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INDUSTRIAL RELATIONS

ARBITRATION AWARD

January 18, 1983

UNITED STATES POSTAL SERVICE

-and-

Case No. H8C-4C-C 12764

AMERICAN POSTAL WORKERS UNION

Art. 15 *Levine*

Subject: Withdrawal from Regional Arbitration

Statement of the Issue: Whether the instant grievance presently belongs in regional arbitration as the APWU asserts or in Step 4 of the grievance procedure as the Postal Service asserts?

Contract Provisions Involved: Article XV, Sections 2, 3 and 4 of the July 21, 1978 National Agreement.

<u>Grievance Data:</u>	<u>Date</u>
Grievance Filed:	December 3, 1979
Step 2 Answer:	January 14, 1980
Step 3 Answer:	February 26, 1980
Appeal to Arbitration:	February 28, 1980
Regional Arb. Hearing:	January 18, 1981
Attempted Withdrawal:	February 13, 1981
National Arb. Hearing:	September 14, 1982
Briefs Submitted:	Nov. 29, 1982 and January 3, 1983

Statement of the Award: The instant grievance belongs in Step 4 of the grievance procedure.

BACKGROUND

This case involves a dispute as to where the instant grievance belongs in the grievance and arbitration procedure. The APWU says that it belongs in regional arbitration and that the Postal Service did not properly remove it from regional arbitration to Step 4. The Postal Service disagrees. It urges that it referred the grievance to Step 4 in accordance with the procedure set forth in Article XV, Section 4B(5) of the National Agreement. It believes there is no sound basis, at this time, for returning this matter to regional arbitration.

The grievance was filed on December 3, 1979, on behalf of two part-time flexible employees in Duluth, Minnesota. These employees had been scheduled in advance to work a certain day but were then told not to report. They did not report. They claimed, however, that they were entitled to be paid "for four hours guarantee as if they had worked." The Postal Service denied the grievance at the various steps of the grievance procedure. Its Step 3 answer added:

"In our judgment, the grievance does not involve any interpretive issue(s) pertaining to the National Agreement or any supplement thereto which may be of general application. Unless the union believes otherwise, the case may be appealed directly to regional arbitration..."

The APWU agreed with this Management view and appealed the case to regional arbitration.

A hearing was held before Arbitrator Gerald Cohen on January 19, 1981. The Postal Service representative, J. K. Hellquist, apparently was surprised by the argument made by the APWU. He concluded during the hearing that the grievance seemed to raise an interpretive issue under the National Agreement. He told Arbitrator Cohen and the APWU that he would, after the hearing but prior to the filing of post-hearing briefs, determine whether he wished to refer the case to Step 4 in accordance with Article XV, Section 4B(5). That provision reads:

"If either party concludes that a case referred to Regional Arbitration involves an interpretive issue under the National Agreement or some supplement thereto which may be of general application, that party may withdraw the case from arbitration and refer the case to Step 4 of the grievance procedure."

Hellquist wrote to Arbitrator Cohen and the APWU on February 13, 1981. His letter stated in part:

"After lengthy discussions with the Union in the person of Mr. Williams, APWU Regional Coordinator, Mr. Williams has indicated to me that it was the decision at the national level of the [APWU]...that employees who are advised to not come in to work under similar circumstances constitutes an obligation on the part of the employer for call-in pay. In view of the fact that the Union insists that this is a national interpretation of the call-in pay provision, which is allegedly supported by Arbitrator Garrett's National Award on this subject, the employer considers this to be a national issue that should be handled at Step 4 of the grievance procedure.

"The arbitrator should issue no opinion and award on this matter until there has been a determination at Step 4 as to whether or not this is a national interpretive issue. If it is decided that this is a national interpretive issue, the arbitrator's jurisdiction over this matter is revoked by virtue of the contract language. If the Postal Service decides at Step 4 that this is not a national interpretive issue, the arbitrator will be advised as to whether or not the parties wish to have it decided." (Emphasis added)

The APWU replied on February 20, 1981. It urged that the Hellquist letter did not comply with Article XV, Section 4B(5) because although there'd been a "referral" to Step 4, there'd been no "withdrawal" from regional arbitration. Its letter explained its position in these words:

"...Mr. Hellquist's request does not conform to the agreement and, therefore, you [Arbitrator Cohen] do not have the authority to honor that request.

* * *

"The parties have a further opportunity under Article XV, Section 4B(5) to reassess their positions and determine whether one party or the other

wishes to withdraw from arbitration at the regional level and refer the case to Step 4. The contract is clear. The party which determines the case involves an interpretive issue must withdraw and refer. The language does not permit a referral without the withdrawal as Mr. Hellquist seems to be requesting. In his letter, ...he states: 'The employer considers this to be a national issue that should be handled at Step 4 of the grievance procedure.' If that is true, he should withdraw the case and refer it to Step 4. However, in the [next]...paragraph, he requests that you not issue a decision until a determination has been made at Step 4 as to whether or not this is a national interpretive issue. He goes on to state that if the Postal Service at Step 4 decides unilaterally that the issue is not a national interpretive issue, you (Arbitrator Cohen) will be advised as to whether or not to decide the case.

"Mr. Hellquist cannot have both a Step 4 grievance and a case certified for arbitration all within the same case. He must decide, as he assured us at the hearing he would, prior to the date set for filing briefs.

* * *

"In light of all of the above, I must assume, in the absence of a specific withdrawal from arbitration by the Employer, that you retain authority to decide this case within the time frame mutually agreed to at the hearing..."

The APWU filed its post-hearing brief on February 24, 1981. It urged Arbitrator Cohen to "decide this case in accordance with the mutual agreement made at the hearing." The arbitrator initially accepted the APWU's view of Hellquist's February 13, 1981 letter. He advised the parties on March 2, 1981 that "the matter has not been formally appealed to Step 4" by the Postal Service and that he therefore would "pursue my duties as the Arbitrator..." Hellquist did not file a post-hearing brief. Instead, he promptly advised the arbitrator and the APWU on March 5, 1981 that "my prior letter indicates that the matter has been referred to Step 4." The arbitrator, relying on this last statement from Hellquist, notified the parties on March 16, 1981 that "I will take no further action in the matter, as my jurisdiction and authority ceases immediately upon reference to Step 4."

The APWU protested. But Arbitrator Cohen stood by his ruling. It is not clear whether there has actually been a Step 4 meeting on this grievance after March 16, 1981. The APWU took the position that the Postal Service had not properly removed this grievance from regional arbitration and that the merits of the grievance should be returned to Arbitrator Cohen for a decision. It brought this procedural issue to national arbitration.

DISCUSSION AND FINDINGS

The applicable contract principle is found in Article XV, Section 4B(5). Where either party determines that a case involves a national interpretive issue, it "may withdraw the case from [regional] arbitration and refer the case to Step 4 of the grievance procedure." The question here is whether the Postal Service properly invoked this right in the instant case. The Postal Service says it did; the APWU says it did not.

The evidence plainly supports the Postal Service's position. The regional arbitration was held on January 19, 1981. During the course of the hearing, the Postal Service spokesman (Hellquist) stated that he would advise the arbitrator and the APWU, prior to the filing of post-hearing briefs, whether he wished to refer this grievance to Step 4 pursuant to Article XV, Section 4B(5). Some twelve or thirteen days before the briefs were due, Hellquist wrote to the arbitrator and the APWU. He stated that "the employer considers this to be a national issue that should be handled at Step 4 of the grievance procedure." His intentions could not have been clearer. He was invoking Article XV, Section 4B(5) and "refer[ring] the case to Step 4 of the grievance procedure."

The APWU asserts that Article XV, Section 4B(5) requires two separate and distinct actions: "withdraw[ing] the case from [regional] arbitration" and "refer[ring] the case to Step 4 of the grievance procedure." It concedes that the necessary referral took place¹ but it insists that no withdrawal occurred. This argument, however, is unrealistic. It enshrines form at the expense of substance.

¹ This concession is obvious from the APWU's February 20, 1981 letter quoted at length earlier in this opinion.

The act of referring the case to Step 4 necessarily included withdrawing the case from regional arbitration. The Postal Service did not have to utter the precise words of Article XV, Section 4B(5) to trigger the application of this provision. It simply had to express its intention to invoke this provision, its intention to move the dispute from regional arbitration to Step 4. It did so.²

Hellquist's letter stated too that Arbitrator Cohen "should issue no opinion...until there has been a determination at Step 4 as to whether or not this is a national interpretive issue." He then added that if a national issue is involved "the arbitrator's jurisdiction over the matter is revoked..." but that if a national issue is not involved "the arbitrator will be advised as to whether or not the parties wish to have it decided."³ The APWU, in its correspondence with Arbitrator Cohen³, viewed Hellquist's words as evidence that the Postal Service was not withdrawing the case from regional arbitration. I cannot agree. This portion of the Hellquist letter was merely a statement of opinion as to what might be decided in Step 4 and how any such decision would affect Arbitrator Cohen's authority to rule on the merits of the dispute. Nothing he said here has any significance for purposes of this dispute. For he had already stated in clear and unequivocal language that the Postal Service was moving the case to Step 4 and hence necessarily removing the case from regional arbitration.

The Postal Service did not waive its right to refer the case to Step 4. It told Arbitrator Cohen and the APWU in the regional arbitration hearing that it would advise them, prior to the filing of post-hearing briefs, whether it wished to invoke Article XV, Section 4B(5). It decided to invoke this provision and gave notice of its decision in Hellquist's February 13, 1981 letter. This was almost two weeks before the brief filing date. The case was properly referred to Step 4.

² Arbitrator Cohen's initial ruling that Hellquist's February 13, 1981 letter did not properly invoke Article XV, Section 4B(5) is certainly not binding on this national arbitrator. That ruling was, in my opinion, wrong.

³ The APWU did not really pursue this point in its post-hearing brief at this national arbitration.

The Postal Service also requests in this national arbitration that the grievance be denied on its merits. However, only the procedural problem under Article XV, Section 4B(5) was explored at the national arbitration hearing. I do not have sufficient evidence or argument for a ruling on the merits. In any event, the case properly belongs in Step 4 for further discussion and disposition.

AWARD

The instant grievance belongs in Step 4 of the grievance procedure.


Richard Mittenthal, Arbitrator