

REGULAR ARBITRATION

C# 10685

In the Matter of the Arbitration )  
Between )

Case No. S7C-3B-C 21022  
(J. Hambleton)

UNITED STATES POSTAL SERVICE )  
Mountain Home, Arkansas )  
Employer )

and )

AMERICAN POSTAL WORKERS UNION, )  
AFL-CIO )  
Union )

BEFORE: Seymour X Alsher

LOCATION OF HEARING: USPO, Mountain Home, AR  
DATE OF HEARING : July 17, 1990  
APPEARANCES:

For the Employer: William V. Woods  
For the Union : Carl Casillas

NATURE OF CASE

The dispute involves the Grievant and Union's objections to first, the basis for an Official Discussion (OD) and, second, the procedure and manner the OD was carried out.

Additionally, the case involves a question of arbitrability, i.e., whether the Arbitrator has contractual jurisdiction to decide the case on substance.

HEARING

In light of Employer's contention that the Arbitrator is barred from deciding the grievance on its merits, I informed the parties that if a determination is made that the grievance is not arbitrable, the substance would be treated only insofar as the facts are intertwined with the question of arbitrability.

## ISSUE

The Union deems the issues: (1) whether the grievance is arbitrable; (2) whether the Employer violated the National Agreement, herein contract, in the method and manner in which the Employer gave Grievant J. Hambleton an OD; (3) whether Grievant is entitled to 41/100 hour of overtime (OT) pay based on an incident of January 18, 1989 which gives rise to the February 13, 1989 OD. (All dates are 1989 unless noted otherwise.)

The Employer limits the issue: whether the grievance is arbitrable under terms of the contract.

## FACTS

Pertinent Contract Provisions (in relevant part)

## ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition /in part/

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment....

## ARTICLE 16 - DISCIPLINE PROCEDURE

Section 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder.../emphasis supplied/

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Approximately 15 employees are in APWU's bargaining unit. Grievant, an employee since 1977, has been the Local Union's President or its Chief Steward during most of his tenure. Grievant's supervisor at all times material herein was J. Ison. O. White is Postmaster.

### Grievance

At written Step 2, the Union describes the nature/issue of the grievance: "Wrongful Discussion-Art.16." The statement segment, in relevant part:

At approx. 1345 J. Hambleton was summoned on 2/13/89 to P.M. office & was given an Official Discussion (OD) regarding "failure to follow instructions." Grievant contends OD was given without just cause...but rather punitive, i.e., alleged incident occurred on 1/18/89. Notes of incident...not kept. A Letter of Warning was read to Grievant and OD were exchanged for LOW. ...changes were kept by SPO Ison. Nothing...given to Grievant although Grievant requested the letter....incident was merely to harass and intimidate Union official.

Employer rejected grievance at Steps 2 on grounds that OD is not considered discipline and therefore is not grievable. Citing Art. 16, grievance was denied on same grounds at Step 3.

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With respect to the OD, there is no dispute over material facts. Ison had considered issuing a LOW based on Hambleton's conduct in mid January. He did not issue the LOW. Parties agree that the February 13 meeting, conducted in private, was an OD within the meaning of the contract. Although Ison did not testify, the Employer does not rebut or refute Hambleton's testimony that Ison read from a paper which initially had been intended to be issued as a LOW. Ison, however, eliminated references to a LOW. He told Hambleton that he had changed his mind about issuing a LOW; he would have the OD instead.

Ison rejected Hambleton's request for the "personal notes." Ison retained them. There is no evidence that Ison's personal notes were distributed to supervisors or to the Postmaster. There is no evidence that Ison's personal notes were incorporated in Grievant's personnel folder.

Hambleton's testimony is largely unrefuted. I declined to take testimony with respect to the circumstances surrounding Grievant's "failure to follow instructions" on January 18. Reason: merits of the alleged January 18 infraction offense is not part of the instant grievance.

With respect to the allegation of intimidation of a Union Official (as described in the grievance itself), the Union did not file an unfair labor practice with NLRB.

Neither SPO Ison nor Postmaster White testified.

### SUMMARIZED CONTENTIONS, ARGUMENTS

#### Union

1. The circumstances which led up to the February 13 OD were based on improper disciplinary measures. The matters which concern Grievant fall within Art. 15 and are therefore grievable.

2. The timing of the OD supports Union's contention that Ison's purpose was to retaliate, not to correct. The incident for which Grievant was counselled took place on January 18; Ison waited almost a month before scheduling the OD. Moreover, the OD took place almost immediately after Ison learned that Hambleton had filed a grievance based on the January 18 incident.

3. The OD was the fulfillment of the Employer's threat to discipline Hambleton if he persisted in pursuing a grievance.

4. Based on all the circumstances, Ison's note was not a "personal note." It was a disguise for a LOW. The Grievant is, therefore, entitled to it.

#### Employer

1. Art. 16, Sec. 2 is explicit: an OD is not grievable. The Arbitrator lacks authority to alter the terms of the contract. If the matter is not grievable, it is not arbitrable.

2. No LOW was issued. The grievance itself concedes that the OD took place. Grievant is therefore not entitled to a copy of Ison's personal notes.

## DISCUSSION - ANALYSIS - FINDINGS

The thrust of the grievance is not that Ison threatened or intimidated Hambleton because of his Union activities. The Union attempts to raise that issue in an attempt to convert the OD to a LOW. Without deciding whether or not the OD was called as a retaliatory measure, the fact is that the February 13 meeting, conducted in private, was an OD. I so find.

Having found that an OD took place, the contract demands only one conclusion, i.e., that the circumstances surrounding the OD, whatever their source, is not grievable.

In the instant case, it is clear that the dispute does not come within the ambit of the grievance procedure. Clear and unambiguous exclusionary language places the dispute outside the scope of the grievance procedure.

In this case the exclusionary language is neither vague nor ambiguous. If the dispute is not grievable, it is not arbitrable.

The Union attempts to circumvent the clear language of Art. 16, Sec. 2 in arguing that Ison, having read from a paper which purports to have been a LOW, actually issued a LOW disguised as an OD. This argument is patently specious.

Ison told Hambleton he had changed his mind; he would not issue a LOW. I find that Ison did not issue a LOW on February 13. Ison read from his personal notes. Hambleton is not entitled to Ison's personal notes. There is no evidence nor is there an allegation that Ison's personal notes were misused. As the term connotes, the notes are "personal" meaning that they are Ison's to retain, not for Hambleton to use.

Neither the Union nor the Grievant has explained what may be behind the decision to pursue this grievance in the face of the clear exclusionary language which places OD outside the scope of the grievance procedure. In light of the unusual labor relations history at the Mountain Home facility, it is plausible to infer that Hambleton's motives may go beyond enforcing terms of the contract. I shall refrain from speculating what those motives may be but it does appear, in light of the decision to grieve a dispute

clearly outside the scope of the grievance procedure, that the Grievant's motive does not encompass promotion of stable labor relations, or to assure compliance with contract terms.

Having found that the instant matter is not arbitrable, I make no determination with respect to the proposed remedy of OT pay for Grievant.

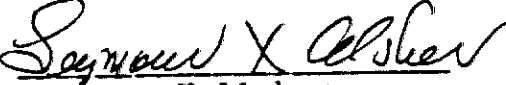
There are few absolutes in life; there are few in labor relations. However, Art. 16, Sec. 2 does include one absolute: OD is not discipline; OD is not grievable. The Supreme Court put the matter clearly in Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962):

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.

#### CONCLUSION

Having found that the subject to the grievance, OD, is not within the scope of the grievance procedure, I conclude that the grievance is not arbitrable. I, therefore, lack jurisdiction to consider the grievance on its merits.

DATE: July 26, 1990

  
Seymour X Alsher  
Arbitrator

JUL 30 1990

AMERICAN POSTAL WORKERS UNION