

IN ARBITRATION

22777 (CFC-4B-c)

C# 00009

UNITED STATES POSTAL SERVICE,) Case No. C8C-4B-C 22777;
and) Arbitrator's File 81-100-670;
AMERICAN POSTAL WORKERS UNION,) Date of Hearing:
BEVERLY COTTON, Grievant.) September 24, 1981,
) Detroit, Michigan.

APPEARANCES

RECEIVED BY

For the Postal Service:

FEB 1 1982

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FROM THE OFFICE OF
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O P I N I O N

Issue

Is the grievance arbitrable?

Facts

At the commencement of the arbitration hearing, the Postal Service stated that it was raising the issue of arbitrability because Grievant, her Union and the Postal Service had never had a Step 1 discussion, as required under Article XV of the National Agreement.

The Postal Service produced as its first witness Grievant's supervisor, who stated that Grievant was absent from work on September 13, 1980. On September 21st, the supervisor asked Grievant if she had filed a Form 3971, requesting approval of her leave of September 13th. Grievant stated that she had not. On September 22nd, Grievant submitted Form 3971 requesting sick leave. The supervisor testified that, at that time, he told Grievant that she would be required to submit medical documentation in support of her sick leave.

He further testified that, when he had not heard from Grievant again by September 24th, he disapproved her request for sick leave for failure to substantiate it, and charged her absence of September 13, 1980, as "Absent Without Leave".

The supervisor testified that on September 25th, he was given a form called "Union's Request for Information" by a Union steward which asked for a copy of Grievant's Form 3971 for her absence of September 13, 1980. He told the steward who sought the information that he would obtain it. He did so, but he said he did not hear from her again. Since she did not contact him thereafter, he did not give it to her, because he was awaiting her further inquiry.

Evidence submitted jointly by the parties indicated that the Union filed a Step 2 grievance appeal on October 1, 1980. The Step 2 grievance decision was rendered on October 22, 1980.

It was a denial on the ground that the grievance was "procedurally defective, no Step 1 discussion".

Thereafter, on November 10, 1980, the Union appealed to Step 3. In its appeal, the Union stated, in part:

"Management makes the contention that this grievance is procedurally defective because there was no Step 1 discussion. However, Management has full knowledge of the fact that the Supervisors on the floor have prevented the Union Steward from making appointments with Supervisors for the purpose of trying to resolve grievances or investigating grievances. Management has arbitrarily refused the Steward the right to interview witnesses and properly investigate any grievances.

In this particular case, the Union's Steward - Ms. Elaine Jackson - requested to have a Step 1 discussion and requested pertinent information from Supervisor R. Givhan to properly process this grievance. The Steward's request was completely ignored by Supervisor R. Givhan. Supervisor R. Givhan received and signed the Steward's Request for Information Form on September 25, 1980.

However, after several days, Mr. Givhan did not respond. The Steward had no recourse but to appeal the grievance to Step 2 of the Grievance Procedure on October 1, 1980.

Since Management at the GMF has prohibited the Union Steward from making any appointments on her own, they must rely upon Management to make and keep the appointment that they try to set up. In this case, the Steward waited eleven days from the date the grievant found out that she was given an AWOL before she decided to appeal the grievance to Step 2 because she had not received any response from the Supervisor regarding her Step 1 discussion and Request for Information."

Thereafter, on November 21, 1980, the Postal Service issued a Step 3 denial, which stated:

"This grievance was not processed in accordance

with the provisions of Article XV as there was no Step 1 discussion. Accordingly, this grievance is denied."

Grievant testified that she was absent from work on September 13, 1980. On September 21, 1980, her supervisor stopped at the LSM at which she was working, and asked her if she had worked on September 13th. She said she had not, and he asked if she had filed a 3971. She replied that she had not, and he advised her that he would mark her AWOL. On September 22nd, she signed and filed a 3971 requesting approval of her leave. She was advised that it would be denied. At that time she asked for, and was allowed to see, a steward.

The steward testified that on September 21st, she was called to confer with Grievant concerning a possible grievance. She stated that she was not Grievant's usual steward, but was acting in the absence of Grievant's usual steward. She obtained Grievant's signature on a Union request for information. She was the steward who had submitted it to Grievant's supervisor. He made no comment when he took it. He said that he would get the information, but never discussed any Step 1 meeting.

According to the steward, very early in October Grievant's supervisor approached her and said that she (the steward) had never come back again for the information. She said she told the supervisor that she could not leave her station without the approval of her own supervisor.

The steward testified that stewards who sought to do Union business involving other sections than their own were first required to obtain permission from their own supervisor, who would then contact the supervisor in the section where they were to do their Union work. (The Union produced a copy of a notice of July 28, 1980, so stating.) The steward would then receive authorization on Form 7020 from the two supervisors to transact the work or Union business which they wished to conduct.

She testified that on several occasions, she sought to obtain permission through her own supervisor, John Taylor, to hold a Step 1 meeting in Grievant's case. When she found that the time was running out under the National Agreement for the Step 1 meeting, she filed a Step 2 appeal.

She stated that her supervisor required that she make up what she called an agenda, to which items were added and subtracted as they arose or were handled, and that she could only handle those items for which she obtained permission. She stated that Grievant's Step 1 meeting was on this agenda, but that she was never permitted to hold - and no arrangements were ever made to have - a Step 1 meeting.

Discussion and Opinion

The Postal Service maintains that this grievance is not arbitrable under Article XV, Section 2, Step 1(a), which provides in part as follows:

"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 Postal Service submitted to the Arbitrator twenty cases that state that a Step 1 discussion must be held. A reading of these cases indicates that arbitrators have uniformly held that before a grievance is arbitrable, a "discussion" must be held between the Grievant, with possibly a Union representative present, and the Grievant's immediate supervisor.

In the instant case, the Union has conceded candidly that no such Step 1 discussion occurred. However, the Union contends that such a Step 1 discussion never occurred because of the refusal of the Postal Service to hold such a discussion.

In Case No. AC-S-12609-D, decided on May 26, 1977, Arbitrator Bernard Cushman stated:

"The issue is whether the grievant's testimony presents a situation which tolls the contractual time limit of fourteen days within which to file or present her grievance."

For purposes of this case, that statement should be paraphrased to read:

"The issue is whether the testimony of the Union and the grievant presents a situation which tolls the contractual time limit of fourteen days within which to file or discuss the grievance with the employee's immediate supervisor."

The evidence of Grievant's steward on the issue of her attempts to arrange a Step 1 discussion was impressive and believable. She first stated that the procedures that were in effect in her post office for obtaining permission to conduct Union business were cumbersome and hence caused delays. The delay in this grievance was the result of the necessity for obtaining multiple permission for the conduct of Union business.

She also stated very forcefully that in conducting her Union business with Management, an agenda was used to which items were added and subtracted as circumstances dictated, and that the supervisors exercised their own choice of those items on the agenda which were to be handled.

No one refuted this testimony, nor did anyone state that the representative of Grievant and her Union were free to discuss any matters that they chose. In addition, the steward's actions were consistent with her testimony. She stated that when she realized that her 14 days in which to proceed on the grievance were expiring, she then took the next step. This shows that she was alert to the requirements of the National Agreement.

It goes almost without saying that if one party to a contract frustrates the attempts of the second party to comply with the contract, the first party should not be

permitted to take advantage of such actions. Were an arbitrator to rule otherwise, then all that the employer would need to do to prevent any grievance from being arbitrable would be simply to refuse to hold a Step 1 discussion. Obviously, no party should be permitted to deny rights to another party as a result of its own conduct.

I find therefore that the Union and Grievant not only were prepared to hold the required Step 1 discussion, but that their efforts to hold such a discussion were denied and frustrated by the actions of the parties with whom they were to discuss the matter.

The grievance is therefore arbitrable. The costs are assessed equally.

Dated this 18th day of January, 1982.


GERALD COHEN
Arbitrator
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