

C#11174

BEFORE THOMAS F. LEVAK, ARBITRATOR

MAY 27

AP. 30.

In the Matter of the Regular
Western Regional Arbitration
Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Santa Ana, California)

and

AMERICAN POSTAL WORKERS UNION
THE "UNION"

(M. Throp, the "Grievant")

WIC-5G-C-21856
WIC-5G-C 21856

DISPUTE AND GRIEVANCE
CONCERNING SHOP
STEWARD CONSULTATION

ARBITRATOR'S OPINION
AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., May 12, 1986 at the offices of the Service, Santa Ana, California. The Union was represented by Bobby Donelson. The Service was represented by Paul La Rocco. The Grievant, Magdalena Throp, appeared and gave testimony on her own behalf. Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows:

OPINION

I. THE ISSUE.

This case concerns an allegation by the Union that the Service violated the 1981-84 National Agreement when it failed to give the Grievant on-the-job time to consult with a shop steward concerning a potential grievance. The parties have failed to agree upon a stipulated issue. Therefore, the arbitrator has framed the issue as follows:

Did the Service violate the National Agreement by failing to accord the Grievant on-the-job access to her shop steward for purposes of consultation concerning the filing of a potential grievance? If so, what is the appropriate remedy?

II. FINDINGS OF FACT.

This case concerns a unit titled Santa Ana, California 114 Operation that during 1983 and 1984 was operating at the Orange County, California office of the Service. During that time the

administrative control of both Orange County and Santa Ana employees was under Orange County Acting Manager of Mail Processing Ken La Carra. The Grievant's immediate supervisor was Elaine Cass, also an Orange County administrator. The Grievant was a Santa Ana employee and a member of the detached 114 Operation.

According to Cass and La Carra, the detached Santa Ana unit was under the jurisdiction of the Santa Ana office. However, they also both testified that Orange County administrators handled local administrative matters for the Santa Ana employees. For example, a separate vacation bid board was held for Santa Ana employees, but the Board was convened and administered by Orange County managers.

Regarding Union representation for the detached Santa Ana employees, La Carra testified that initially no separate Santa Ana employees were certified by the Union as shop steward for the detached operation, so that initially Santa Ana employees with potential grievances were referred to certified Orange County shop stewards. While the record is somewhat unclear, apparently John Eastman, Gary McDowell and Treva Scott were the three Orange County shop stewards initially utilized by the detached Santa Ana employees.

On January 16, 1984, Southwest Coastal Area Local Union President Bonnie Nelson provided Santa Ana Postmaster Clayton Bakke with a certified list of shop stewards which covered both the Santa Ana facility and the detached Santa Ana 114 Operation at Orange County. Apparently, the list was never forwarded by Bakke to La Carra for posting, since neither La Carra nor Cass were able to recall ever seeing a certified list for the detached operation.

Dwane Wise appears on the certified list as the Tour I shop steward for the detached operation, and Barbara Ribar appears as a Tour II alternate. Cass testified that at some point she became aware that Wise was a Santa Ana shop steward, but she further testified that she did not remember whether she became aware of that fact before or after the incident involving the Grievant which gave rise to this case.

The Grievant testified that she started working in the detached unit in November or December 1983 and from that time until February 1984 she had filed a number of grievances. She testified that on those occasions either Ribar or Wise served as her shop steward. She testified that in the absence of Wise or Ribar, she would sometime consult with Orange County Shop Steward Scott, but that she always filed any grievance through a Santa Ana steward. The Service did not offer any documentary evidence in an attempt to rebut the Grievant's testimony concerning shop stewards actually utilized by her for the filing of grievances.

The incident at issue occurred on the morning of February 7, 1984. Certain crucial facts are disputed by the persons

involved.

The Union's Version of the Facts:

The Grievant testified that about 9:00 a.m. on February 7, 1984, she approached Cass and asked to see a shop steward for purposes of filing a grievance. She testified that Cass told her that she (Cass) had one hour to provide the Grievant with a steward. The Grievant testified that she waited for two hours, and that when she was not provided with a steward, she again approached Cass and asked to be provided a steward. The Grievant testified that at that point, Cass asked her what her grievance was about. She testified that she explained the nature of her grievance to Cass, and that Cass responded that the Grievant's complaint was not a grievance. The Grievant further testified that Cass then told her that if she (the Grievant) wanted to file a grievance, she would have to see a union representative on her own time. Finally, the Grievant testified that after work she drove to the office of Union Representative Bobby Donelson and explained her discussions with Cass, and that Donelson thereupon immediately called Cass by telephone.

Donelson testified at the arbitration hearing that when the Grievant came to his office on the afternoon of February 7, 1984, she reported to him that she had twice requested shop steward time, that Cass had told her she did not have a grievance, and that Cass also told her that she would have to see a union representative on her own time. Donelson next testified that he immediately telephoned Cass, related the Grievant's version of the facts to her, and asked Cass for an explanation. Donelson testified that Cass did not deny those facts but told him that after she had been contacted by the Grievant, she had asked LaCarra for advice and was told by LaCarra that the Grievant did not have a grievance and would therefore have to consult a Union official on her own time. Donelson testified that Cass told him that she simply relayed LaCarra's advise to the Grievant. Finally, Donelson testified that the next day he filed the instant grievance with Cass.

The Service's Version of the Facts:

Cass testified that at approximately 9:00 a.m. on February 7, 1984 the Grievant approached her and asked to see a shop steward for purposes of filing a grievance. She testified that because she was busy with the dispatch, she told the Grievant that she would have to wait until the dispatch was over and that as soon as it was over she would arrange for the Grievant to see a shop steward. She also testified that at that time she may have asked the Grievant what the grievance was about and that the Grievant explained the nature of the grievance to her.

Cass next testified that after the dispatch was over, she looked for a shop steward but that none was available. She testified that she believed that the only available certified shop stewards were Orange County Stewards Eastman, Scott and

McDonald, and that none of those were at work. She also noted that Scott may have been at work but may have refused to act as a steward. She testified that if Mr. was a steward at the time, that he had already finished his tour and gone home at 8:30 a.m.

Cass testified that because she could not find a shop steward, she went to La Carra and told him that the Grievant had a grievance but that there was no shop steward available. However, she also testified that she could not remember whether she had actually asked La Carra for advice.

Cass testified that after discussing the matter with La Carra she went back to the Grievant and told the Grievant that no shop steward was available on that date. She testified that while she may have said to the Grievant, "In my opinion, you don't have a grievance," she did not flatly tell the Grievant that her complaint did not constitute a grievance. She also denied having told the Grievant that she would have to see a Union steward on her own time after work.

Finally, Cass testified that she believed that she had twenty-four hours to provide the Grievant with a shop steward, and that she would have provided the Grievant with a shop steward on the next day.

La Carra testified that he could not recall anything concerning the incident and conversations at issue. He testified that he did not recall any specific February 1984 conversation with Cass concerning the Grievant. He also testified that he did not recall the Grievant's original grievance against Cass, and that he could not recall any conversations concerning this matter between himself and Union Representatives Bonelson and Manny Botello.

While La Carra could not recall anything relevant and material, he did testify that he never would have told Cass to deny the Grievant a shop steward on the ground that the Grievant had no grievance.

Finally, La Carra testified that it was the practice at the Orange County office to provide a shop steward on the same day one was requested if possible; and if such was not possible, he would provide a shop steward within twenty-four hours.

Arbitrator's Resolution of the Factory Dispute.

The Arbitrator concludes that the Union has established by a preponderance of the evidence that its version of the facts constitutes the true facts of this case, and makes a special finding of fact in that regard. The following is the reasoning of the Arbitrator.

First of all, the Grievant testified in a credible and forthright manner. Her statements have the "ring of truth" and her demeanor was that of a person intent on giving a truthful

recounting of the facts.

Second, the Grievant's actions support her version of the facts. The Grievant was experienced in filing grievances, and it is unlikely that she would have misunderstood Cass' responses to her. The Grievant's action of immediately driving to the Union office after work also supports the fact that she was advised to do so by Cass.

Third, upon arriving at the Union office, the Grievant reported her version of the facts directly to Donelson. That version coincides with her testimony at the arbitration hearing. Further, Donelson corroborated the Grievant's testimony in every regard. Donelson's testimony appeared to be completely credible and forthright and his demeanor was that of a witness intent upon giving a truthful recollection of the facts.

Fourth, as testified by Donelson, when he immediately telephoned Cass, she did not then dispute the Grievant's version of the facts, but rather explained to him that she had merely communicated to the Grievant the advice she had received from La Carra.

Fifth, Donelson's version of his conversation with Cass is consistent with Cass' own testimony that due to the unique detached operation existing at the Orange County office, it was often necessary for her to seek advice from La Carra on the proper way to proceed on particular matters. It seems clear that when Cass was faced with a difficult situation, she sought advice from La Carra and simply communicated his determination to the Grievant. There was no reason for Cass to consult with La Carra, unless she was seeking advise from him.

Sixth, La Carra's purported inability to recall any relevant information concerning the matter, and in particular his inability to recall any advice he may or may not have given to Cass, leads the Arbitrator to credit Donelson's version of his discussion with Cass over the Service's version. While La Carra may have testified truthfully and in good faith, his testimony cannot be deemed to have corroborated Cass' own testimony.

Seventh, the Step 2 and Step 3 decision letters tend to support the Union's version of the facts. The Service's Step 2 denial letter affirms the fact that Cass conveyed to the Grievant that the Grievant's complaint was not a grievance. The Step 3 denial letter is not grounded in a direct disagreement with the facts, but is based upon the assertion that the Grievant had other avenues to pursue her complaint than simply going to the Union office.

Eighth, although Cass and La Carra asserted that they had twenty-four hours in which to provide the Grievant a shop steward, there was no convincing testimony or evidence that Cass told the Grievant that she would be provided a shop steward within twenty-four hours. To the contrary, the best evidence is

that Cass simply notified the Grievant that she would not be allowed to see a shop steward on the clock.

Ninth, the January 16, 1984 certified shop steward list supports the fact that stewards were in fact available on the day in question. The fact that the list was properly provided Santa Ana management creates at least some inference that LaCarra and Cass were aware of its contents.

In summary, while the Union's evidence and testimony is credible and consistent, the Service's evidence is generally inconsistent and uncorroborated. The Arbitrator therefore finds that the Union's version constitutes fact, and that the Union has proven its asserted facts by a preponderance of the evidence. Using a term often stated by trial judges, based upon the evidence, it is more likely that the Union's version of the facts occurred than did the Service's version.

III. UNION CONTENTIONS.

The Union's version of the facts is the most credible and should be credited by the Arbitrator.

Articles 15 and 17 grant the Grievant the right to consult with a shop steward for purposes of filing a grievance on the clock. The Grievant was forced to drive twenty-six miles to consult with a Union official on her own time, and should be compensated for one hour at her regular rate plus mileage so as to rectify the breach of the National Agreement.

IV. SERVICE CONTENTIONS.

The Service's version of the facts is the most credible.

Even assuming, arguendo, that Cass denied the Grievant's request for a shop steward, the Grievant had other reasonable avenues open to her than driving to the Union office. She could have simply filed a grievance herself with her own supervisor, and she had fourteen additional days in which to do so. There was no need for her to drive to the union office.

Further, Article 17.4 does not set forth a time within which a shop steward must be provided to an employee. The custom at the Orange County office was to do so within twenty-four hours, and that time frame was certainly reasonable.

There was no intent to deny the Grievant representation. The Grievant had used Orange County shop stewards in the past and she could have used one to file a grievance rather than going all the way to the Union office to consult with Benelson. In fact, the Grievant could simply have used the telephone to call a Union representative.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Union has established by a preponderance of the evidence that the Service violated the National Agreement. Accordingly, the grievance is sustained. The following is the reasoning of the Arbitrator.

First, based upon the above Findings of Fact, the Arbitrator restates his finding that the Union has established by a preponderance of the evidence that its asserted facts constitute the true facts of this case. Articles 15 and 17 of the National Agreement require the Service to grant on-the-job requests by an employee for consultation with a shop steward for purposes of filing a grievance. The Service violated that obligation; therefore, the only issue in this case is the appropriate remedy.

Second, the Service's basic defense in this case, as set forth in its Step 3 reply letter, is: (1) that the Grievant had other avenues to pursue her complaint; and (2) that by discussing her grievance with her supervisor, she in effect held a Step 1 meeting. The Service's defense is valid only in part.

It is true that Cass' statements to the Grievant did not compel the Grievant to drive to the Union office; however, it is equally true that Cass' statements to the Grievant compelled the Grievant to consult with a Union official off-the-clock, at least by telephone. It must be remembered that Cass told the Grievant both that she did not have a grievance and that she would have to discuss the matter with a Union official off-the-clock. The Grievant was doing no more than following Cass' directive.

The Service's breach of the Agreement permitted the Grievant to perform functions off-the-clock that she should have been able to perform on-the-clock. In light of that fact, the only appropriate remedy - and the only means by which the Grievant can be compensated - is through an award of monetary compensation. An award in the amount of one hour's pay at the Grievant's regular rate is a reasonable and foreseeable sum for the type of breach involved in this case. An additional amount for mileage is not warranted, since the Grievant, indeed, could have consulted with the Union off-the-clock by telephone.

Because a dollar amount has been awarded, a few remarks regarding remedy are appropriate. In the lead case on the subject, *United Steelworkers v. Enterprise Wheel and Car Corp.*, 80 S. Ct. 1358, 1361 (1960), the U. S. Supreme Court noted the need for flexibility on the part of arbitrators when it comes to formulating remedies. At a meeting of the National Academy of Arbitrators, arbitrator M. S. Ryder expressed the view that an award should be within the realm of conceivable and reasonable remedial expectation by the party in error. (16th Annual Meeting of NAA, 68-69 (BNA) 1963.)

An award of one hour's pay for denied time is within the

realm of conceivable and remedial expectation, and does not rise to the level of punishment. The failure of the Arbitrator to award some sum would result in his award being no more than a hollow statement of rights.

For all the aforementioned reasons, the grievance is sustained.

AWARD

The Service violated the National Agreement. The grievance is sustained.

The Grievant is awarded the sum of one (1) hour's pay at her regular rate in effect on February 7, 1984, such sum to be paid forthwith by the Service.

DATED this 23rd day of May, 1986.


Thomas F. Levak, Arbitrator.