BEFORE THOMAS F. LEVAK, ARBITRATOR C#01300

W8N-5C-C-14769
Class Action
Oakland, CA

In the Matter of the Grievance Arbitration between:

U. S. POSTAL SERVICE

THE "SERVICE"

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

THE "UNION"

CASE NO. W8N-5C-C 14769

DISPUTE AND GRIEVANCE CONCERNING HOLIDAY SCHEDULING/TIMELINESS

MEMORIALIZATION OF ARBITRATOR'S RULING

This matter came for hearing before the Arbitrator at 9:30 a.m., September 3, 1982 at the offices of the Service, Berkeley, California. The Service was represented by Regional Labor Relations Representative Denise M. Alter. The Union was represented by Regional Administrative Assistant William H. Young.

Following the commencement of the proceedings, the Arbitrator rejected the Service's procedural defense that the Union's case had not been filed in a timely manner, but sustained the Service on the merits for the reason that the Union failed to present a prima facia case that the National Agreement had been violated. The following is a memorialization of the rulings of the Arbitrator.

I. THE ISSUES.

On June 25, 1980, the Service posted holiday schedules at nine of the Oakland, California area branches for July 3, 1980. Carriers were assigned pursuant to those posted schedules, and on July 18, 1980 all affected employees received pay checks covering the holiday. The Union filed its Step 1 grievance on July 31, 1980. The grievance alleged that the scheduling violated the "pecking order" set forth in Article XI, Holiday Scheduling, of the Local Memorandum of Understanding in effect at the Oakland stations. The Service contended at the arbitration hearing that the Union had waived its right to process the grievance for the reason that it had not been filed within fourteen days from the day it first became aware of, or reasonably

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should have become aware of, the facts giving rise to the grievance. The Service also denied the Union's claim on the merits.

II. THE ISSUE OF TIMELINESS.

The Arbitrator bifurcated the proceedings and directed the Service to proceed first upon the defense of timeliness. Evidence introduced by the Service demonstrated that while the Service may have verbally raised the issue of timeliness at the Step 2 meeting, the Service did not furnish the Union with a written Step 2 decision until several months after the Step 2 meeting and after the case had been appealed to Step 3.

The Arbitrator ruled that under Article XV, Section 3(b), the failure of the Service to raise the issue of timeliness in its written Step 2 decision prior to the time the case was appealed to Step 3 constituted a waiver of its timeliness objection.

As noted by the Arbitrator, the Step 2 meeting is no more than a general meeting aimed at settlement of a grievance. Following such a meeting, it is normally very difficult for the parties to remember the contractual provisions relied upon and the reasons advanced in support of each party's position. Similarly, many contentions are raised at those meetings which the parties later determined should not be pursued.

Thus, in order to focus attention upon the facts and contracual provisions in dispute, as well as the express reasons in support of each party's position, the National Agreement requires that the actual written decision of the Service set forth the relevant facts, the contractual provisions involved, and the detailed reasons for the denial. Similarly, the contractual provisions relating to a written Step 3 appeal impose similar requirements upon the Union. The written appeals and decisions thus constitute the "pleadings" of the parties. Therefore, an allegation or defense not set forth in writing cannot be said to have been "raised."

In summary, since the Service failed to raise the issue of timeliness in its written Step 2 decision within the prescribed time limit, its objection to the processing of the grievance was waived.

III. THE MERITS.

Article XI of the Local Memorandum of Understanding sets forth the following "pecking order" of six employee groups:

> Scheduling of employees to work on their holiday or designated holiday will be made in the following order:
>
> 1. Casuals, even if overtime is necessary.
>
> 2. Part-time flexibles, even if overtime is necessary.
>
> 3. Full-time regulars who have volunteered and who will be working on what would otherwise be their non-scheduled work day, selected on the basis of seniority.
>
> 4. Full-time regulars who have volunteered to work on the holiday or designated holiday when such day otherwise would be part of their work schedule, shall be selected on the basis of seniority.
>
> 5. Full-time regulars who have not volunteered and who will be working on what would otherwise be their non-scheduled work day, selected in the inverse order of seniority.
>
> 6. All other full-time regulars who have not volunteered and are on their holiday or day designated as their holiday, selected by inverse seniority.

The Union asserted that prior to preparing the June 25, 1980 holiday schedule, Postal Service management at the nine affected stations went directly to Group No. 4 employees and asked them to volunteer to work the holiday, thus bypassing employees in Groups 1, 2 and 3 in order to save half-time pay. The Union further asserted that management never posted notices asking for volunteers from all six groups.

At the commencement of the arbitration proceeding, the Arbitrator received into evidence a document prepared by Union Shop Steward Paul Roose which purported to set forth the carriers who worked the holiday and the carriers who were not offered an opportunity to work their scheduled days off.

The Service did not challenge the admissibility of the exhibit on the basis of authenticity in preparation, but did challenge the accuracy of the exhibit. The Service further asserted that a general opportunity had in fact been given to all employees to volunteer for the holiday work.

The Union called as its first witness Local President Robert Rutter, who testified that he had received the Union exhibit from Shop Steward Roose and that Roose had prepared the exhibit. Mr. Rutter took no part in preparation of the joint exhibit or the investigation conducted pursuant to that preparation. He did not personally know whether the Service had announced a general opportunity to volunteer or whether the allegedly bypassed employees had been offered an opportunity to work. Further, he was uncertain whether Mr. Roose had actually talked to all the employees listed on the exhibit. He did note that the exhibit itself indicates that certain employees had not been contacted by the Shop Steward because they were on annual leave at the time of the grievance investigation.

During the Service's cross-examination of Mr. Rutter, the Service offered business records which indicated that some of the employees listed in the exhibit as having been allegedly bypassed actually worked the holiday (e.g., K. Washington and T. Hughes).

At the conclusion of Mr. Rutter's testimony, the Union stated that the only other witness it was prepared to call was Shop Steward Roose. The Union further conceded that Mr. Roose would be unable to confirm the overall accuracy of the exhibit and that his testimony would constitute hearsay.

The Union stated that it had not intended to call any of the individual grievants since it had not believed that the Service had intended to challenge the accuracy of the exhibit at the arbitration hearing. It further submitted that the sole defense raised by the Service prior to the arbitration hearing was that the holiday assignments were proper since all were voluntary and no carrier was required to work on his/her designated holiday.

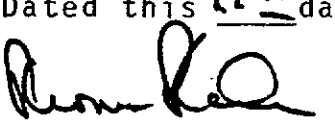
The Arbitrator thereupon notified the Union that he intended to deny the grievance for the reason that the Union's entire case consisted of uncorroborated hearsay and double hearsay evidence which was insufficient to establish a prima facia case that the Service had violated the National Agreement. The Arbitrator noted that while hearsay evidence is admissible in arbitration hearings, it must be corroborated by direct evidence, and in this case the Union was unprepared to call any individual employee-grievants to corroborate the Union's basic assertions and allegations. The Arbitrator further ruled that the Service was under no obligation to agree to the accuracy of the Union's assertions or its evidence;

nor was the Service under any obligation to present evidence to support the Union's case. Finally, the Arbitrator noted that in an arbitration proceeding, it is not necessary for either party to formally move for a "directed judgment" or "dismissal." Where no direct evidence is presented by the party charged with the burden of coming forth, an arbitrator should properly dismiss the claim without receiving evidence from the defending party on the grounds that no prima facia case of a contract violation has been presented.

Faced with the intended decision of the Arbitrator, the Union asked the Arbitrator to direct the Service to require all affected employees to immediately appear at the arbitration hearing to give evidence. In the alternative, the Union asked that the Arbitrator return the case to Step 3. The Arbitrator denied the requests of the Union.

In summary: (1) The party bearing the burden of proof in an arbitration proceeding must come to the hearing prepared to present a prima facia case through direct evidence. The party bearing the burden cannot simply presume that basic facts are unchallenged. In a discipline case, the assertions and allegations set forth in the grievance documents do not automatically constitute fact. The Service must present direct evidence through the testimony of supervisors and management familiar with the facts in order to establish a prima facia case. Similarly, in a contract dispute, the Union must be prepared to present direct evidence in support of its case. (2) Where a prima facia case is not presented, an arbitrator should properly deny the grievance. (3) The same rule holds true in a "branch" ("class") grievance. In a branch grievance, the Union must be prepared to offer direct testimony by representative members of the class in order to sustain its burden of establishing a prima facia claim on behalf of the entire class.

Dated this 22nd day of September, 1982



Thomas F. Levak, Arbitrator