C-#09460

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION Between	*	GRIEVANT: Cleo Kirkland, Jr.
UNITED STATES POSTAL SERVICE	*	POST OFFICE: Dallas, Texas
And	*	
NATIONAL ASSOCIATION OF LETTER CARRIERS	*	CASE NUMBER: S7N-3A-D-22432

BEFORE: P. M. WILLIAMS, ARBITRATOR, SOUTHERN REGION

APPEARANCES:

FOR THE POSTAL SERVICE:
John Vallie, Labor Relations Representative

FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS:
George White, Local Business Agent

PLACE OF HEARING:
Main Post Office, Dallas, TX

DATE OF HEARING:
September 22, 1989

DECISION AND AWARD

BACKGROUND:

The grievant was employed as a letter carrier router and assigned to the Royal Lane Station, Dallas. His craft seniority date is October 23, 1971.

The facts are not in dispute. On October 29, 1986 he was issued a Notice of Indefinite Suspension (Suspension) it which it was alleged, "There is reasonable cause to believe that you are guilty of a crime for which a sentence of imprisonment can be imposed."

A grievance was filed protesting the Suspension. On September 30, 1987 a "Pre-Arbitration Settlement" was entered into between the Employer and the Union. In part it stated as follows:

"Based on the evidence, the parties mutually agree there was reasonable cause for the issuance of the indefinite suspension dated October 29, 1986, and the grievant is not entitled to back pay for the first 70 days of the indefinte suspension. If the U. S. Postal Service determines to return the grievant to a pay status, the grievant's pay status beyond the 70-day indefinite suspension may be negotiable and may be the subject of a separate grievance. If the decision is made to remove the grievant, the grievant will not be entitled to back pay beyond the 70-day supsension unless the grievant is exonerated of all charges in the removal action through the grievance-arbitration procedure."

On April 11, 1989, the Employer prepared a Notice of Removal (Removal) and sent it to the address listed on a Form 1216 that is dated December 13, 1985 and contained in his Official Personnel Folder. The address shown was: 6851 Marla Drive, Dallas, Texas 75217-5861. The Removal was sent by certified mail and also regular mail to that address. The carrier on the route returned the certified mail with the notation "Certified Letter Not Delivered 4/15/89 ... Certified Forwarding Order Expired."

The Employer concedes that the Union was not sent a copy of the Removal. Rather a Union representative learned of it on May 30th when he asked a Employer official about what its position would likely be in the event the grievant's lawyer was successful in negotiating a plea bargaining agreement with the local prosecuting attorney. The Union also learned then that the Employer was taking the position that because a grievance was not filed within 14 days after the termination became effective, i.e., 14 days after May 15, 1989, the matter was not grievable because his employment status was allegedly ended.

The Union filed a grievance on or about June 11, 1989. At Step 1 the Employer's position was to the effect that the grievance was untimely. An appeal to Step 2 was made on June 15, 1989 with a similar challenge being made. An appeal to Step 3 was filed on July 24th, with the Employer again raising its procedural objection of untimeliness, but also denying the grievance on its merits.

All interested parties appeared at the hearing where they were given an opportunity to present such evidence and argument as was deemed appropriate under the circumstances. The grievant appeared and was prepared to testify on his own behalf on the merits of the matter. The Employer however again raised the procedural objection of untimeliness and asked that the issue be resolved by me as a threshold question. And only if I found the grievance timely filed ought the matter be heard on its merits. It further asked for leave to file a post-hearing brief on the procedural objection it raised.

While the Union did not agree that the procedural objection was a valid one, it nevertheless did not object to the hearing being limited to matters relating to the Employer's procedural objection. Thereafter the hearing continued along the lines indicated, and the factual matters outlined above were made a part of the record.

The parties agreed that each would mail a post-hearing brief on or before October 13, 1989. The briefs have been received and each was timely post-marked.

POSITION OF THE PARTIES:

United States Postal Service (Employer):

The essence of the Employer's position in this case stems from its claim that the provisions of §666.7 of the Employee and Labor Relations Manual (ELM), place upon an employee (the grievant) the duty to keep it advised concerning his or her correct address and to complete a revised Form 1216 whenever a permanent address is changed. It said he did not

.fill out a new Form 1216 when he moved from his Dallas residence, and that he should have. It contended it had a right to rely on the last address he had made available for inclusion in his Official Personnel Folder, and if the address shown thereon was incorrect and as a result the notice of Removal, which was official correspondence, was not received, he must assume full responsibility for its non-receipt and for also having not acted within the time limits set by Article 15 of the National Agreement (NA) to grieve it. It vigorously claimed the grievance was untimely and therefore was not arbitrable. It asked that it be dismissed.

National Association of Letter Carriers (Union):

The Union claimed that §666.7 of the ELM did not impose a requirement on employees to file a new Form 1216 whenever a permanent address was changed. Rather it was merely a request that they do so. It noted also that the date of the last Form 1216 completed by him was December 13, 1985, yet the address shown on the Suspension Notice of October 29, 1986 (which he received) was not 6851 Marla Drive, Dallas, as the Form 1216 indicated, rather it was 1811 Idaho, Dallas. It also claimed that between the dates of the Suspension and the Removal actions one of its officers had given a note to someone in "Labor Relations", requesting that a new address be shown for him. Allegedly the note listed his parents' residence in Tyler as his new permanent address. It also said it did not learn of the Removal action until May 30, 1989 and that it filed the grievance within 14 days thereafter. It strongly contended the grievance was timely filed, and therefore was arbitrable and should be heard on its merits. It asked that the Employer's untimeliness objection be overruled.

ISSUE: Was the grievance timely filed, and if so, what is the proper remedy?

OPINION:

§666.7 of the ELM provides as follows:

"§666.7 Furnishing Address

"Employees must keep the installation head informed of their current mailing addresses. Any changes in mailing addresses will be reported on Form 1216, Employee's Current Mailing Address, to the installation head who will forward copy No. 1 to the Postal Data Center.

Article 15 of the NA provides in part as follows:

"Section 2. Grievance Procedure - Steps

"Step 1. Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union may also initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the"

"facts giving rise to the grievance. In such case the participation of the individual grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office..."

Article 16 of the NA in part provides as follows:

"Section 5. Suspensions of More Than 14 Days or Discharge

"*** In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

"Section 6. Indefinite Suspensions - Crime Situation

"*** D. The Employer may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 5 of this article."

Article 31 of the NA in part provides as follows:

"Section 3. Information

"The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Argreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

"Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee. All other requests for information shall be directed by the National President of the Union to the Senior Assistant Postmaster General for Human Resources."

"Nothing herein shall waive any rights the Union or Unions may have to obtain information under the National Labor Relations Act, as amended."

Article 41 of the NA in part provides as follows:

"Section 1. Posting

"*** B. Method of Posting

"1. The notice inviting bids for Letter Carrier Craft assignments, and to such other assignments to which a letter carrier is entitled to bid, shall be posted on all official bulletin boards at the installation where the vacancy exists, including stations and branches, as to assure that it comes to the attention of employees eligible to submit bids. Copies of the notice shall be given to the local Union. When an absent employee has so requested in writing, stating a mailing address, a copy of any notice inviting bids from the craft employees shall be mailed to the employee by the installation head..."

The publication date of the Form 1216 signed by the grievant on December 13, 1985 is "Feb. 1984". In part the Privacy Act Statement portion of the Form provides as follows: "*** Completion of this form is voluntary..."

The publication date of the Form 1216 signed by the grievant on May 30, 1989, when he and the Union learned of his removal, is "March 1988". In part the Privacy Act Statement portion of the Form provides as follows: "*** Completion of this form is mandatory..."

Based upon the facts disclosed in the two immediate preceding paragraphs it is not incorrect to say that prior to the grievant's suspension the policy of the Employer did not require that employees have on file a Form 1216 showing their correct permanent address, and that in the interim of his suspension the policy was changed making such a disclosure mandatory. The record is conspicuously silent, and it should not be, about whether the mandatory requirement was communicated to either the grievant or the Union after its effective date.

The purpose of pointing out that initially the completion of the Form 1216 was voluntary and that later this was made mandatory is not to necessarily imply that the Employer's argument here is automatically weakened as a result of this change. Rather the purpose is to draw attention to the provisions of Article 15, §2, Step 1, relating to when the employee or the Union "reasonably should have become aware of" the circumstance upon which a grievance might be based, and also to Article 41, §1B(1), which directs an absent employee to submit an address if he or she wants to be advised of bid invitations.

That is to say it seems to me that if employees were not mandated to keep a correct Form 1216 on file, which was the case when the grievant's suspension was issued, the Employer's assertion that it could rely entirely on what the Form shows for purposes of notifying him of an impending removal action tends to not only overlook the reasonableness test of Article 15, §2, Step 1, the assertion also tends to imply

that the plain language of the Feb. 1984 Form 1216 which states completion is voluntary is without meaning. Moreover, the assertion necessarily carries with it the implication that he cannot be guided by what the Form states in plain language. Rather the Employer apparently believes he is subject to §666.7 of the ELM, which neither he nor his local Union representative likely had working knowledge of, and which is a contradiction to what the Form expressly states on its face.

Additionally, the assertion fails to take into account the language of Article 41, §1B(1), which I believe tends to mitigate against the thrust of what is claimed here; i.e., an absolute right to rely on the address listed on the most recent Form 1216 insofar as official correspondence is concerned. I glean from what §1B(1) says that the parties undoubtedly did not anticipate that the Form was the exclusive method for keeping the Employer advised of an employee's address otherwise they would not have gone to the trouble of including §1B(1) in the NA. Moreover, had that not been their belief to include it was unnecessary and also created a redundancy that added nothing to the NA insofar as the individual employees were concerned.

In all events the inclusion of §1B(1) raises the rhetorical question: why would an employee who is required (per the Employer) to provide a current Form 1216 also be required to furnish a second current address for bid invitation purposes? I believe the answer lies in the fact that no purpose would be served by such a duplicity of addresses unless the parties wanted to ensure receipt of the bid invitations and their experience was convincing that receipt of them might not occur if the address on the most recent Form 1216 was relied on, which is another way of saying continual updating of the Form was not mandatory.

It should not escape notice that §1B(1) also requires that the Union is to be advised of the bid invitations. More will be said about this requirement in a moment. First however it should be noted that at the hearing it was said that at this installation it was not the practice of the Employer to send copies of discipline/discharge notices to the Union when that type of notice was issued to an employee.

I am constrained to say I find what is last said a surprizing admission. However, having made the observation it is to be emphasized that what is about to be said should not be construed to mean that I believe the lack of such notice to the Union, if that indeed was the situation, is a violation of the NA. In my view this case does not turn on the answer to that question therefore this opinion is not to be taken as an expression, one way or the other, on what is the Employer's duty, if any, in that regard. Moreover, what is about to to be said is intended to apply only to the situation of this case; it is not intended to apply to any other types of case(s), past or present.

In the course of presenting its case the Employer did not indicate what caused it to decide to initiate the Removal after such a lengthy period of time. Neither did it indicate or claim that it either would or could suffer a detriment as a result of either the grievant or the Union, or both, belatedly making it aware that the Removal was being contested. Rather its challenge to the grievance being arbitrable is solely on the procedural ground of its being untimely filed, i.e., not within 14 days of the date the removal became effective. The remainder of this opinion will be limited to a discussion of that contention.

On page 3 hereof Article 15 §2 was quoted in part. It will not be restated here. Suffice to say that in this situation in the absence of the Employer showing (and it did not) actual receipt of the Notice of Removal by either the grievant or the Union, or both, before May 30th the factual background tends to indicate that the reasonable test of §2 ought to be used for purposes of determining whether the Employer comported to what the NA requires that it do in this kind of situation. If it did its objection to the arbitrability of the grievance is well taken and should be sustained. If it did not its objection is without merit and should be dismissed.

The parties agree that a copy of the Removal was not sent to the Union. They also agree that the Union and the grievant first learned of the Removal on May 30th, 1989. And they agree that the Removal was sent to an old address (which was then a vacant house and had been for some time) where the grievant had not resided since shortly after his indefinite suspension on October 29, 1986. The Employer concedes the Removal was dated April 11th, 1989, that delivery was attempted on the 15th and that it was returned to "Labor Relations" on the 19th. It is correct to say therefore that for approximately 26 days before the date the Removal was to become effective on May 15th, the Employer was aware of the fact that neither the grievant nor the Union knew of its decision to remove him from the roll of its employees.

Because neither he nor the Union first learned of the Removal before May 30th and the grievance was filed within 14 days thereafter it is unnecessary to dwell on whether the grievance was timely filed using the 30th as the stating date. I therefore may proceed to a review of the circumstances under the test of whether either he or the Union, or both, "may reasonably have been expected to have learned of" the issuance of the Removal.

To arrive at what I believe is the proper result in this case I need not discuss the federal law regarding the rights of the bargaining agent to be informed of actions likely to impact upon the bargaining unit members in general, or upon an single member of it specifically because I believe Article 15, §2 adequately covers the thrust of the law. It is to be said however, for purposes of emphasis, that in the absence of the Employer being able to transfer the duty of notice of the action taken from itself to the grievant for purposes of the Union learning of its action (and I do not believe that such a transfer is possible under the federal law), there is no question but that in this case the Union may not (emphasis mine) "reasonably have been expected to have learned of" the Removal until May 30th. It therefore could have filed a timely grievance at any time until and including June 13th. The Step 1 meeting was held June 12th, therefore, if the matter may be deemed a Union grievance, it was timely lodged.

Before proceeding it should be pointed out that the Employer made no contention that the matter could not be persued as a Union grievance. Moreover, it did not claim that it was not filed as a Union grievance. Neither did it contend that it was filed exclusively as an individual grievance by the grievant, as opposed to being filed by the Union. While these oversights of the part of the Employer may seem unimportant and perhaps would be under other circumstances, they never-

theless are very important in matters where the timeliness issue is raised (as it is here) and the record shows that the Union was unaware of a matter because the Employer did not kick-off a copy of its unilateral action to the Union's office. The latter may not be a requisite of the NA (although I tend to be of the opinion that it is), but be that as it may, for all practical purposes it is a requisite, I believe, if the Employer intends to raise timeliness as a factor in defending against the validity of a grievance.

That is to say the Employer has the burden of proving knowledge to the Union of the incident giving rise to the action it has taken. It therefore puts itself in a weak position to meet that burden if it opts to rely on an employee's rushing to the union hall in order to make it (Union) aware of what has happened to him or her. Moreover, Article 15 §2, or so it seems to me, comes out strongly in favor of the right of the Union to grieve a circumstance (even in the absence of a request by an employee that it do so) when it learns of a happening that seemingly flies in the face of what it perceives are either its rights or the rights of the members of the bargaining unit.

Here the Employer neither notified the Union before May 30th that it had issued the Removal, nor asserted at the hearing that the Union had not filed, or was unable to file a grievance to the issuance of the Removal mailed April 11th. I therefore am of the opinion, and so find, that insofar as the Union is concerned the Employer's position is not well taken and therefore may not be sustained. Rather it is without merit and is to be dismissed. The question then becomes: is it to be said that the grievant may reasonably have been expected to have learned of the Removal before May 30th?

Earlier it was said that when the grievant was suspended on October 29, 1986 he had completed a Form 1216, which the Employer had placed in his Official Personnel Folder (OPF) listing 6851 Marla Drive, Dallas, as his permanent address. Inexplicably however the suspension notice was not sent to that address. Rather it was sent to 1811 Idaho, Dallas. It nonetheless was received by him. The silence from the Employer concerning why the Suspension was not sent to the Marla Drive address when its principle witnesses claimed the Form 1216 was always automatically used for mailing out official correspondence is both surprizing as well as damaging to its position to say the least. I say this because their statements were quite emphatic that the Form 1216 was automatically placed in the front of an employee's OPF and that it was always the source document for address information for all official correspondence to all employees. The record simply does not support the witnesses' claims even though it perhaps supports their personal experience, which is too short term to establish a general practice of the magnitude the Employer seeks to show in this case.

In the absence of the Employer appropriately showing that the grievant either knew or he should have known he was required to fill out a new Form 1216 each time his permanent address changed (and for the reasons stated earlier it did not so show), I am of the opinion that when it learned on April 19th that the Removal had not been delivered to him this was cause for it to know he was unaware that a removal action was in progress against him. At that point in time if it expected to have the Removal affirmed in the grievance-arbitration

procedure of the NA it should have taken action to serve him as directed by Article 16 §5. It did not see fit to do that before May 30th. The time limits for filing a grievance therefore did not begin to run until that date because the Employer had no proper basis for concluding that he may reasonably been expected to have learned of the Removal. Moreover, with the grievance having been discussed at Step 1 on June 12th, it is clear that insofar as he, individually, is concerned the grievance was timely filed, therefore as to him it is arbitrable, and as noted above, the same is true of the Union as well.

In the preceding paragraph mention is made of Article 16 §5, which is quoted on page 4 hereof. I shall not lengthen this opinion by discussing it or its ramifications in any great detail. I will say however that I believe §5 must be read together with Article 15 §2 in order to arrive at what likely was the parties' intent insofar as what constitutes proper notice to employees who become involved in adverse disciplinary action and when a grievance is to be filed contesting that kind of action vis a vis protesting an alleged contractual violation on the part of the Employer.

I am persuaded that when those §§ are read together there is reason to believe that in providing "any employee shall ... be entitled to an advance written notice of the charges" Article 16 §5 is not suggesting the parties intended that the mere mailing of the charges to the employee at the most current address listed on the Form 1216 is sufficient. Rather I believe the clause reflects their intent as being for the notice to be "served" (received), as §4 specifically requires for non-adverse action suspensions. Moreover, it is inconceivable to me that they would put a greater notice burden on the Employer for minor suspensions than is placed on it for adverse action suspensions and/or removals.

But, having concluded that the thrust of the Employer's argument of it having a right to rely on the address listed on the Form 1216 is without essential merit, I will not dwell on my beliefs regarding what I consider to be the thrust of Article 16. Rather I need only say that with the facts being as they are Article 15 §2 fails to support the position the Employer has taken here. Its objection to the arbitrability of the grievance therefore should be, and the same hereby is, dismissed.

On the basis of the entire record in this case, which includes a post hearing brief from each of the parties, the undersigned makes the following

AWARD

The grievance was timely filed. The Employer's objection to the processing of the grievance at the level of arbitration is dismissed.

IT IS SO ORDERED.

P. M. Williams
Arbitrator

Dated at Oklahoma City, Oklahoma
this 25th day of October, 1989.