

C#10972

UNITED STATES POSTAL SERVICE

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS

RE: Case No. S4N-3Q-C 25392  
Gr: Ms. Carolyn Lamb  
Place of Hearing - Jennings, LA  
Date of Hearing - June 24, 1991  
File: 844-JFC

APPEARANCES

FOR THE UNION	Collier M. James, Regional Administrative Assistant
FOR THE POSTAL SERVICE	Bill Roberts, Labor Relations Representative
ARBITRATOR	John F. Caraway, selected by mutual agreement of the parties

On May 26, 1988 Equal Employment Opportunity Administrative Judge, Sandra Moore, rendered a decision on the identical raised in this grievance/arbitration. That decision granted the grievant, Ms. Lamb, the relief prayed for. The Postal Service had sixty (60) days from receipt of Ms. Moore's written decision to accept that decision or appeal. In view of the status of the case, this Arbitrator ruled that the case would be held in abeyance until final disposition was made of the complaint before the Equal Employment Opportunity Commission. The Arbitrator retained jurisdiction until final disposition was made of the case. [See Arbitrator Caraway's decision of June 24, 1988].

On February 4, 1991 United States Magistrate Trimble rendered a decision on the Postal Service's Motion for Summary Judgment. The recommendation of the United States Magistrate was that the Motion for Summary Judgment of the Postal Service be granted and that petitioner's claims be dismissed.

In his analysis of Law and Facts the Magistrate stated at page 9 of his decision. [Agency Exhibit No. 2]:

"Petitioner has not established a prima facie case of racial or sex discrimination or disparate treatment under 42U.S.C., Section 2000E-16. Although a member of a protective group who has suffered an adverse faction, petitioner has not shown that similarly situated employees not of her protective group were treated differently. Employees on limited duty are not similarly situated to employees on light duty. Therefore, a difference in treatment of employees in those two classes is not evidence of discrimination. During the time petitioner was on limited duty, she was treated no differently than the others who were on limited duty. Petitioner has pointed to no employees on light duty who were treated more favorably than she, and accordingly, has failed to establish a prima facie case of racial or sex discrimination."

United States District Judge Hunter signed a judgment based upon the Report and Recommendation of the Magnistrate and an independent review of the record decreed that the defendant's

Motion for Summary Judgment be granted and that petitioner's claims be dismissed. This was on February 25, 1991.

This case returned to arbitration at a hearing on June 24, 1991. At that time the Postal Service entered a motion that the grievance claiming back pay from December 20, 1985 to January 15, 1986 was not arbitrable by reason of the judgment of the United States District Court. The case was not heard on its merits but was restricted solely to the arbitrability of the grievance.

#### CONTRACT PROVISIONS INVOLVED

##### Article 15, Section 1

###### Definition

"A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include but is not limited to, the complain of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement, or any local Memorandum of Understanding not in conflict with this agreement."

##### Article 16

###### Section 9. Veterans' Preference

"A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the agreement beyond Step 3 of the grievance-arbitration procedure."

ISSUE

Is the grievance arbitrable?

ARGUMENT

The Postal Service maintains that Magistrate Judge Trimble went into all of the facts surrounding the grievant's accident and claims for back pay during the time in question. The complaint before the Equal Employment Opportunity Commission was a monetary complaint by Ms. Lamb which is identical to the remedy sought by the Union in the instant grievance. Magistrate Trimble's written opinion shows that it was in detail as to the work progress and history of the grievant during the entire time period in question. The Magistrate set forth the law regarding the burden of proof imposed upon the complainant in this case. The conclusion was as has already been indicated, that the petitioner, Ms. Lamb, failed to establish a prima facie case. Accordingly, all of her claims which included the identical monetary claims covered by this grievance, were dismissed.

Since the United States District Court has affirmed the Report and Recommendation of the Magistrate dismissing Ms. Lamb's monetary claim, and this is the identical claim pending in this grievance, the grievance should be ruled to be

non-arbitrable.

The Union maintains that Ms. Lamb has an independent right to proceed with her grievance through the grievance/arbitration procedure. She is not barred from processing her grievance because of the dismissal of her claim before the Equal Employment Opportunity Commission. The Union cites Alexander vs. Gardner-Denver Compan, United States Supreme Court, 94 S. Ct 1011 [1974], appealed from an adverse decision of the Federal Court of Appeal, which held that there was concurrent jurisdiction in employee discrimination cases even-though an Arbitrator has ruled upon a specific claim of the employee. Because there was a contractual basis for a claim does not bar an employee's right to assert the identical claim on a statutory basis which would be under Title VII.

The Union cites Article 16, Section 9 of the National Agreement which provides that if an employee files both a grievance as well as a claim before the Merit System Protection Board, concurrently, the employee waives access to the grievance/arbitration procedure beyond Step 3. Thus, under the "election of remedies", if the employee elects to proceed with a claim with the Merit System Protection Board, the employee cannot process his/her grievance beyond Step 3 under the National Agreement. However, no such prohibition is placed upon the

employee's rights to process the identical claim for the Equal Employment Opportunity Commission. Thus, under the National Agreement an employee can exhaust all of his/her rights under Title VII and proceed to adjudicate the identical claim in the grievance/arbitration procedure. Because the Equal Employment Opportunity Commission rendered a decision adverse to a claim asserted in the grievance, does not prohibit the employee from pursuing that claim before an Arbitrator.

The Union cites a number of cases where the parties at the national level entered into an agreement that EEO settlements did not bar further processing of her grievance.

The Union finally asserts that Ms. Lamb is entitled to a final adjudication of her grievance under the language of the Postal Reform Act of 1970. The parties have agreed to be bound by the collective bargaining Agreement which they entered into. A provision thereof contains final and binding arbitration. This is the right to which Ms. Lamb is entitled.

#### DECISION

The evidence and the law requires the Arbitrator to rule that the instant grievance is arbitrable.

Under Alexander vs. Gardner Denver, supra, the United States Supreme Court held that an employee retained his statutory rights under Title VII to file a claim for discrimination

eventhough that identical claim had been decided by an Arbitrator under the Company-Union Collective Bargaining Agreement. After the Arbitrator's decision was rendered, the employee processed a complaint with the Equal Employment Opportunity Commission. The Company then filed a motion to dismiss the EEO complaint on the basis that an Arbitrator's decision had already been rendered precluding any further adjudication in the matter. When the case reached the United States Supreme Court, the court held that there was a significant difference between the employee's statutory rights under Title VII and the employee's rights under the Collective Bargaining Agreement. Exhausting the rights under the grievance/arbitration procedure did not preclude that employee from exercising rights granted under Title VII. Thus, the employee was permitted, not only to have a hearing before an Arbitrator, but also had the right eventhough an Arbitrator had rendered a decision to process a claim before the Equal Employment Opportunity Commission.

The Court's rationale was stated as follows:

"[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the

employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."

The reverse procedure is present in the instant case. That is, the employee proceeded first to a decision concerning her EEO complaint, then when these rights under Title VII were denied by the United States District Court, she invoked Arbitration. The grievant has every right to do this under the Alexander vs. Gardner Denver case.

Study of the Magistrate's opinion shows that the sole issue before the Magistrate was whether or not racial, sex discrimination or disparate treatment had occurred under 42 U.S.C. Section 2000E-16. The question was if a violation of Ms. Lamb's statutory rights had occurred. This is not the question which is posed in the instant arbitration. The question to be decided by the Arbitrator is whether or not the Postal Service violated the National Agreement by denying Ms. Lamb back pay from December 20, 1985 to January 15, 1986 or such other dates as the evidence shows.

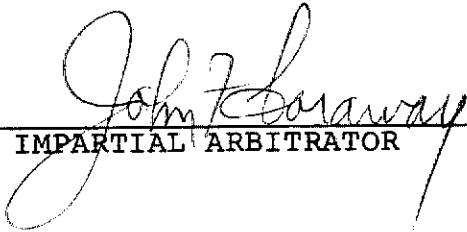
The issue is one to be resolved under the Collective Bargaining Agreement in effect between the parties. Ms. Lamb has a contractual right to have such a decision rendered.

The parties in their negotiations preserved an employee's right to proceed with an EEO claim. Under Article 16, Section 9 of the National Agreement if an employee has an appeal under the Veterans' Preference Act, then the employee

cannot proceed beyond Step 3 of the grievance/arbitration procedure. No such agreement was reached with regard to the employees appeal under Title VII. Indeed, the parties could not negotiate such a provision because it would be contrary to the United States Supreme Court ruling in Alexander vs. Gardner-Denver.

AWARD

The Union grievance is arbitrable.

  
John T. Baraway  
IMPARTIAL ARBITRATOR

New Orleans, LA

August 5, 1991

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