C# 03723

USPS - NALC CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between: THE UNITED STATES POSTAL SERVICE Toledo, Ohio Post Office -and- NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO Branch 100	*	Case No. C1N-4F-D 8380 Decision Issued August 7, 1983

APPEARANCES

FOR THE EMPLOYER

Thomas J. Lang	Labor Relations Representative
Delbert J. Duckins	Labor Relations Representative
Samuel Mattoni	Director, E & L R

FOR THE UNION

Jerry N. Street	Local Business Agent
Ronald E. Coughenour	Vice President, Branch 100
Charles E. Minneker	Grievant

ISSUE: Article 15, Section 2 -- Timeliness of Grievance.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
Shaker Heights, Ohio 44120

BACKGROUND

This controversy stems from the removal of a fifty-nine-year-old, part-time flexible letter carrier who was employed at the Toledo, Ohio Post Office. The Grievant received his career appointment on March 7, 1981. Eleven months later, on April 23, 1982, he was issued the notice of proposed removal. Subsequently he received a letter of decision from the Toledo Postmaster on May 27, informing him that his removal would occur on June 4.

The Postal Service's action was founded primarily upon the assertion that the Employee was physically impaired to the extent that he was unable to fulfill the duties of his position. The removal letter also recited Grievant's disciplinary record. In his first seven months as a letter carrier he had been issued a letter of warning and a seven-day disciplinary suspension.

Grievant's alleged physical disability first came to light on January 13, 1982 when, while delivering mail, he tripped over a snow-covered step. When Grievant returned to the station and reported the accident, Supervision sent him to the Phillips Medical Center for an examination and a duty status evaluation. The physician who examined Grievant made a preliminary diagnosis of contusion of the left knee. He projected that complete recovery would take place in ten days to two weeks. The record discloses that the doctor's evaluation was incorrect. Two days later x-rays revealed

that Grievant had serious hypertrophic changes in his knee which included "medial space narrowing and two lose (sic) bodies posteriorly one on the medial side and one is on the lateral side." Several more examinations of Grievant were conducted by physicians at the Phillips Medical Center, a Postal Service medical officer, and Grievant's own doctor. The results were uniform. The conclusion was that Grievant's injury caused aggravation of a preexisting degenerative osteoarthritic condition. The physicians were of a single opinion -- that Grievant would not be able to perform the full range of letter carrier duties, and should be restricted from activities that would cause stress to the injured area. Those activities were specifically delineated as walking, bending, and climbing.

After the first medical examination which predicted that the Employee's condition would heal, Grievant received two weeks of sick leave. Then, some of the later medical opinions were reported. When Grievant returned to work, he was assigned three weeks of light duty. In the meantime, Grievant spoke to his station manager who advised him of the possibility that he could apply for and receive a permanent reassignment to a different craft --one that would not call for the same physical exertion that was required of letter carriers. Grievant accepted the suggestion and on January 29, 1982, he wrote a letter to the Toledo Postmaster requesting reassignment to the Clerk Craft. In that letter he stated that x-

rays of his knees "show a problem that will not get any better with continued hours of walking as a carrier." He also complained of hypertension that was aggravated by his current job.

Grievant's request set machinery in motion which ended in a result that the Employee obviously had not anticipated. On March 30, 1982 he was placed on Leave Without Pay status, pending a decision on his request. He was also required to report for fitness-for-duty examinations.

At this point it is to be noted that the Postal Service had the authority, but not the requirement, to comply with Grievant's request for a less taxing job. Article 13 of the Agreement establishes a right of employees who are partially disabled by an occupational injury to receive available light duty. However, the contractual benefit is mandatory only with respect to employees who have five or more years of accumulated service. When Grievant was injured he had been an employee for only eleven months. Therefore, Management had no obligation to grant his request.

The Toledo Postmaster reviewed Grievant's letter and declined to honor it. The Employee's brief length of service, the limiting nature of his injury, and his disciplinary record were all considered. The decision was made to terminate his Postal Service employment. The notice of proposed removal was given to Grievant on April 23, 1982.

A week after he received and signed for the removal notice, on May 1, 1982, Grievant prepared a lengthy written response. The

document contained a rambling account of his complaints against the manner in which Supervision had treated him. More to the point, it implied that all of the medical diagnoses and prognoses were incorrect. Grievant stated that he had cured himself of his disability through rest and self-administered medication consisting of bone meal, alfalfa, vitamins A, D, C, E, and Comfrey Root. Grievant's letter concluded:

> I would like to transfer as a Distribution Clerk, however, I believe I am physically much better [than] I was a year ago; and can perform all the duties as a City Carrier. I AM WILLING and ABLE.

On May 5, the Employee submitted his letter and, at the same time, gave a verbal response to the Toledo, Ohio Director of Employee and Labor Relations. Neither the written nor the verbal response dissuaded Management. The record was reviewed by the Postmaster who wrote to Grievant on May 27, informing him that the removal would proceed on June 4, 1982.

The Union initiated a Step 1 (verbal) grievance on May 29, 1982. It was denied by Management on the same day, and a Step 2 (written) grievance was submitted on June 2. The matter remained unresolved in the preliminary Steps and it was appealed to arbitration. A hearing was convened on September 10, 1982 in Toledo, Ohio. At the outset of the hearing, the Representative of the Employer

asserted that the grievance was not arbitrable because it had not been initiated within the mandatory contractual time period. Article 15, Section 2 of the Agreement provides a fourteen-day limitation period for submission of grievances at the first Step, and Section 3(b) states that grievances which are not processed within specified time limits shall be deemed to have been waived. The language of the Sections is as follows:

ARTICLE 15

GRIEVANCE - ARBITRATION PROCEDURE

Section 2. Grievance Procedure -- Steps

Step 1: (a) 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.

Section 3. Grievance Procedure -- General

(b) The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

The Postal Service called attention to the fact that the notice of proposed removal was given to Grievant on April 23.

Thereafter, the Employee delayed initiating his Step 1 grievance until May 29. Thirty-three days intervened. Accordingly, since Grievant did not meet the fourteen-day time limitation, the Postal Service concluded that his right to grieve had been waived and that the Arbitrator was without jurisdiction to review the merits of the complaint.

The evidence confirmed that the Postal Service raised its timeliness argument at or before the Step 2 proceedings and that no implied waiver of the argument occurred under Article 15, Section 3. Although the Postal Service agreed to presentation of both substantive and procedural evidence, its concession in that regard was solely for the sake of convenience. It was not to be considered as an abandonment of its threshold arbitrability position; and it was understood that the Arbitrator would not decide the merits unless and until the procedural issue was resolved in the Union's favor. If it was found that the delay in initiating the grievance constituted a jurisdictional defect in the case, such finding would require that the grievance be denied without reference to the merits of Grievant's protest.

THE PROCEDURAL ISSUE

This Arbitrator adopts the view that an employee's access to the grievance procedure should not be easily destroyed. It is well recognized that provisions for orderly negotiation and resolu-

tion of employee complaints are keystones of collective bargaining. They are designed to supplant the right of an organized workforce to use economic weapons -- primarily strikes -- to force management's acquiescence to demands. It is axiomatic that those procedures have their desired effect only if they work -- if they truly provide a means by which an employee can challenge management and perhaps win. In order for grievance machinery to work, it must be favored. Its purposes should not be confounded by a myriad of technicalities which remove the privilege of an employee to fully expose the merits of his or her complaint up to and including the point where he or she may obtain a binding decision from a neutral third party. In order to observe the importance of grievance procedures in the scheme of collective bargaining, arbitrators should be hesitant to find that trivial neglect on the part of an employee stands as a bar to the right to obtain a full hearing and a final binding arbitral decision. When an employer challenges arbitrability, it should be put to the task of supporting its position persuasively. Inconsistencies or reasonable doubts in such presentation should be resolved in favor of the employee -- in favor of survival of the grievance.

There is a second principle that governs a case such as this -- one that may require dismissal of a grievance irrespective of apparent injustice. Arbitrators are contract readers, not contract writers. Their authority extends to interpreting and apply-

ing the language of a governing collective bargaining agreement. They do not have the right to alter, amend, or ignore clear contractual provisions. When an arbitrator rules according to his or her concept of justice, notwithstanding conflicting contractual language, he or she commits an unpardonable abuse of office by assuming powers and authority that the parties have not granted. This precept is unambiguously set forth in Article 15, Section 4 A (6) of the National Agreement between the Postal Service and the Letter Carriers. The provision states:

> All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

Article 15, Section 2 A of the Agreement provides that an aggrieved employee must initiate the first Step of the grievance procedure within fourteen days after he or she knows or has reason to know of the cause for complaint. The mandatory aspect of the language of the Section is reinforced by Section 3 (b) which states that failure to meet time limitations constitutes waiver of the right to further processing of a grievance. The Arbitrator cannot legitimately fail or refuse to apply the unambiguous language of the Agreement. If, as the Postal Service maintains, the Employee had notice of his cause for grieving on April 23, 1982, and did not

initiate his Step 1 complaint until May 29, he was clearly out of rule. No matter how many presumptions are indulged to preserve a grievance against divestiture, thirty-three days cannot be interpreted as falling within the prescribed fourteen-day limitation. Therefore, if the Employee failed to grieve within the required period, his grievance must be dismissed.

The Union recognizes the soundness of the Postal Service's contention. It does not argue for an arbitral decision on the merits because summary dismissal would be unfair or unjust. Rather it maintains that the grievance was initiated within the contractually established time period. In support of its position, the Union makes two assertions. It states that the cause for a grievance did not jell until May 27, 1982, when the Postmaster communicated his final decision to proceed with the removal. Up to that time, Management was considering Grievant's verbal and written responses to the April 23 letter proposing his removal. According to the Union, there was always the possibility that the Postmaster might not concur in the decision to end Grievant's employment. He might have reinstated Grievant, particularly since the Employee insisted that his condition had healed and that he was able to perform the functions of a letter carrier. It was possible that the Postmaster might give credence to the fact that the physicans' reports were advisory, and did not state conclusively that Grievant was permanently disabled. The Postmaster delayed his decision until May 27.

The Step 1 grievance was submitted two days later, on May 29, 1982, and, in the Union's view, it was well within the fourteen-day contractual time limitation.

The Union's second contention is that, if the period for grieving began to run on April 26 when the proposal notice was issued, Grievant's written and verbal responses to the Director of Employee and Labor Relations on May 5 should have been regarded as commencing the grievance. Adoption of that argument would also preserve the procedural integrity of the grievance.

OPINION

The Union's contention that the grievance period did not commence until the Postmaster made his final determination is not well taken. Article 15, Section 1 of the Agreement defines "a grievance" as follows:

> **Section 1. Definition**
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> A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Grievant's right to grieve materialized as soon as he had a com-

plaint, or had reason to believe he had a complaint that his contractual rights were being disregarded. Certainly the letter proposing his removal informed the Employee that he had a complaint. In fact, Grievant immediately answered the proposal letter with a letter of his own, contending that he was being dealt with unjustly and implicitly requesting that he be permitted to continue in his letter carrier job if his request for transfer to the Clerk Craft were not approved.

The Postal Service submitted a sizable number of previous arbitral decisions, all of which held that an employee's right to grieve a discharge commences when he or she receives the proposal letter, not when the final decision is made or when the removal takes effect. The Arbitrator finds that those opinions were well reasoned and that they stated the contractual interpretation that is recognized by these parties. To state that a grievance does not have to be initiated until the final removal decision is made is equivalent to stating that a grievance submitted upon receipt of a letter of proposed removal is precipitous. That kind of contractual interpretation flies in the face of the definition of a grievance contained in Article 15, Section 1. The fact that Management might reconsider its original decision has nothing to do with the question of when a grievance must be commenced. A grievance must be commenced when the employee knows he has a reason to grieve. That occurs when the employee is given an official notice that his removal officially has been proposed.

The time limit between a proposed removal and a final discharge is contractually set by Article 16, Section 5 of the Agreement at not less than thirty days. The obvious purpose is to accord an employee the opportunity to grieve before he or she is actually removed. The provision also establishes a cooling-off period. But that does not mean that the thirty-day period is designed to extend the time for initiating a grievance. If the parties had intended to create that kind of exception to the limitation on the right to initiate grievances, they would have so stated in the Agreement. The time limits span several contractual terms, during which the parties have received numerous arbitral awards stating that a grievance must be commenced not more than fourteen days after receipt of the removal proposal. If the Union had desired or had been able to change that rule, it would have done so at the bargaining table.

The Union is on somewhat firmer ground in contending that Grievant's written response and his verbal conference with the Director of Employee and Labor Relations was equivalent to a Step 1 grievance. During the arbitration hearing, however, the Director testified that he was not of the impression that the Employee was initiating a grievance in accordance with Article 15. Grievant did not state that he was entering the grievance procedure, and if that was his intention, Article 15, Section 2, Step 1(a) of the Agreement specified that the verbal Step has to occur with the immediate Supervisor, not with the Director of Employee and Labor Relations.

The Arbitrator finds it unnecessary to determine whether the Postal Service effectively waived the normal Step 1 procedure and accepted the Employee's grievance through the conference with the Director of Employee and Labor Relations. The evidence clearly establishes that Grievant's May 5 verbal reply was not a grievance, and was not even intended to be a grievance by the Employee. In order to fully understand this conclusion, it is important to review the last page of the April 23 notice of proposed removal. That page set forth that the Employee had several alternatives if he wished to retain his employment. It provided that he could attempt to influence Management by submitting documentary evidence of his ability to work and/or by conferring with the Director of Employee and Labor Relations. In addition, the last paragraph of the letter reminded Grievant that he had a right to protest through the contractual grievance machinery provided that he initiated a grievance within fourteen days. Those portions of the letter stated:

> As a preference eligible employee you have the following rights:
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> You and/or your representative may review the material, if any, relied on to support the reasons for this notice at the Personnel Office, Room 307, 435 S. St. Clair St., Toledo, Ohio 43601, between the hours of 8:00 A.M. and 5:00 P.M., Monday through Friday. If you do not understand the reason for this notice, contact Mr. Samuel A. Mattoni, Director, Employee & Labor Relations at 259-6470 for further explanation.

> You and/or your representative may answer this notice, either in person or in writing, or both, to Mr. Samuel A. Mattoni, Director, Employee & Labor Relations, Room 314, 435 S. St. Clair St., Toledo, Ohio 43601, between the hours of 8:00 A.M. and 5:00 P.M., Monday through Friday. You may also present appropriate documentation, including affidavits or other written material to Mr. Mattoni in support of your answer. If you are otherwise on official duty, you will be allowed a reasonable amount of official time to review the material relied on to support the reasons for this notice, to secure affidavits and prepare an answer to this notice. You will be allowed 10 calendar days from the date you receive this notice to submit your answer. Full consideration will be given to any answer(s) you submit. As soon as possible after your answer(s) is received, or after the expiration of the 10-day limit, if you do not answer, you will be given a written decision from Mr. James F. Brzezinski, Postmaster, Toledo, Ohio.
>
> You have the right to file a grievance under the Grievance-Arbitration Procedure set forth in Article 15, Section 2 of the National Agreement within fourteen (14) days of your receipt of this notice. [Emphasis added]

It is reasonably clear that Grievant's verbal and written replies were not a grievance. The Employee was only exercising the privilege to attempt to influence Management in accordance with the procedure outlined in one portion of the letter. That procedure, incidentally, was consistent with an appeal to Merit Systems Protection Board.

There is yet another aspect of the case which requires finding that this grievance was untimely. If the Employee's May 5 responses was arguably the beginning of the grievance procedure,

his right to process the grievance would still have to be viewed as having been waived because of untimely appeal to Step 2. Article 15, Section 2, Step 1(d) of the Agreement provides that a Step 2 appeal, which consists of submission of the grievance in writing on a standard grievance form, must be commenced within ten days after Supervision gives its Step 1 answer. Furthermore, the Agreement provides that the Supervisor's answer must be communciated not more than five days after the Step 1 conference, and, if the Employer does not meet its time limit, the grievance automatically moves to the next Step. That means that the Grievant would have had a maximum of fifteen days after his May 5 conference to submit the written grievance on the appropriate form. Even if the Union's argument were adopted, the time for appealing to Step 2 would have expired on May 20, 1982. The Step 2 appeal in this case was not filed until June 2.

Finally, it is clear that neither Grievant nor his Union Representative believed that the grievance machinery was activated until May 29. That was the day on which the Union conducted the Step 1 conference. If that part of the grievance procedure had been viewed as already concluded, there would have been no reason for the Union to start again at Step 1.

The grievance will be dismissed on procedural grounds. However, the Arbitrator feels compelled to make an additional, admittedly gratuitous, comment. The Arbitrator could not help but

observe that the medical evidence in this case completely supported the Postal Service's position on the merits. Grievant's self-serving statement that he had cured himself through rest and home remedies could not have stood against an abundance of reports of qualified medical practitioners, all of which indicated that the Employee's degenerative osteoarthritis was a progressive condition. It would have been preposterous to accept Grievant's assertions that he was able to perform the full range of letter carrier duties and discard or ignore all of the competent medical evidence to the contrary. If this grievance had been heard on the merits, it would have been denied.

AWARD

The Arbitrator finds that the grievance is barred by contractual time limits and that he is without jurisdiction to issue an award on the merits. Accordingly, the grievance is denied.

Decision Issued:
August 7, 1983

Jonathan Dworkin, Arbitrator