C# 12205

REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	**GRIEVANT:**	Michael L. Audet
between	**POST OFFICE:**	Punta Gorda FL
UNITED STATES POSTAL SERVICE	**USPS CASE NO:**	S0N-3W-D 04320
and	**NALC CASE NO:**	016872
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO		

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service:	William Daigneault
For the Union:	O.D. Elliott
Place of Hearing:	U.S. Post Office
Date of Hearing:	April 9, 1992

AWARD:

For the reasons given, the grievance is found to be arbitrable.

Date of Award: July 17, 1992

Raymond L. Britton

Matthew Rose, NALC
National Business Agent

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NALC
Br. Pres.
Cs. File
ADVOCATE

ISSUE

Whether the grievance is arbitrable?

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, it was stipulated by the parties that the Arbitrator had the authority to render the decision in this matter. After the Hearing, it was agreed that the parties would submit Post-Hearing Cross-Briefs to the Arbitrator by placing such Cross-Briefs in the mails not later than May 8, 1992. The Post-Hearing Cross-Brief filed by the United States Postal Service (hereinafter referred to as "Employer") was received by the Arbitrator on May 11, 1992. The Post-Hearing Cross-Brief filed by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") was received by the Arbitrator on May 12, 1992.

SUMMARY STATEMENT OF THE CASE

Michael L. Audet (hereinafter sometimes referred to as Grievant") is a City Letter Carrier at the Post Office in Punta Gorda, Florida. On October 16, 1991, Supervisor of Delivery & Collection Charles J. Hauck issued to the Grievant a Notice of Proposed Removal (Management Exhibit No. 1). On October 31, 1991, the Grievant filed a grievance protesting the Notice of Proposed Removal, and on that date, the grievance was denied by Supervisor Hauck. (Management Exhibit No. 2). Pursuant to Article 15 of the National Agreement, the grievance was appealed on November 12, 1991, to Step 2 of the grievance procedure alleging a violation of, but not limited to, Articles 16 and 19 of the National Agreement (Management Exhibit No. 2). A Step 2 meeting was scheduled for December 10, 1991; however, on that date, the parties were unable to agree on a procedural question, and the meeting was terminated prior to a discussion of the grievance.

On November 13, 1991, in a letter to the Grievant, Postmaster J.M. Furiato issued his Letter of Decision (Management Exhibit No. 3). On November 21, 1991, the Grievant filed a grievance protesting the Letter of Decision, and on November 25, 1991, the grievance was denied by Supervisor Hauck. (Management Exhibit No. 4). Pursuant to Article 15 of the National Agreement, the grievance was appealed on November 25, 1991, to Step 2 of the grievance procedure alleging a violation of, but not limited to, Articles 16 and 19 of the National Agreement (Management Exhibit No. 4). According to a letter dated November 25, 1991, from Union Executive Vice President O.D. Elliott to Postmaster Furiato, a Step 2 meeting was to be scheduled. At this meeting, the first grievance (concerning the Notice of Proposed Removal) and the second grievance (concerning the Letter of Decision) were scheduled to be discussed (Management Exhibit No. 6). A letter dated December 4, 1991, from Superintendent of Postal Operations Richard L. Barber to Union President Johnny Bourlon confirms that the meeting was scheduled for December 10, 1991, and was intended to cover both grievances (Management Exhibit No. 7). However, as indicated above, the parties were unable to agree on a procedural question, and the meeting was terminated prior to a discussion of the grievances. On December 17, 1991, the grievance concerning the Letter of Decision was appealed to Step 3 of the grievance procedure (Management Exhibit No. 8).

On January 27, 1992, a Step 3 meeting was held, and on February 12, 1992, in a letter to National Business Agent Matthew Rose, the grievance was denied by Labor Relations Manager Frank M. Dyer (Management Exhibit No. 9).

Thereafter, both grievances were appealed to arbitration.

Provisions of the National Agreement effective June 12, 1991, to remain in full force and effect to and including 12 midnight November 20, 1994, (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 2. Grievance Procedure--Steps

Step 1:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union may also initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

(b) In any such discussion the supervisor shall have the authority to settle the grievance. The steward or other Union representative likewise shall have the authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

(c) If no resolution is reached as a result of such discussion, the supervisor shall render a decision orally stating the reasons for the decision. The supervisor's decision should be stated during the discussion, but in no event shall it be given to the Union representative (or the grievant, if no Union representative was requested) later than five (5) days thereafter unless the parties agree to extend the five (5) day period. Within five (5) days after the supervisor's decision, the supervisor shall, at the request of the Union representative, initial the standard grievance form that is used at Step 2 confirming the date upon which the decision was rendered.

(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:

1. *Detailed statement of facts;*
2. *Contentions of the grievant;*
3. *Particular contractual provisions involved; and*
4. *Remedy sought.*

Step 2:

(a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Step 2 official, and shall so notify the Union Step 1 representative.

(b) Any grievance initiated at Step 2, pursuant to Article 2 or 14 of this Agreement, must be filed within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following the receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

(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.

(e) Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form, but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems.

(f) Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for denial of the grievance.

(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.

(h) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed, (3) the Union corrections or additions to the Step 2 decision.

* * *

ARTICLE 17
REPRESENTATION

* * *

Section 4. Payment of Stewards

The Employer will authorize payment only under the following conditions:

Grievances

Steps 1 and 2-- The aggrieved and one Union steward (only as permitted under the formula in Section 2A) for time actually spent in grievance handling, including investigation and meetings with the Employer. The Employer will also compensate a steward for the time reasonably necessary to write a grievance. In addition, the Employer will compensate any witnesses for the time required to attend a Step 2 meeting.

Meetings called by the Employer for information exchange and other conditions designated by the Employer concerning contract application.

Employer authorized payment as outlined above will be granted at the applicable straight time rate, providing the time spent is a part of the employee's or steward's (only as provided for under the formula in Section 2A) regular work day.

* * *

POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that the grievance concerning the Notice of Proposed Removal was untimely at Step 2. Additionally, the Employer takes the position that the grievance concerning the Letter of Decision was procedurally defective since 1) it was untimely at Step 1; 2) the Union failed to present a Step 2 meeting for this grievance; and 3) because the Union failed to pursue the first grievance relative to the Notice of Proposed Removal, it is now estopped from pursuing the same matter in the second grievance relative to the Letter of Decision.

The Position of the Union

The Union takes the position that the two grievances were combined and that both grievances are arbitrable. The Union contends that it did not waive the issues in the grievance concerning the Notice of Proposed Removal by refusing to meet at Step 2.

OPINION

In this matter, the Arbitrator is required to address only the issue of whether the grievance concerning the Letter of Decision is arbitrable. For the purposes of discussing this question, the grievance concerning the Letter of Decision will be referred to as Grievance 1, and the grievance concerning the Notice of Proposed Removal will be referred to as Grievance 2.

In support of its position that the grievance is not arbitrable, the Employer first argues that the grievance filed protesting the Notice of Proposed Removal was not pursued by the Union. While the Employer notes that this grievance is not now before the Arbitrator, it nevertheless considers it important to the resolution of this issue that the background of the grievance concerning the Notice of Proposed Removal be taken into consideration. In this regard, the Employer contends that there is no question that the Step 2 appeal of Grievance 2 was untimely. Article 15 of the National Agreement requires that a grievance be appealed " . . . within ten (10) days after receipt of

the supervisor's decision." The Step 2 appeal was not submitted until November 12, 1991, while the Step 1 decision denying the grievance was issued on October 31, 1991. Thus, twelve days had elapsed since the rendering of the Step 1 decision, and the appeal was therefore untimely. According to the Employer, the Union conceded that the appeal was untimely when Union Executive Vice President O.D. Elliott testified that he realized on November 12, 1991, that the time limits had expired. Thus, the Employer contends that the Union chose not to pursue Grievance 2. Further, the Employer argues that it never agreed to combine Grievance 2 with Grievance 1 nor did it ever agree to extend the time limits for either grievance.

The Union, on the other hand, maintains that the two grievances were combined, and as evidence that this occurred, the Union references the letter dated November 25, 1991 (Management Exhibit No. 6), from Mr. Elliott to the attention of Superintendent Barber, in which it is stated that the parties " . . . mutually agreed to hold the Step 2 meeting of the two above referenced grievances concurrently as a cost savings matter . . . " Further, according to the Union, in the Step 3 appeal dated December 17, 1991 (Management Exhibit No. 8), it is stated that "It had been previously agreed to hold this grievance [Grievance 1] meeting in conjunction with [Grievance 2]."

Notwithstanding the foregoing arguments of the Union to the contrary, the Arbitrator finds no persuasive evidence in the record submitted to support the position of the Union that the two grievances were combined. In this regard, the Arbitrator notes that both documents referenced by the Union were prepared by the Union and neither bears the signature of any management official. Accordingly, in the absence of any documentary evidence to buttress the claim by the Union that the parties mutually agreed to combine the two grievances, the Arbitrator is constrained to conclude that there was no such agreement.

With respect to Grievance 1, the Employer contends that it is untimely at Step 1. Specifically, the Employer maintains that the Grievant first learned of his removal on October 18, 1991, and did not file Grievance 1 until November 21, 1991. Further supportive of its view that Grievance 1 is untimely, the Employer argues, is a Memorandum of Understanding in which the parties agreed to clarify the meaning and intent of Article 15 of the National Agreement as it relates to proposed removal notices. This Memorandum of Understanding states in relevant part as follows (Management Exhibit No. 12):

> *For the purpose of grievance procedure appeals, the time limits of Section 2 of Article 15 of the National Agreement shall run from the proposed removal notice, not from a decision letter on the proposed removal.*
>
> *Once a grievance on a notice of proposed removal is filed, it is not necessary to also file a grievance on the decision letter.*

According to the Employer, this Memorandum of Understanding means that an employee is entitled to file one grievance within fourteen days of receipt of the Notice of Proposed Removal.

As read by the Arbitrator, however, the Memorandum of Understanding referenced by the Employer was signed by a representative of the Employer and a representative of the American Postal Workers Union; no signature of a representative of the National Association of Letter Carriers is found thereon. Accordingly, the Arbitrator finds the document to be of questionable application in the proceeding now before him.

Citing twelve prior arbitration awards, the Employer additionally argues that the issue of arbitrability when a grievant or union fails to file a grievance within fourteen days of receipt of a Notice of Proposed Removal is not new with arbitrators. According to the Employer, in all twelve referenced cases, the grievant or union filed a grievance at Step 1 after receipt of the Letter of Decision and more than fourteen days after receipt of the notice of proposed action, and in all twelve cases, the arbitrators found that the union had waived its right to further process the grievance because the grievance was untimely at Step 1.

In order to avoid unduly lengthening this Opinion through specific references to each of the twelve awards referenced by the Employer, it should be sufficient to note that the facts of this matter are found by the Arbitrator to be distinguishable from the awards cited by the Employer. Specifically, in the case at hand, neither Grievance 1 nor Grievance 2 was untimely at Step 1; therefore, the conclusions of the respective arbitrators in the referenced cases are without persuasive force with respect to the outcome of this matter.

The Employer additionally argues that Grievance 1 is procedurally defective as a result of the alleged failure of the Union to present a Step 2 meeting. According to the Employer, the parties had previously agreed on the employees and managers who would be present for this meeting. However, the Employer maintains that on the morning of the meeting, Union President Bourlon stated that he had had a change of heart and decided not to allow management to have a notetaker present at the meeting. Mr. Bourlon is further said by the Employer to have stated that he would refuse to participate in the Step 2 meeting unless the notetaker was dismissed.

In contrast to the foregoing, the Union contends that it was ready, willing, and able to meet at Step 2 provided that the meeting was conducted in accordance with Article 15, Section 2, Step 2(c) and (d) as well as Article 17, Section 4 of the National Agreement. In this connection, Mr. Bourlon testified that, while he did have a preliminary discussion with Superintendent Barber concerning allowing a notetaker at the meeting, he subsequently reconsidered the advisability of permitting this and ultimately decided that a notetaker should not be present. He further testified that he was willing to allow the Employer to obtain a tape recorder for the purpose of preserving a record of the meeting but that Superintendent Barber was unwilling to proceed under such circumstances.

As read by the Arbitrator, Article 15 of the National Agreement contains no provision for either party to insist upon the presence of a notetaker. Indeed, the pertinent language, contained in Section 2, Step 2(d) states that "The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions [and] . . . in cases involving discharge either party shall have the right to present no more than two witnesses." This paragraph continues by stating that "Such right shall not preclude the parties from jointly agreeing to interview additional witnesses . . . " In the considered judgment of the Arbitrator, this language does not allow either party to insist upon the presence of a notetaker, although it seems to permit the parties to mutually agree to include one or more notetakers if the parties so choose. Thus, it appears that, regardless of the intimations allegedly made by Mr. Bourlon that he would allow a notetaker to be present, he was within his rights when he subsequently insisted that the notetaker be excluded. Accordingly, the failure of the Employer to proceed with the meeting was, in the view of the Arbitrator, in error. It follows therefrom that Grievance 1 was properly advanced to Step 3, particularly since the Employer failed to issue a Step 2 answer.

Finally, the Employer maintains that since the Union failed to pursue Grievance 2, the Grievant is now estopped from pursuing the same matter in Grievance 1. Supportive of this position, the Employer contends, is the arbitration award in Case No. W1C-5K-C-21155. In that case, a grievance had been filed and denied at Steps 1, 2, and 3, and the Union did not appeal the matter to arbitration. Thereafter, a second grievance was filed, reasserting the same facts as it had done in the original grievance. The arbitrator concluded that the second grievance was not filed in a timely manner, concluding that the subsequent "refiling" constituted a new and independent grievance subject to procedural defenses. While the Employer herein maintains that the facts in the instant matter are similar, the Arbitrator is constrained to disagree.

The record herein reflects that on October 31, 1991, the Grievant filed a timely grievance over the Notice of Proposed Removal, which he received on October 18, 1991. While awaiting a Step 1 meeting, the Grievant met with the Postmaster on October 25, 1991, in an effort to persuade the Postmaster to rescind the Notice of Proposed Removal. Subsequently, and while awaiting the Postmaster's decision, a Step 1 grievance meeting occurred and the grievance was denied at Step 1 on Thursday, October 31, 1991. According to the Union, as a result of two intervening weekends and a federal holiday, Union Executive Vice President Elliott did not learn until Tuesday, No-

vember 12, 1991 that the deadline for the grievance appeal had passed. On that date, Elliott immediately requested an extension from Superintendent Barber, who declined to grant the requested extension.

While it is accurate, as the Employer has argued, that the Step 2 appeal was filed after the ten-day deadline, and while such deadlines are included in labor contracts for important reasons, arbitrators have generally taken the view that a minor breach of a filing deadline may be forgiven, particularly when the other side is unable to demonstrate that it has been prejudiced in any way. This is particularly true in an instance such as the present matter, where the Grievant, who did file his two grievances in a timely manner, stands to be denied his day in court purely as the result of a procedural error, namely, a two-day delay in the filing of the Step 2 appeal, which may well have resulted from the interposition of two weekends and a federal holiday. Indeed, even in the award in Case No. W1C-5K-C-21155, which the Employer cites with approval, arbitrator Levak states that "The starting point in this case is the general principle that where there is any question regarding a procedural bar, all doubts will be resolved in favor of addressing the dispute on its merits." Similarly, in Case No. C1N-4F-D-8380, also cited with approval by the Employer, arbitrator Dworkin states that " . . . arbitrators should be hesitant to find that trivial neglect on the part of an employee stands as a bar to the right to obtain a full hearing and a final binding arbitration."

There is the additional concern in this case that, at the time the Union sought an extension of the time limits for filing the Step 2 appeal, the Postmaster had not yet issued his Letter of Decision. Thus, even as the Union attempted to appeal the Notice of Proposed Removal, no final decision had been made by the Employer as to the Grievant's fate. Under such circumstances, and in light of the Arbitrator's conclusion that the filing delay may well have been justified, he finds that it would be manifestly unjust to rule that Grievance 1 is not arbitrable.

In reaching this finding, the Arbitrator has considered the numerous awards submitted by the parties over the question of grievance filing in removal cases. Curiously, the parties seem to have come full circle on the matter. Prior to 1974, the Employer appears to have taken the position that a grievance could not be filed upon receipt of a Notice of Proposed Removal but must, instead await the issuance of a Letter of Decision. In September 1974, however, in a Step 4 Decision (Union Exhibit No. 1), the Employer acquiesced in a Union request and determined that " . . . a grievance may be filed upon receipt of the proposal notice." Now the Employer seemingly takes the view that not only "may" a grievance be filed upon receipt of a Notice of Proposed Removal, but if it is not, then the employee has waived his right to protest his removal, notwithstanding the fact that no final decision has been rendered through the issuance of a Letter of Decision.

This approach is further complicated in that it creates an inconsistency with Article 16, Section 8 of the National Agreement, which states that "In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee." In the matter at hand, there is no indication from the record presented as to whether Supervisor Hauck received the necessary concurrence prior to issuing the Notice of Proposed Removal. Perhaps it was not necessary that he do so, since he was only "proposing" the Grievant's removal. Perhaps, too, Supervisor Hauck believed that the concurrence would be forthcoming from Postmaster Furiato when the latter issued his Letter of Decision. This would, of course, be acceptable, since, if Postmaster Furiato upheld Supervisor Hauck's proposed removal, then Article 16, Section 8 would be satisfied. However, such a process would require the Grievant to file a grievance protesting his removal well before the proper concurrence had been issued. Realistically, in many installations, the supervisor issuing a Notice of Proposed Removal will also be the person with whom an employee meets at Step 1; and the official who concurs in the decision to remove and issues the Letter of Decision will be the individual with whom the employee meets both at Step 2 and in the meeting in which the employee answers the charges outlined in the Notice of Proposed Removal. It seems to the Arbitrator that this unnecessarily complicates the operation of the grievance machinery, leading to procedural dilemmas such as the one involved herein.

There is a final point that should be noted in this matter. The parties have seemingly established the procedure of issuing a Notice of Proposed Removal, followed by a meeting with the station head or postmaster during which the employee is afforded an opportunity to defend himself. Thereafter, the official makes a decision and issues a Letter of Decision. Concurrent with this process, the Grievant is required to file a grievance, hold a Step 1 meeting, presumably with the supervisor who issued the Notice of Proposed Removal, and defend himself in that forum. In the considered judgment of the Arbitrator, this dual procedure has the potential of endangering an employee's right to a fair hearing by complicating the procedural process and creating opportunities for error. Indeed, the pitfalls that await both the employee and the Union are no more apparent than in the instant case. Interestingly, in the award cited with approval by the Employer from Case No. C7C-4B-D-854, arbitrator Alan Walt, in addressing the propriety of requiring an employee to file a grievance at the Notice of Proposed Removal stage, made the following observation:

> *If this were a matter of first impression, the undersigned would agree with the Union's arguments on the arbitrability question. A reading of the Notice of Charges–Removal (Veteran) clearly reveals that no decision had been reached at that time to discharge grievant from employment. The notice states that "it is proposed to remove you from the Postal Service . . . The Union is correct when it argues that grievant was not "made to suffer" until the Employer finally reached its decision on September 3 to discharge grievant.*

This Arbitrator finds himself in agreement with the sentiment expressed by arbitrator Walt. Were it not for the long period of time during which the parties have followed the procedure in question, and in light of the long line of arbitral decisions that have upheld the procedure that the parties now follow, this Arbitrator would conclude that the proper time for filing a grievance is not when a Notice of Proposed Removal is issued but within fourteen days after the Employer has made a final decision to remove an employee.