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In the Matter of the Arbitration (Grievant: Thomas-Williams)
between (Post Office: WDC-Ward Place)
UNITED STATES POSTAL SERVICE (USPS Case No. K06-N-4k-0926017
and (09256017)
NATIONAL ASSOCIATION OF (NALC Case No. 142WP37015-9)
LETTER CARRIERS AFL-CIO)

BEFORE: Joseph Brock, Sr.

APPEARANCES:

For the U.S. Postal Service: Robyn Ford, LRS

For the Union: Robert E. Harnest, EVP, NALC Branch 142

Place of Hearing: 900 Brentwood Rd., Washington, DC 20066

Date of Hearing: August 18, 2009

Date of Award: October 8, 2009

Relevant Contract Provision: Article 15

Contract Year: 2006 - 2011

Type of Grievance: Procedure – Non-Compliance

Panel: Regular

Award: Management violated Article 15 and is ordered to pay \$300.00 to the Union in accordance with the full award.

Arbitrator:



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Background

This matter was arbitrated pursuant to the grievance and arbitration provisions of a Collective Bargaining Agreement (National Agreement) in effect between the United States Postal Service (USPS) and the National Association of Letter Carriers (NALC). A hearing in this matter was held before me on August 18, 2009, in Washington, DC. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument and to examine and cross-examine witnesses. The parties presented testimony and documentary evidence separately in this case. At the conclusion of the evidence the USPS presented oral arguments in support of their respective position; and the NALC chose to present a brief in support of their arguments. The brief was received by me on September 21, 2009 and at that time the record was closed. I utilized a voice recorder to supplement my notes and erased the tape at the completion of this award.

Statement of Fact

The original dispute in this case involved a just cause determination of the suspension discipline of employee R. Thomas Williams.

There was no formal Step A and the discipline was appealed by the Union to Formal Step B. In addition the Union grieved the fact that there was no Formal Step A meeting and placed the blame squarely on Management.

On June 15, 2009, the Dispute Resolution Team (DRT) resolved that Management did not have "just cause" to issue discipline to the grievant, R. Thomas Williams and that the "Notice of Seven Day Suspension" be rescinded and expunged from the grievant's personnel file.

However, as it relates to the Article 15 complaint and subsequent remedy, the DRT declared impasse. The NALC then appealed the Article 15 impasse to arbitration. The parties could not resolve the issue and therefore the issue is properly before me.

Issue

As stated in the DRT impasse report:

“Did Management violate Article 15 when they failed to schedule and meet with the Union at Formal Step A of the grievance process and if so, what is the appropriate remedy?”

Witnesses

Union: Keith Hooks, Shop Steward

USPS: Bryant Hubbard, Acting Station Manager

Robert Fauntleroy, Acting Station Manager

Denise Carbone, Customer Service & Sales Operations

The record includes numerous arbitration award citations introduced by both parties.

Union Position

Because there was no attempt by the Management Formal Step A Designee to make any contact, either written or verbal, to schedule and meet at Formal Step A, to protect the Union and its grievance, the Union Formal Step A Designee was required by Article 15.3C to appeal the grievance to Step B, without any meeting at Formal Step A. When the Union Formal Step A Designee appealed the case to Step B, the Union added the fact that Management failed to abide in the good faith principles of Article 15.3A, by failing to schedule and meet at Formal Step A. This was a repetitive violation, again wiping away the Union’s right and the grievant’s right to have the grievance settled at the lowest possible grievance step, per the good faith principles espoused in Article 15.3A of the NA. Several Step B precedents setting grievance decisions were included in the Union’s Step B appeal grievance papers, due to the fact that Management was notorious for not meeting at Formal Step A and heretofore, there had been little if any consequence to Management.

The DRT’s “STEP B DECISION” makes it clear that, because Management failed to

schedule and meet at Formal Step A, that Management made no contentions or rebuttals against the Union's contentions. Therefore, the discipline was rescinded and expunged from the records. Ordinarily, the Step B DRT made its decision to include a remedy for the violation of Management's failure to schedule and meet at Formal Step A. But this time, the remedy was sent to IMPASSE. Given these facts, it is clear that the issue surrounds nothing more than the answer to this question: What is the appropriate remedy for Management's incessant and repeated failure to schedule and meet at Formal Step A?

To be succinct, it was a foregone conclusion by the DRT itself, in fashioning its "ISSUE" on page 1 of the "Step B Decision," that Management indeed failed to schedule and meet at Formal Step A, as it was similarly a foregone conclusion that the remaining issue that was sent to IMPASSE and eventuated this arbitration hearing was quite simply the question directly above.

Based on the above, it appears that the Management Advocate's/MA's ploy is to backtrack and persuade the Arbitrator that the Management DRT's arguments and contentions, never made at Formal Step A, should now be entertained and given weight by this Arbitrator. The Union objected and pointed directly to Article 15 itself and argued that if this latent argument by the DRT, first made in the Step B Decision, is not dismissed and given no weight, this threatens the very integrity of the Formal Step A process and renders the good faith principles of Article 15.3A of the National Agreement (NA) meaningless. Moreover, Article 15 places an obligation on both Formal Step A Designees that they must develop all facts and contentions the parties are presenting and arguing at the Formal Step A meeting. The language states, (c) The installation head or designee will meet with the steward or Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form unless the parties agree upon a later date. In all grievances at Formal Step A,

the grievant shall be represented for all purposes by a steward or a Union representative who shall have authority to resolve the grievance as a result of discussions or compromise in this Step. The installation head or designee also shall have authority to resolve the grievance in whole or in part. (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 Articles 17 and 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.

The Union Formal Step A Designee was not afforded the opportunity to make its presentations at Formal Step A due to the repetitive violation and the failure of the Management designee to schedule and meet at Formal Step A. Management must not be able to rehabilitate its case by inserting all of its facts and contentions for the first time in the Step B Decision.

Given these facts, the Management DRT stepped outside of the scope of his duties in order to rehabilitate Management's side of the grievance. Given these facts, the Arbitrator should decide this case based on the grievance papers that were appealed to Step B after the Management designee failed to schedule and meet at Formal Step A for the umpteenth time. A decision to permit such bad faith actions on the part of Management would be an incentive to not

ever meet at Formal Step A in the future. Management at the local level and this particular Management DRT member already believe that Management's failure to schedule and meet at Formal Step A and the many cease and desist orders rendered at Step B cannot result in anything other than the Union appealing the grievance to Step B pursuant to Article 15.3C.

The Union has demonstrated that nothing has had the deterrent affect to end these violations and force the Management designee to act in good faith with the Formal Step A grievance process.

After the record is closed, the Union has confidence that the Arbitrator will not award another meaningless cease and desist, but rather, order a cease and desist along with the remedy requested at Formal Step A of \$300, to increase each future violation.

Management Position

Management contends the Union has a responsibility to fully and contractually support their alleged contractual violation, including the requested remedy. In this instant case, the Union has fallen short.

It's undisputed and consistent with contractual language that the local parties are required to jointly review the JCAM through each stage of the grievance-arbitration procedure. However, while Article 15 provides distinct clarity to the procedures contained within, additionally, it provides a remedy when those procedures are not properly respected.

For example:

15.3.B The failure of the employee or the Union in Informal Step A, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Formal Step A, or at the step at which the employee or Union failed to meet

the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

In short, if the Union fails to meet the required timeliness at each step of the grievance process, then the grievance shall be considered “waived.” On the contrary, Article 15, Section 3.C explains:

15.3.C Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

This language is clear and unambiguous in that the remedy for Management’s failure to meet or render a timely decision requires that the Union advance the grievance to the next step if it wishes to pursue the dispute. It does not render the grievance “moot,” nor does it grant the Union monetary benefits. It appears the local Union is trying to gain a remedy through Arbitration which is inconsistent with what the national parties established through contract negotiations.

The Union has provided no such language contained anywhere in the Collective Bargaining Agreement which entitles them to a punitive monetary remedy. In this case file the grievant’s suspension letter was rescinded and expunged for lack of “Just Cause.” Just Cause was not met, in large part, because Management failed to meet and provide any written contentions to support their allegations.

The Union argued that Management “refused to meet,” and annotated that language on the PS Form 8190 (USPS NALC Joint Step A Grievance Form) dated May 27, 2009. This statement is incorrect. In this case file, the Union has asserted, “Management refused to meet,” as evidenced by the notations on the PS Form 8190. However, the Union has not documented

who refused to meet, when they refused to meet, or where they refused to meet. How is it possible that the USPS Formal Step A Representative can schedule a Formal Step A meeting, when the Union's Formal Step A Representative is not responsive to the USPS Formal Step A Representative's attempts to schedule the meeting. There is no evidence of a response or supporting documentation that the Union Formal Step A Representative did so.

On the NALC Form for dates of meetings, decisions and appeals, the Union did nothing more than provide a timeline for what the National Agreement requires when a dispute is filed. This does not constitute evidence that the USPS Formal Step A Representative did not attempt to schedule the Formal Step A meetings as required or that the Union Formal Step A Representative was unresponsive to any of the USPS Formal Step A Representatives' attempts to schedule the Formal Step A meeting.

The Union requests Management pays a compensatory remedy of \$300.00 for non-compliance to grievance settlements for failing to schedule and meet at the Formal Step A level again. The Union's remedy is in clear violation of Article 15 of the National Agreement and is inappropriate and without merit. The Postal Service requests that based on the evidence and testimony, which will be before you today that you find the remedy is inappropriate and deny this grievance.

Discussion and Opinion

The relevant issue in this grievance is Article 15, section 2A, Formal Step A. It is important to include certain parts in this discussion. It reads as follows in the relevant sections:

Formal Step A

“(a) The Joint Step A Grievance Form appealing a grievance to Formal Step A shall be filed with the installation head or designee. In any associate Post Office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Formal Step

A official, and shall so notify the Union Formal Step A representative.

(b) Any grievance initiated at Formal Step A, pursuant to Article 2 or 14 of this Agreement, must be filed by submitting a Joint Step A Grievance Form directly with the installation head within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form unless the parties agree upon a later date. In all grievances at Formal Step A, the grievant shall be represented for all purposes by a steward or a Union representative who shall have authority to resolve the grievances as a result of discussions or compromise in this Step. The installation head or designee also shall have authority to resolve the grievance in whole or in part.

(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 Articles 17 and 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.

(e) Any resolution will be sent to the steward and supervisor who initially were unable to

resolve the grievance.

(f) The Formal Step A decision is to be made and the Joint Step A Grievance Form completed the day of the meeting, unless the time frame is mutually extended. The Union may appeal an impasse to Step B within seven (7) days of the date of the decision.

(g) Additions and corrections to the Formal Step A record may be submitted by the Union with the Step B appeal letter within the time frame for initiating the Step B appeal with a copy to the Management Formal Step A official. Any such statement must be included in the file as part of the grievance record in the case."

Formal Step A is significant in the grievance procedure and should not be ignored. If the parties did not believe Step A important, they could have, should have eliminated it and proceeded to Formal Step B directly from Informal Step A. But despite numerous opportunities they did not.

There is a reason: This clause assists the parties to develop their arguments, and not be "ambushed" at the DRT or eventually arbitration, if it is unavoidable.

At the hearing Management presented 3 supervisors who testified as to their only true defense of the failure to initiate a Step A Meeting. Unfortunately I did not find the testimony of these gentlemen to be convincing and compelling. The testimony carried a staunch aroma of having been rehearsed and refined. The culmination of their testimony can best be summarized as more shadow than substance. It is not my intention to impugn the testimony but their efforts to contact Mr. Hooks to arrange a Step A meeting were weak and completely inadequate. Given the events of the past, replete with the cease and desist directives which serve as a paper sword, and an occasional \$100.00 fine, it appears to this arbitrator that the Management representatives' are unsympathetic to the necessities of this language. It appears to this arbitrator that the continued failure to schedule formal Step A was an organized, structural snub of the Union.

In this situation, Management was obligated to make a vigorous effort to contact and arrange a meeting. Word of mouth is not going to, in most cases, be sufficient or acceptable.

The record is an abomination. The Union presented over 20 incidents whereby the Step A Formal was never arranged. Management did not contest or challenge these records. In most of the cited cases, the DRT issued an ineffectual “cease and desist order” and on at least 2 occasions ordered a lump sum payment of \$100.00. Obviously, this superficial amount had little influence on Management.

However, in this issue – the precedent for the remedy has been affirmed by the DRT.

I find Management’s assertion that their failure to arrange a Formal Step A meeting was advantageous to the Union to be ludicrous and disconnected with good faith obligations and only serves to obstruct the negotiated grievance procedure. Knowing you will probably lose the grievance if you fail to appear at Step A Formal and then attempt to prevail at Step B, or in arbitration, is absurd. Management could conserve funds and time by just settling the grievance at Formal Step A. In this instant grievance the Union is compelled to a costly arbitration, to make a point!

Management and Union are obligated to attempt to resolve the grievance at the earliest step in the procedure. Management must affect a transparent effort to schedule the contractual meetings.

As to the question did Management violate Article 15? It is clear to me Management did violate this Article and by doing so fracture the integrity of the agreement between the parties.

As to the Union’s remedy request for a remedy:

There is an overall lack of agreement among arbitrators as to the type remedy proposed by the Union. This is evident in the several award citations presented by the parties. A review of these awards demonstrates a fairly equal division of opinions regarding the awarding of what

some would consider a penalty remedy. I am not influenced by the theory that the remedy in this case would be a penalty, but is a progressive and corrective action.

I strongly support the statement of Arbitrator, Louis M. Zigman, Esq. in Case #F98-4F-C020912732/SG-194-10C:

"As such, and in view of the narrow fact in this case, I agree that the Union's request for additional compensation be granted. However, because I agree that there was no monetary harm to any of the grievants, I agree that no remedy should be awarded to them. The monetary remedy should inure to the benefit of the Union because the Union has to bear additional expenses in processing grievances over these repetitive violations.

For all of these reasons, local Management is directed to cease and desist from these violations. And, rather than directing a remedy based upon the number of days from when a request was granted, I shall direct that the Service pay to the Union the sum of \$200.00, keeping in mind that the remedy could escalate based upon the nature of the conduct in other cases."

And in Case #J01N-4J-C07030670 (no Union number provided), Arbitrator, Mark W. Suardi, observes:

"As for a remedy, the Union seeks a monetary award. Admittedly, monetary awards for non-compliance with prior grievance settlements are the exception, not the rule. Yet some of the cited settlements in the dispute resolution package actually reflect the prospect of a compensatory award based on non-compliance with a grievance settlement. In any event, the myriad of grievance settlements set forth in the present record suggests that local Management's commitment to its Step A obligation has been tepid, making a compensatory award proper on the particular facts of this case. "

And in Case #J01N-4J-C08106377/06-093373, Arbitrator, Thomas J. Erbs ordered the Service to pay the entire invoice of the Arbitrator rather than only half.

Many agreements are silent as to the remedy power of an arbitrator, (as is the agreement between the parties) who has found a violation of the agreement. Of course the parties may deal with the matter in the agreement, in the submissions or by stipulation at the hearing. While they on many occasions attempt to restrict the arbitrator's remedy power, as the Service did in this instant case, one must still look to the contract and past awards as have I. The agreement itself does not place such prohibition on the arbitrator. However, discretionary remedial authority is assigned the arbitrator when most issue statements include the phrase, "what shall the remedy be?"

It is important to realize that an arbitral assignment carries with it an inherent power to specify an appropriate remedy, unless there is a specific and clearly restrictive language withdrawing a particular remedy from the arbitrator's jurisdiction. The CBA contains no such constraints.

I find that Management clearly failed to comply with previous "cease and desist" settlements. I do not find, in light of the numerous violations, that Management inadvertently failed to meet their obligations. I believe the "failures to schedule" are too profuse to be an accident or lapse of their attentiveness. As stated, they appear to be intentional. To paraphrase Arbitrator Suardi, "the possibility of mischief" is obvious as Management could sit back and hope the Union would forget to appeal and Management may claim the grievance resolved.

I hold that the Union does suffer harm to its image and its relationship with its membership when Management intentionally fails to honor its commitments to the bargaining agreement with impunity. Furthermore, there is the cost incurred when the Union must accept the burden of moving to arbitration for a case which, it would appear, the Service was agreeable to settle at the lowest level, but for the failure to make an appearance at this Formal Step A. Again!

Regarding the Union's request that I disallow the Service's introduction of new

witnesses, it is very possible that the issue may be referable to a National Arbitration review as an interpretive issue.

The fact that I received Management's arguments should not be considered as precedent, but only in the context of this instant grievance. If Management's production of evidence, which was not introduced prior to the Step B proceedings, had any effect on this award, the Union's arguments would deserve serious contemplation, as I do believe the "new evidence" argument to have merit. However, as stated, it is possible that the definitive ruling is relegated to future proceedings.

Award

Management is in violation of Article 15.2 Formal Step A, and is hereby ordered to pay NALC Branch 142, \$300.00 to compensate for repeated violations of the same contractual provisions. As such the sum is not punitive, but a small consideration for the Union's cost of a needless arbitration to enforce the agreement.

In addition, I hereby issue another cease and desist notice to Management in hopes that it will adhere to the contractual obligations of Article 15.

I maintain jurisdiction for a period of 30 days from the date of the award.

Date: 10/08/09 Arbitrator: Joseph Brock, Jr.