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ARBITRATION DECISION C#01648

UNITED STATES POSTAL SERVICE
St. Paul, Minnesota

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS
Branch 28, St. Paul, MN

RE: John Rogers
C8N-4C-C 13609
St. Paul, Minnesota

FOR THE POSTAL SERVICE: Beverly J. Jones, Labor Relations Specialist
Joel Berman, Director, Employee and Labor Relations

FOR THE UNION: Roger L. McClure, President, Branch 28
Barry J. Weiner, Regional Administrative Assistant

PANEL ARBITRATOR: William F. Dolson, Louisville, Kentucky

By the terms of the Agreement between the UNITED STATES POSTAL SERVICE (hereinafter referred to as "the Postal Service") and the NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 28, St. Paul, MN (hereinafter referred to as "the Union"), there is a grievance procedure including arbitration. Accordingly, William F. Dolson, a member of the regular regional arbitration panel, was assigned to this case. A hearing was held in St. Paul, Minnesota on April 10, 1981. The parties were given the opportunity to file post-hearing briefs. The Arbitrator received briefs from both parties.

DECISION

ISSUE: Is the Grievance arbitrable even if the original remedy requested is no longer attainable?

BACKGROUND

On January 21, 1980, the grievance of John Rogers was appealed to Step 2. Standard Grievance Form, completed by Roger McClure, President of Branch #28, outlines the nature of the complaint and the remedy sought.

> FACTS AND UNION CONTENTIONS: DATE, TIME & LOCATION: On Wednesday morning, January 16th, Grievant signed up for vacation in accordance with Art. XXX, Item 4B of the local agreement. On Wednesday afternoon, Grievant was informed that the week of December 29, 1980 thru January 3, 1981 which he signed up for was disallowed because it was an unauthorized time for signing up for vacation.
>
> CORRECTIVE ACTION REQUESTED: That Grievant be allowed to take the week of December 29, 1980 thru January 3, 1981 of which he signed up for. Nowhere in the local agreement is December noted as an exception or exemption from non-prime time. It is also noted that in the impasse items dated 2-27-79, under Art. XXX, Section B9, December is not exempted there either. Further, each year management has allowed carriers to be off on annual the week following Christmas.
>
> (Joint Ex. #2, p. 8)

The following Step 2 answer was made by LeRoy F. Lazenberry, Director, Employee and Labor Relations on February 7, 1980:

> The above captioned grievance was discussed with you on January 30, 1980. The Union cites violation of Article XXX, Item 4B and 9. The issue is a vacation request of John Rogers for the week of December 29, 1980 through January 3, 1981. At Step 2, the broader issue of all of December was discussed.
>
> The Union's position is that December is not excluded from vacation planning in our Local Memorandum of Understanding; therefore, Mr. Rogers should be granted this leave. The Union also states that in the past, management has allowed carriers to be off the week following Christmas.

In response to that last statement, management agrees that carriers have been allowed off the week after Christmas. But, this was never part of the vacation selection. Each year requests for that week are held by the Manager, Delivery and Collections, and approval is based on the availability of replacement help under the procedures in Item 12A. Approval is not granted until shortly before Christmas.

Management's position is that this grievance is untimely. Historically, December has never been considered part of the vacation sign-up period. December was not included in vacation planning for 1979, and there was no protest initiated by the Union. Enclosed are copies of several letters issued by the Post Office every year regarding December annual leave. On October 30,1979, a copy of the most recent letter was sent to the Union, yet, no protest was initiated. The subject of annual leave in December had been discussed by the Union and Mr. Harry Link, Manager, Stations and Branches, on several occasions and he always explained that December was "out". Again, no grievance was initiated.

If a change in December leave policy was desired, it should have been obtained through 1978 Local Negotiations, and any questions resolved immediately thereafter. The grievance, at this time, is untimely.

As to the merits, we feel the established past practice that scheduled vacation is not allowed in the post office during December is a common sense provision, not excluded by the present language im the Local Memorandum. Therefore, this grievance is denied, both on procedural grounds and on merit. (Joint Ex. #2 pp. 6-7)

On February 14, 1980, Mr. McClure sent Mr. Lazenberry the following additions and corrections to Roger's grievance:

In accordance with Article XV, Section 2(g) of the National Agreement, the following are additions and corrections of Branch 28, NALC grievance number 121-LC-80.

Branch 28, NALC feels Management is wrong when they say this grievance is untimely. Branch 28, NALC and the St. Paul Postal Service entered into local negotiations at 3:30 P.M. in the St. Paul PEDC on Monday October 16, 1978. At that time we set the ground rules and proceeded to enter a few proposals, for the new Agreement. November 14, 1978 was the last day of negotiations.

We could not reach an agreement on twenty (20) items. On November 22, 1978 the Union sent twenty (20) items to impasse. On Tuesday February 27, 1979 the Regional Labor and Relations ruled in favor of Branch 28, NALC on thirteen (13) of the twenty (20) items. One in the Unions favor was annual leave. The St. Paul Postal Service would not honor the decision of the Central Region. Branch 28, NALC was forced to file charges with the National Labor Relations Board. The contract was finally signed on May 1, 1979. Under the 1975 Agreement annual leave was signed for between January 1st and the 2nd week of February. Therefore when the Local Agreement was signed on May 1st the vacations had already been signed for. At that time I discussed the annual leave with the Director of Customer Services and his staff. I stated that in my opinion the month of December was non-prime time: they did not agree. As President I did not feel the Union could file a grievance until some carrier was refused annual leave in December. Therefore the Union tried to work it out before such time occurred. Branch grievance number 1012-LC-79 was a grievance over annual leave in December. In that grievance carrier Radermacher did receive annual leave. However the grievance was never settled in whole of the corrective action requested. Furthermore if Management thought it was an untimely grievance they should have stated so at step one in accordance with Article XV, Section 3(b).

This year when the vacation list started out on December 1, 1980 Management was in violation, because they failed to have the month of December as non-prime time. I discussed this with the Director of Customer Services again and at that time he was informed that the first carrier that was turned down for vacation in December, a grievance would be filed. That carrier being John Rogers. In keeping with the National policy, to try and work things out at the lowest possible level, the Union had no right to file a grievance until such time as a carrier was turned down. Therefore this is not an untimely grievance.

Management is right when they say, historically December has never been considered part of the vacation sign up period. The reason the Union put it in local negotiations was to get a set policy. Several part-time flexible carriers do not get fourty (40) hours per week or eighty (80) hours per pay period in the month of December. Several letter carriers have asked to be off the week between Christmas and New Years, several would like to be off the first week in December. However they cannot make plans if it is going to be granted on a day to day basis.

The enclosed letters from the St. Paul Postal Service will substantiate that annual leave is granted during the month of December.

Management claims that no protest was initiated on the letter they sent out on October 30, 1979. However a grievance was filed on October 12, 1979. How many times do we have to protest the same subject. The subject of annual leave was discussed with Harry Link, Bill Maurer and Myself several times before the grievance was filed. I was keeping with the Postal Service policy of trying to settle the grievance before they start, at the lowest possible level.

The established past practice of the Postal Service in St. Paul should be changed with the 1978 Local Agreement.

As for the common sense provision, that is exactly what the Union is trying to do. The Union has offered a compromise to the problem. The compromise was the first two weeks in December and the week between Christmas and New Years would be non-prime time. The letter carriers then could plan for a vacation during that period, instead of having it granted on a day to day basis. (Joint Ex.#2 pp. 4-5)

Mr. McClure's Step 3 appeal on February 29, 1980 contains the following statement:

NATURE OF GRIEVANCE: DATE, TIME & LOCATION: 1-16-80 Morning Daytons Bluff Station

WHAT HAPPENED: John Rogers signed for vacation in accordance with Article XXX, Item 4B of the local agreement. On 1-16-80 in the afternoon John was informed that the week of December 29, 1980 thru January 3, 1981, which he signed for was disallowed because it was an unauthroized time for signing up for vacation. Nowhere in the local agreement is December noted as an exception or exemption from non-prime time. It is also noted that in the impasse item dated 2-27-79, under Article XXX, Section B9, December is not exempted there either. Further, each year management has allowed carriers to be off on annual the week following Christmas.

CORRECTIVE ACTION REQUESTED: That the grievant be allowed to take the week of 12-29-80 thru 1-3-81.
(Joint Ex. #2 p. 3)

On February 25, 1980 Thomas Neimann issued the following Step 3 decision:

> The evidence in the record does not indicate that the month of December was included as part of the vacation period established for sign up at the beginning of each year. Accordingly, leave during the month of December will continue to be granted as in the past and the grievance is denied. (Joint Ex. #2 p. 2)

At the arbitration hearing the Postal Service took the position that the grievance was no longer arbitrable. It contended that "by the mere gravity of time the remedy sought by the Grievant has been moved beyond the physical and contractual limitations of the Arbitrator." The remedy, asserts the Postal Service, "is no longer available to be granted by the Arbitrator and therefore determines this case to be non-arbitrable." (Post-hearing brief, page 1)

The Postal Service, at the hearing, requested that the Arbitrator not hear evidence on the merits of the grievance until he decided the arbitrability issue and it further requested that it be allowed to file a brief on the matter.

It is the Union's position that the grievance is arbitrable even though the original remedy sought is no longer possible. The Union maintains that the vacation issue is likely to come up again, particularly if it is not addressed in this present grievance.

The Union further contends that the Arbitrator has the inherent power to fashion a remedy he deems appropriate if the original remedy is no longer attainable.

The Union at the arbitration hearing argued that the Arbitrator should make a bench ruling on the arbitrability issue and then proceed with the merits of the case, if the ruling was favorable to the Union. Further, in as much as the Postal Service was not prepared to present its case on the merits at the hearing, the Arbitrator should order it to assume the full cost of the Arbitrator's services connected with that proceeding.

After receiving oral arguments from the parties the Arbitrator issued a oral ruling at the hearing that he would decide the arbitrability issue before receiving evidence on the merits of the grievance. The Postal Service's request that it be allowed to submit a post-hearing brief on the arbitrability issue was granted. At that point the Union indicated that it too would submit a post-hearing brief on that issue.

DISCUSSION ON ARBITRABILITY

The analysis of this issue should begin with the definition of the term "grievance" as found in the Agreement. Article XV, Section 1 provides:

> 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 Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any Memorandum of Understanding not in conflict with this Agreement.

The above language reflects that the basic purpose of a grievance is to resolve disputes between the parties over the interpretation or application of the Agreement. In the present case such a dispute still exists even though the specific remedy requested in the grievance has been rendered moot by a force beyond the control of man - time.

A ruling by the Arbitrator that the Postal Service has violated the Agreement would not be a futile act. First, the Union's February 14, 1980 letter, which contains additions and corrections, reveals that the issue raised in the present grievance is not an isolated incidence which may never occur again. Just the opposite. Union President McClure in the February 14 letter indicates that a disagreement existed between the Union and the Postal Service as to whether December was non-prime time and that the Union had informed the Postal Service that upon the first carrier being turned down for vacation in December a grievance would be filed. That carrier happened to be the present Grievant, John Rogers. Thus, it is clear that the instant grievance transcends the John Rogers incident.

Mr. Justice Douglas in United Steelworkers vs. Warrior & Gulf Navigation Company, 363 U.S. 574, 578-581 (1960), 46LRRM2416, examines the collective bargaining agreement and the role an arbitration decision plays in that agreement. He states:

> It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.... A collective bargaining agreement is an effort to erect a system of industrial self-government.... Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in away which will generally accord the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

It is clear from Mr. Justice Douglas's statement that arbitration decisions constitute guidelines for the future (unless the parties expressly provide otherwise). The following comment by Arbitrator Emmanuel Stein in Remedies in Labor Arbitration, "Challenges to Arbitration, 39, 48 (National Academy of Arbitrators, Proceedings of the 13th Annual Meeting, 1960) is instructive:

> The Arbitrator performs his chief function, in my opinion in determining whether or not the collective bargaining agreement has been violated. Remedies are of secondary importance, at least in those cases where the parties have demonstrated an ability to live and an ability to work out their problems not only at the time of negotiating a collective agreement but during its life.

Similarly, Professor R. W. Fleming in Arbitration and the Remedy Power, 48 Va. L. Rev. 1199, 1222 (1962) states:

> An arbitrator is set up to determine whether there has been a violation of the contractual agreement. Usually, though not always, violation of the agreement is followed by some kind of remedial order. Thus the arbitrator is, in effect, the enforcer of the agreement. (Emphasis supplied)

The Arbitrator has carefully examined the cases cited in the Postal Service brief and finds that they contain different facts. The arbitrator in the Munro Case found that the grievant estopped himself from a remedy by resigning after Step 2A and prior to Step 2B. There is nothing in the record to indicate that the Grievant in the present case similarly estopped himself.

The decisions of Arbitrator Marvin J. Feldman cited in the Postal Service brief can also be distinguished from this case. The facts of those decisions were not set forth, but from what was included, it appears that procedural arbitrability was involved, viz, untimeliness in filing the grievance or appealing a decision. Neither of those issues are involved in the present case.

Arbitrator Feldman in those cases alluded to Article XV, Section 4A(6). In the opinion of the Arbitrator deciding the present case on the merits would not violate the mandate of that provision. As pointed out above, a decision on the merits falls within the four corners of the Agreement and carries out the intent of the Agreement.

The Postal Service argues that because of the remedy sought, the Union should have made an effort to move the grievance ahead on the arbitration schedule. The Union, however, could not move the grievance ahead without agreement on the part of the Postal Service. (See Article XV, Section 4B(2)) Moreover, based on what has been said above, failure by the Union to request that the grievance be advanced, is immaterial.

The Union in its brief, argues that because the Postal Service was not prepared to present the case on its merits at the hearing, the Postal Service should assume the full cost of the Arbitrator's services. The Arbitrator rejects this argument because it is within his discretion to decide the arbitrability issue before hearing the case on the merits. And the Arbitrator exercised his discretion in favor of the Postal Service's request that he receive briefs on the arbitrability issue before receiving evidence on the merits of the grievance. Secondly, the Union did not cite any contractual provision which supports its argument that the Postal Service should be assessed the full cost of the Arbitrator's services.

In summary, the Arbitrator is obligated under the Agreement to perform his primary function - determine whether there has been a violation of the Agreement, regardless of whether the specific remedy requested in the grievance no longer can be granted.

AWARD

The grievance is arbitrable.

June 3, 1981
Louisville, Kentucky

William F. Dolson, Arbitrator