

ARTICLE XV - SECTION 2, STEP 2A

ARBITRABILITY - TIMELINESS

Scheduled again 8/17/79 before Cohen IN ARBITRATION

UNITED STATES POSTAL SERVICE)

) and

AMERICAN POSTAL WORKERS UNION)

FLINT, MICHIGAN LOCAL, APWU,) Grievant.

Case No. 5 DET 4078b/AC-C-23533X
 Grievance No. 79-39; won
 Arbitrator's No. 79-39-343
 Date of Hearing:
 June 7, 1979
 Flint, Michigan

ACC 23533 ✓

Cohen

4/3/79

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Arbitration Division
Labor Relations Department

O P I N I O N

Issue

Is the grievance arbitrable?

Facts

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INDUSTRIAL
RELATIONS

On December 24, 1977, the Union (which itself is the principal grievant) filed a grievance. The grievance was denied. Immediately thereupon, on December 27, 1977, the Union appealed the denial of its grievance to Step 2-A.

The Step 2-A appeal was denied. The notice of the denial of the grievance at Step 2-A was received by the Union on February 2, 1978. It had to appeal to Step 2-B within ten (10) days or the appeal was waived according to the Collective Bargaining Agreement.

This denial was also appealed. The letter of appeal was dated February 11, 1978. The postmark on the envelope gave a date of February 14, 1978. According to the Union official responsible for grievance appeals, she typed the appeal on Saturday, February 11, 1978, and deposited it in the postal collection box in front of the Flint, Michigan Main Post Office. She further

testified that though she handled a great many grievances, she remembered this one because it was unusual.

This appeal was denied by letter dated March 29, 1978, which indicated that the grievance had been received on February 16, 1978. Thereafter, the sequence of denials of grievances and appeals progressed without incident, eventually culminating in arbitration.

At none of the grievance steps did any of the Post Office representatives raise the question that the appeal of the Step-2-A decision occurred more than ten days after the receipt of the denial. The issue was first raised by a Post Office representative two to three weeks prior to the arbitration hearing by notice of the Post Office representative to a Union representative that the Post Office would seek to limit the arbitration to the question of arbitration because of the issue of timeliness of appeal. But the Post Office still requested the right to proceed with the hearing on the merits if the issue of timeliness were ruled adverse to its position.

A witness for the Post Office testified that postmarks are normally affixed by machine. Sometimes the machines skip affixing the postmark. Letters not postmarked are caught and sent back through the machine.

This letter, according to the Post Office witness, had a hand stamp cancellation. The witness had no explanation for the

cancellation by hand other than that sometimes a hand cancellation is used.

The witness further testified that on occasion a letter may be inadvertently left in a mail sack if the sack is improperly emptied. Such a letter might be marked by stamp "found in empty equipment."

The Post Office witness testified that letters received at the Main Post Office are collected almost continuously from the drop box in front of the building. From midnight to 12 noon, the cancellation will appear as "a.m." From noon to about 5 or 6 P.M., the cancellation will appear as "p.m.". From then until midnight the cancellation will appear as "--" (minus) "p.m.". The cancellation on the letter in question was "p.m".

DISCUSSION AND OPINION

The Post Office has submitted some fourteen cases in opposition to the Union position that the matter is arbitrable. These cases make several points, which, perhaps should be repeated lest they be forgotten.

Point No. 1 is that the time requirements in a Collective Bargaining Agreement, since they have been negotiated by the parties, must be adhered to. When an action must be taken within a certain number of days or rights will be lost, the action must be taken within the period designated for action. Reasonable compliance is insufficient. Another point mentioned by the cases

is that the Post Office or any other party is never estopped from raising the issue of arbitrability because that is what confers jurisdiction on the arbitrator. If he does not have the right to arbitrate, nothing he himself can do will confer it upon him.

Other points in addition to these are made by the cases. I quote one such point from NC-C-5271-D, which is as follows:

"A basic principle of arbitral law is that arbitrators abhor deciding cases on issues of procedure, especially in matters involving job security. A so-called 'bite at the apple' cannot be taken if in fact the issue of merit never gets before the arbitrator. Further, there is usually no appeal and, therefore, arbitrability questions need perhaps a closer perusal therefor than merit questions."

Another point made by the cases is that very frequently the issue of arbitrability is one of fact which the arbitrator must determine. For instance, in the same case from which the quote was just cited, the arbitrator ruled as a question of fact, that the grievant never held a meeting with his supervisor as the Collective Bargaining Agreement required as a first step of the grievance procedure.

Again, in the case of NB-C-6879-D, the arbitrator concluded that the testimony produced by the Union as to its compliance with time limits of the Collective Bargaining Agreement was too vague to be believed and as a result ruled against the

Union on the question of arbitrability.

Based on the testimony presented by the Union, it is my conclusion that the appeal was filed timely. The Union witness stated, without question, that she placed the letter of appeal within the postal box in front of the postal station where the parties were employed within the ten-day period necessary for appeal. No evidence was produced to contradict her other than the fact that the postmark placed on the envelope was past the ten-day period. However, this postmark, according to the testimony of post office authorities was a hand stamp. This would indicate that the letter was not stamped in the usual course of business because that would have been done by a machine stamp. It is easy to infer that there must have been some form of delay that would have occurred to have warranted a hand stamp to be placed on the letter.

Another factor to be noted is that the question of timeliness of the appeal by the Union was not raised until late in the grievance procedure. As a matter of fact, that question was raised just prior to the arbitration. While the Post Office is not estopped from raising the point (Case No. AB-C-4415-D), it is proper to infer that if the issue was not raised until late in the process, it could be because others had considered it and did not think it applicable. For instance, in Case No.

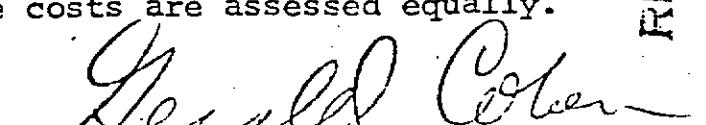
N-C-4170-D, the issue of timeliness of appeal was raised immediately. I might note that the latest National Agreement makes radical changes on the issue of timeliness of appeal.

As a matter of fact, even in the instant case, there is no clear point at which the appeal was filed because the postmark on the letter that the Post Office said contained the appeal, was dated two days prior to the time that the Post Office referred to the appeal date in some of its later correspondence. (See Joint Exhibit 5, letter of 3/29/78 from Bruce D. Evans, Labor Relations Specialist, United States Post Office, to Gerald Anderson, National Vice-President, American Postal Workers Union). Even there, a variance appears.

Case No. NC-C-238D stated, "A grievance is presumed proper when filed. If, in fact, a disability does exist which is fatal to the grievance, then in fact the party-movant must prove the disability to overcome the presumption of propriety". I conclude that the Postal Service has not overcome the presumption of propriety. The evidence of filing has never been sufficiently contradicted to justify holding that this grievance is not arbitrable.

The grievance is arbitrable and the matter should proceed to arbitration. The costs are assessed equally.

DATED this 3rd day of July, 1979.


GERALD COHEN, Arbitrator
722 Chestnut Street,
St. Louis, Missouri 63101

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Labor Relations Department

- a) USPS No.: ACC 23533
- b) UnAd: _____
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- d) USPS Region: (N)ortheast (E)astern (C)entral (S)outhern (W)estern
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- f) State: MI
- g) Office: FLINT
- h) Grievant: CLASS
- i) Union: (N)ALC (A)PWU (L)IUNA N(R)LCA
- j) Contract Year: 71 73 75 78 81
- k) C/D: (C)ontract (D)iscipline
- l) Arbitration Level: (N)ational (R)egeional (E)xpedited
- m) Decision: (S)tandard (M)odified (D)enied (O)ther
- n) Arbitrator: Cohen G
- p) Date: 790703
- q) H/M Provision (01): _____

- r) NA Provision (02): _____

- s) Subject (03): 600.000
000.906
