

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

To: Local and State Presidents
National Business Agents
Regional Coordinators
National Advocates
Resident Officers

From: Greg Bell, Director *B*
Industrial Relations

Date: May 12, 2010

Re: Award on Appeal Date for Dispute over Contract Postal Units

Enclosed you will find a copy of a national award by Arbitrator Linda Byars in which she rejected management's claim that our dispute over Contract Postal Units wasn't required to be placed on the national arbitration docket using the date the original grievance was appealed in accordance with the parties' 2004 MOU "Re: Review of Pre-1998 Grievances Referred or Appealed to the National Level." She specifically ruled that the grievance should be placed on the national arbitration docket with the original appeal date of March 16, 1995, rather than the date of our subsequent appeal to arbitration of a dispute involving the same grievance. (USPS #Q06C-4Q-C 09134027; 5/4/2010)

This case arose after the APWU reviewed a pre-1998 national grievance that had been held along with two other grievances pending the outcome of a January 2006 national dispute (which resulted in a pre-arbitration settlement agreement in May 2007). The three grievances had been remanded to the regional level in accordance with the parties' 2004 MOU, with one of the grievances being heard on the merits in arbitration. The union determined that another of these grievances presented an interpretive issue and we initiated a national interpretive dispute in March 2009 asserting that Contract Postal Units "may not exist when the Postal Service has the use of property by consignment or other special agreement, for example, on military bases, in National Parks, and in government buildings." We appealed the dispute to national arbitration on June 22, 2009. The APWU indicated that the grievance should be placed on the arbitration docket with the original appeal date of March 16, 1995 if the parties could not resolve the issue. In opposition, the Postal Service argued that the issue raised in the grievance had been resolved by the May 2007 pre-arbitration settlement agreement and an appeal to national arbitration by the APWU should be treated as a new appeal. The parties then agreed to bifurcate the case to address the procedural issue of the correct appeal to arbitration date.

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Arbitrator Byars stated that the only appropriate issue to be decided at this time was “where the grievance should be placed in line for arbitration.” She thus found that management’s contention that the interpretive issue in the 1995 grievance appeal was resolved by the May 2007 settlement agreement and a subsequent regional award wouldn’t be considered in this decision. She further reasoned that it was inappropriate to consider its alternative argument, that the issue is a new one and the 2004 MOU doesn’t preserve “the original appeal date,” in order to reach a decision on the issue that was a part of the bifurcation agreement.

Arbitrator Byars then addressed management’s contention that the 2004 MOU creates “a one-time benefit” or exception from the normal Article 15 process for pre-1998 grievances. The Postal Service had asserted that “the heading of the MOU, as well as the controlling paragraph having been written in the singular” supported its interpretation of how pre-1998 grievances would be treated. However, the arbitrator reasoned that “[c]ontrary to the Postal Service argument, the language of the June 3, 2004 MOU does not reflect the intent and expectation of the parties that its application would be a one-time event.” She indicated that paragraph 5 of the MOU “requires that the national dispute be placed back on the national arbitration docket using the date of the appeal of the original grievance.” Therefore, according to Arbitrator Byars, the MOU “does not preclude using the original appeal date when a grievance is appealed to national arbitration for a second time.”

The arbitrator found that the June 3, 2004 MOU was “an agreement by the parties to change the normal order [of appeals],” and an exception to Article 15 which “controls” until “a pre-1998 grievance is settled.” She thus ordered that the grievance be placed on the national arbitration docket with the appeal date of March 16, 1995.

In addition to the award, I have attached a copy of the June 3, 2004 MOU for your convenience.

Attachments

GB/MW:jm
OPEIU#2
AFL-CIO

BACKGROUND

In recognition of the changes negotiated in the Article 15 procedures of the 1998-2000 National Agreement, the parties agreed to a Memorandum of Understanding dated June 3, 2004. [Postal Service Exhibit No. 2 and APWU Exhibit No. 4.] The June 3, 2004 MOU required as a first step that the parties' national representatives meet in an attempt to resolve all grievances pending at the national level that were appealed to the national level from Step 3 and/or referred from area/regular arbitration under the pre-1998 Article 15 process. [Postal Service Exhibit No. 2 and APWU Exhibit No. 4.] As part of the review, three grievances originating in Enid Oklahoma, two at Vance Air Force Base (G90C-4G-C 94016792 and G90C-4G-C 94016793) and one at La Mesa Station (G90C-4G-C 4016795), were returned to Step 3.

By letter dated January 13, 2006, the APWU initiated a dispute at Step 4 (Q00C-4Q-C 0610364) based on the three Enid, Oklahoma grievances. [Postal Service Exhibit No. 5 and APWU Exhibit No. 6.] On May 17, 2007 the parties reached a pre-arbitration settlement on the interpretive issue, i.e., whether there is a violation of the national agreement, specifically Articles 1, 7, and 19, when contracts are let for a CPU to contractors who do not own the

property/facility. [Postal Service Exhibit No. 9 and APWU Exhibit No. 7.]

Following the agreement on the interpretive issue, the parties at the local level discussed the three Enid, Oklahoma grievances but did not resolve them. The grievances were scheduled for regional arbitration, and on November 7, 2008 Arbitrator Maretta Comfort Toedt found that the May 17, 2007 settlement agreement resolved an interpretive issue and that the three Enid, Oklahoma grievances were ready to be heard on the merits. [Postal Service Exhibit No. 10 and APWU Exhibit No. 8.] On February 5, 2009 Arbitrator Toedt presided at hearing on one of the Enid grievances, G90C-4G-C 94016795, and rendered an award dated April 8, 2009. [APWU Exhibit No. 9.]

By letter dated March 5, 2009, the APWU initiated a dispute at Step 4 of one of the Enid grievances, G90C-4G-C 94016793. [Joint Exhibit No. 2, pp. 8-9.] The APWU advised the Postal Service of its expectation that the grievance would be placed on the arbitration docket based on the original appeal date of March 13, 1995¹ should the parties be unable to resolve the issue. [Joint Exhibit No. 2, pp. 8-9.] By letter dated June 4, 2009 and referencing Case No. Q06C-4Q-C 09134027, the Postal Service set forth its position that the issue raised in the grievance was resolved by the May 17,

2007 pre-arbitration settlement agreement and that an appeal to national level arbitration by the APWU should be treated as a new appeal. [Joint Exhibit No. 2, pp. 3-5.] By letter dated June 10, 2009 and referencing Case No. Q06C-4Q-C 09134027, the APWU set forth its position. [Joint Exhibit No. 2, pp. 6-7.] By letter dated June 22, 2009, the APWU appealed Case No. Q06C-4Q-C 09134027, the Grievance, to arbitration. [Joint Exhibit No. 2, p. 2.] By letter dated November 23, 2009, the parties jointly scheduled the Grievance for arbitration with the notation "(Bifurcated to address issue of correct appeal to arbitration date)." [Joint Exhibit No. 2, p. 1.]

On January 12, 2010 the Grievance came before the Arbitrator for hearing on the procedural issue. At the request of the parties, the record remained open until March 29, 2010 for post-hearing briefs. The parties agree that the issue is whether the dispute should be scheduled for arbitration based on the appeal date of March 16, 1995 or of June 22, 2009.

OPINION

Clearly, the APWU intends to have the Grievance heard and decided at the national level. The question at this time is not whether the Grievance can be appealed to arbitration,

¹ The arbitration appeals of the Enid grievances (APWU Exhibits 5A,5B,

and decided on the arbitrability issue and on the merits, if necessary. Rather, the question here is where the Grievance should be placed in line for arbitration. The Postal Service acknowledges that the parties have agreed to bifurcate the hearing to permit a decision on the correct date of appeal prior to a hearing on the merits.

The controlling language, Paragraph 5 of the June 3, 2004 MOU, provides as follows:

In the event that either party's national representative determines an issue is interpretive and initiates a dispute, and the dispute is subsequently appealed to national arbitration, it will be placed back on the national arbitration docket using the date of the appeal of the original grievance. Accordingly, such dispute should contain a reference to the original grievance number and the original date of appeal to national arbitration. [APWU Exhibit No. 4 and Postal Service Exhibit No. 2.]

The original arbitration appeal date of the Enid grievances is March 16, 1995. [APWU Exhibit Nos. 5A, 5B, and 5C.] The APWU maintains that the language of Paragraph 5 controls and leads to only one conclusion, i.e., the Grievance is to be placed on the national arbitration docket with the date of March 16, 1995.

As the Postal Service maintains, the parties addressed interpretive issues related to the Enid grievances at the national level and reached a national level settlement dated May 17, 2007. By award dated November 7, 2008 Arbitrator

and 5C) are dated March 16, 1995.

Maretta Toedt addressed a threshold issue with respect to the three Enid grievances and decided that they should be heard on the merits. Arbitrator Toedt heard the grievance arising at La Mesa Station, G90C-4G-C 94016795, and issued a decision dated April 8, 2009 on the merits. The other two grievances, G90C-4G-C 94016792 and G90C-4G-C 94016793 arising at Vance Air Force Base, have not been heard on the merits, and the APWU is appealing G90C-4G-C 94016793 as containing an interpretive issue. The APWU initiated a dispute to national arbitration, and pursuant to the June 3, 2004 MOU it is to "be placed back on the national arbitration docket using the date of the appeal of the original grievance," i.e. March 16, 1995.

If, as the Postal Service maintains, the interpretive issue(s) in the 1995 grievance appeal was resolved by the May 17, 2007 settlement agreement and the Toedt decisions, then the Grievance will be decided on the threshold issue at arbitration.² However, whether the interpretive issue is the same as the one settled by the May 17, 2007 settlement agreement is not the issue to be decided here. To decide that issue would nullify the agreement by the parties to bifurcate the hearing for a decision on the correct appeal date.

² If the parties agree, that issue could be decided with the submission of written arguments and without the necessity of an additional hearing day.

The Postal Service further maintains that if the issue is not identical to the one raised in 1995, then it is a new issue and the June 3, 2004 MOU does not preserve the original appeal date. However, as stated, that issue is not yet at arbitration. The parties' agreement to bifurcate to address the issue of the correct appeal to arbitration date necessitates such a decision prior to the decision that the Postal Service now seeks.

The Postal Service maintains that the June 3, 2004 Memorandum of Understanding creates a singular, unique exception to the normal Article 15 appeal process to address a very specific problem that the parties were having and to give the pre-1998 grievances the benefit of the new procedure, i.e., a one-time benefit. It is the Postal Service's position that once a grievance or set of grievances has received the benefit of the exception provided for in the June 3, 2004 MOU and has been advanced to the head of the line once; thereafter, the grievance must adhere to the negotiated Article 15 appeal procedure. The three Enid grievances, having invoked the MOU scheduling exception in 2006, were placed at the head of the line pursuant to the provisions of the MOU. Therefore, the Postal Service submits that the APWU is not entitled to another scheduling exception for any of the Enid grievances.

As the Postal Service recognizes, the record demonstrates that the parties did not address the possibility of more than one attempt to invoke the retroactive date of a pre-1998 appeal when they negotiated the June 3, 2004 MOU. However, the Postal Service maintains that the thrust of the language is more consistent with the view that the MOU addressed a singular process and not an ongoing special process that would give the pre-1998 grievances super-standing under the new Article 15 procedure. Although the Postal Service contends that the heading of the MOU, as well as the controlling paragraph having been written in the singular, supports its interpretation, the limitation the Postal Service seeks is not evident in the language.

The original appeal date of Case No. G90C-4G-C 94016793 is March 16, 1995, and Paragraph 5 of the MOU requires that the national dispute be placed back on the national arbitration docket using the date of the appeal of the original grievance. The June 3, 2004 MOU does not preclude using the original appeal date when a grievance is appealed to national arbitration for a second time. Contrary to the Postal Service argument, the language of the June 3, 2004 MOU does not reflect the intent and expectation of the parties that its application would be a one-time event.

As the Postal Service maintains, the National Agreement mandates that appeals, as a general rule, be scheduled in the

order of appeal and that agreement of the parties is required to change the normal order. The June 3, 2004 MOU is an agreement by the parties to change the normal order. It is, as the Postal Service agrees, an exception to the Article 15 language. Until a pre-1998 grievance is settled, the exception language controls. Accordingly, the Arbitrator finds for the APWU and makes the following Award.

AWARD

The Grievance shall be placed on the national arbitration docket with the appeal date of March 16, 1995.



DATE: May 4, 2010

Linda S. Byars, Arbitrator



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

June 4, 2004

TO: Local and State Presidents
National Business Agents
National Advocates
Regional Coordinators
Resident Officers

FR: Greg Bell, Director
Industrial Relations

A handwritten signature in black ink, appearing to be 'GB', is written over the name 'Greg Bell'.

RE: Pre-1998 Grievances Referred or Appealed to the National Level

Enclosed you will find a copy of the Memorandum of Understanding (MOU) regarding pre-1998 grievances referred or appealed to the national level.

The intent of the enclosed MOU is to require the parties at the national level to review pre-1998 grievances to determine whether there actually is an interpretive dispute between the parties, and if not, to have the grievances adjudicated based on their specific fact circumstances at the appropriate level (local or area/regional). If the parties at the regional level are unable to reach agreement, remanded pre-1998 grievances, including any grievances previously certified for arbitration that were held in abeyance, will be placed back on the appropriate arbitration docket to be scheduled in the order originally appealed.

Consistent with the intent of the MOU, in the event either party at the national-level determines that a pre-1998 grievance involves an interpretive issue, the respective party must initiate a new national dispute consistent with the current provisions of Article 15. If the dispute is not resolved and is subsequently appealed to national arbitration, it will be placed back on the national arbitration docket using the date of the appeal of the original pre-1998 grievance.

Background

Prior to the 1998 national agreement, if either party's representative maintained that a Step 3 grievance involved an interpretive issue the union was entitled to appeal that grievance to Step 4. Moreover, if the Postal Service's Step 3 representative maintained in its Step 3 decision that the grievance involved an interpretive issue, the union was required to appeal to Step 4, rather than regional/regular arbitration (even if the union disagreed).

In addition, either party at the regional level had a right to have a grievance withdrawn from regular arbitration, and the grievance would therefore be appealed to Step 4, if they maintained that the case involved an interpretive dispute.

Once a grievance was appealed to Step 4, it had to be (1) remanded by mutual agreement, (2) settled, (3) arbitrated, or (4) withdrawn. Most of the grievances at the national level are grievances the Postal Service maintained were interpretive (requiring an appeal to Step 4), despite the fact that most of the grievances appealed to Step 4 are returned by the parties to Step 3 as non-interpretive. We believe that in most cases the process was being used as a tactic to delay the resolution of grievances at the local and area/regional level.

In 1998, we were successful in negotiating changes to Article 15 of the National Agreement that improved the process, requiring that national-level disputes be determined and initiated by the parties at the national level, rather than at the regional level.

The MOU is intended to apply the same principle to pre-1998 grievances that apply to post-1998 cases, i.e., that it is the parties at the national level that are responsible for identifying interpretive issues.

If you have any questions, please contact my office.

GB:jmg
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afl-cio

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
AMERICAN POSTAL WORKERS UNION, AFL-CIO**

Re: Review of Pre-1998 Grievances Referred or Appealed to the National Level

In recognition of the significant modification that the parties made to the grievance/arbitration procedure during the 1998 negotiations, and consistent with the intent of the 1998 changes that national level "Interpretive" disputes be initiated at the national level, rather than at the Step 3 area/regional level, the parties agree to the following:


1. The parties' national representatives shall meet in an attempt to resolve all grievances pending at the national level that were appealed to the national level from Step 3 and/or referred from area/regular arbitration under the pre-1998 Article 15 process, i.e. prior to July 12, 1999.

In the event either party's national representative determines that a grievance involves an interpretive issue, the respective party may initiate a dispute, and the grievance will be remanded to be held pending the outcome of the national dispute. The parties may mutually agree to remand other grievances that may have been filed on the specific interpretive issue in dispute, to be held pending the outcome of the national dispute.

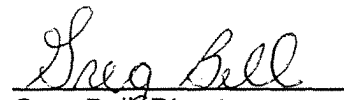
2. No later than September 30, 2004, those grievances appealed under the pre-1998 Article 15 process that are not settled or withdrawn or remanded pending the outcome of a national dispute shall be remanded to the parties at Step 3 for further processing or to be scheduled for arbitration, as appropriate. Such grievances shall be adjudicated based on their specific fact circumstances at the appropriate level (local or area/regional). If the grievance was scheduled to be heard in arbitration at the time of referral, or was being heard in arbitration, the case will be processed in accordance with the provisions of Article 15.5.B.5 and the MOU on Step 4 Procedures found on page 316 of the 2000 National Agreement. If the case had not yet been scheduled for arbitration, it will be placed back on the appropriate arbitration docket to be scheduled in the order originally appealed. If already scheduled for arbitration the case will be heard before the same arbitrator who was originally scheduled to hear the case. Further, if the hearing had convened, the case will continue at the same stage of arbitration.
3. In addition, the parties at the appropriate local and/or regional level shall meet in an attempt to resolve those grievances that were held in abeyance pending the outcome of a remanded pre-1998 level grievance. Thereafter, the procedures and time limits applicable to the respective steps shall apply. Such grievances shall be adjudicated based on their specific fact circumstances at the appropriate level (local or area/regional), unless the union designates a representative case in accordance with Article 15.2 (Step 3) (e). If a grievance held in abeyance is certified for arbitration, it

will be placed back on the appropriate arbitration docket to be scheduled in the order originally appealed.

4. If either party's Step 3 or area/regional representative believes that a remanded pre-1998 grievance involves an interpretive issue, the issue must be discussed with their respective national representative at the headquarters level and processed pursuant to the new 1998 Article 15 process.
5. In the event that either party's national representative determines an issue is interpretive and initiates a dispute, and the dispute is subsequently appealed to national arbitration, it will be placed back on the national arbitration docket using the date of the appeal of the original grievance. Accordingly, any such dispute should contain a reference to the original grievance number and the original date of appeal to national arbitration.



John W. Dockins, Manager
Contract Administration (APWU)
Labor Relations



Greg Bell, Director
Industrial Relations
American Postal Workers
Union, AFL-CIO

Date: 6-3-04

Date: 6/3/04