

C# 11196

IN ARBITRATION

UNITED STATES POSTAL SERVICE,) Case No. CLC-4A-D 37562;
and) Arbitrator's File 85-52-1060;
)
AMERICAN POSTAL WORKERS UNION,) Date of Hearing:
MICHAEL G. LEAVY, Grievant.) August 20, 1985,
) River Grove, Illinois.

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Date of Award: December 31, 1985.

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OPINION

Issue

Is the grievance arbitrable?

Facts

Grievant was a part-time flexible clerk at the Bensonville, Illinois, Post Office. He was appointed to the position on September 15, 1984.

The Postal Service's evidence was that on November 21, 1984, Grievant was advised verbally by the Postmaster of the installation that he was being terminated under the probationary employee provisions of the National Agreement.

On December 20, 1984, the Union protested Grievant's discharge. It sent the Postmaster a letter to that effect. The Postmaster replied to this letter on December 22, 1984, by writing to Grievant, reiterating that the Postal Service had advised him on November 21, 1984, that he was terminated as of December 8, 1984.

The Postal Service introduced in evidence a letter to the Postmaster of the Bensonville Post Office dated July 11, 1984, advising the Post Office that Sharon Rhodes had been elected

president of the Union on Tuesday, July 10, 1984, and that LuAnn Carlson had been elected steward on the same date.

The evidence of the Postal Service was that it had never received any Step 2 appeal in this grievance.

The first witness for the Union testified that during the period in question, she had been the Union steward at the Bensonville Post Office. However, at the time of the hearing, she was an alternate supervisor and the Union had another regular supervisor. One of her duties as a steward was to process grievances at Step 1 and at Step 2.

The witness stated that she had a great deal of trouble with the grievances that she filed because she had difficulty meeting with the immediate supervisor with whom she should have a Step 1 meeting. She was always being put off concerning the meetings.

The witness stated that on November 21, 1984, Grievant came to her and advised her that he had been told that he would be terminated. The witness attempted to have a Step 1 meeting. The supervisor in question who was a 204B (acting supervisor) was evasive with regard to a Step 1 grievance meeting, giving her excuses as to why it should be done later. The witness complained to the Postmaster, who told her to contact the 204B for a Step 1 meeting. She did so again, and was told again that it would be put off to another day.

She advised her business agent about the situation, and he advised her to go to Step 2.

Grievant then wrote a Step 2 appeal.

A joint exhibit was introduced which shows the Step 2 grievance appeal form signed by Frederick Parker for LuAnn Carlson.

The Union also introduced in evidence a letter dated July 26, 1983, addressed to the General Manager of the Labor Relations Branch, Central Regional Office, United States Postal Service, Chicago, Illinois, advising the General Manager that Frederick E. Parker was designated as "the duly authorized steward for the office indicated on the LuAnn Carlson grievances". The office of certification was Bensonville, Illinois.

On cross-examination, the witness testified that very frequently she was unable to get Step 2 appeals handled because of the refusal of the Postmaster.

The next witness for the Union stated that he was Fred Parker, the Union representative mentioned in the letter to the Postal Service of July 26, 1983.

He had talked to the manager of Employee and Labor Relations relative to Grievant's discharge prior of the end of Grievant's 90-day probationary period. He then sent the Postmaster a letter dated December 20, 1984, protesting Grievant's discharge.

This was followed by a letter to Grievant from the Postmaster dated December 22, 1984, which stated:

"As you were told on 11/21/84 your employment with the Bensonville Post Office was terminated effective 12/8/84. You were also told that you were being non-scheduled effective 11/21/84 until such time (sic) that the personnel action forms could be processed."

It was after this letter that the witness advised the steward to go to Step 2. The witness wrote the Step 2 form with the steward's knowledge and permission.

On cross-examination, the witness testified that he handled the steward's duties on the strength of the steward certification letter of July 26, 1983.

The last witness for the Union was Grievant, who stated that shortly before November 21, 1984, he was called at home by the Postmaster and asked to come in to the Post Office. He did, and the Postmaster told him that he had been informed that Grievant had been arrested for possession of marijuana. Grievant said that he admitted that he had, and advised the Postmaster of the circumstances. It was at that time that the Postmaster advised him that he would be terminated. Grievant asked the Postmaster to delay his termination and talk to his attorney. The Postmaster agreed to do so.

Later, the attorney called Grievant, and stated that the Postmaster had talked to him and said that he would not change his decision.

Grievant testified that he had never received the Form 50 advising of his termination, but he had received the letter of December 22, 1984.

Discussion and Award

Position of the Postal Service

The position of the Postal Service is that the Union has violated Articles 15 and 17 of the National Agreement. Article 15

requires that a Step 1 appeal must be filed with the immediate supervisor within fourteen days after the Union has first learned of the grievance.

The Postal Service argues that it is clear that no Step 1 appeal was filed. The evidence contrary to this, as put forth by the Union steward, is contradictory, confused and totally unconvincing.

The evidence merely indicated on that, on occasion, supervisors might have procrastinated in holding Step 1 meetings, but never refused. Further, the Step 2 appeal was likewise procedurally defective because it was not sent on time either.

The Postmaster testified that he did not receive the Step 2 appeal and there was no evidence to contradict him on that point.

Article 17 was also violated due to the fact that stewards must be designated according to the procedure set out in the Article. The notification authorizing Parker to act as a steward is invalid because he did not investigate, present and adjust grievances in the office. The Step 2 procedures would then have been the responsibility of Ms. Carlson, the certified steward. She did not write or submit a Step 2 grievance to Mr. O'Brien.

The Postal Service submitted a number of cases which it maintains supports its position. One case, AC-S-12,601-D, contains the quotation that the timely filing or presenting of a grievance is antecedent to all other steps.

Another case, S8T-3U-C 1642, stated that employees may file a grievance but that at Step 2 a shop steward must represent the grievant, since the steward would have the right to settle or

withdraw the grievance on behalf of the Union.

Position of the Union

The Union argues that the Postal Service has produced in evidence only one document to show that Grievant was terminated. That is a Form 50, which was "authorized on December 29, 1984". However, Grievant never received it, and the Postal Service never introduced any evidence to establish that he had.

This form came clearly after the letter of December 20, 1984, sent to the Postal Service protesting Grievant's termination.

In any event, the Form 50 would have been insufficient to terminate Grievant because it failed to meet the requirements of Sections 365.326 and .327 of the Employee and Labor Relations Manual, which requires that the termination notice be received before the end of the probationary period and that it set forth the reasons for the termination.

The clear testimony of Steward Carlson was that she attempted to have a Step 1 discussion and was refused. A Step 2 grievance was mailed to the Postmaster. He failed to meet on this, and so the matter was advanced properly.

An opinion introduced by the Union states that when the grievant had not been notified in writing of his separation prior to the end of his probationary period, he had the right to grieve. That is the case here.

The grievance is arbitrable and should proceed to arbitration.

Arbitrator's Discussion

The parties have stipulated that the only issue to be determined is that of the arbitrability of the grievance. In determining the question of arbitrability, I must first call to the parties' attention the fact that there is a presumption that a grievance is arbitrable. Having raised the issue of arbitrability, the Postal Service therefore has the burden of proof in the face of the presumption of arbitrability to prove that the grievance is not arbitrable.

The first circumstance regarding that issue to be noted is the fact that at the time that the Postal Service attempted to terminate Grievant, he was still in his probationary employment period.

Generally speaking, an employee who is terminated during his probationary period has no right to grieve. He cannot resort to the arbitration process to seek to set aside his discharge. That is clearly provided in the National Agreement, Article 12, Section 1.

However, for the termination to be proper, it must follow the required procedures. The regulations in Section 365.326, .327, of the Employee and Labor Relations Manual set out the method by which termination is to be effected. Since under Article 19 of the National Agreement these regulations become a part of the National Agreement, they are as binding on Management as they are on the Union.

The regulations provide that a written notice of termination during the probationary period is to be given to the

employee and shall set forth the reasons for his discharge.

The Postal Service did not provide such a notice to this Grievant during his probationary period, and, therefore, his termination became effective on December 22, 1984, when his Notice of Removal was mailed to him. Since his Notice of Removal reached him after the end of his probationary period, he then had the right to grieve his termination.

The question, then, is, did Grievant grieve properly under the National Agreement so that he has a right to arbitrate his grievance?

For the grievance to be properly before the Arbitrator, the Steps of the grievance procedure, as set forth in the National Agreement, must be followed. Management cites AC-S-12609-D, wherein Arbitrator Cushman states that "the requirement of timely filing or presenting a grievance in the first instance is antecedent to all other steps in the grievance-arbitration procedure".

The Postal Service also cites Arbitrator Britton's decision of S8T-3U-C 1642, which states that the other steps of the grievance procedure must be held properly, including representation by a proper shop steward, for the grievance itself to be properly before the arbitrator.

Taking all these cases and others into account, we are left with the rule that the contract must be followed. What must now be determined is, was it?

The Union's testimony was that Grievant's steward attempted to hold a discussion with the proper Management official shortly after she was notified by Grievant in December, 1984, that he had

been terminated. There is no reason to doubt her word, nor is there any reason to doubt her testimony that she was unsuccessful in having the meeting. Handling grievances is probably the single most important job of a steward.

The result is that, according to Article 15 of the National Agreement, the grievance was then advanced to the next Step in the arbitration process. That Step was the filing of the grievance.

The Union states that the grievance was mailed as required.

In looking at the grievance, I note that it is signed by Fred Parker for LuAnn Carlson. There is no question but what LuAnn Carlson was the steward. It has been held in the past that as long as the grievance is filed in the name of an authorized steward, it is a proper grievance. Mr. Parker did not purport to be filing the grievance on his own behalf, but as a representative of the authorized steward. That preserves the right of that steward to make the ultimate decision on the handling of the grievance.

I must comment at this point on a strange circumstance. The Union and Management both have stated that they sent various notices, each to the other, which each state they did not receive. Needless to say, it is rather odd when Postal employees complain that they have sent notices through the mail to others in the Postal system, and have been faced with non-delivery of that mail. It is my position, as is held in many legal situations, that when a letter is mailed, it is presumed to have been received. I therefore will decide this matter with the presumption that all notices mailed by the parties, each to the

other, were received in the due course of business.

I think it best at this point to note the sequence of events.

The Postmaster's letter to Grievant of December 22, 1984, constitutes the Notice of Termination. Shortly thereafter, although the time is somewhat indefinite, Grievant's steward, LuAnn Carlson, attempted to hold a discussion with the immediate supervisor. Since that failed, the matter was then advanced to the next Step, which is the filing of the grievance. According to Article 15, this must be done within ten days after the receipt of the supervisor's decision. If the supervisor gives no decision within five days, the matter is advanced to the next Step.

The evidence was that Grievant's steward tried to meet with the supervisor within two or three days after December 22nd. Five days from that date would be approximately December 27th, and there would be ten days thereafter in which to file the grievance at that point. This would put the last day for grieving at approximately January 6, 1985. Frederick Parker, acting for LuAnn Carlson, steward, filed the grievance on January 4, 1985. It was therefore filed within the time limit.

I therefore conclude that, from a time standpoint, there was no defect on the Union's part.

I also might point out that Article 15 provides in Section 3 that the question of time limits is waived unless the issue is raised at the first opportunity. Step 3 would have been

the first opportunity to raise that issue. The Step 3 decision states:

"There was no Step 1 or Step 2. Further, the NA (sic) provides for inclusion of only employees in the regular work force. Grievant was a probationary employee."

The Step 3 decision does not raise the question of the timeliness of the filing of the grievance. It is possible to have timely grievances on which no Step 1 or Step 2 meetings are held. The only effect of this is to advance the grievance to the next step. The failure to hold a Step 1 or Step 2 meeting as requested does not make the grievance defective, and to simply state in a Step 1 or Step 2 answer that there were no such meetings is not the same as to state that the grievance was not filed in time or that the meetings were ignored.

The next question is, was a proper shop steward used?

I conclude that one was.

By letter to the Central Regional Office, Management was advised that Fred Parker could act for LuAnn Carlson. He did so on occasion. After this letter of appointment was sent in 1983, LuAnn Carlson was again elected as steward in 1984. Management draws the conclusion that Mr. Parker was therefore no longer the representative of Carlson. There is no reason to draw that conclusion, since the original appointment letter named Carlson specifically. The conclusion can just as well be drawn that, as long as she was steward, Parker could act in her name. He would therefore have all the powers which she had. The purpose of having stewards act is so that someone in authority for the Union would be in a position to settle grievances for the Union. That

could still be done under the circumstances here. Considering the presumption in favor of arbitrability, it must be presumed that Parker could still act for Carlson.

It is my conclusion that the Postal Service sent Grievant a written notice of his termination after the end of his probationary period. He therefore had the right to grieve his discharge. The Union thereafter complied with the grievance procedure, and the grievance is arbitrable.

Award

The grievance is arbitrable.

The costs are assessed equally.

Dated this 31st day of December, 1985.

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