

C# 13837

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration)	GRIEVANT:
between)	I. D. Saenz
UNITED STATES POSTAL SERVICES)	Austin, Texas
and)	CASE NO.
NATIONAL ASSOCIATION OF LETTER)	G90N-4G-D93040395
CARRIERS)	

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: Edward F. Ward, Jr.
Chief Counsel, Labor Rel.

For the NALC: Keith E. Secular
Attorney (Cohen Weiss
& Simon)


Place of Hearing: Washington, D.C.

Date of Hearing: April 6, 1994

Date of Post-Hearing Briefs: June 3, 1994

AWARD: The grievance is granted.
If there was work available for I. Saenz during
the 30-day period following notice of her proposed
discharge, she should be made whole for the pay
she should have received during this period.

Date of Award: August 18, 1994


Richard Mittenthal,
Arbitrator

BACKGROUND

This grievance protests Management's action in placing a transitional employee (TE) in non-pay status immediately after providing her with a 30-day advance written notice of her proposed discharge. NALC maintains that this action is a violation of paragraph 11 of the January 1992 TE Arbitration Award. The Postal Service disagrees.

Some history is necessary to place this case in proper perspective. The June 1991 Interest Arbitration Award involved both NALC and APWU. It established a new non-career bargaining unit classification, "transitional employee." This classification was to be used to "fill anticipated impacted positions as a result of automation." The parties were directed to meet and resolve all questions with respect to the terms and conditions of employment for TE's. In the event they were unable to reach agreement, the dispute was to be referred back to the Interest Arbitration Panel for a final and binding decision.

The Postal Service and APWU reached agreement on December 3, 1991. But the Postal Service and NALC were unable to reach agreement notwithstanding the many meetings they held between July and December 1991. Because of this impasse, they returned to the Interest Arbitration Panel which was reduced from five to three persons due to the fact that this arbitration concerned just one member (NALC) of the Joint Bargaining Committee.

One of the many issues before the Panel was the kind of protection to be afforded TE's in the event of discipline or discharge. The Postal Service urged that because TE's were non-career, limited term employees, they should have few work rules governing their employment and they should be treated in a manner similar to "temporary employees." It believed TE's should not be given any of the "just cause" protection found in Article 16 but should simply be insulated against any retaliation by Management for filing grievances, invoking contractual rights or otherwise engaging in "protected activity." This proposal tracked the language of the TE Agreement already reached by the Postal Service and APWU. NALC objected to these terms. It contended that TE's, being bargaining unit employees, should be entitled to all of the protections found in Article 16.

The Panel's Award, issued on January 16, 1992, disposed of this dispute as follows:

11. Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pre-textual.

Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge.

In the case of removal for cause, a transitional employee shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement. (Emphasis added)

In addition, the Award lists the various articles of the National Agreement that will apply to TE's. Article 16 is not included in the list.

The underscored words in paragraph 11 of the Award are the crux of this dispute. NALC insists that the reference to "advance written notice in accordance with the provisions of Article 16..." necessarily includes a TE's right to remain on pay status, "either on the job or on the clock" at Management's option, during the 30-day notice period. It concedes, however, that TE's would not have a right to remain on pay status if there is no work for them to do. The Postal Service, on the other hand, emphasizes that paragraph 11 speaks only of "advance written notice" and says nothing about the pay status rules of Article 16. It believes the words "in accordance with the provisions of Article 16..." are merely a reference to the variations in "advance written notice" permitted by Article 16 and a designation of the precise portion of the National Agreement in which "advance written notice" is mentioned. It insists that NALC is attempting, under the guise of contract interpretation, to enlarge the terms of the TE Award and give TE's pay status protection which is not covered by the

Panel's decision.

Irma Saenz is the grievant in this case. She was a TE, represented by NALC, in an Austin, Texas postal facility. She was given "advance written notice" that she was to be discharged 30 days later because of her unsatisfactory attendance. The "notice" also stated that she would "remain in non-pay, non-duty status for the notice period." NALC grieved Management's failure to pay Saenz during the 30-day notice period. That is the dispute presently before the arbitrator. It should be noted that her discharge was later upheld by a Union/Management Pairs (UMPS) decision. There is no pending claim that she should be reinstated.

Because Article 16 (Discipline Procedure) plays a significant role in this case, its references to "advance written notice" should be quoted at length:

Section 5. Suspensions of More Than
14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case...When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee a full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 6. Indefinite Suspension -
Crime Situation

A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment

can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

* * *

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U. S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had... (Emphasis added)

DISCUSSION AND FINDINGS

The interpretive question concerns paragraph 11 of the TE Award. This paragraph states that where Management intends to discharge for cause, a TE "shall be entitled to advance written notice of the charges...in accordance with the provisions of Article 16..." Express mention of "advance written notice" is found in Sections 5 and 6 of Article 16. I refer particularly to Section 5 which provides that an employee who Management wishes to discharge "shall...be entitled to advance written notice of the charges...and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days." These words mean that the employee shall be in pay status during the 30-day notice period. Section 5 goes on to say that at the end of the notice period, "the employee is immediately removed from a pay status."

NALC contends that the reference in the TE Award to "advance written notice...in accordance with provisions of Article 16..." necessarily includes pay status during the notice period. The Postal Service contends that these are

separate and distinct subjects and that paragraph 11 granted TE's "advance written notice" but not pay status during the notice period.

For the following reasons, I believe NALC's view is more persuasive.

First, the service of "advance written notice" is a statement of Management's intentions. It is not a discharge. The TE is informed she will be discharged 30 days after receipt of the notice. She remains in a form of status quo during the notice period. Here, however, Management took the aggrieved employee off-the-clock and placed her on non-pay status immediately upon service of the notice. In these circumstances, realistically speaking, she has not received "advance" notice. For she has been removed from her job, denied pay status, and in effect discharged on the very day she received the notice. The fact that a formal statement of discharge will be issued 30 days later is not a sufficient basis for saying that the initial notice was "advance" notice.

Second, the object of "advance written notice" appears to have been to preserve the status quo for pay purposes during the notice period. The "advance" notice delays the proposed discharge and enables the employee to remain in pay status pending the actual discharge. The intimate linkage between the two is clear from a reading of Sections 5 and 6 of Article 16. Both provisions plainly state that the employee, after being served "advance written notice", remains in pay status during the notice period. The notice period is ordinarily 30 days but may be less in some situations. Whatever its duration, however, "advance" notice insures some period during which the employee is in status quo for pay purposes.

Third, it is true that the TE Award says Article 16 is not one of the provisions that applies to TE's. But this broad exclusion has been modified by paragraph 11 of the TE Award. That paragraph specifically requires that a TE shall, in the event of a proposed discharge, be given "advance written notice...in accordance with the provisions of Article 16..." Thus, in order to understand the scope and meaning of "advance written notice", one must look to Article 16. And, as I have already explained, a close examination of Sections 5 and 6 of Article 16 reveals the special meaning which attaches to the term "advance written notice."

Fourth, the Postal Service claim largely ignores the paragraph 11 requirement that the "advance" notice be given "in accordance with the provisions of Article 16..." For Management to give "advance" notice in the sense of a preliminary notice later followed by a final notice is not enough. What is necessary is the kind of "advance" notice contemplated by Article 16. That "advance" notice demands a true notice period during which the TE, not yet having been discharged, is left in status quo for pay purposes. That is the kind of protection bargaining unit employees obtain by reason of "advance" notice. That is the kind of protection TE's, as bargaining unit employees, presumably were granted by paragraph 11.


Fifth, the implication on which this decision rests is not foreign to the administration of Article 16. In an earlier national award (Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518), I held that Management need not give "advance written notice" when it invokes the "emergency procedure" of Article 16, Section 7 and puts an employee on off-duty, non-pay status due to certain kinds of conduct. My reasoning was that Management's right under Section 7 to place someone "immediately" on non-pay status necessarily implies that there is no requirement of "advance" notice. Similarly, in the present case, Management's obligation under paragraph 11 of the TE Award to give "advance" notice pursuant to Article 16 necessarily implies that it may not place the employee immediately on non-pay status.

Finally, the Postal Service observes that TE's do not have a scheduling guarantee (i.e., work hours per week or pay period) under the TE Agreement. But the evidence shows that pay status retention under Article 16, Section 5 or 6 is not calculated on the basis of scheduling guarantees. Part-time flexibles illustrate the point. They are guaranteed only two or four hours per pay period depending on the size of their office. The parties agree, however, that when a part-time flexible is given "advance" notice of discharge, she remains on pay status for the notice period and is paid no less than her average number of hours over some earlier period. The fact that TE's have no scheduling guarantee does not defeat the instant grievance.

Saenz, the TE in question, was accordingly entitled to remain on pay status during the notice period. Management's failure to provide this benefit was a violation of paragraph 11 of the TE Agreement.

AWARD

The grievance is granted. If there was work available for I. Saenz during the 30-day period following notice of her proposed discharge, she should be made whole for the pay she should have received during this period.


Richard Mittenthal, Arbitrator