

C# 07200

REGULAR REGIONAL ARBITRATION  
ARBITRATOR'S AWARD

In the Matter of the Arbitration	)	David A. Dilts
Between	)	Arbitrator
United States Postal Service,	)	
St. Louis, Missouri	)	
and	)	Case No. C4N-4Q-D 23074
Parker Simpson, represented by	)	NALC No. 305-343-86D
National Association of Letter Carriers	)	June 8, 1987

APPEARANCES:

For the U.S. Postal Service:

Paul Lyons, Advocate  
Joseph Adams  
LaSalle Goldsby  
Levi Barnes

For the Union:

John Haake, Advocate  
Parker Simpson, Grievant

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JUN 11 1987

CHARLES J. COYLE  
N.B.A. - N.A.L.C.

Hearings in the above cited case were conducted at the United States Post Office, 1720 Market Street, St. Louis, Missouri on Wednesday, June 3, 1987. The parties stipulated the present matter is properly before this Arbitrator in accordance with Article 15 of the 1984 National Agreement.

## ISSUE

Is the issue of the grievant's separation from the United States Postal Service arbitrable under Article 15 of the 1984 National Agreement?

## BACKGROUND

Effective April 26, 1986 the grievant was employed by the United States Postal Service and assigned to the Kirkwood Station in St. Louis, Missouri. The grievant served as a part-time flexible letter carrier until July 10, 1986, when he was involved in on-duty motor vehicle accident resulting in his sustaining incapacitating personal injuries. The grievant, as a result of the July 10 automobile accident, was placed in a continuation of pay status.

Mr. Joseph Adams, Acting Superintendent of the Kirkwood Branch, issued a letter of notification of separation from the Postal Service addressed to the grievant and dated July 14, 1986 [Joint exhibit 3]. Since the grievant was on compensatory leave the Acting Superintendent took the letter [Joint exhibit 3] to the special delivery unit with instructions to deliver the letter to the grievant at his address of record, 5935 Romaine, St. Louis, Missouri. Mr. Levi Barnes delivered the letter to the grievant's address, but finding nobody at home placed the letter in the grievant's mailbox and noted the date and time of delivery on the written instructions provided by the Acting Superintendent. The date and time of delivery noted on this form

is 2:15 p.m., July 15, 1986.

The parties stipulated that the grievant's 90 day probationary period expired on July 25, 1986. The parties further stipulated that the issue of arbitrability is the only question before the Arbitrator. If the issue is determined to be arbitrable the grievant is entitled to reinstatement and if the matter is not arbitrable the grievant will remain separated.

The pertinent contract provisions are:

ARTICLE 12, Section 1

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. . . .

Part 365.326, *EMPLOYEE AND LABOR RELATIONS MANUAL*

**Procedure in Separating.** If an appointing official decides to terminate an employee who is serving a probationary period due to conditions arising prior to appointment, or because work performance or conduct during this period fails to demonstrate fitness or qualification for continued postal employment, the employee's services are terminated by notifying the employee in writing as to why he is being terminated and the effective date of the action. The information in the notice regarding the termination, as a minimum, consist of the appointing official's conclusions as to the inadequacies of performance or conduct.

Part 365.327, *EMPLOYEE AND LABOR RELATIONS MANUAL*

**Effective Date.** The effective date of separation by disqualification must be before the end of the probationary period but may not be retroactively effective. The notice of separation must be given to the employee before the end of the probationary or trial period.

These Parts of the *Employee and Labor Relations Manual* are granted contractual authority as a result of the parties' agreement embodied in Article 19 of the 1984 National Agreement.

#### **POSTAL SERVICE'S POSITION**

The Postal Service contends that the grievant was constructively served with his notice of separation on July 14, 1986. This service was effected by delivery, to the grievant's place of residence, of the notice by a special delivery messenger. The Postal Service has shown that such delivery occurred on July 14, 1986 by the testimony of Mr. Barnes who is the special delivery messenger, and Employer exhibit 1. There is no dispute between the parties that July 14, 1986 is well within the grievant's ninety day probationary period.

The 1984 National Agreement, in Article 12, Section 1 (A), specifically states that the Postal Service has the right to remove any employee during their probationary period and that the employee does not have access to the grievance process in relation to that separation. The grievant was issued his notice of separation well within his probationary period and the notice was properly delivered to his address of record. The Service has met its obligations to the contract and to the employee by such delivery.

Based on the contractual bar to the grievance process, this grievance is not arbitrable and must be dismissed because the Arbitrator does not have any jurisdiction in this matter. The Postal Service respectfully requests the Arbitrator to dismiss

this grievance as being non-arbitrable.

#### UNION'S POSITION

The Union bases its case on two unrefuted facts. The grievant did not receive the notice of separation and did not become aware of his dismissal until early in September when he reported to the Kirkwood Station after his period of disability. Further the Postal Service failed in its contractual obligation to give the notice of separation to the grievant.

The requirements of the *Employee and Labor Relations Manual*, Parts 365.326 and 365.327 are clear and unambiguous. For a probationary employee to be separated from the Service and be barred from the grievance process the notice of separation must be given to the employee during the period of probation. These requirements do not include the transmittal of the notice by any form other than giving such notice to the employee. For the employee to be given the notice requires not only that the Postal Service transmit the notice but that the employee receives the notice. The Union accepts the fact that the Postal Service transmitted the notice, but the grievant never received it. The grievant could have been called to the station or the appropriate appointing authority could have gone to the grievant's residence and handed the document to him. Further, the Postal Service's business is the delivery of documents, letters, and parcels. The Postal Service could have sent the separation notice by certified mail with a return receipt requested. The record clearly shows none of these alternatives were selected by the Postal Service and the Postal Service bears the responsibility to give the

notice to the grievant, not simply transmit a notice in the hopes the grievant receives it.

The Union respectfully requests the Arbitrator to find the instant grievance is arbitrable, since the grievant had served his probationary period without being given a notice of separation.

#### **ARBITRATOR'S OPINION**

The basic facts are not in dispute. The Postal Service did, in fact, transmit a notice of separation to this grievant within his ninety day probationary period. The grievant claims that he never received the notice of separation and did not become aware of the notice until he reported back to work on September 3, 1986. The Postal Service suggests that the grievant's testimony is self-serving but has no real proof that the grievant never received the notice of separation.

#### ***What Does Given Require in Part 365.327?***

The question before this Arbitrator is a relatively simple one. What does the word given mean with respect to the requirements of Part 365.327 of the **Employee and Labor Relations Manual**? Neither the National Agreement nor the **Employee and Labor Relations Manual** provides a specific definition for the word as used in Part 365.327 nor did the parties offer evidence of a mutually agreed to and relied upon practice for the term given as used in this Part of the **ELM**. **Webster's Encyclopedic Dictionary of the English Language** defines the word given as:

Bestowed; conferred; admitted or supposed; addicted;  
disposed; . . .

Only bestowed or conferred are relevant to the usage of the word given found in Part 365.327 of the *ELM*. The *Dictionary* defines conferred as:

To give or bestow: with on or upon before the recipient. Confer differs from bestow, inasmuch as it always implies a certain amount of condensation or superiority on the part of the giver.

The verb given now takes on a clearer meaning in that management will give a separation notice to an employee, hence an element of confer, meaning an act between unequals, where management occupies a superior position for the instant purpose. Yet even with this element of clarification, the required act in giving the notice to the grievant is still left ambiguous. In examining the definition of the verb bestow this Arbitrator found *Webster's* contained the following:

To stow away; to lay up in store; to deposit; to lodge; to place; to give; to confer; to impart: followed by on or upon before the recipient.

The meaning to be assigned the first two definitions offered are, on their face, irrelevant to the present usage. It is also this Arbitrator's considered opinion that neither to place nor to lodge specifies a particularly useful meaning for the present definitional purposes. This leaves the Arbitrator with only to deposit or to impart to aid in the established common usage meaning of the word given. *Webster's* defines the verb deposit

as:

To lay down; to place; to put; to lay in a place for preservation; to lodge in the hands of a person for safekeeping or other purpose; to entrust; to commit as a pledge.

It clear to this Arbitrator that first three definitions add little to our understanding of the verb given and that neither party contemplated preservation or storage as a possible meaning. The Union, in the instant matter, contends that the verb given should be interpreted as to "***lodge in the hands of a person for the purpose***" of notification of his separation. Yet this Arbitrator remains unconvinced that this particular definition should be given controlling weight. *Webster's* defines the verb to impart as:

To bestow a part, share or portion of; to give, grant, confer, or communicate; to communicate the knowledge of; to make known; to show by words or tokens.

This definition includes to make known which implies that the transmittal of the instant separation notice is insufficient, that such a notice must also be received. To show by words or token and to communicate embody the same or similar implications. This supports the Union's contention that the notice of separation must be made known or physically handed to the grievant and together with the previous definitive phrase ***lodge in the hands of a person for a purpose*** is convincing to this Arbitrator of the common meaning of the verb given. This was not done by the Postal Service on July 14, 1986 by simply sending a



special delivery messenger to the grievant's address without a return receipt being requested or some other reasonable method to attempt to assure the grievant's receipt of the separation notice.

***Constructive Service and the Requirement that the Grievant be Given the Notice of Separation.***

The question now becomes did the Postal Service do all that was reasonable in attempting to properly serve the notice of separation upon the grievant and was the Postal Service's actions of July 14, 1986 constructive service? In this Arbitrator's opinion the answer to this question is no.

On July 14, 1986 the Postal Service had 11 days in which to make known to the grievant that he was being separated from the Postal Service and still comply with the requirement that the notice be given by the grievant's ninetieth day of employment. The effective date of the grievant's separation was July 17, 1986 but even in the intervening three days attempts could have been made to contact the grievant by telephone or a certified letter with a return receipt requested would have provided the assurance that the grievant came into possession of the notice of separation.

The requirement that the grievant be given a notice of separation is far different than the separation be issued or that the Service transmit to the grievant a notice of separation. The requirement that the grievant be given the notice means, in the common usage of the word given, that the Postal Service make known to the grievant or lodge in his hands the notice. The

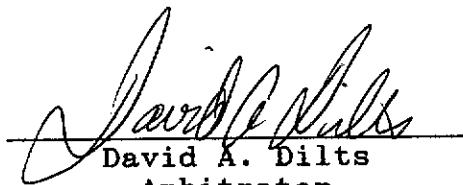
actions of the Postal Service failed to comply with this requirement. Constructive service is accomplished only when the Service makes known to the grievant or lodges in his hands the required notice.

There is, however, a troubling element in the grievant's testimony. The grievant testified that his regular supervisor had informed him earlier in the day on July 14, 1986 that there was some consideration being given to his separation from the Service. The supervisor is not reported to have stated that he was going to be separated but simply that consideration was being given such a decision. It is a plausible scenario that even with this information that an employee or even this grievant would avoid his mailbox and telephone until after July 25, 1986 to defeat the Postal Service's right to separate him. There are even facts in this case which suggest that the grievant did not check his mail for a day or two after July 14. Had the Postal Service reasonably attempted to contact the grievant by telephone, certified mail, or other normal and reasonable channels through which he could have been made known he was separated then this Arbitrator would entertain a contention that reasonable attempts at constructive service should prevail. The record in the instant matter shows only a special delivery messenger leaving a letter in a mailbox on July 14, 1986 without further attempt to bring the separation to the grievant's attention. Constructive service cannot now stand in light of the specific requirement that the grievant be given the notice of separation.

**AWARD**

The present grievance is arbitrable under the requirements of Articles 12 and 15 of the 1984 National Agreement.

At Manhattan, Kansas  
June 8, 1987:

  
David A. Dilts  
Arbitrator