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NALC-USPS Regular Arbitration Panel

In the Matter of Arbitration

Between

Grievant: Class Action

The United States Postal Service

Post Office: Manchester, NH

And

Case No.: B01N-4B-C 08041671

The National Association of

DRT No.: 14-090952

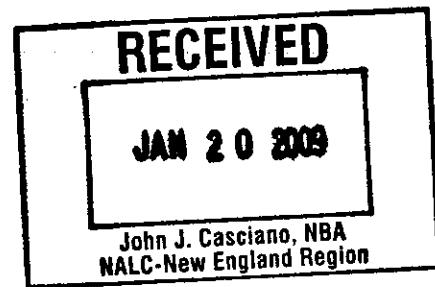
Letter Carriers, AFL-CIO

Before: Marilyn H. Zuckerman, Esq., Arbitrator

Appearances:

For the U.S. Postal Service: Tom Caiazzo

For the NALC: William Bothwell



Award

The Arbitrator finds that the present grievance is substantively arbitrable and that the Arbitrator has the authority to grant the remedy requested by the Union or a similar remedy.

On the merits, the Arbitrator finds that the Postal Service violated the Joint Statement on Violence and Behavior in the Workplace and the National Agreement by the supervisory actions of Supervisor Goodman when he made the undisputed threat in the workplace regarding Letter Carrier Roger Richard on November 5, 2007. To remedy this violation, the Arbitrator orders the Service to send Goodman to anger management training and to remove him from supervising letter carriers at the South Station facility in Manchester, NH.

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Proceedings

This case was heard in arbitration in Bedford, NH on December 4, 2008. The parties summed up orally on the merits at the hearing. Briefs on the issue of substantive arbitrability were filed by the parties and received by the Arbitrator by January 6, 2009. The Joint File (Joint Exhibit #2) consists of 121 pages. The parties each submitted eleven exhibits with the briefs including eighteen arbitration decisions on the issue of substantive arbitrability.

Background

Supervisor Harold Goodman works for the Manchester NH Post Office at the South Station facility. He directly supervises six letter carriers and is responsible for the entire facility during the evening hours as the late supervisor. It is undisputed that on October 29, 2007 in a group meeting with the letter carriers, Supervisor Goodman said, "The section is doing fine, we are getting back at a reasonable time, but carriers like Romolo are holding me up because he is so slow. That guy is trying to work like that asshole Roger Richard." It is also undisputed that in another group meeting with the carriers on November 5, 2007, Supervisor Goodman stated the following: "Screw Roger Richard, if he comes back here, I'll break his legs." At the time of these statements by Supervisor Goodman, Richard had not worked for him for nearly eight months.

On November 5, 2007, Station Manager Denis Paquin heard about the statement that Supervisor Goodman made on that day and Paquin began an investigation. As a result of the investigation, the West Unit Station Manager and Supervisor went out to Richard's route to inform him of the threat. Station Manager Paquin also began meeting one on one with the letter carriers who were present at the group meeting on November 5 and heard

Goodman's comments regarding Richard. On November 6, 2007, Paquin oversaw a meeting with all of the letter carriers, Goodman and Union Representative Bill Bothwell. During this meeting, Goodman apologized for his comments regarding Richard. Everyone present was also presented with copies of the Joint Statement on Violence and Behavior in the Workplace. Paquin finished his individual interviews with the letter carriers on November 6. He conducted a pre-disciplinary interview with Goodman and gave him a Letter of Warning for Improper Conduct on November 20, 2007.

At that time, Richard did not want an apology from Supervisor Goodman. Richard testified at arbitration that he has worked for the Postal Service for twenty three years and is the Reserve Regular #1 substitute in Manchester, NH. He explained that the South Station facility has the most work of the Manchester facilities and he is now afraid to bid on jobs there because of the threat made about him by Supervisor Goodman. Station Manager Paquin spoke with Richard at that time and Paquin testified at arbitration that Richard said that he was not afraid of Goodman. According to Paquin, Richard told him that he knew that Paquin would take care of it. Manager Paquin wrote to Peter Prunier, Branch 44, NALC on December 12, 2007 in response to the Formal Step A grievance:

I personally spoke with Roger Richard and he was confident that I would handle the situation appropriately and had no issue with my actions. He also responded jokingly 'that he could take Harold any-time or anyplace and didn't feel at all threatened by his comments.' (Joint Exhibit #2, p. 36).

The Joint Statement on Violence and Behavior in the Workplace dated February 14, 1992 (Joint Exhibit #2, p. 38) states in pertinent part:

We openly acknowledge that in some places or units there is an unacceptable level of stress in the workplace; that there is no excuse for and will be no tolerance of violence or any threats of violence by anyone at any level of the Postal Service; and that

there is no excuse for and will be no tolerance of violence by anyone at any level of the Postal Service; and that there is no excuse for and will be no tolerance of harassment, intimidation, threats or bullying by anyone.

We also affirm that every employee at every level of the Postal Service should be treated with dignity, respect and fairness. The need for the USPS to serve the public efficiently and productively, and the need for all employees to be committed to giving a fair day's work for a fair day's pay, does not justify actions that are abusive or intolerant. *'Making the numbers' is not an excuse for the abuse of anyone.* Those who do not treat others with dignity and respect will not be rewarded or promoted. Those whose unacceptable behavior continues will be removed from their positions.

This Joint Statement was signed by the NALC and a number of other unions as well as the Postal Service, the National Association of Postal Supervisors, the National Association of Postmasters and the National League of Postmasters.

The NALC views Supervisor Goodman's threat to break Richard's legs as a violation of the Joint Statement and requests that the Arbitrator award the following remedy:

1. Direct Supervisor Goodman to attend anger management training;
2. Remove Supervisor Goodman from supervising letter carriers; and
3. Ensure that Supervisor Goodman is no longer allowed to supervise letter carriers.

At the arbitration hearing, Manager Paquin did not object to anger management training for Supervisor Goodman who did not testify and was not present.

Statement of the Issues

1. Is the grievance substantively arbitrable based on the Union's requested remedy?
2. Did Management violate Article 14, 19 and the Joint Statement on Violence and Behavior in the Workplace with the supervisory actions of Supervisor Harold Goodman and, if so, what is the remedy?

Positions of the Parties

Arbitrability

The Service. Management argues that this case is not substantively arbitrable or alternatively that if it is arbitrable, then the remedy should be limited to a cease and desist order. The Service reads the National Decision of Arbitrator Snow narrowly and limited to the issue he framed and decided. This issue was:

Does the Joint Statement on Violence and Behavior in the Workplace constitute an enforceable agreement between the parties so that the Union may use the negotiated grievance procedure to resolve disputes arising under the Joint Statement? If so, what is the appropriate remedy?
(See National Decision of Arbitrator Snow in Case Nos.: Q90N-4F-C 94024977/94024038 dated August 16, 1996 at page 2.)

The Award was:

Having carefully considered all the evidence submitted by the parties concerning this matter, the arbitrator concludes that the Joint Statement on Violence and Behavior in the Workplace constitutes a contractually enforceable agreement between the parties. Accordingly, the Union shall have access to the negotiated grievance procedure set forth in the parties' collective bargaining agreement to resolve disputes arising under the Joint Statement. It is so ordered and awarded. (National Decision of Arbitrator Snow at p.23)

The Service argues that the following language by Arbitrator Snow in the body of his opinion was mere dicta:

The grievance procedure of the National Agreement may be used to enforce the parties' bargain and arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies including removing a supervisor from his or her administrative duties. (National Decision of Arbitrator Snow at p. 22)

The Service maintains that removing a supervisor from supervising employees is different from removing a supervisor from administrative duties and this difference

was not developed or adjudicated as a national interpretive issue in the Snow Award.

The Service argues that that the Snow Award did not modify the National Agreement which provides at Article 1, Section 2:

Exclusions.

The employee groups set forth in Section 1 above do not include and this Agreement does not apply to:

1. Managerial and supervisory personnel

According to the Service, the Joint Statement and the National Snow Award provide for enforcement between the parties (NALC and USPS) and not as against individual supervisors or managers. The Service maintains that breach of promise contained in the Joint Statement can not create personal liability against a private individual such as a supervisor. The Service concludes that an arbitrator's authority was the same before the Snow Award as after it.

The Service is concerned about due process protections for supervisors including internal procedures and MSPB review which is not covered by the National Agreement between the Postal Service and the NALC. Regional arbitrators have denied the Union's requested remedies in other cases involving alleged supervisory violations of the Joint Statement on the basis that supervisors are not covered by the National Agreement and to award remedies against them would violate their due process rights. See the opinions of Arbitrators Powell (Case No.: K10N-4K-C 02247372 dated April 14, 2003), Olson (Case No. F01N-4F-C 04017431 dated March 18, 2004), and Walt (Case No. J01N-4J-C 031913363 dated December 22, 2004). In the opinion of Arbitrator Javits, (Case No. A01N-4A-C 06097741 dated February 2, 2008) however, the case before him was not

arbitrable, but cases involving the Joint Statement and a supervisor are arbitrable and the question is the extent of the remedy.

The Service is also concerned about double jeopardy since Supervisor Goodman received a Letter of Warning. Management contends that if the present case is arbitrable, the only appropriate remedy is a cease and desist order against the Postal Service which is party to the National Agreement.

The Union.

The Union argues that the present case is substantively arbitrable and that the Arbitrator has the authority to grant the remedy requested. The Union maintains that National Arbitrator Snow ruled that:

The Joint Statement on Violence and Behavior in the Workplace constitutes a contractually enforceable bargain...The grievance procedure of the National Agreement may be used to enforce the parties' bargain, and arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies including removing a supervisor from his or her administrative duties. (See National Arbitrator Snow Award at p.22.)

Regional Arbitrators have interpreted the Snow Award to mean that alleged violations by supervisors of the Joint Statement are arbitrable. See, for example, the opinions of Arbitrators Devine (Case Nos.: A90N-1A-C 95063232 and A90N-1A-C 95063233 dated March 7, 1997) and Simmelkjaer (Case No.: A94N-4A-C 96040539 dated May 9, 2007). Both Arbitrators held that they had the authority to fashion the remedies that the Union requested. However, Arbitrator Simmelkjaer expressed concerns for supervisors' due process rights.

Another Regional Arbitrator has fashioned a remedy similar to the one requested by the Union in the present case. See the opinion of Arbitrator Fields (Case No. I94N-4I-C

99136168 dated November 1, 2000). See also the opinion of Arbitrator Dorshaw (Case No. G94N-4G-C 98091703 dated October 12, 2004). Regional Arbitrator Bajork upheld the demotion of a Manager to a Supervisor's position (Case No. H94N-4H-C 95041405 dated April 17, 2000) based on the Manager's violation of the Joint Statement and Bajork's Award was upheld by the U.S. Court of Appeals for the Sixth Circuit (Case No. 02-5050 dated June 5, 2003). Regional Arbitrator Britton removed a Postmaster (Case No. K94N-4K-C 98111598 (2001)). The Service had the Arbitrator's Award vacated and the Union appealed that decision. The U.S. Court of Appeals for the Fourth Circuit reversed the lower court's ruling and ordered that the decision to remove the Postmaster should be upheld (Case No. 02-1159 dated November 5, 2002).

The Union concludes that it has demonstrated that arbitrators have the authority to fashion remedies in cases involving supervisory violations of the Joint Statement and that such remedies have been similar to the one requested in the present case. The Union's position is that the present Arbitrator has the authority to grant the remedy requested and therefore, the Union asks that the Arbitrator rule in favor of the Union on the issue of arbitrability and move on to the merits.

The Merits.

The Union. Supervisor Goodman's uncontested statement to the letter carriers at a group meeting at the South Station facility on November 5, 2007 was that if Roger Richard came back to the facility, Goodman would break his legs. Richard was told of the threat by the West Unit Station Manager. The Union argues that this was a serious threat and was taken as such by Richard and the letter carriers at South Station. The Union maintains that this threat violated the Joint Statement and that if an employee

made this threat, he or she would have been put on emergency placement and removed from the Postal Service. According to the Union, the Letter of Warning which was issued to Goodman and the apology he made at another group meeting were not enough. The Union requests that the Arbitrator order that Supervisor Goodman be sent to anger management training and that he be removed from supervising letter carriers.

The Service.

The Service does not dispute that the threat about Richard was made by Supervisor Goodman at the group meeting of letter carriers at the South Station facility on November 5, 2007. Management contends, however, that the threat was taken care of by Goodman's apology to the group and the Letter of Warning that he received. Station Manager Paquin also met with Richard and with each carrier who heard the threat at the November 5 meeting.

The Service maintains that any further discipline against Goodman would constitute double jeopardy. The Service objects to his being removed from supervising letter carriers and contends that there is no work available for him other than supervision. However, the Service does not object to sending Goodman for anger management training as requested by the Union.

Discussion and Decision

The Arbitrator concludes that the present grievance is substantively arbitrable and that the Arbitrator has the authority to grant the remedy requested by the Union.

The Arbitrator does not read the National Snow Award narrowly as does the Service. In that case, the Union argued that the standards set forth in the Joint Statement allowed an Arbitrator to deny a supervisor managerial authority over letter carriers. Arbitrator

Snow found that the Joint Statement was a binding contract between the Service and the Union and that the Union could use the negotiated grievance procedure to resolve differences between the parties under the Joint Statement. Arbitrator Snow noted that the contractual definition of "grievance" at Article 15.1 is that:

A grievance shall include, but is not limited to, the complaint of an employee or of the Union 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.

Since the parties agreed that the grievance procedure could be used to resolve "a dispute, difference or complaint" related to conditions of employment, the procedure could be used to resolve a dispute between an employee and a supervisor. Arbitrator Snow found that:

Arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties.

Arbitrator Snow quoted from the Steelworkers' Trilogy for the proposition that in formulating remedies:

The need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. See, United Steelworkers' of America v. Enterprise Wheel and Car Corp., 363 US 593 (1960).

Some regional arbitrators have read the Snow Award narrowly as does the Service in the present case. See, for example, the decisions of Arbitrators Powell (Case No.: K10N-4K-C 02247372 dated April 14, 2003), Olson (Case No.: F01N-4F-C 04017431 dated March 18, 2004) and Walt (Case No.: JO1N-4J-C 031913363 dated December 22, 2004). Others have read the Snow Award more broadly and have awarded remedies

similar to that requested here. See, for example, the Decision of Arbitrator Fields in Case No: 194N-4I-C 99136168 dated November 1, 2000 and the Decision of Arbitrator Dorshaw in Case No. G94N-4G-C 98091703 dated October 12, 2004. Still other regional arbitrators have gone further and ordered the demotion of a manager to a supervisory position (the Bajork Award in Case No.: H94N-4H-C 95041405 dated April 17, 2000) which was upheld by the Court of Appeals or the removal of a Postmaster (the Britton Award in Case No.: K94N-4K-C 98111598 (2001)) which was also upheld by a Court of Appeals. The granting of a remedy as against a supervisor does not create personal liability for the supervisor. The award of this remedy puts an obligation on the Postal Service to deal with a supervisor in his/her working capacity as part of the management team.

On the merits of the present case, the Arbitrator finds that the undisputed threat made by Supervisor Goodman on November 5, 2007 to the group of letter carriers at the South Station facility that he would break Richard's legs if he came back there was totally inappropriate and unacceptable and constituted a serious violation of the Joint Statement and the National Agreement. While Manager Paquin got on the case right away and had Goodman apologize to the group and gave him a Letter of Warning, these actions were insufficient to remedy the taint to the South Station facility and to Roger Richard.

The Arbitrator has considered that Manager Paquin testified at arbitration that he spoke with Richard after the threat and Richard said that he was not concerned and that he did not feel threatened. According to Paquin, Richard said that he knew that Paquin would take care of it. However, Richard testified that he did and does feel threatened (over a year later) and that he has not bid on jobs at the South Station facility where there

is the most work in Manchester, NH because he feels threatened. Both Paquin and Richard were credible witnesses at arbitration. The Arbitrator concludes that their testimony is not necessarily inconsistent. While Richard may have said to Paquin initially that he did not feel threatened, Richard may have felt threatened once the threat sunk in.

Since the threat was made, it poisoned the atmosphere for letter carriers at the South Station facility and for Roger Richard. Employees have the right under the Joint Statement to work in a harmonious atmosphere and not to be the subject of threats by supervisors. Every letter carrier at the South Station facility must be apprehensive that he or she will be threatened next.

To remedy this situation, the Arbitrator orders the Postal Service to send Supervisor Goodman to anger management training (to which the Service did not object at the hearing). The Arbitrator also orders the Service to remove Goodman from supervising letter carriers at the South Station facility in Manchester, NH. This way, a healthier working atmosphere can be restored for the letter carriers there and for Roger Richard if he bids on and is awarded jobs there. This way, Supervisor Goodman has a chance to start fresh supervising other letter carriers and/or employees in other crafts. This remedy is narrower than that requested by the Union, but hopefully will achieve a positive result for all concerned.

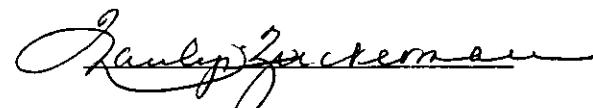
This remedy does not create double jeopardy for Supervisor Goodman because this is not a criminal case where the concept of double jeopardy is applied. This remedy is based on the present grievance filed by the Union alleging that the Postal Service violated the Joint Statement and the National Agreement by the actions of Supervisor Goodman.

The removal of Goodman from supervising letter carriers in the South Station facility also is not discipline in the sense that a seven or fourteen day suspension or a removal would be discipline. The removal of Supervisor Goodman from supervising letter carriers at the South Station facility is distinct from the Letter of Warning that he received.

The Arbitrator is concerned that she did not meet Supervisor Goodman and hear what he had to say. However, he had an opportunity to testify at arbitration and either he chose not to or the Service decided that he would not testify. This decision was made by the management team. Furthermore, his comments were undisputed and were discussed with him by the Service in the pre-disciplinary interview. In terms of due process, Supervisor Goodman has not waived any administrative procedures that may be otherwise available to him.

By removing Goodman from supervising the letter carriers in the South Station facility and having him supervise other letter carriers and/or employees of other crafts, the Arbitrator gives him another chance to comport himself. However, Goodman is on notice that by the terms of the Joint Statement, continued violations of that Statement can lead to his removal from the Postal Service.

January 16, 2009



Marilyn Zuckerman