ARBITRATION DECISION - AWARD
March 7, 1986
C4N-4J-C-7100

C# 05826

U.S. Postal Service
Milwaukee, Wisconsin

and

National Association of
Letter Carriers, Branch 2

Arbitrator: Daniel G. Jacobowski, Esq.

DISPUTE: S. Martin. Dallas transfer request denial.

JURISDICTION

APPEARANCES: USPS: Labor Relations Representative James S. Boelter.

NALC: Regional Administrative Assistant Barry J. Weiner.

HEARING: The February 6, 1986 hearing was conducted in Milwaukee, on this contract grievance dispute, pursuant to the procedures and stipulations of the parties under their national agreement.

ISSUE

QUESTION: Did the employer violate the contract in denying the transfer request of Sherman Martin, Jr. to Dallas, or instead, did Dallas have a valid basis for the denial?

CASE SYNOPSIS: In February, 1985, Milwaukee carrier Sherman Martin, Jr. applied for a transfer to Dallas. On June 20, 1985, Dallas denied his request, terming his work record unsatisfactory. The grievance protests that the denial is without a valid basis and in violation of the Contract's Memo of Understanding of the Postmaster General's April 6, 1979 policy guidelines.

CONTRACT PROVISIONS APPLICABLE:

Article 12, Section 6 requires installation heads to consider requests for transfer by employees from elsewhere. The union claims the denial was a violation of the Contract's Article 3, 5, and Memos of Understanding. Most pertinent is the following memo.

MEMORANDUM OF UNDERSTANDING
Re: Requests for Voluntary Transfer/Reassignment.

"The parties agree that the policy and guidelines as set forth in the attached Postmaster General's April 6, 1979 memorandum will remain in effect during the life of this Agreement. . . .

There is much to be gained by considering the voluntary transfer of qualified, skilled and experienced Postal people in lieu of hiring new employees. The approval of transfer requests can improve morale and performance, and can be helpful in controlling the accession rate.

In light of the potential benefits that can be realized from granting transfers . . .I expect all managers to adhere to the basic guidelines set forth below concerning voluntary transfer requests. . . .

"C. Prior to hiring from entrance registers, installation heads will afford full consideration to all transfer requests from within the Postal Service. Such requests from qualified employees will not be unreasonably denied. Sound judgment must be exercised by all employing managers. . . .

D. . . . Where vacancies exist and consideration for reassignment is afforded an employee, both the gaining and losing installation head must be fair in their evaluations. . .Evaluations must be valid and to the point, with unsatisfactory work records accurately documented. . . .

Similarly, gaining installation managers must not deny deserving and qualified employees opportunities for reassignment because of unfounded reservations concerning performance. Prior disciplinary records must be reviwed carefully and objectively, taking into account the nature, seriousness, and frequency of the offense as well as the employee's performance record subsequent to the resulting discipline, before making a reassignment decision.

E. Responsible managers must respond timely to requests, granting the transfer where appropriate, or giving specific reasons for denial. Denials must be based on reasonable cause, such as documented poor performance, recent disciplinary action, excessive absenteeism, local employment conditions, etc. Similarly, employees must be notified promptly if no suitable vacancies exist or are expected in the near future. . . ."

BACKGROUND - FACTS

The grievant, Sherman Martin, Jr., started his career appointment with the Postal Service in June of 1977. In October 1979 he was granted a transfer request to the Milwaukee Post Office from a small town nearby. He has been in Milwaukee since. In February, 1985 he applied for a transfer to the Dallas Post Office, which was closer to the town where he was raised. In a June 20, 1985 letter, the Dallas office denied his request stating simply:

"Officials of this office reviewed your official personnel folder and did not approve your request because of your unsatisfactory work record. . . . We are sending your Official Personnel Folder back to the Milwaukee Post Office."

No further reasons nor specifics were supplied to the grievant nor the union for the denial. The union then submitted the July 3, 1985 written grievance claiming the denial was invalid and in violation.

On the transfer request, Dallas requested and received information from three sources. One was a one page questionaire filled out by the grievant, answering questions related to sick leave use, disciplines, and job related injuries. A second was an abstract of driving or vehicle violations from the State of Wisconsin. The third was his personnel folder from Milwaukee.

The questionaire sheet asked if there were any disciplines in the past 2 years, to which the grievant replied no. However, the personnel folder of the grievant forwarded to Dallas, contained records of several past disciplines from earlier years. Over the union's objections, these were introduced. One was a September 6, 1979 suspension, later reduced and later withdrawn from the records via a grievance settlement. On September 26, 1979, the grievant was deferred a step increase based on two warning letters for absenteeism, and the recent discipline. After this, in October, 1979, the grievant was granted his request for transfer from Cedarburg to Milwaukee. Later the grievant received three additional suspensions, on May 11, 1980, January 29, 1982 and August 20, 1982, for different matters. However, in each instance, they were reduced or cancelled as grievance settlements, with provision for their removal from the records.

The union challenged and objected to the submission of these past disciplines on the following grounds. They were not part of the official records since they were to be removed from the records by the respective grievance settlements. They were not specified as reasons for the denial as provided by the memo agreement guidelines. They were not earlier recited to the union as reasons contrary to the full disclosure required in the processing of grievances by Article 15. Article 16, Section 10 provides a 2 year limit for the consideration and removal of disciplines. Continuing the discipline records in the permanent file is contrary to the USPS Personnel Operations regulations in 621.422, a, (47)(b), and 621.431. The employer disputed these contentions. In further defense, the union also obtained management's admission that the records showed that there was only the one 1979 deferred step increase; that in all other instances and since, the grievant has been granted his step increases, which are based on a required showing of a satisfactory record.

The employer also submitted that the record showed an attendance problem of the grievant. On the single sheet questionaire filled out by the grievant and returned to Dallas, in response to the questions on sick leave balance, the grievant listed a balance of 69 hours, showing the number of hours he had used in the past 12 and 24 months. Under mitigating circumstances, he explained that he had been hospitalized and received medical treatment. On a later question as to whether he had any job accidents, he responded no; but on the next question as to whether he lost time off from work and how much, he responded yes, three times. The Milwaukee office records showed the three

accidents to be falls on steps and ice during the winter months of 1979, 1980, and 1982. However, these accident records were not forwarded to Dallas.

The union raised similar challenge and objection to the submission of an attendance problem as contrary to the guidelines of the Memo Agreement and Article 15. It also cited as supportive, Section 513.571, c of the Employee and Labor Relations Manual, which recites that no minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory, and Assistant Postmaster General Ulsaker's April 7, 1980 and May 15, 1981 memos reciting that postal policy prohibits any action discouraging the reporting of an accident. The employer disputed the applicability of these union contentions to transfer considerations.

Earlier, in its presentation, the union had charged that Dallas was too deficient in approving transfers, contrary to the mandate of the memo agreement policy guidelines. As illustrative, it produced a report of carrier positions filled in Dallas during the period of June 24 through October 8th, 1985, showing that of 152 carrier positions filled, only one was a transfer from another office; 142 were filled by outside hire, and 9 were filled by promotion, reinstatement, or re-assignment.

As illustrative of standard national policy among post offices, Milwaukee recited some its own experiences in considering transfer requests. The testimony was from a Milwaukee employment supervisor. Milwaukee receives about 50 transfer requests a year, from elsewhere, and approves a number of them if the employee's record is satisfactory. She was not sure how many, but admitted that approving only 1 out of 50 would be highly unusual. Milwaukee takes into account a person's attendance and use of sick leave. Two examples were supplied of applicants denied because of a poor attendance record. Disciplines are also considered including those of earlier years, if they are in the personnel folder. However, she admitted that she would not consider a past discipline if there were a notation that it was to be removed from the record. She admitted that the granting of step increases is predicated upon a satisfactory record.

Over strenuous union objection, the employer next presented the testimony of Dallas employment relations manager Lamb, in a conference call telephone interview. He said he was unable to appear as scheduled, because of a sickness or medical problem that he was seeing the doctor about that day.

Lamb supplied the following information relative to the grievant's request. Dallas determined that his work record was unsatisfactory because of the disciplines of his suspensions and warning letters, and the attendance problem indicated by his low sick leave balance and three job related accidents. The information on the disciplines came from the Milwaukee personnel folder, and the information on his sick leave balance and job accidents came from the questionaire sheet he answered. Lamb was aware that the disciplines were from prior years, but had note of a warning letter as recent as March 19, 1985. He failed to notice that the supsensions had been reduced and removed from the records. On the sick leave usage and job accidents, he admitted making no further inquiry on them, feeling the questionaire sufficiently indicated an attendance problem, and contending it was the responsibility of the grievant to supply and document any mitigation, not theirs. Dallas received no further information nor question from the

grievant nor anyone else in immediate follow up, and was not even aware of the grievance until it received notice that the matter was going to arbitration. He admitted the denial letter to the grievant was unspecific, but claimed that was a frequent type of response used, and the grievant should have been aware of his own record.

Lamb also explained the general experience and policy of Dallas in handling transfer requests. In general, satisfactory work records are accepted, and unsatisfactory work records are refused. Unsatisfactory elements of a person's work record can include disciplines, poor attendance, and poor supervisory comments or performance evaluations. Their general rule of thumb is that a sick leave balance of less than 50% indicates a poor attendance record. This can be overcome by showing some documented mitigation, which can include items such as a single extended disability, or a maternity leave. Records of past disciplines and poor attendance can be overcome where followed by a reform, of something like three years. Dallas receives about 200 transfer requests a year. Several examples were supplied, representing both approvals and refusals. The refusals were for poor performance, poor attendance, or heavy sick leave usage. Some of the Milwaukee rejection letters indicated a preference for exemplary employees. Some of the Dallas rejection letters similarly stated that only those with better than average work records are considered, with mention that competition is keen and that Dallas receives more requests than can be accommodated.

In vigorous challenge, the union emphasized the several mistakes Dallas made on the disciplines of the grievant; it failed to note the removals from the records, and there was no record of a March, 1985 warning letter which Dallas recited. It argued that Dallas was too restrictive in granting transfer requests, contrary to the memo agreement guidelines. Again, it argued that the Dallas consideration of distant past disciplines, and low sick leave balances or job accidents with no further inquiry, is a violation of the several provisions of both the contract and postal regulations. It argued that the belated showing at the hearing of what Dallas regarded as unsatisfactory elements of the grievant's work record should be rejected by the arbitrator, since not submitted earlier, and therefore contrary to the Article 15 requirement of full disclosure during a grievance processing. It cited a number of significant arbitration decisions, wherein the employer's submissions made late at the hearing, were rejected under Article 15 since not earlier made during the grievance phase. Again, the employer denied the applicability of the union's contentions and cited provisions, maintaining that they did not apply to transfers and that the union applied them out of context.

At the end of the hearing, the union also supplied vigorous emphasis to its claim that it is within the power of the arbitrator to fashion the appropriate remedy and grant the relief requested by the union, to direct Dallas to approve the transfer request retroactively to the time period when the grievance was raised. It again supplied a number of arbitration decisions which upheld the power of the arbitrator to fashion an appropriate remedy. The question of an appropriate remedy had not previously been raised between the parties and had not been challenged by the employer. The position of the employer had been simply to deny the grievance and to deny that it had violated the contract. The union asked the employer if it planned any challenge if the arbitrator were to order such a directive to Dallas, but the employer declined to commit itself. However in maintaining its position that

the grievance should be denied, the employer did claim that the original grievance did not specifically request retroactivity as such. This the union denied by noting that the grievance requested a prompt granting of the transfer. In general, the union recognized the two different locations of Milwaukee and Dallas, but maintained that the arbitrator has the power to grant its requested relief, in view of the fact that the USPS is a single entity employer, the fact of the national agreement between the parties, and the power of the arbitrator to fashion a remedy appropriate to this circumstance.

ARGUMENT

UNION: In summary, the main points of the union are as follows. The grievant has a satisfactory work record and the denial of the transfer by Dallas was directly contrary to the mandate and intent of the memo agreement guidelines. The satisfactory work record of the grievant is proven and established by all of the step increases he has been granted. The late raising in the arbitration of the factors considered to be unsatisfactory should be rejected, since it violates the specific disclosure required both by the memo agreement and Article 15. Past disciplines should not have been considered because of their prior removal from the record, their staleness and inconsistency with the contract and manual regulations and by the compounding of the mistaken misreading of the past record by Dallas. Dallas exaggerated with undue harshness, the concept of poor attendance from the meager information of the sick leave usage and job accidents, made no further inquiry, and violated the spirit of postal policy which permits the use of sick leave and prohibits the discouragement of reporting accidents. The Dallas standard for approving transfer requests is too rigid, and contrary to the mandate and intent of the memo agreement in the contract. The arbitrator should uphold the grievance and direct Dallas to approve the transfer retroactively, as the remedy appropriate to the circumstances and within the power of the arbitrator to fashion and grant.

EMPLOYER: A brief summary of the employer's main points are the following. Dallas validly denied the transfer request, was within its management rights in so doing, and in no way violated the contract nor postal regulations. The denial letter reference to the unsatisfactory work record was fully adequate and did not violate any need for greater specificity under the memo agreement guidelines or Article 15. The grievant was well aware of the unsatisfactory elements in his own work record. There was nothing new nor failure of any disclosure by the employer. The grievant never repudiated nor raised question about what were the unsatisfactory elements in his record. The union has exaggerated and distorted out of context the limitations on past discipline. Provisions for their removal from the record or limitations after 2 years, is more directly applicable to applying them to future discipline, and does not specifically exclude Form 50 entries that may have been made in the personnel records. Even in those instances where the suspensions were to be removed from the record, in reality the disciplines were reduced, some back pay was not provided, and the record removals were contingent on subsequent probation and good behavior. Disciplines and attendance are proper considerations under the memo agreement guidelines. Sick leave usage and job related accidents are proper considerations and have been a customary basis for denial of transfer requests. The postal policies cited by the union are taken out of context and do not preclude their consideration in transfer requests. The considerations and denial applied to the grievant, are consistent with the

practice that has been maintained and applied to others. The transfer request was fully justified, did not violate the contract, and the grievance should be dismissed.

DISCUSSION

As the case was initially presented by the employer, it was apparent that the employer regarded 4 elements in the grievant's record as being unsatisifactory for consideration in denying the transfer request. The 4 were, the disciplines, the sick leave usage, the job related accidents, and the personal driver's license record. The evidence substantially supports the elimination of three of them, the disciplines, the job accidents, and the driver's license record. The reasons next follow. The fourth, on the matter of sick leave usage and attendance, is more arguable and will be discussed later.

The driver's license reference is readily eliminated by reason of the following. First, it pertained to his personal driving or vehicle and did not involve his job driving or permit. Second, although it could be arguably inapplicable by reason of the remoteness of the past years and type of information shown, any further consideration is rendered unnecessary and moot by reason of the admission of Dallas that it had no bearing and that it found nothing objectionable on it relative to his transfer request.

The next element easy to eliminate is the Dallas consideration of job accidents of the grievant. Its only information was that meagerly supplied by the grievant on the single sheet questionaire. But, even in responding, the grievant was not clear, by first reciting no job accident, but then answering yes, three times, to the next question of time off from work. The three time reference is vague and unclear as to whether it refers to number of accidents, periods of time off, individual days, or simply three short duration instances. By itself, it begs further investigation and clarification. The broad intent of the April 6, 1979 memo agreement guidelines are suggestive that further inquiry or attentativeness to this by the employer would be more appropriate. Here, Dallas provided none. In point, the Milwaukee records showed that the accidents were several years back, and arguable to mitigation factors such as the winter weather, the conditions of the steps, and the absence of accidents since. Dallas claimed it allowed for a reform period, but did not bother to apply the concept here, waiving any further interest in it. These considerations eliminate the job accidents as an unsatisfactory factor in the work record.

A similar conclusion is reached for the elimination of the discipline factor, though on this matter the record is more voluminous. First, the grievance settlements specifically recited that the suspension disciplines were to be removed from the employee's records. This is a specific committment which mandates adherence. The employer claim that this applied only to records for future disciplines, is unconvincing and unsupported. An employee's records can be used for other matters, such as promotions, step increases, and transfer requests, as dramatically illustrated here. The union is persuasive that such removal from the records is consistent with Personnel Operation regulation 621.422 and 621.431. The grievance settlement stipulations for their removal likewise could be regarded as within the concept of the employee's request for removal under Article 16, Section 10. Even Milwaukee conceded that it does not consider old disciplines on transfer requests which

contain a provision for their removal from the record. The Dallas interview revealed that his past disciplines were a significant, if not the most significant, reason for their denial of the transfer request. Milwaukee's inclusion of them in the folder, and their consideration by Dallas, severely violated the rights of the grievant. This became dramatically compounded by the Dallas admission that it failed to note the provisions for the removals, and by its error note of a more recent March 19, 1985 warning letter, where in fact, the record showed none.

The last remaining disputed unsatisfactory work record factor is the sick leave usage as an attendance problem indicator. There are arguable consideration on both sides. In considering the factors favorable to managment, it is fundamental and well recognized that attendance and excessive absenteeism are valid factors to examine in the evaluation of an employee. This is recognized in item E of the memo agreement guide. Both Dallas and Milwaukee affirm that it is one of the factors examined on transfer requests. Both supplied examples where transfer requests have been denied because of poor attendance, and where it was expressed in the denial letter. The response of the grievant to the Dallas questionaire sheet did indicate his heavy sick leave usage, and should have alerted him that this was a factor of consideration.

On the opposite side are the favorable factors to consider for the union. On the questionaire the grievant did indicate his hospitalization as a mitigating factor. Dallas did indicate that a heavy sick leave usage factor could be overcome by a showing of mitigation, such as an extended hospitalization. However, Dallas admits it made no further inquiry on this. The grievant had an official current record as a satisfactory employee. The failure of Dallas to inquire further into this is inconsistent with its own policy allowing for a mitigation, and inconsistent with the spirit and responsibility of the memo agreement guidelines. Dallas failed to notify the grievant that this was a factor in his denial, violating the specific reason requirement of item E and denying the grievant the opportunity to respond or overcome. There is presumption that his work record in Milwaukee was satisfactory on that score, in view of his general satisfactory current record and in the absence of any current warning, discipline, or step increase deferment. There is arguable merit in the union's claim that Dallas has an excessively rigid standard on sick leave usage. While its 50% rule of thumb may have some validity as a red flag for inquiry and examination, its automatic application is questionable as inconsistent with the manual section 513.371, c, and the obligation to conduct further objective inquiry as discussed above. Further, the Dallas explanation indicated that the past disciplines were the more primary substantial reasons for denying the transfer, and that it really did not bother to inquire further into the absence factor. Dallas admitted that its only information on the sick leave usage was from the questionaire response of the grievant. But, this was not an unsatisfactory item in his work record in Milwaukee and was not part of his personnel folder forwarded, according to the evidence submitted. The June 20, 1985 denial letter from Dallas only recites the personnel folder and his unsatisfactory work record as the reason for the denial. There is no reference to his attendance or sick leave usage made. It was never offered nor cited by Dallas as a reason during the grievance processing, Dallas not even being involved nor aware at that time. There is arguable merit then to the union's claim that raising it in the arbitration proceeding is inconsistent and in violation of Article 15.

Much of these considerations and this last point would similarly apply to the job accident and driver's license factors since they likewise were not part of the official folder forwarded to Dallas, and were not identified by Milwaukee as unsatisfactory items in his work record. On these considerations therefore, I likewise find that the sick leave usage has been eliminated as a justifiable factor for the denial by Dallas.

In addition to the examination of the above specific factors, there are several additional general considerations that lend favor to the grievant and subject the Dallas denial to criticism. Admittedly, the grievant has had some blemish and problems in the past, particularly on discipline, but that was earlier in his work history and several years distant, followed by a reform, and significantly with a satisfactory work record since. The denial based upon an alleged unsatisfactory work record is therefore inconsistent. Next, the evidence indicates that Dallas maintains an excessively high standard in denying transfer requests beyond that required for an employee to be termed satisfactory, and beyond and inconsistent with the standard expressed in the intent and mandate of the memo agreement guidelines. The guidelines do not suggest the Dallas restrictiveness of only exceptional employees above the average, but rather the opposite, that the benefit of transfer considerations are to be extended to employees in general, if qualified and satisfactory. The evidence indicated that Dallas approves few transfer requests, as compared with the much greater number of outside hires. This excessive restrictiveness is inconsistent with the spirit and specifics of the memo agreement guidelines, and was improperly applied to the denial and detriment of the grievant.

On the basis of the above then, I do find and conclude in favor of the union, that Dallas did violate the contract and memo agreement guidelines by its improper denial of the transfer request of the grievant. I further find that the grievant is entitled to the appropriate remedy to have the denial revoked, with his transfer request approved, and a directive to Dallas and Milwaukee to so comply and coordinate. I have no difficulty in fashioning and determining this remedy; it is appropriate to the circumstances and the proper means of rectifying the violation and the right of the grievant denied. The separate locations of Dallas and Milwaukee are not a deterrent; they are both branches of the single employer entity, the parties negotiated the common national agreement for all locations and branches. The union requested this type of remedy in its original grievance and at no time has the employer raised any objection to the specific form of remedy as such, aside from its general denial of the grievance, according to the evidence and records submitted. Only the union raised concern over this, at the ending oral summary.

However, on the union's claim for retroactivity, I have some reservations, it is the burden of the union to establish and justify. I have considered all the circumstances and a number of factors. If retroactivity were granted, the rights of other carriers could be involved, and there is a possibility of complexities and challenges which could arise, beyond the direct substance of the dispute here considered. There is no evidence that the union or the parties specifically discussed retroactivity that distinctively during the processing of the grievance. If there were a showing that a current opportunity for transfer has been lost or delayed because of the interim of the denial, then the arbitrator might be more persuaded to consider retroactivity back to a time when a transfer opportunity existed. However, in

the absence of such a specific showing, under the present circumstances, and with the presumption and expectation that Dallas can readily approve and effect a transfer currently, within a reasonable period for coordination, I do not feel that retroactivity has been adequately proven or justified at this time.

DECISION - AWARD

DECISION: Based on the evidence and in accord with the above discussion, the decision is here made that the employer and its Dallas office did violate the contract and the memo understanding April 6, 1979 guidelines in denying the transfer request of grievant Sherman Martin, Jr. The union's grievance is sustained.

AWARD: The employer, and the Dallas office in particular, is directed to revoke the denial, to approve and grant the transfer request, and to implement the transfer procedures at this time.

Dated: March 7, 1986.

Submitted by:

Daniel G. Jacobowski, Esq.
Arbitrator