

C-24264

## **REGULAR ARBITRATION PANEL**

**BEFORE:** Philip Harris, Arbitrator

**APPEARANCES:**

For the U.S. Postal Service: Albert J. Ward, Labor Relations Specialist  
For the Union: James Mayfield, Local Business Agent  
Place of Hearing: Phenix City, AL  
Date of Hearing: February 19, 2003  
Date of Award: May 5, 2003  
Relevant Contract Provisions: Articles 15, 17  
Contract Year: 2000  
Type of Grievance: Contract

### **Award Summary:**

**Issue:** Was the case filed properly with respect to arbitrability as filed by the Union President in accordance with Articles 7.2A and 17.2.B? If so, the case is arbitrable.

**Charges:** The Union did not meet the requirements of the Agreement.

**Postal Service Position:** The grievance is not arbitrable because the Letter of Certification was not issued.

**Union Position:** Non-arbitrability is disallowed by national awards because it is a new issue.

Opinion and Award: There was a past practice existing with the previous Postmaster that bound his successor.

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Philip Harris  
Philip Harris

MAY 22 2003

**VICE PRESIDENT'S  
OFFICE  
NALC HEADQUARTERS**

**Issue**

Was the case filed properly with respect to arbitrability as filed by the Union President in accordance with Articles 7.2A and 17.2.B? If so, the case is arbitrable.

**Facts**

On May 30, 2000 the Union submitted its Standard Grievance Form concerning certain work methods and past practices. The dispute was not resolved, and at arbitration Management raised for the first time the threshold question of arbitrability. The Service requested bifurcation, which was granted.

**Relevant Contract Provisions****ARTICLE 15 - GRIEVANCE ARBITRATION PROCEDURE - STEP 2**

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

## ARTICLE 17 - REPRESENTATION

### Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

### Section 2. Appointment of Stewards

A. The Union will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of the Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula hereinafter set forth.

Employees in the same craft per tour or station

Up to 49	1 steward
50 to 99	2 stewards
100 to 199	3 stewards
200 to 499	5 stewards
500 or more	5 stewards plus additional steward for each 100 employees

B. At an installation, the Union may designate in writing to the Employer one Union officer actively employed at that installation to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance. The activities of such Union officer shall be in lieu of a steward designated under the formula in Section 2.A and shall be in accordance with Section 3. Payment, when applicable, shall be in accordance with Section 4.

Postal Service Position

1. Arbitrator Mittenthal wrote that it is not persuasive that Management waived its right to assert non-arbitrability prior to arbitration. "Arbitrators do not have unlimited authority." (Postal Service Post-Hearing Brief page 2, hereafter PSB 2).

2. "...the very power of the arbitrator to act and cannot be waived through prior silence" applies. Arbitrator Snow requires "a high quantum of proof" to award a denial of an arbitrability claim. Arbitrator Eisenmenger wrote that an arbitrator would be without authority if jurisdiction were lacking (PSB 3).

3. Arbitrator Plant did not find evidence that the Local President was not properly certified a Steward (PSB 4).

4. Arbitrator Dash held that non-arbitrability can be raised for the first time at arbitration. Arbitrator Tranen denied a grievance because a designated Steward did not file the grievance (PSB 5).

5. Arbitrator Justin concurred with Mittenthal regarding arbitrability. Also, "[the] clear language provides that if a Union officer wishes to act as a steward, then upon notification to the Postal Service he can do so to investigate a specific problem" (PSB 6).

6. The Contract applies to all offices equally. "Other stewards filed grievances in Phenix City, even while the President was there...there was more than one steward" (PSB 7).

7. Arbitrator Brooks noted that the standard for a past practice was not met in his case, nor in the one at bar. Arbitrator Justin cited standards for past practice.

The grievance before you clearly does not meet the standards of past practice. Lacking that, for the Arbitrator to have jurisdiction to hear the merits of this case the Union must provide something in writing showing that Mr. Smith, a Union Officer, was going to act as a steward to investigate, present, and adjust this specific grievance. The Union stipulated this had not been done and could not

even produce a regular steward listing as required by Article 17 (PSB 8).

8. Management did not advance any new argument, and questions the Arbitrator's jurisdiction. Arbitrator Stoltzberg "went beyond the bounds of the contract" (PSB 9).

9. The Employer did not receive a Certification that a Union Officer would investigate and file the grievance, which is therefore a nullity and should be denied (PSB 10).

### Union Position

1. In bold print, the relevant provisions from Articles 15 and 17, and the JCAM are:

**The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon.**

**The selection and appointment of stewards or chief stewards is the sole and exclusive function of the Union.**

**Both parties are:**

**Required to state in detail the facts and contract provisions relied upon to support their positions. The Postal Service is also required to furnish to the Union, if requested, any documents or statements of witnesses as provided for in Article 31, Section 3. (Union Post-Hearing Brief page 1, hereafter UB 1).**

### **2. Steward Certification**

This language obligates NALC to certify each steward and alternate to the employer in writing. Once certified, the steward represents employees in a specific work location. The steward from Station A, for example, must investigate any grievance occurring at his or her location, even the grievance of a carrier who is detailed temporarily from Station B and whose grievance arose at Station A. This is true even if the Station A steward must travel to interview the grievant in Station B (as provided in Article 17, Section 3). See Step 4 NC-C-8435,

October 6, 1977 (M-00455).

Union President Cecil Smith sent a Letter of Certification to then Postmaster Burt Hildreth upon becoming President, and served as Step 1 and Step 2 Representative. He filed over 70 grievances since becoming President, producing "24 documents supporting his acceptance as President/Union Steward over a several year period." The station was entitled to one steward (UB 2).

3. Mr. Smith did not send another Letter of Certification to the successor Postmaster Finch, but one was sent on Union Vice President Scott Ward when Mr. Smith was on leave of absence. Mr. Ward became the Steward. Mr. Smith retired but remained a President and continued to do Formal Step A hearings.

The Union appoints its Stewards. Mr. Smith was President and Chief Steward. A Step 4 decision states:

**"the Union is not precluded from having the Branch President, acting as Chief Steward, present a grievance at Step 2 in lieu of the steward."** (Bold Print Added)

Another letter certified Mr. Ward as Steward at the Informal Step A and then Formal Step A when Mr. Smith resigned. Also, Mr. Ward did some Steward work between December 23, 1999 and June 20, 2000. "...no evidence was introduced by Management to support that the Phoenix [sic] City Management every questioned steward certification of either Mr. Smith or Mr. Ward." A document showed Mr. Ward as Steward and Mr. Smith filing the grievance. There was no Management testimony "that anyone but Mr. Smith had acted as Shop Steward during the period in question" (UB 3).

4. There were no Management witnesses. Documents prove Mr. Smith was accepted as Steward for several years "irregardless of whether a Letter of Certification was on file or not... Mr. Finch's letters to the Union referred to Mr. Smith as the Union Steward." The Contract requires the Parties to make full disclosure for grievance (UB 4).

5. Grievance hearings were held with Mr. Smith by the Postmaster and

Supervisors. There is no requirement for the Union to "send another letter of certification at every Postmaster change." Management should not "ambush" the Union even though Arbitrator Mittenthal said arbitrability can be raised at the hearing. Challenging Steward Certification is an entirely new argument. At Step 2 the Certification was not mentioned. Arbitrator Mittenthal said it was impermissible to change the thrust of a grievance. Arbitrator Aaron said new arguments introduced at arbitration are barred (UB 5).

6. Arbitrator Stoltenberg agreed that the late introduction of arbitrability is a surprise argument to be barred. Management did not prove Mr. Smith was not the Certified Steward, and did accept him as such. The burden of proof is on the Postal Service to disprove the Union's evidence (UB 6).

7. Mr. Smith was properly Certified, hence for several years he was never questioned about it. Management did not prove otherwise. The grievance is arbitrable (UB 7).

#### Opinion

The threshold question of arbitrability was raised by the Postal Service for the first time during the run of the grievance. The Union claimed it was barred as a new argument by a national award. Another award holds that the appropriate forum to raise a non-arbitrability claim is at arbitration and not some prior step of the grievance procedure. The latter ruling is seen as the applicable one for the case at bar. The term itself - - non-arbitrability - - gives an obvious semantic indication of the logical and intended locale as an agenda subject. Of course, a Party may raise it earlier, but failure to do so is not a waiver of rights. Hence arbitrability is a unique exception to the barring of new arguments, which still stands.

Concerning the merits, both Parties discussed in depth the awards submitted with their Post-Hearing Briefs. The net result is the Union having

the preponderance of evidence, one major reason being the stipulation that Mr. Smith filed some ninety grievances including both before and after the instant one. Hence Arbitrator Justin's case, submitted by Management, applies: "1) unequivocal, 2) clearly enunciated and acted upon, and 3) readily ascertainable over a reasonable period of time, as a fixed and established practice clearly accepted by the Parties." There was a modus operandi between Mr. Smith and former Postmaster Hildreth to whom the Union said was forwarded the required Letter of Certification. Certainly Mr. Hildreth must have received it or else he would have been continually violating the Contract over an extended period of time! And certainly, the Service does not allege any such violation. When he was replaced by Postmaster Finch the problem arose concerning the Certification. The Union sought to continue the procedures without having to replicate the Letter of Certification on its own initiative. The modus operandi was in place, hence no obligation to re-file. If Mr. Finch had requested another Letter of Certification, surely the Union would have acquiesced. Why not? But the request was not made, and it is inequitable to in effect punish the Union for not doing something it did not have to. The new Postmaster was obliged to continue the past practice or negotiate a change in it as a matter of good-faith labor-management relations. If another Letter of Certification were required for the instant case, the Union could have been served notice of this requirement so the grievance could be moved along without additional confrontations.

The above rationale outweighs Management's arguments, including the one citing two Stewards instead of one on the scene. This solitary exception proves the existence rather than the non-existence of the modus operandi, for otherwise there would have been numerous other exceptions.

#### Award

The grievance was filed properly and is arbitrable.