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HIC-3W-C-10155

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ARBITRATION AWARD

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INDUSTRIAL
RELATIONS

July 27, 1983

UNITED STATES POSTAL SERVICE
Orlando, Florida

-and-

Case No. HIC-3W-C-10155

AMERICAN POSTAL WORKERS UNION
Central Florida Area Local
Orlando, Florida

Subject: Seniority - Right to Vacancy - Effect of Discharge
(Removal) - Scope of Grievance - Effect of Restora-
tion - Meaning of Settlement Agreement

Statement of the Issues: Whether Ms. Myers' re-
moval on January 20, 1982, resulting in her being
placed on non-pay non-duty status, precluded her
from being declared the senior qualified bidder for
the job in question on June 11, 1982? Whether her
subsequent June 18, 1982 grievance properly encom-
passes the APWU's seniority rights "restoration"
claim made at the arbitration hearing? Whether
Myers, upon being restored to duty status on July 8,
1982, was entitled under the "restoration" clause
to the job she'd earlier bid for while on non-pay
non-duty status? Whether the July 8, 1982 settle-
ment agreement, restoring her to duty, served to
withdraw the instant complaint, i.e., the June 18,
1982 grievance now before the arbitrator?

Contract Provisions Involved: Article 15, Sections 2,
3 and 4; Article 16, Section 5; and Article 37,
Sections 2 and 3 of the July 21, 1981 National Agree-
ment.

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Statement of the Award:

The grievance is granted. D. Myers should be placed on the Distribution Clerk, Machine job she would have filled on June 11, 1982, had it not been for her "unjust removal." She should also be made whole for any loss of earnings she has experienced since July 9, 1982, by reason of this contract violation.

United States Postal Service
Washington, D.C.

American Postal Workers Union
Washington, D.C.

Hearing Held 4/19/83 at
USPS Headquarters
Washington, DC

Mr. Roland McPhail
Labor Relations Executive
United States Postal Service
Southern Regional Office
Memphis, Tennessee 38166-0222

Mr. Gerald "Andy" Anderson
Assistant Director
Clerk Division
American Postal Workers Union
817 - 14th Street, N.W.
Washington, D.C. 20005

BACKGROUND

This grievance concerns an employee, D. Myers, who was restored to duty after being discharged. The APWU insists that a bid she submitted in the interim (i.e., after discharge but before reinstatement) for a vacant job should have been honored upon her return to duty. It believes the Postal Service's refusal to grant her that vacant job was a violation of Article 37, Section 2D7b. The Postal Service disagrees. It urges also that the grievance, having been filed before her reinstatement, does not cover this Article 37, Section 2D7b claim and that the grievance was in any event withdrawn by the settlement agreement which returned her to work.

There is no dispute about the facts. Myers works in the Orlando, Florida Post Office. She was given a removal notice (i.e., a discharge notice) on January 26, 1982, because of her "continued unsatisfactory attendance" and her "being absent without approval leave." This removal was to be effective February 26, 1982. A timely grievance and EEO complaint were filed protesting the discharge.

The Postal Service posted several Distribution Clerk, Machine vacancies (PS Level 6) on January 30, 1982. Myers was still working. She bid for one of the vacancies on February 4, 1982. Management awarded the vacancy to J. O. Brown on February 18, 1982. The APWU makes no claim that the selection of Brown was improper. He had more seniority than Myers. However, he was not qualified on essential scheme requirements. He had a 90-day deferment period within which to qualify. He failed to do so. Management then awarded the vacancy to M. G. Richards on June 11, 1982. The Postal Service says this was justified by the terms of Article 37, Section 3F3:

"...Immediately after the end of the deferment period, the senior bidder then qualified shall be permanently assigned [to the vacancy]..."

Myers was on non-pay non-duty status at that time.* She was above Richards on the seniority roster; she was qualified on the essential scheme requirements. The Postal Service nevertheless by-passed her because she was on removal status. It maintains that she was not available for work on June 11, 1982, or thereafter and that she hence was not

* Myers had been on non-pay non-duty status pending removal since February 26, 1982.

"qualified" to fill the vacancy. It refers to the contract language quoted above as well as Article 37, Section 3F2 ("The successful bidder must be placed in the new assignment within 21 days...")

The APWU concluded that Myers' seniority rights had been violated. It filed a Step 1 grievance on her behalf on June 18, 1982, alleging that the vacancy "was awarded to Mr. Richards in error" and citing Article 37, Section 3F4a. After it had appealed the grievance to Step 2, Management gave the following Step 2 answer on July 6, 1982:

"Management rejects the union's allegation that ...[the vacancy] was incorrectly awarded. Although it is true that the...bid position was not awarded to the senior bidder [Myers], there were extenuating circumstances which prevented the awarding of the job to the senior bidder. The senior bidder was in a non-duty/non-pay status pending removal...on June 11, 1982, when the position was awarded. Since the senior bidder was in a non-duty status, the next senior bidder was selected.

"The intent of retaining someone on the rolls in a non-duty/non-pay status is for continuance of their life/health insurance and retirement contributions. For all practical purposes the senior bidder on the position in question had been removed from the postal service effective February 26, 1982."

Myers was restored to duty through a July 8, 1982 settlement agreement of her EEO complaint. That agreement, signed both by Myers and her APWU representative, provided for her "return...to duty...without back pay", for her "enroll[ment] in the PAR program...", and for her being on "probationary status for one and one-half...years" with respect to her work attendance. It provided further that she and the APWU "will withdraw all forms of appeal of this removal action." The grievance protesting her discharge was withdrawn. The grievance protesting her failure to be chosen for the vacancy in question was not withdrawn.

This latter grievance was appealed to Step 3 on July 27, 1982. That appeal added the following argument: "...Grievant was returned to work without loss of seniority and as such should have been awarded the position..." The Postal Service

rejected the appeal. Its Step 4 answer defined the issue as "whether management violated Article 37...by not selecting the senior employee [Myers]..." and then asserted the vacancy had been properly given to a less senior employee "because [Myers] was in a non-pay non-duty status pending removal when the assignment was awarded."

The APWU emphasizes the seniority rights Myers was to receive upon her return to duty. It relies heavily on Article 37, Section 2D7b:

"Restoration. On restoration in the same craft in the same installation after return from military service, transfer under letter of authority or unjust removal, the employee shall regain the same seniority rights he/she would have if not separated."

(Emphasis added)

DISCUSSION AND FINDINGS

This case poses a variety of issues, both procedural and substantive.

With respect to procedure, the Postal Service contends (1) that the July 8, 1982 settlement agreement served to withdraw the instant grievance from arbitration and (2) that the instant grievance, in any event, does not encompass the Article 37, Section 2D7b claim which was the crux of the APWU's case at the arbitration hearing. The APWU disagrees with these contentions. It also asserts that the settlement agreement argument was raised for the first time at the arbitration and should hence be disregarded because of its lateness.

The settlement agreement states that Myers, presumably the APWU as well, "will withdraw all forms of appeal of this removal action." The original January (or February) 1982 grievance challenging the removal was withdrawn. The instant grievance was filed more than four months later on June 18, 1982. It did not protest Myers' removal. Rather, it challenged Management's failure to select her for a vacancy in June 1982. Its real concern was the question of whether she could exercise certain seniority rights while she was on non-pay non-duty status. For these reasons, I do not believe the instant grievance was a "form...of appeal of this [January 1982] removal action." Her grievance had an

entirely different purpose. It was not withdrawn by the settlement agreement.

The scope of the instant grievance is a more troublesome matter. The June 1982 grievance was directed at Management's choice on June 11 to fill the vacancy with Richards rather than Myers. This complaint obviously did not involve Article 37, Section 2D7b. For Myers was still on non-pay non-duty status pending removal. There was then no issue of "restoration" of seniority rights. The situation changed on July 8, 1982, when the settlement agreement restored her to duty. Only then could she have asserted rights under Article 37, Section 2D7b.

The APWU's Step 3 appeal on July 27, 1982, recognized this change. One of the grounds for the appeal was that "Grievant was returned to work without loss of seniority and as such should be awarded the [disputed] position." These words did not expressly mention Section 2D7b. But they plainly refer to the "restoration" rights granted Myers by that section. The Postal Service thereafter denied the grievance in Steps 3 and 4 without mentioning Section 2D7b.* There was no testimony as to what was actually discussed at these steps of the procedure. Absent such testimony, I believe the clear reference in the Step 3 appeal to the Section 2D7b issue enlarged the APWU's claim and placed this section before the arbitrator.

With respect to substance, some preliminary comments might help to place the issue in sharper focus. The Postal Service argued this case largely, but not entirely, on the basis that the Article 37, Section 2D7b issue was not before the arbitrator. Its primary argument was that Myers was not improperly by-passed on June 11, 1982, when Management chose Richards to fill the vacancy. It believes she was not the "senior qualified bidder" because, given her removal status, she was not then available to fill the vacancy. All of this may be true. But the heart of the APWU's case relates not so much to what happened on June 11, 1982, but rather to what happened on July 8, 1982, when she was restored to duty. It asserts that her "restoration" rights include the right to the vacancy she would have been awarded had it not been for

* The Step 3 and 4 denials were couched in broad, conclusive language without real discussion of the issue. The Step 4 denial points to "Article 37 of the 1981 National Agreement" without mentioning any particular section.

her "unjust removal." Whether Section 2D7b grants such a right is the decisive issue. If that issue is resolved in Myers' favor, then the Postal Service argument related above is immaterial.

Article 37, Section 2D7b describes the rights an employee is granted upon her "restoration." It states that "on restoration in the same craft in the same installation after... unjust removal, the employee shall regain the same seniority rights...she would have if not separated."

The Postal Service suggests at the outset that there was no "unjust removal" here. It emphasizes that Myers was returned to work "without back pay" and was placed on "probationary status for one and one-half...years" with regard to her work attendance. Thus, in its opinion, her absence between February 26 and July 8, 1982 was due to her own misconduct and was not attributable to any "unjust" action by Management.

This argument is not persuasive. The term "unjust removal" is, I think, synonymous with the notion of an unwarranted discharge. When the Postal Service discharged Myers and later voluntarily reinstated her, it had in effect recognized that the discharge penalty was too severe. Or, to express the point somewhat differently, it had conceded that Management should not have discharged her in the first place. That is true no matter how serious the original misconduct and no matter how long she had been on removal status. The act of reinstatement, regardless of back pay considerations, is an acknowledgement that the discharge (i.e., the removal) was "unjust." Of course, reinstatements occur even when the Postal Service is convinced that its discharge action would be affirmed in arbitration. But, for purposes of Article 37, Section 2D7b, any reinstatement in which the employee does not waive her rights under this section must be treated as an "unjust removal."*

Moreover, it is worth noting that the settlement agreement in this case did not state that Myers' time off "without back pay" should be treated as a disciplinary suspension. That may be the effect of the settlement agreement from the standpoint of the wage loss. But the reinstatement "without back pay" may in reality have been nothing more

* None of this should come as a surprise to the Postal Service. For in granting Myers seniority credit for the period of her absence (February 26 to July 8, 1982), it was in effect applying Article 37, Section 2D7b to her situation.

than a compromise arrangement by APWU for insuring Myers' return to work. Indeed, had Myers merely been given a suspension on January 26, 1982, the chances are that she would have been back at work before the posting of the vacancy in question was withdrawn on February 9. She certainly would have been working by June 11 when the vacancy was awarded to Richards, a junior employee. In other words, had discipline other than removal been imposed on January 26, 1982, the probability is that Myers would have been designated the successful bidder on June 11.

There remains the interpretive issue, how Article 37, Section 2D7b should be applied to Myers' "restoration." She was reinstated to "the same craft in the same installation after return from...unjust removal." She therefore was entitled to "regain the same seniority rights...she would have if not separated."

First, the contract refers not simply to "seniority" but rather "seniority rights." This distinction is important. The parties obviously meant to restore the employee's "seniority" date, to provide her with seniority credit for time lost from work. They also meant to restore such "seniority rights" as she "would have" possessed had there been no "unjust removal." These "rights" include a valid claim to any vacancy she would have filled through the operation of the seniority clause had it not been for her "removal."

Second, this interpretation is consistent with the apparent purpose of the "restoration" clause. That purpose must have been to place the employee who had been the victim of an "unjust removal" in the same seniority position she would have been in had there been no "removal."*

Third, this construction compels the granting of this grievance. Myers would have filled the vacancy in question had it not been for her "unjust removal." She submitted a timely bid for this vacancy; she would have been the senior qualified bidder on June 11, 1982, had it not been for her removal status. She therefore had a "seniority right" upon

* I note that "unjust removal" is involuntary from the employee's standpoint while absence due to "military service", another personnel action covered by the "restoration" clause, is voluntary from the employee's standpoint. This distinction might also be significant in construing Article 37, Section 2D76.

her "restoration" to be placed on the job which she would otherwise have filled on June 11. Her rights under Article 37, Section 2D7b have been violated.

Fourth, the Postal Service relies heavily on the fact that Myers was not available for work on June 11, 1982, the day the vacancy was filled, because of her removal status. That fact does not alter my conclusion in any way. The "restoration" clause requires that Myers be put in the job she would have held had it not been for her "removal." Hence, her unavailability on June 11 is not relevant.

AWARD

The grievance is granted. D. Myers should be placed on the Distribution Clerk, Machine job she would have filled on June 11, 1982, had it not been for her "unjust removal." She should also be made whole for any loss of earnings she has experienced since July 9, 1982, by reason of this contract violation.



Richard Mittenthal
Richard Mittenthal, Arbitrator