C#05018

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
UNITED STATES POSTAL SERVICE)
)
AND)
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, BRANCH 82)
(W1N-5D-D 30932))
R. Lucas Grievance))
Gresham, OR.

ANALYSIS AND AWARD

Carlton J. Snow,
Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1981 through July 20, 1984. A hearing occurred on June 14, 1985 in a conference room of the Main Post Office located in Portland, Oregon. Mr. Robert G. Funge, Labor Relations Representative, represented the United States Postal Service. Mr. Jim Edgemon, National Business Agent, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. The arbitrator placed all witnesses under oath. As an extension of his personal notes, the arbitrator tape-recorded the proceeding. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that

the matter properly had been submitted to the arbitrator for determination. The parties submitted the matter on oral argument. With the authority of the parties, the arbitrator has retained jurisdiction of the matter for ninety days following issuance of an award.

II. STATEMENT OF THE ISSUE

The parties were unable to agree on a statement of the issue and authorized the arbitrator to frame it. The issue is as follows:

> Did the Employer violate the parties' collective bargaining agreement when it refused to authorize the grievant's leave of absence for religious reasons? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 - NONDISCRIMINATION AND CIVIL RIGHTS

Section 1. Statement of Principle

The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions against employees because of race, color, creed, religion, national origin, sex, age, or marital status or because of a physical handicap with respect to a position the duties of which can be performed efficiently by an individual with such a physical handicap without danger to the health or safety of the physically handicapped person or to others.

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal service, that directly relate to wages, hours or working conditions as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

IV. STATEMENT OF FACTS

In this case, the grievant has challenged the decision of the Employer to remove him from the Postal Service when he refused to work on the Jewish holiday of Yom Kippur. He submitted a request for a leave of absence covering the day of the holiday celebration, and the Employer denied it. Out of that beginning has come this dispute.

In 1984, Yom Kippur occurred on October 6. The grievant had celebrated Yom Kippur every year since 1981 with his wife. His spouse was reared in an atmosphere that held religious values to be important, and she testified that her bas mitzvah was a significant experience for her.

The grievant has not officially converted to Judaism. He testified that the Jewish faith is central to his life and the "essence" of his existence. No question has been raised regarding the sincerity of the grievant's religious beliefs. The genuineness of the grievant's religious commitment simply was not an issue before the arbitrator.

In June of 1984, the grievant and his wife underwent a temporary separation. The grievant, nevertheless, made an attempt to obtain a leave of absence so that he could celebrate Yom Kippur. He borrowed certain religious articles from his wife with whom he was exploring the prospect of reconciliation, in order to celebrate the religious holiday alone.

The grievant has worked at the facility where the dispute arose since November 27, 1983. He has accumulated twelve years of experience with the Employer. Previous duty assignments have

been in Culver City, California and Salem, Oregon, but this particular office had no prior experience with the grievant's efforts to celebrate Jewish holidays. Other relevant facts will be discussed later in the report.

V. POSITION OF THE PARTIES

A. The Employer:

It is the position of the Employer that there was just cause for discharging the grievant. According to the Employer, there has been no religious discrimination in this case. Management discharged the grievant because he failed to obey a direct order. In support of its position, the Employer contends that the grievant failed to give management notice of the grievant's religious beliefs and that seniority provisions in the collective bargaining agreement prevented the Employer from making accommodation for the grievant's religious needs in this particular case.

B. The Union:

It is the position of the Union that the Employer violated the provisions of the parties' collective bargaining agreement by discharging the grievant without just cause. According to the Union, management violated Article 2 of the parties' agreement by engaging in religious discrimination. It is the belief of the Union that the Employer had an obligation to accommodate the grievant's request for a leave of absence.

VI. ANALYSIS

A. Procedures for a Leave of Absence:

There are two methods of securing a leave of absence. One may file a Form 1547 at the beginning of the year, or one may follow the unscheduled annual leave policy. For the date of October 6, 1984, Messrs. Lovegreen and Mikander had been granted their request for a leave of absence pursuant to Form 1547. At this point in time, the grievant "passed" his opportunity to schedule leave as the result of a Form 1547 request. (See, Employer's Exhibit No. 3). A second method for obtaining a leave of absence, of course, was by filing a Form 3971 for unscheduled annual leave.

Guidelines for obtaining unscheduled annual leave at this particular facility are as follows:

Memorandum of Understanding with Branch 82, NALC
and
U.S.P.S. Gresham Oregon

UNSCHEDULED ANNUAL LEAVE POLICY

A. With the exception of personal emergencies and other extenuating circumstances, the following guidelines will govern the unscheduled annual leave policy for this office:

B. Unscheduled annual leave will be granted on a first-come, first-served basis. If two or more employees submit their application on the same day, the employee with the highest seniority will be granted annual leave first.

C. Form 3971's must be submitted a minimum of 72 hours and a maximum of 14 days in advance and must be handed personally to the appropriate supervisor.

D. Management agrees to grant the annual leave request whenever conditions permit, exceptions being: unusually heavy mail volume, light carrier work force, or other extraordinary circumstances.

On September 13, 1984, Mr. Craig submitted a Form 3971 for October 6, 1984. Management approved his request on September 26, 1984. (See, Union's Exhibit No. 2). The grievant, then, submitted a Form 3971 on September 26, 1984. In the box for "remarks," the grievant stated:

> Yom Kippur--day of atonement. (See, Union's Exhibit No. 3).

Management denied the grievant's request for annual leave. The basis of the denial was "operational needs." At that point, management had approved two Form 1547 requests and one Form 3971. Because October 6 was part of a three day weekend, the Employer received a number of annual leave requests. Management denied requests from Messrs. McCoy, Wilson, and Clack All three of these individuals are senior to the grievant. The grievant's

Form 3971 was the only religiously motivated request.

The work schedule covering the day of October 6, 1984 had been posted on September 26, 1984. Management had placed the schedule on a clipboard on the supervisor's desk. Witnesses for both parties agreed that the work schedule frequently is changed after it has been posted. Each posted schedule usually is for a two week period.

After the work schedule had been posted, the grievant spoke with Postmaster Singleton on October 1, 1984. According to the grievant, he told the Postmaster he would work any other day, including Christmas, if he only could celebrate Yom Kippur. The Postmaster indicated to the grievant that he would "look into it."

On October 3, 1984, the grievant submitted a second Form 3971, requesting a leave of absence for October 6, 1984. After receiving the second denial of his request for leave, the grievant spoke with his immediate supervisor, Supervisor Stratton, on October 5. He explained to Supervisor Stratton the importance of Yom Kippur to him and asked Mr. Stratton to serve as a mediator in the dispute between him and the Postmaster. According to unrebutted testimony, Mr. Stratton stated that he did not "want to be put in that position."

Later that day, when the grievant's Form 3971 request had been returned, Supervisor Stratton informed the grievant that "the ball is in your court" and that, if the grievant failed to report for work on October 6, he could be terminated. The grievant informed Supervisor Stratton that he could not

"compromise my religious beliefs" and that he would not report to work on the day in question. To be certain there was no misunderstanding, the grievant later had a co-worker witness a repetition of the conversation with Supervisor Stratton. The witness, Miss Colby, testified that the grievant informed the supervisor of his inability to work on October 6 and that he would be unable to call in his absence because religious restrictions of Yom Kippur required that he have no communication "with the outside world."

There was no dispute about the fact that the grievant spent October 6, 1984 observing Yom Kippur. He did not report for work or call in regarding his absence. The grievant testified without haughtiness that he would be compelled to repeat the same pattern of conduct if again faced with the same circumstances.

Superintendent Randall worked on the shift when the grievant should have called in regarding his absence. Mr. Randall testified that he had no knowledge of the grievant's inability to report his absence. There was unrebutted testimoney that the Employer delivered all mail on the day in question. There was testimony about the fact that some secondary mail could have been cased on the day of the grievant's absence. There was no indication that management would have assigned the grievant to sort the mail in question.

There was a carrier not scheduled to work on October 6, 1984 who had volunteered to work in the grievant's place. This individual, Mr. Malsbary, approached the Postmaster on October

5 and offered to work in the grievant's place. The Postmaster did not accept the offer and testified in the arbitration hearing that he could not do so because there already were three senior employes working against their wishes who previously had submitted Form 3971's for October 6, 1984.

Only one of those three more senior employes testified at the arbitration hearing, namely, Mr. Clack. Mr. Clack stated that he had not been contacted regarding any possibility of the grievant's need to be away from the job on October 6. Shop stewards at the facility testified that they had no knowledge of Mr. Malsbary's offer to work in place of the grievant, and there was no inquiry regarding the potential impact of such a possibility on the parties' collective bargaining agreement.

In unrebutted testimony, Mr. Malsbary indicated that he sought the names of other carriers who had the day of October 6 off work. The Postmaster refused to provide the information. Mr. Malsbary testified that he requested the names because the grievant repeatedly had asked management for the names. There was no rebuttal to the fact that the Employer failed to provide the grievant with such information.

The Employer made clear that the decision to remove the grievant had been reached purely on the basis of this incident alone. The Employer maintained that the grievant had received a direct order to report for work. He refused to comply with the order even though he understood the consequences of not doing so, and, accordingly, management maintained that it had no option but to discharge him.

B. Some Guiding Principles:

The Postmaster General has made clear that it is the policy of the Employer to avoid religious discrimination. He has stated:

> A fundamental part of the Postal Service Equal Employment Opportunity policy is that discrimination based on religion is prohibited. Further, the Postal Service is committed to making reasonable accommodations of employees' and applicants' religious needs with respect to regular schedules, scheduling of tests, training, interviewing, etc., on employees' and applicants' Sabbath or religious holidays. In this regard, managers must be particularly conscious of days on which employees, because of their religious beliefs, may be prohibited from working or required to attend religious services. Methods of accommodating which are consistent with any applicable collective bargaining agreements and our operating requirements must be attempted. (See, Union's Exhibit No. 4).

It is useful to have some understanding of the legal context in which the Postmaster General's policy has been developed. It is clear from the management rights provision in Article 3 of the parties' collective bargaining agreement that the Employer has retained the right to implement such statements of policy. The objective of the parties, however, is to make such policies "consistent with applicable laws and regulations." (See, Joint Exhibit No. 1, p. 4). The Employer's "religious accommodation" policy has its roots in 1972 amendments to the Civil Rights Act of 1964, and the parties have agreed that such policy shall be implemented in a manner consistent with the law of the land.

Section 2000e(j) of the Civil Rights Act of 1964 has imposed on employers an obligation reasonably to accommodate

religious needs of workers, except when undue hardship on the conduct of the employer's business will result. (See, 42 U.S.C. § 2000e(j) (1982)). The U.S. Supreme Court had interpreted the "religious accommodation" requirement in Trans-World Airlines v. Hardison in 1977 (See, 432 U.S. 63 (1977)). As the Supreme Court stated in Hardison:

> The intent and effect of this definition (in 42 U.S.C. § 2000e(j)) was to make it an unlawful employment practice under Section 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees. (See, 432 U.S. 63, 75 (1977)).

In that statement, the Court set forth the test to be met in religious accommodation cases, but the extent of the obligation has remained unclear and has been confronted by lower courts in a number of cases since 1977.

While the extent of the obligation to make religious acommodation lacks complete definition, there are a number of discernible elements. First, it is clear that the concept of religious accommodation covers not only adherence to certain religious principles but observance of religious practices as well. The 1972 amendments to the Civil Rights Act of 1964 make clear that there is a duty to accommodate religious observances of workers. There is an obligation to accommodate reasonable religious needs of employes. (See, 42 U.S.C. § 2000e(j) (1982)).

Second, an equally important element is that religious accommodation does not extend as far as imposing an undue hardship on the conduct of an employer's businness. Appellate

courts have made clear that the obligation to "make reasonable accommodation" must be defined on a case by case basis. As one court has stated:

> Each case involving such determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances of the individual employer-employee relationship. (See, Redman v. GAF Corp., 574 F.2d 897 (1978)).

The U.S. Supreme Court has made clear that there should be "reasonable accommodation" that is "short of undue hardship." (See, Trans-World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977). Such language makes clear that religious accommodation may well result in some degree of hardship. It simply must not reach the level of "undue" hardship. Courts have not reached agreement regarding the precise degree of hardship that may be imposed on the employer in an effort to reasonably accommodate an employe's religious needs. Such precision eludes decision makers in such cases not only because of the different facts and circumstances of each case, but also because no consistent analytical framework has been applied to such problems. (See, Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397 (9th Cir. 1978); and Cummings v. Parker Seal Company, 516 F.2d 544 (6th Cir. 1975), 433 U.S. 903 (1977)). The point is that it is reasonable to understand the legal guidelines for religious accommodation as including an element of hardship, as long as it does not reach the level of undue hardship.

As a third element, the U.S. Supreme Court has taught that

there is no obligation to violate the seniority system of a collective bargaining agreement in order to accommodate the religious needs of an employe. As the Court stated in Hardison:

> It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. (See, TWA v. Hardison, 432 U.S. 63, 81 (1977)).

It is important to recall that, in Hardison, the Union in the case was unwilling to modify requirements of the parties' seniority system. As the Court stated, "TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective bargaining contract." (See, Hardison, 432 U.S. 63, 68 (1977)).

As a fourth element, the Supreme Court has made clear that anything more than de minimis costs will be defined as "undue hardship." As the Court stated:

> To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the court of appeals would, in effect, require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. (See, Hardison, 432 U.S. 63, 84 (1977)).

As articulated by the Supreme Court, the financial test of "undue hardship " has been set forth without precision. Since

1977, appellate courts have refined the "financial cost" test of undue hardship.

First, it is necessary, in making the financial analysis of undue hardship, to establish the nature of the costs to be incurred by the employer. (See, for example, Nottelson v. Smith Steelworkers, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); and Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979)). Second, the employer must do more than advance speculative or hypothetical costs of accommodation. (See, Haring v. Blumenthal, 471 F.2d 1172 (D.D.C. 1979), cert. denied, 452 U.S. 939 (1981)). The Court has made clear why there is a direct link between establishing costs and testing undue hardship. The Court stated:

> Unless the statutory mandate . . . is to be rendered meaningless, it must be held to provide that until facts or circumstances arise from which it may be concluded that there can no longer be an accommodation without undue hardship, employees' religious practices are required to be tolerated. (See, Brown v. General Mctors Corp., 601 F.2d 956 961 (8th Cir. 1979)).

While the Court would require the employer to bear no more than a de minimis cost in testing undue hardship, proof of such costs must be based on more than speculation. There must be persuasive evidence that the costs are equivalent to undue hardship.

A fifth requirement in religious accommodation cases is that the employee give notice to the employer of the employee's religious needs. As one court has stated:

> Accommodation is not so onerous as to charge an employer with the responsibility for continually searching for each potentially religious conflict of every employee. The employee has the duty to

> inform his employer of his religious needs so that the employer has notice of the conflict. (See, Redman v. GAF Corp., 574 F.2d 897, 902 (1978)).

From a procedural standpoint, it would seem a grievant must establish that reasonable notice of his or her religious needs has been given to the employer and must establish that the employer has failed reasonably to accommodate those religious needs. At that point, the burden of going forward would seem to shift to the employer to establish that religious accommodation would constitute an undue hardship. It is at this point that the employer must submit evidence of actual costs and not mere theoretical possibilities. There must be evidence that the cost is more than de minimis in terms of the employer's ability to bear those costs. In order to determine whether or not the hardship imposed on the employer as a result of religious accommodation rises to the level of an "undue" hardship, it is necessary for a decision maker to understand the impact of the costs on the operation of the employer's business. All costs might be characterized as an undue hardship, and there is a need to understand such costs in terms of the size of the operation, the number of individuals who would be affected by the accommodation, the number of workers who need the particular accommodation, and what alternatives are available in order to effect the proposed accommodation.

A final element in testing religious accommodation is that of mutuality. It is the obligation of both parties to attempt to arrive at a religious accommodation. As one court has stated:

> A mutuality of obligation inheres in the employer-employee relationship. Title VII does not supplant this mutuality, but using it as a necessary background, simply adds detail to certain areas of the relationship which are to remain free of discrimination.
>
> 42 U.S.C. Section 2000e(j) delimits an employer's ultimate duty of accommodation in terms of the imposition of an undue hardship on the conduct of its business. The statute does not explicitly address, however, the penultimate duties of the employee inherent in his relationship to his employer, to attempt to accommodate his beliefs himself and to cooperate with attempts at reasonable accommodation by his employer. An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own belief or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible. In such a case, the employee himself is responsible for any failure of accommodation, and his employer shall not be held liable for such failure. (See, Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (1977)).

It is clear that the parties have a mutual obligation to attempt reasonably to accommodate an emplcyee's religious needs.

C. Application of the Principles:

The Employer has argued that religious accommodation was not possible in this case because management is bound by the parties' collective bargaining agreement. The agreement requires that seniority rights of employes must be honored, and that obligation elevates seniority rights over religious needs of an employe. The U.S. Supreme Court has made clear that

accommodation for a single employe may not result in suspension of other employes' rights. It, therefore, is correct to say that the employer does not have unilateral authority to grant a leave of absence that would deprive a senior employe of his or her contractual seniority rights.

The Employer, however, has a duty to make reasonable accommodation within limitations set forth by the parties' collective bargaining agreement. This obligation has been codified in the Postmaster General's policy statement. As he indicated, accommodation consistent with the parties' agreement "must be attempted." (See, Union's Exhibit No. 4). It will be recalled that in the Hardison case, management clearly attempted such accommodation. The accommodation failed to work because the union steward in that case refused to agree to a violation of any seniority provisions. (See, 432 U.S. 63 (1977)).

In this case, the Employer failed to attempt an accommodation. Superintendent Randall stated that, before he would consider violating the collective bargaining agreement in order to effect a religious accommodation, he would confer with the union. In this case, however, there is no evidence that management conferred with the Union. In fact, Supervisor Stratton testified that he "never discussed the problem with the Union. I know of no manager who did." There was no evidence that management made any effort at all to accommodate the grievant's request.

These facts are to be contrasted with those that emerged in Johnson v. U.S. Postal Service. (See, 497 F.2d 128 (5th

Cir. 1974). In that case, the employer made a reasonable effort to accommodate the grievant's religious needs. According to the court:

> In an attempt to accommodate Johnson's request for every Saturday off, the Post Master offered to allow Johnson as many Saturdays off as possible, or in the alternative, to recommend Johnson for transfer to the larger post office in Tallahassee. (See, p. 130)

The Employer also had an opportunity to accommodate the grievant by providing names of carriers who were available to work on October 6. The grievant requested such information, and the Employer failed to provide it. According to Postmaster Singleton, it was "up to the grievant to talk to other carriers." Yet, there was unrebutted testimony that the schedule routinely changed after being posted, and the Employer had notice that the grievant was sensitive about indiscriminately seeking out fellow employes in an effort to have them alter their work schedule in order to accommodate his religious need. He clearly was willing to speak with a worker who had been designated by the Employer. It is important to note at this point that management failed to show it would have created an undue hardship to have accommodated the grievant by providing him with relevant names. Arguably, management ought to have taken a more affirmative role in speaking with relevant employes regarding the religious need of the grievant. Since management made no such employe contacts, it is impossible to determine whether or not seniority rights of other employes would have been violated. Employes with seniority rights greater than the grievant's might have waived rights in an effort to accomodate

the grievant's religious needs. It simply remains an unknown regarding whether or not such an arrangement could have been negotiated with relevant employes as well as the Union because management never made any inquiries with other employes or the Union. In other words, the impact of having accommodated the grievant in this case remains speculative.

Nor was payment of premium wages an issue in this particular case. Supervisor Stratton testified that denial of the grievant's request for a leave of absence on October 6 "was not a matter of overtime. It was a matter of whether we were going to be able to physically cover the operation." Operational needs of the Employer could have been met by asking Mr. Malsbary to substitute for the grievant, since premium pay was not an issue. It, however, is important to note that the Employer fulfilled its operational requirements on the day in question without the grievant or a substitute.

The Employer also has contended that the grievant failed to give management adequate notice of his religious need. There was a dispute regarding whether or not the grievant's religious observance arose at the time he interviewed for employment. The Employer, however, received adequate notice of the grievant's desire to take annual leave on October 6. On September 26, 1984, he gave management notice of his desire to be away on October 6 for a religious reason. At the point that Form 3971 surfaced, management had an obligation (1) to "find out who, what, when, where, and why"; (2) to "make absolutely sure you have all the facts"; and (3) to "resolve as many problems as

possible before they become grievances." (See, Union's Exhibit No. 10). The Form 3971 indicated that the grievant desired to take annual leave because it was "Yom Kippur--day of atonement." (See, Union's Exhibit No. 3). While management had an obligation at that point to gather all the relative facts, Supervisor Randall testified that he never spoke with the grievant regarding the request for annual leave in order to observe Yom Kippur.

This is a case in which a grievant requested annual leave in order to engage in a religious observance. The Employer, however, never established with objective evidence that the request caused undue hardship. Management speculated that the request might have an impact on the seniority system and disrupt the relationship with the Union, but there was no persuasive evidence to support that assertion. Nor did the Employer show that the request generated more than de minimis costs. The employee clearly gave notice of his religious need. He also fulfilled his part of the mutual duty to arrive at a reasonable accommodation by offering to work any day, including Christmas, and by requesting that management give him the names of relevant employes with whom he might swap assignments. The grievant had a choice between obeying the order to work and fulfilling his sense of a religious commitment. Since the Employer has accepted a contractual obligation to implement work rules in a manner consistent with applicable laws, the order of management for the grievant to work on October 6 must be understood within its legal framework. The order was not consistent with statutory and case law guidelines regarding

the obligation reasonably to accommodate religious needs of employes.

It is the obligation of employes to obey orders and rules applicable to them. It is not their right to refuse work assignments on the ground that they involve a contractual violation. As the eminent Harry Shulman stated over forty years ago, "An industrial plant is not a debating society. Its object is production." (See, Ford Motor Company, 3 LA 779, 781 (1944)). It is for management to issue orders and to expect workers to obey them. That is the obligation of all employes, including this grievant.

In this particular case, however, the order issued the grievant was beyond the legal authority of the Employer. It is important to note that the grievant had no right to disobey an order simply because he believed it violated the agreement of the parties. Dean Harry Shulman explained this clearly when he stated:

> Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. A determination of that rests in the collective negotiation through the grievance procedure. (See, Ford Motor Company, 3 LA 779, 780-81 (1944)).

The Employer, however, has agreed to exercise its rights in a manner consistent with applicable laws and regulations. There was no effort in this particular case to make the order issued by management consistent with the law. This was not a casual

act by the grievant and came only after he pleaded with management and specifically asked one supervisor to serve as a mediator in his behalf. Having committed itself to a course of conduct, the Employer was unresponsive to the request. Arbitrators long have taken the position that a grievant should not be punished for failing to obey an order that clearly is beyond the authority of the employer. (See, for example, Dwight Manufacturing Company, 12 LA 990 (1949); Ross Clay Products Company, 43 LA 159 (1964); Equitable Bag Company, 52 LA 1234 (1969); and Marion Power Shovel Division, 72 LA 417 (1979)).

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the collective bargaining agreement between the parties when it refused to accommodate the grievant's leave of absence request made in order to respond to his religious needs. He shall be reinstated with full back pay and all benefits, minus interim earnings. Interest on the back pay award is not appropriate. Even the grievant conceded that there was no intent by the Employer to hurt him or to harm the grievance procedure.

The arbitrator shall retain jurisdiction of this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 7-15-85