HEADING: INTERPRETATION OF ARTICLE XV, SECTION 2.

#73-946

ARBITRATION
OPINION AND AWARD
RA-73-946
C. GASSAM
DEARBORN, MICHIGAN

X

C#01552

ARBITRATION AWARD

February 13, 1974

UNITED STATES POSTAL SERVICE
Dearborn, Michigan

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS
Branch 2184

Case No. N-C-4170-D
Detroit 148 b

Subject: Discharge - Timeliness of Grievance Appeal to Step 2A

Statement of the Issues: Whether the grievance must be considered waived for failure to appeal to Step 2 within the prescribed time limits?

Whether the discharge of the grievant, C. Gassam, was for "just cause" under the circumstances of this case?

Contract Provisions Involved: Article XV, Section 2 and Article XVI of the 1971 National Agreement.

Grievance Data:

	Date
Step 1 Decision:	January 17, 1973
Appeal to Step 2:	(In dispute)
Step 2a Decision:	February 5, 1973
Appeal to Step 2b:	February 12, 1973
Step 2b Decision:	April 25, 1973
Appeal to Arbitration:	May 17, 1973
Case Heard:	December 4, 1973
Union Brief Filed:	December 21, 1973
Postal Service Brief Filed:	January 15, 1974

Statement of the Award: The grievance is dismissed on the ground that it was not appealed to Step 2 within the contractual time limits.

BACKGROUND

allegedly C. Gassam was sent a notice of discharge on January 10, 1973, for "alter[ing] an official document from the Dearborn Medical Centre ...by affixing thereon the words 'stay off foot'." The Union contends that he is not guilty of any such alteration, that he did not falsify this medical document. It asks that he be reinstated immediately and that he be made whole for his loss of earnings.

Gassam was hired by the Postal Service as a letter carrier in April 1970. He was on a "drive route" in December 1972 when he slipped and fell on ice as he climbed out of his jeep. His right foot was injured. He went to the Dearborn Medical Centre (DMC) on December 22, 1972, for treatment. X-rays were taken and his foot was examined, given physiotherapy and bandaged. Dr. Seitam diagnosed the problem as a "contusion of the right foot", a self-limiting minor injury. He found no fracture or dislocation. He recognized the contusion could be painful for awhile and he recommended that Gassam "work...inside 1 week" and return for further treatment on December 26. Gassam claims the doctor told him to do "light work" only and to "stay off foot." The statement given to Gassam by DMC, however, mentioned only that he should "work...inside 1 week."

Gassam returned to DMC, as directed, on December 26. His foot still hurt and he received physiotherapy. He insists he asked Dr. Seitam whether he should still do "light work" and "stay off [his] foot." The doctor's answer was "yes." But when Gassam left DMC that day, he did not receive a statement to take back to the Postal Service. He returned to DMC again on December 29, having been specifically instructed to secure a statement this time. He received physiotherapy. He told Dr. Seitam his foot was "feeling better." The doctor recommended that he come back on January 2, 1973, if necessary. Gassam alleges that he then asked the doctor, "Should I still do the same?", and that the doctor said "yes." He understood this exchange to mean that he was to continue to limit himself to "light work" and "stay off foot." The doctor, however, insists he never told Gassam to "stay off foot." He asserts that such instructions would have been inconsistent with his recommendation that Gassam "work...inside." He claims, moreover, that he simply would not use this expression ("stay off foot") in this kind of situation. For, in his opinion, there was no reason for Gassam not to work. His intention, as of December 29, was that Gassam continue to "work...inside" if necessary.

Before Gassam left DMC on December 29, he stopped at a receptionist's desk to get a statement regarding his condition. The receptionist wrote down the employer ("U. S. Post Office"), the employee's name ("Charles Gassam"), his injury ("Re-visit", apparently a reference to an earlier statement), and his return date for further treatment ("1-2-73"). She wrote nothing beneath the term, "Disability." Gassam testified that when he saw this blank on the statement, he objected. He says he explained to the receptionist that the doctor had told him to "stay off foot." And he claims the receptionist then printed these words onto the statement. The DMC, on the other hand, maintains that none of its receptionists placed such words on Gassam's statement.

The Postal Service received the December 29 statement from Gassam. It questioned him about the extent of his disability and was referred to the earlier December 22 statement. It believed there was a disparity between the two statements and began an investigation. From its conversations with DMC officials, Dr. Seitam and Business Manager Carty, it concluded that the doctor never instructed Gassam to "stay off foot" and that DMC personnel had not written these words onto the December 29 statement. It decided that Gassam should be discharged for "alter-[ing] an official document from the [DMC] dated 12-29-72 by affixing thereon the words 'stay off foot'."

The Postal Service sent a letter to Gassam on January 10, 1973, notifying him of his discharge. Gassam received the letter on January 12. He and Branch President Adams met with Superintendent Kresovich on January 17 to protest the discharge. This was the Step 1 meeting on Gassam's grievance. At the end of this meeting, Kresovich told Gassam and Adams that the grievance was denied and informed Gassam of his right to appeal this Step 1 decision.

The appeal to Step 2 is contained in a letter from President Adams to the Postmaster of the Dearborn Post Office. That letter, according to Adams, was prepared the evening of January 22, 1973, and was deposited in a local box in the main lobby of the Dearborn Post Office sometime after 10:00 p.m. It is dated January 22. It is postmarked the afternoon ("PM") of January 23. And it was received by the Postmaster on January 24.

DISCUSSION AND FINDINGS

The threshold question is whether Gassam's grievance was appealed to Step 2 within the contractually prescribed time limits. Article XV, Section 2 of the 1971 National Agreement reads as follows:

> "Step 1: The employee must discuss the complaint with his immediate supervisor within five (5) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause... The supervisor shall render a decision within two (2) days. The Union shall be entitled to appeal an adverse decision in Step Two of the grievance procedure within five (5) days after receipt of the Employer's decision.
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> "Step 2: a. Such appeal shall be made in writing to the head of the installation, or his designee...
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> "The failure of the aggrieved party or his representative to present the grievance within the prescribed time limits of the steps of this procedure, including arbitration, shall be considered as a waiver of the grievance." (Emphasis added)

The language of the National Agreement is clear and unambiguous. When an employee has a grievance, he must first discuss it with his immediate supervisor. Then the supervisor must render a decision. If the grievance is granted, there is no need to appeal. If the grievance is denied, the employee must "appeal an adverse decision in Step Two... within five (5) days after receipt of the...decision." A "failure" to appeal within the prescribed five-day period "shall be considered as a waiver of the grievance." Thus, Article XV, Section 2 makes it mandatory that the procedures set forth in Step 1 be followed. Time is of the essence in appealing a complaint through the several steps of the grievance procedure. The parties expressly agreed that failure to appeal within the contractual time limits would serve "as a waiver of the grievance."

Here, a Step 1 discussion of the grievance was held on Wednesday, January 17. Superintendent Kresovich, Branch President Adams, and Gassam were present. At the end of the discussion, Kresovich denied the grievance. The five-day period for an appeal ran from Thursday, January 18 through Monday, January 22. Adams' appeal letter is dated January 22. He claims the letter was prepared that evening and was deposited in a local box in the main lobby of the Dearborn Post Office sometime after 10:00 p.m. The letter is postmarked the afternoon ("PM") of January 23 and was received by the Postal Service on January 24.

The resolution of the timeliness issue depends on which of these days is regarded as the appeal date. The Union argues that January 22 is the appeal date and that its appeal to Step 2 was therefore within the prescribed time limits.

This argument is not convincing. Certainly, the date placed on the appeal letter cannot be controlling. For if it were, the time limits could be circumvented by the simple expedient of backdating a grievance appeal. Such a result would defeat the purpose of the time limits and would conflict with the parties' stated intentions. Perhaps, in appropriate circumstances, the date the letter is placed in a mail box could be controlling. But even Adams did not unequivocally state that the appeal letter was mailed on January 22. Rather, his testimony was that the letter was deposited in a mail box "sometime after" 10:00 p.m. that evening. If this posting occurred more than two hours after 10:00 p.m., the letter would not have been mailed until January 23. Equally important is Personnel Manager Alexander's uncontradicted testimony. She asserted that when she discussed the grievance with Adams in Step 2, she raised the untimeliness defense and Adams replied that the date on the letter should be considered the appeal date. Adams said nothing to Alexander about his having mailed the appeal letter the evening of January 22. Furthermore, the letter bears an afternoon postmark ("PM") on January 23. If, as Adams alleges, the letter had been placed in a local box in the main post office the evening of January 22, it surely would bear a morning postmark ("AM") on January 23. The afternoon postmark, when viewed in conjunction with the other evidence in this case, plainly indicates that the appeal letter was not mailed until January 23.

For these reasons, I have no choice but to find that January 23 was the appeal date in this matter. The appeal therefore was not within the

prescribed five-day period, January 18 through January 22. This failure to make a timely appeal to Step 2, according to the National Agreement, "shall be considered as a waiver of the grievance." There is no sound basis for the Union position that the time limits need only be "substantially complied with." The time limits, pursuant to the clear language of Article XV, Section 2, must be strictly followed. The contractual consequence of failing to adhere to the prescribed time limit is "a waiver of the grievance."

THE ARBITRATOR RULED:

AWARD

"The grievance is dismissed on the ground that it was not appealed to Step 2 within the contractual time limits."

Richard Mittenthal

Richard Mittenthal, Arbitrator

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