In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE Case No. H1C-NA-C 52

and

AMERICAN POSTAL WORKERS UNION

APPEARANCES: D. James Shipman for the Postal Service; O'Donnell, Schwartz & Anderson, by Susan L. Catler, Esq.

DECISION

This grievance arose under and is governed by the 1981-1984 National Agreement (JX-1) between the above-named parties. The undersigned having been jointly selected by the parties to serve as sole arbitrator, a hearing was held on 13 January 1984, in Washington, D. C. Both parties appeared and presented evidence and argument. The arbitrator finds the issues to be as follows:

1. Does Article 15, Section 4.B(7) of the National Agreement preclude either party from ordering a verbatim transcript of a regular arbitration hearing at the regional level without the consent of the other?

2. Did the Postal Service violate Article 15, Section 4.B(7) of the 1981-1984 National Agreement by ordering a verbatim transcript of all regular arbitration hearings at the regional level before one particular arbitrator?

3. If the answer to Issue #1 or Issue #2, or both of them, is in the affirmative, what is the appropriate remedy?

A verbatim transcript was made of the arbitration proceeding. Each side filed a post-hearing brief.

On the basis of the entire record, the arbitrator makes the following

AWARD

1. Article 15, Section 4.B(7) of the 1981-1984 National Agreement does not preclude either party from ordering a verbatim transcript of a regular arbitration hearing at the regional level without the consent of the other, so long as reasonable advance notice is provided.

2. The Postal Service did not violate Article 15, Section 4.B(7) of the 1981-1984 National Agreement by ordering a verbatim transcript of all regular arbitration hearings at the regional level before one particular arbitrator.

3. The grievance is denied.

Benjamin Aaron
Arbitrator

Los Angeles, California
4 May 1985

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OPINION

I

Article 15, Section 4.B(7) of the 1981-1984 National Agreement (JX-1) provides in pertinent part:

> Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Regional level arbitration, except either party at the National level may request a transcript, and either party at the hearing may request to file a post-hearing brief.

Article 15, Section 4.A(7) provides in pertinent part: "All arbitrators on the Regular Regional Panels . . . shall serve for the term of this Agreement and shall continue to serve for six (6) months thereafter, unless the parties otherwise mutually agree."

Some time in April, 1982, the Postal Service notified the Union that transcripts would be made of regular arbitrations at the regional level before a particular arbitrator. (In January, 1982, the Postal Service had passed up its op-

portunity to remove this arbitrator from the Regional Panel.) Thereafter, transcripts were routinely requested by the national office of the Postal Service in all regular regional arbitrations conducted by that arbitrator. The reason subsequently given by the Postal Service at the arbitration hearing for following this procedure was that its representatives had observed that the arbitrator had "some difficulty . . . [in keeping] the facts straight and we believe that particular Arbitrator may need some assistance in that for our own interest, to protect our own interest." (Tr. 16)

On 26 April 1982, William Burrus, the Union's General Executive Vice President, wrote a letter (UX-1) to Joseph F. Morris, Senior Assistant Postmaster General, Employee and Labor Relations Group, stating in part:

> The . . . Union maintains that demand for transcripts in all Hearings before a specific arbitrator is violative of the National Agreement.
>
> Article 15, Section 4.B(7) states in part "normally, there will be no transcripts of arbitration hearings."

In a letter dated 4 February 1983 (JX-2) to James C. Gildea, Assistant Postmaster General, Labor Relations Department, Union President Moe Biller submitted a "dispute over the interpretation of Article 15, Section 4, B(7) as prohibiting USPS policy of demanding transcripts in all cases heard before" the arbitrator in question. His letter

also stated in part:

> The union interprets the language of exception ". . . except either party at the National level may request a transcript." as requiring the party who desires a transcript to make such request from the other party.
>
> The union further interprets the application of "normally" as restricting the right of either party to demand transcripts in all cases heard before a particular arbitrator.

On 22 February 1983, William E. Henry, Jr., Director, Office of Grievance and Arbitration, wrote a letter to Burrus (JX-2), stating the position of the Postal Service on the Union's grievance, as follows:

> It is the position of the Postal Service that the language in dispute reserves to each party individually the right to have a regular regional arbitration hearing recorded and transcribed when the need arises, without seeking the concurrence of the other party; and that this same right is reserved for the submission of post-hearing briefs on the same basis. This position anticipates that appropriate reasonable notice be given the other party in each such instance.

On 9 March 1983, the Union formally appealed the dispute to arbitration. (JX-2)

Concerning the practice followed before the arbitrator in question during the period between April, 1983, and January, 1984, a representative of the Postal Service, D. James Shipman, advised that the Postal Service initially had advised the Union by telephone of its intention to order a transcript of the hearing, but later had acceded to the Union's demand that the request be in writing. Shipman also

provided the following additional information (Tr. 62-63):

> When we have made a request or a notification . . . to the National Union concerning [this particular arbitrator], we've never received back a written response or anything saying, "We do not agree to this," or, "We object to it." There have been instances wherein advocates who agree to a level arbitration hearing have, in fact, asserted objections at the hearing.
>
> [The arbitrator in question] has basically taken a look at the particular cases and in some cases he found that, irrespective of whether it was he or any other Arbitrator, there was a basis for taking a transcript and permitted the taking of a transcript.
>
> . . . In one case . . . [he] reserved a ruling on whether or not to take a transcript and he wrote an opinion and award which . . . addressed the question of whether a transcript ought to be taken and he took it upon himself to interpret this language as requiring some agreement by the parties et cetra. However, he did allow the transcript in that particular case and then said "This is how I'm going to rule in future cases."
>
> In one other case . . . [he] declined to allow the Court Reporter to take a transcript for the purpose of making a record of the proceeding and in that particular matter it ultimately eventuated that the Court Reporter remain[ed] simply for the purpose of making notes for the Postal Service and this was strictly a Postal Service record. A copy was not provided to the Arbitrator.
>
> In another case, the Union objected to the presence of a Court Reporter and it was pointed out to [the arbitrator] that a request had, in fact, been made in that case at the National level and notification by the Postal Service to the Union. The Union, at the National level, had never asserted any objection to the presence of a Court Reporter and the Union . . . at the Regional

> level hearing, could not then assert an objection to the standard procedure. In that case he permitted the presence of the Court Reporter and did receive a copy of that and rendered an opinion and award concerning the matter . . . .

Phillip Tabbita, a Union representative, added the following to Shipman's account (Tr. 64):

> . . . [I]n quite a number of cases that . . . [this particular arbitrator] has had, the objections have been raised and . . . [he] has acted quite vigorously to avoid a ruling on that, feeling that . . . the transcripts were directed at him but he would prefer not to be the person who decides whether or not the transcript will be taken and a number of other advocates have failed to pursue their objections, based on his desire not to be the focal point in making the decision.

The Postal Service also called as a witness, Frederick W. Frost, Jr., formerly General Manager, Arbitration Division and currently General Manager, Labor Contract Administration, who testified, over the Union's objections, concerning the background of negotiations over Article 15, Section 4.B(7) prior to its introduction into the 1978-1981 National Agreement.(Ex-4) His testimony, in essence, was to the effect that he had refused to yield to Union proposals that transcripts could be ordered only by mutual agreement, and that the parties had ultimately agreed that

> the National parties could make a determination in the sense that if I wanted a transcript on the National basis, I would call Frosty [Forrest M. Newman, APWU Director of Industrial Relations] or call [Frank] Conners [Vice President of the NALC] and tell them, "I'm going to get a transcript in this case" (Tr. 44).

The Postal Service also introduced a letter dated 26 May 1983 (EX-6) to Sherry S. Barber, General Manager, Arbitration Division, from John P. Richards, APWU Industrial Relations Director, reading as follows:

> Pursuant to Article 15, 4B(7), the . . . Union will have a court reporter for: [specify the date, arbitrator, location, grievance number, and grievant]. . . .
>
> P.S. Frank Dyer of the USPS was informed by phone this date.

It also appears that the determination whether to file a post-hearing brief in any given regular regional arbitration case has been made unilaterally by each party, without requesting the consent of the other.

II

Union counsel objected to the admission of Frost's unrebutted testimony at the arbitration hearing on two grounds: first, because the language of Article 15, Section 4.B(7) is "clear," and second, because "bargaining history was not mentioned in the Step 4 decision, where it should have been mentioned, if they're going to rely on it." (Tr. 23(a)) I do not find either objection persuasive.

To characterize the language of Article 15, Section 4.B(7) as "clear" strains credulity; the provision is studded with ambiguities, as the competing arguments of the parties prove only too well. Specifically, they cannot agree on the meaning of "Normally" or of "request." Nor do I believe

that the Union has been prejudiced because the Postal Service introduced testimony about bargaining history for the first time at the arbitration hearing. Of course, it would have been better practice for the Postal Service to have indicated its partial reliance on bargaining history in the grievance procedure, but the Union can hardly claim to have been surprised by Frost's testimony at the arbitration hearing. Whenever the meaning of contract language is in dispute, the parties are automatically on notice that the relevant bargaining history may come up in an arbitration hearing. In any case, I think this particular dispute can be resolved primarily on the basis of a common-sense interpretation of the disputed provision.

Construed in context, the word "Normally" means, in my judgment, "usually," rather than "in all but abnormal cases." I reject the latter interpretation because there is no indication in the National Agreement itself or in the bargaining history that the parties ever had a common understanding of what constitutes an "abnormal" case, and also because the former interpretation seems to conform better with past practice.

It also seems clear that the word "request" does not mean what it normally does in a different context; rather, in this provision it means "notify." That this interpretation takes a certain liberty with the contract language is

true; but it also adopts a construction that conforms with that adopted by the parties themselves. Thus, as previously noted, when the Union decided it wanted a transcript in a regular case at the regional level, it advised the Postal Service that it would "have" a court reporter, and added that a Postal Service representative had been "informed" of its decision by telephone. That is not a request; it is a notification. Frost's testimony of Postal Service practice was to the same effect. Finally, according to statements by both Postal Service and Union representatives, even the particular arbitrator in question was uncertain how to handle the issue of a transcript ordered by the Postal Service, deciding on some occasions to allow it, on others to refuse to use it, and on still others, quite understandably, to avoid ruling on the question.

I therefore conclude that Article 15, Section 4.B(7) of the National Agreement does not preclude either party from ordering a verbatim transcript of a regular arbitration hearing at the regional level without the consent of the other, so long as reasonable advance notice is provided, and that in the circumstances of this case the Postal Service did not violate the National Agreement by regularly ordering transcripts in cases heard by one particular arbitrator.

This determination is not intended, of course, as an endorsement of the Postal Service's policy, the consequences

of which are to cause great embarrassment to the arbitrator in question and to create doubts in the Union's mind about the Postal Service's good faith. Nevertheless, there is no indication that the number of cases heard by that arbitrator constituted so unusually high a percentage of regular cases in that region as to offend against the principle that neither party will usually (i.e., "normally") order a transcript.

Benjamin Aaron
Arbitrator