

C #325

IN THE MATTER OF THE ARBITRATION BETWEEN
UNITED STATES POSTAL SERVICE
CLEVELAND, OHIO

- and -

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Arbitrator: William Haber, Ann Arbor, Michigan

Case No.: CIC-4E-D 16000

Date of Grievance: February 8, 1983

Date of Hearing: August 1, 1983

Issue: Removal of Charles Schumacher

Opinion and Award: October 13, 1983

1. Issue

Charles Schumacher, a clerk with the Postal Service in Cleveland, Ohio, was issued a Notice of Removal on January 26, 1983 for failure to qualify on an MPLSM scheme assignment. The Union initiated a grievance on his behalf on February 8, 1983 with the supervisor. The grievance was denied at step 1 and at the other steps of the grievance procedure and submitted to arbitration before William Haber of Ann Arbor, Michigan, a member of the Regular Arbitration Panel.

2. Hearing and Appearances

A Hearing on this grievance was held in the Cleveland, Ohio Postal Facility on Orange Avenue on August 1, 1983. The APWU was represented by Roland L. Carter, President of the Local, who presented the case. Present with him were Jennie C. Carter, Steward; Charles Schumacher, grievant; and Frank Bates, witness.

The Postal Service was represented by Bernard D. King, Labor Relations Assistant, who presented the case. Appearing with him was James McDowell, Labor Relations Assistant.

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The Arbitrator was provided with several Joint Exhibits:

J 1 is a copy of the Agreement between the parties.

J 2 is the grievance package. It includes a copy of the formal grievance, dated February 16, 1983. It claims that the notice of removal issued for scheme failure is not for just cause; the grievant had met the qualifications for which he was hired and that Management was hiring employees for training on O81 program for which the grievant is also proficient. He requests that the notice of removal be rescinded and he be made whole.

In a letter dated February 18, 1983, signed by the Labor Relations Assistant, the advocate in this case, it is stated that the Postal Service had not violated the Agreement and that, nevertheless, the notice of removal, dated January 25, 1983, has been rescinded effective February 16 and that a certified letter to that effect is sent to the grievant.

Also attached to this Exhibit is a lengthy statement from the APWU, signed by Jennie Carter, the steward, taking note that the removal has been rescinded, that no reason for this action was given, that the employee however was advised on February 24 that he had been issued another notice of removal and that his last day at work was March 16, 1983. The reissuance of the discipline after its withdrawal exposes the employee to double jeopardy.

The step 3 grievance decision is dated May 23, 1983, also a part of this Exhibit, is signed by Management Desginee and deals with the merits of the case stating that the grievant failed to qualify on the required scheme, that the removal was for just cause and that the grievance was denied.

Several Exhibits were submitted by the Employer:

E 1 is the original Notice of Removal, dated January 25, 1983.

E 2, dated February 16, 1983, was sent to the grievant by certified mail and states simply that the Notice of Removal issued under the date January 25 is hereby rescinded. It is signed by the supervisor.

E 3 is dated February 16, 1983, signed by the supervisor, and received by the employee on February 25. It is simply repeating the original notice of removal for "Failure to qualify on your current required manual secondary MPLSM scheme assignment..." Unlike that original notice of removal, dated January 25, this one includes four paragraphs concerning the fact that as a preference eligible employee the grievant has certain rights, which are spelled out in a lengthy paragraph.

E 4 is a receipt, signed by the grievant's wife and the grievant, acknowledging the second notice of removal.

E 5 is dated March 24, 1983 and is an appeal to the Merit Systems Protection Board, asking for an investigation and adjudication of the action taken against the grievant by the Cleveland Post Office.

E 5a is a document from the Merit Systems Protection Board, Chicago Regional Office, signed by the Regional Director, consisting of seven pages, dated April 8, 1983, dealing with the grievant's appeal to the Board.

The Union submitted but one Exhibit, U 1, being an excerpt from Blacks Law Dictionary, with the Arbitrator's attention called to the definition of the word "rescind." It reads as follows:

"Rescind. To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. To declare a contract void in its inception and to put an end to it as though it never were..... Not merely to terminate it and release parties from further obligations to each other, but to abrogate it from the beginning and restore parties to relative positions which they would have occupied had no contract ever been made"

In addition to these Exhibits the parties submitted Post-Hearing Briefs. That of the Postal Service was received on August 17 and that of the APWU on August 26, 1983. They were exchanged between the parties by the Arbitrator's office on the latter date.

In addition, the Arbitrator was provided by the Union advocate with an arbitration award by Arbitrator Gerald Cohen, dated August 31, 1978.

3. Position of the Parties

It is the position of the Employer that the grievant filed a grievance on February 8, 1983, which was denied at the step 2 hearing on February 16. The grievance was denied verbally, but at the same time the notice of removal, issued to the

grievant on January 25, 1983 (Employer Exhibit 1) was rescinded. The Union was informed of that decision on February 18, 1983. The grievant was issued another notice of removal on February 25 and the Union failed to file a grievance, responding to that notice of removal. The grievant, however, did appeal to the Merit Systems Protection Board on March 24, which was acknowledged by the MSPB on April 18, 1983.

It is the Employer's position that the issue before the Arbitrator is moot, since the notice of removal, which is the source of the grievance, had been rescinded. The Arbitrator has no jurisdiction, therefore, over that notice of removal and the issue before him is a question of arbitrability.

Moreover, the grievant having appealed to the Merit Systems Protection Board, he will have to "receive his Day in Court through that forum." The Arbitrator simply cannot arbitrate a moot issue. This is the Employer's brief and total argument.

It is the position of the Union that the grievant was issued a notice of removal for failure to qualify on a scheme assignment, receiving a grade quite below the qualifying score. He filed a grievance as provided for in Article XV of the Agreement. The grievance was denied on February 8. A step 2 grievance was filed and discussed and also denied. At that step, on February 22, 1983, the Union became aware that the advance notice of removal had been rescinded. No reason was given. The rescission was made, to use the Union term, "without equivocation."

A new notice of removal was issued, effective March 16, 1983. In the Union's view, once the notice was rescinded it cannot be kept alive and a new one cannot be issued in its place. It cites legal dictionaries to indicate that having been rescinded, it was abrogated, canceled, and ended, as if it never existed. The Union cites Arbitrator Gerald Cohen, that once the removal was rescinded without a reservation, the Employer waived the complaint and, in effect, "dismissed the charges" against the grievant. To do otherwise is "to hold a sword over grievant's head indefinitely" and "to keep a complaint in cold storage for future use."

At the Hearing the Union objected to the presentation of the January 25 notice of removal, since the supervisor who issued it was not present and, as stated by the Union advocate, it would be unreasonable "to cross examine a document." The Union also objected to the introduction of the other Employer Exhibits, since it had not seen them before and, in the Union's view, they have no bearing upon the issue before the Arbitrator. None of these Exhibits deal with the merits of the issue which led to the notice of removal for scheme failure.

The Union denied, for example, that Employer Exhibit 4, containing the grievant's signature (PS Form 3811) is actually his signature, and calls the Arbitrator's attention to other signatures of the grievant which are of different script.

The Arbitrator is urged to disregard Employer Exhibit 5 in which the grievant himself appealed to the Merit Systems Protection Board, in view of the fact, that under the Agreement

he can appeal only to one forum, that provided for in Article XV of the Agreement. The Union maintains that the grievant only filed an appeal and merely received an acknowledgment that the appeal arrived. He was not, in fact, involved in hearings before two forums simultaneously.

The Arbitrator is urged to simply recognize the fact that the Postal Service committed an error in issuing the notice of removal to begin with, and rescinded it because of that error. The first letter of removal resulted in a grievance, and that grievance, states the Union, was not appealed to the Merit Systems Protection Board. The second one was appealed and no grievance was filed. The Arbitrator is asked to hear the grievance on its merits.

4. Discussion: Opinion and Award

The Arbitrator has been in some anguish about the proper course to follow in deciding this case. He is usually disinclined to deny a grievance on a technicality. An employee has been removed. Substantial reasons were suggested as to why he was not qualified to continue on the tasks for which he was being trained. He grieved his removal and sought a hearing on the merits of his claim. The removal was rescinded on a technicality, an error made by the Employer's representatives. The grievant had in the meantime filed a grievance, which was denied at step 1 and again at step 2, and before proceeding to step 3, the removal was rescinded.

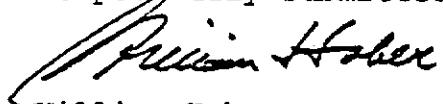
The Arbitrator is now presented with a technicality. The removal which he grieved disappeared. The new one which was

issued was not grieved. The principles of arbitration, while committed to due process and to the searching after the facts with utmost diligence, should not, in this Arbitrator's views, be thwarted by a simple technicality. A grievance existed and should be pursued. That is the objective of Article XV of the Agreement between the parties. If an error was made in issuing the notice of removal, and later corrected by withdrawing it, and issuing another notice of removal, that withdrawal should not represent a total obstacle to hearing the issue on its merits.

A discharge of an employee is a serious action on the part of the Employer and represents the maximum punishment which can be meted out to an employee. The employee is entitled to have his grievance heard. It may well be that he cannot adequately perform on the task for which he was being trained, and ought to be removed. Or, in view of the fact that he has been a Postal employee for over three years, he may be eligible for transfer to a less demanding position. This can only be determined after hearing the case on its merits and should not be aborted by having to explore Blacks Dictionary, or other legal volumes.

It is the Arbitrator's Opinion and Award that the issue should be heard on its merits and the decision of back pay, if any, should be decided at that time.

Respectfully submitted,



William Haber