract language must prevail over arguments that may seem persuasive. The 1768's were given to the grievants well beyond the time limits that were required. Therefore, the Arbitrator rules as follows:

AWARD

The Postal Service violated the National Agreement when it failed to render Form 1768 within the appropriate time limits to the grievants. The Form 1768 involved in this case are to be removed from the appropriate files of E. Pawarski and K. Ertel. The Arbitrator is leaving it up to the parties as to whether or not they wish to sequester these forms in some other file.


ROBERT L. MITRANI, Arbitrator
July 12, 1989