

C# 16740

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION)
)
 between)
)
UNITED STATES POSTAL SERVICE)
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 and)
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)
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GRIEVANT: R. Brascia
Case Nos.
USPS: A 94N-4A-C
96040539
NALC: 9615
POST OFFICE:
STATEN ISLAND, N.Y.

Before: Prof. Robert T. Simmelkjaer, Esq., ARBITRATOR

APPEARANCES

FOR THE USPS

Douglas P. Dawson, Labor Relations Specialist

FOR THE NALC

George Mignosi, Vice President, Branch 41

Place of Hearing: 550 Manor Road, Staten Island, NY

Date of Hearing: April 9, 1997

AWARD

The grievance of Robert Brascia is arbitrable.

Date of Award: May 9, 1997

Robert T. Simmelkjaer

BACKGROUND

Pursuant to the collective bargaining agreement between the United States Postal Service (hereinafter "The Service") and the National Association of Letter Carriers, AFL-CIO (hereinafter "The Union"), the undersigned was designated Arbitrator to hear and determine the following issue:

Whether the grievance of Robert Brascia is arbitrable?

A hearing was held on April 9, 1997 at the United States Postal Service's facilities located at 550 Manor Road, Staten Island, N.Y. At that time the parties were accorded full opportunity to present witnesses, documentary evidence and oral arguments in support of their respective positions. The record consists of two (3) Joint Exhibits. The parties also submitted several arbitration awards.

RELEVANT CONTRACT LANGUAGE/ MANUALS (ELM)

Article 1
UNION RECOGNITION

Section 1. Union

The Employer recognized the National Association of Letter Carriers, AFL-CIO as the exclusive bargaining representative of all employees in the bargaining unit for which it has been recognized and certified at the national level - City Letter Carriers.

Section 2. Exclusions

The employee group set forth in Section 1 above does not include, and this Agreement does not apply to:

1. Managerial and supervisory personnel ... (Jt. Ex. #1)

STATEMENT OF THE CASE

This case arises from a grievance by the Union that the Grievant, Robert Brascia, was placed on Emergency Suspension by his supervisor, Kevin Keating, Manager of the New Dorp Station “solely for personal reasons involving some sort of relationship with a female carrier at the New Dorp Station.”

CONTENTIONS OF THE PARTIES

DISCUSSION

The parties' acknowledge that prior to the National award of Arbitrator Snow it was not possible for the Union to subject supervisors to the Grievance-Arbitration Procedure,” primarily because Article I of the National Agreement, specifically Section 2, specifically excluded managerial and supervisory personnel.

Pursuant to that provision several Arbitration awards had reinforced this limitation as follows:

In Case No. S1N-3P-C-16591, Arbitrator Robert foster stated:

The first problem with this grievance as originally filed and processed through the grievance step procedure is that the stated requested remedy of removing the supervisor from his position is to ask the arbitrator to exceed his jurisdictional powers that are derived from the agreement. This is so because Article I of the National Agreement excludes supervisor personnel from the coverage of the Agreement.

Even though it may be said that paragraph 666.2 of the Employee and Labor Relations Manual is applicable to supervisory personnel, this provision is nevertheless enforceable by the arbitrator only as to bargaining unit employees who are covered by the Agreement and not supervisors. Accordingly, I am without contractual authority to issue an award that would involve disciplinary action against the supervisor, or cause management to change the supervisor's assigned duties, since these are rights retained exclusively by management.

Arbitrator Thomas Levak in Case No. W7N-5M-C 20208 stated:

The jurisdiction and authority of a service panel arbitrator is limited by the National Agreement. Agreement Articles 1.2 and 3 expressly exclude supervisory personnel from the Agreement's coverage and reserve unto management the exclusive authority to deal with supervisors on disciplinary or administrative matters. Therefore, it necessarily follows that the arbitrator has no jurisdiction or authority to entertain a case that has as its sole aim a directive from the arbitrator that a particular supervisor be disciplined or be administratively dealt with.

The fact that the Agreement incorporates certain ELM provisions, including the Code of Ethics, does not aid the Union's case. Even assuming that those ELM provisions apply to all service employees, including supervisors, those provisions are incorporated into the Agreement only so far as bargaining unit employees are concerned.

In addition, Arbitrator B.R. Skelton in Case No. S7N-3V-C 11041 concluded:

Because supervisors are excluded from the bargaining unit, grievances seeking reprimand, suspension, or discipline of supervisors have no legitimate contractual basis and to order such remedies is beyond the arbitrator's authority.

The grievance as presented in the earlier steps and appealed to arbitration is not arbitrable.

Finally, in Case No. C4M-4K-C, Arbitrator George Bowles held:

There is nothing in the Agreement between the parties in this case,

or any decided Postal Service cases, that would indicate in any way that an arbitrator can order the discipline of a supervisor.

The Union maintains that its access to the Grievance-Arbitration Procedure for the purpose of disciplining supervisors was facilitated by the Snow award insofar as the supervisor's misconduct was encompassed by the parties' Joint Statement On Violence and Behavior In The Workplace, dated February 14, 1992.

The following excerpts from the Snow award are deemed relevant to the instant case.

The grievance procedure of the National Agreement may be used to enforce the parties' bargain and arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties.

With respect to the contractual implications of the Joint Statement, Arbitrator Snow further stated:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Joint Statement on Violence and Behavior in the Workplace constitutes a contractually enforceable agreement between the parties. Accordingly, the union shall have access to the negotiated grievance procedure set forth in the parties' collective bargaining agreement to resolve disputes arising under the Joint Statement. It is so ordered and awarded.

The Service has argued that the instant matter is not arbitrable because the Union initiated the grievance before the Snow Award became effective on August 16, 1996. The date of the incident is January is January 11, 1996. The Step I was held on January 26, 1996.. According to the Service, "it is not reasonable to

believe that any grievances previous to the date of the Snow Award should be deemed arbitrable --- before the Snow Award became ‘law.’”

In addition, the Service maintains that another ground is available for finding the instant matter is not arbitrable. Whereas the Snow Award contemplates as a remedy the removal of a “supervisor from his or her administrative duties,” it does not mention among the remedies that the arbitrator might consider those proposed by the Union herein, namely, suspension of the supervisor or the imposition of a fine. Consequently, in the Service’s view, the instant grievance should be found not arbitrable because the remedy sought lies outside “the parameters set by the Snow Award.”

OPINION

It is clear that the award of Arbitrator Snow provided the Union with access to the negotiated grievance procedure “to resolve disputes under the Joint Statement On Violence In The Workplace.” The Snow Award further provides that in such cases the grievance procedure authorizes the Arbitrator to devise an appropriate remedy where misconduct is found, “including removing a supervisor from his or her administrative duties.”

Given the Snow Award, it is indisputable that the Union can file grievances seeking remedies for matters alleging transgressions on violence in the workplace.

Although the instant Arbitrator need not address the substantive issue of whether the remedy sought by the Union is appropriate in the case of Supervisor

Keating pursuant to the Snow Award, he is inclined to note that the suspension of the supervisor or the imposition of a fine would entail fundamental due process considerations not fully delineated in the Award. That the supervisor could be subjected to a penalty without an opportunity to be heard as the consequence of a grievance procedure from which he is expressly excluded seems antithetical to the parties extensive guarantee of comparable rights for those employees covered by the collective bargaining agreement.

Conceivably, as Arbitrator Wooters has indicated, "the arbitrator might determine that only declaratory relief was required," or similarly, the Grievant might be deemed to posses a right for which the National Agreement provided no specific remedy. A third alternative could render the proposed discipline of the supervisor tantamount to an advisory opinion which the Service could either implement or modify at its discretion.

The Arbitrator is not persuaded by the Service's claim that the instant grievance should be declared not arbitrable because the remedy sought by the Union, namely suspension and/or a fine, is not mentioned in the Snow Award. The language of the Snow Award is not exclusive but illustrative and thus does not sanction the limitation advocated by the Service. Specifically, the Snow Award states:

...arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including the removal of a supervisor from his or her administrative duties.

Since the foregoing language contemplates multiple remedies of which removal of a supervisor from his or her administrative duties is but one such remedy, the remedies of suspension, fine or a range of other appropriate penalties are undoubtedly encompassed by the Snow Award language and available to the Arbitrator to ensure the "flexibility" necessary to equate the penalty with the offense.

With respect to the timeliness claim, the Arbitrator is also inclined to affirm the Union position. Although the Snow Award had not become effective until after the instant grievance was filed, the award addresses the contractual commitment of the parties to be bound by the terms of the Joint Statement which became effective on February 14, 1992 and pre-dated the instant grievance. The Snow Award, absent language to the contrary, can be construed as relating back to the Joint Statement and thereby providing the means to adjudicate grievances derived from that pronouncement. But for the nexus between the 1992 Joint Statement and the 1996 Snow Award, the presumption of prospective application would prevail.

Accordingly, the grievance of Letter Carrier Brascia is arbitrable.