ARBITRABILITY

C# 01518 ✓

(2)

ARTICLE XVI, SECTION 6 VETERANS' PREFERENCE

RA-2081D-75
CASE NO. NC-W-4391D
(Jack C. Bessee)
Durango, Colo.
REMOVAL

In the Matter of the Arbitration between	:
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	:
-and-	:
UNITED STATES POSTAL SERVICE	:

BEFORE: Howard G. Gamser, Arbitrator

APPEARANCES:

For the NALC - James R. Barnett, Esq.

For the USPS - Stephen C. Yohay, Esq.

BACKGROUND:

In this case the National Association of Letter Carriers seeks to arbitrate the discharge of Grievant Jack C. Bessee, who had been employed as a City Letter Carrier at the Durango, Colorado Post Office. The USPS claimed that the issue posed by the Union is not arbitrable, and the parties agreed that the only issued to be presented in this proceeding was the question of arbitrability.

The parties further stipulated and agreed that the issue to be decided could be stated as follows:

> "Whether Grievant Jack C. Bessee, by filing an appeal of his discharge with the Civil Service Commission under the Veterans Preference Act, waived access to arbitration under the National Agreement with respect to the merits of his discharge."

The parties further agreed that the evidence relative to the issue of arbitrability could be stipulated into the record without the necessity of calling witnesses.

THE CHRONOLOGY OF EVENTS:

July 15, 1976 - By certified mail, the Postmaster notified the grievant that he proposed to remove him from the postal service not earlier than thirty days from the date that he received this letter. The notification advised the grievant that he, as a preference eligible employee, had a right to review the material underlying the proposed removal and to answer the notice personally and in writing, or both, to the Postmaster. The Grievant was further advised that full consideration would be given to any answer and supporting documentation he submitted, and that within 10 days or as soon as possible after his answer was received, the Postmaster would issue a written decision.

In that same letter, the Postmaster also advised the Grievant that he could file a grievance under Article XV, Section 2 of the National Agreement within fourteen days of receipt of this notice.

July 17, 1976: M.M. Burnett, the President of the Grievant's Local Branch No. 792, initiated two grievances on behalf of Bessee protesting his suspension and also his separation.

July 19, 1976: Grievant Bessee sent a letter, in answer to the one he had received from the Postmaster on July 15, 1976, in which he attempted to explain why he had engaged in a physical altercation with his supervisor.

July 20, 1976: The contractual grievance was denied by Bessee's supervisor at Step 1.

July 26, 1976: The Local Union President appealed the contractual grievances which had been filed to Step 2A.

August 3, 1976: The Postmaster, by certified mail, issued his determination to separate the Grievant as of August 18, 1976. In that same letter, the Postmaster informed the Grievant that he had the right, as a Preference Eligible to appeal to the Federal Employee Appeals Authority, Civil Service Commission, immediately but not later than fifteen days after the date of his proposed separation, August 18, 1976. The letter went on further to indicate that such an appeal had to be in writing and to give specific reasons why he was contesting the action taken.

The Postmaster's letter concluded with the following statement: "If you appeal to the Civil Service Commission you thereby waive access to any procedures under the National Agreement beyond Step 2B of the grievance-arbitration procedures."

August 5, 1976: The Postmaster sent a letter to the NALC denying the grievance as presented . On that same date, the President of the Local wrote to the Regional Director for Employee and Labor Relations in San Bruno, California, appealing that Step 2 A decision to Step 2 B.

September 23, 1976: The Labor Relations Representative for the Western Region wrote to the Union's National Business Agent concerning their Step 2B meeting on this grievance. That meeting was apparently held on August 30, 1976. In that letter, the Labor Relations Representative notified the Union that the grievance was denied at that Step.

October 3, 1976: In an undated letter, time stamped received on October 3, 1976, the Grievant, Jack C. Bessee, wrote the Federal Employee Appeals Authority and stated as follows:

> "I would like to appeal my Step 2B decision to your office at this time. I have sent you a complete file of what has been done up to this time. Also a complete file to the D.A.V. there at the Federal Center. I am a member of D.A.V. LifeMember Code: 05 04 8L 08 572
> Veteran C No. C 04 625 553
> Social Sec.No. 544-09-3847
> "Calvin Burchfiel was my representative at the 2B hearing there in Denver with Frank DeFalco. Calvin Burchfiel's address and phone No. is:
> Calvin Burchfiel
> National Business Agent-N.A.L.C.
> 928 N. York St.
> Suite 1C
> Muskogee, Okla. 74401
> "Your help would sure be appreciated."

October 4, 1976: J. H. Rademacher, then President of the NALC sent a Memorandum to James V.P. Conway, Senior Assistant Postmaster General requesting arbitration of the Bessee case and indicating that pursuant to Article XV, Section 2, Step b and Section 3 of the National Working Agreement, he, as President, "have authorized and hereby request and certify arbitration of the above-captioned case."

October 20, 1976: The Federal Employee Appeals Authority wrote to Bessee and acknowledged receipt of his letter and indicated that, "As soon as the material from the agency has been received we will notify you." On that same day, the Appeals Authority wrote to the Postmaster and requested that he furnish them with "the documents and evidence relied upon to support the action appealed" and other documentation concerning Bessee term of service with the agency. The Service was advised that copies of all relevant documents would be

sent to the Grievant. The Postmaster was also notified that if the Grievant requested a hearing, the Service would be notified as to the time and place. The Postmaster was further advised that if the Grievant did not request a hearing, the appeal would be adjudicated based upon the record submitted by the Postal Service as well as the comments of the Grievant concerning that record. The Postal Service was given ten days in which to furnish the documentation requested.

November 9, 1976: The Director of Employee and Labor Relations in Pueblo, Colorado, apparently complied with the request from the Appeals Authority and submitted all the information regarding the Grievant that had been requested and supportive documentary evidence to defend the action that had been taken.

December 8, 1976: The Appeals Authority wrote to Mr. Burchfiel, the National Business Agent of the NALC, who Bessee had named in his letter to the Appeals Authority as his representative. The Appeals Authority notified Burchfiel that since Bessee had been removed as of August 18, 1976, "and his letter of appeal was postmarked October 1, 1976,", the Authority wanted to know why the Grievant did not file his appeal within the 15 days provided after the adverse action had been effected. The Authority indicated that the time to file could be extended by the Commission for specific reasons. Mr. Burchfiel was directed to justify Bessee's failure to file in timely fashion within fifteen days of this letter or the Authority proposed, "we will close the file and adjudicate this matter on the information currently available in the file."

December 13, 1976: Burchfiel, the National Business Agent wrote to the Chief Appeals Officer at the Civil Service Commission, who had written to him on the 8th, as stated above. In this letter,

Burchfiel shouldered the blame for any delay in perfecting the appeal. Burchfiel wrote that he had advised the Grievant and his Local President that a decision on an appeal to the Civil Service Commission did not have to made until after the Step 2B decision, under the grievance procedure, was at hand. He relied on Article XVI, Section 7 of the National Agreement for giving such advice. He further indicated that the Step 2B decision was dated September 23, 1976 and that he had not received it until September 27th. He then stated that he forwarded that decision to Bessee's Local President on September 28th. He further noted that Bessee's appeal had been postmarked October 1st, according to the Commission, and received, also according to the Commission, on October 5, 1976.

January 5, 1977: The Federal Employee Appeals Authority denied Bessee's appeal on the grounds that it had not been filed in timely fashion, as required by Section 752.203(a) of the Civil Service Regulations, "and will receive no further consideration."

The letter from the FSEA concluded with the following two paragraphs:

> "Since Mr. Bessee's appeal was denied because it was not timely filed, no decision has been made on the issue of whether his removal from employment with the agency was warranted or unwarranted.
>
> "Section 772.309 of the Civil Service regulations provides that the decision of the Federal Employee Appeals Authority is final and there is no further right of administrative appeal."

CONTENTIONS OF THE PARTIES:

The NALC argued that the mere filing of an Appeal Letter with the Civil Service Commission, especially an untimely one, does

not waive a Postal Employee's access to arbitration under the National Agreement with respect to the merits of his discharge. The NALC claimed that, by statute, preference eligibles are provided with a special protection against adverse actions not subject to impartial and independent review. In the instant case, the Union contended that Bessee had, in effect, waived his right to a CSC review before he filed his letter on October 1, 1976 seeking such review of the Step 2B decision issued by the Postal Service. His letter of October 1, 1976 was of no force and effect since the time for requesting such review had passed and Bessee could not satisfy any of the conditions laid down by the Commission to extend that time.

The NALC anticipated that the USPS would protest being placed in the position of having to defend its actions in two forums. The Union asserted that the only thing that the USPS did, as a result of the inquiry which it had received from the Civil Service Commission, was to forward to the FEAA copies of documents which had been requested. According to the Union, this imposed no great burden upon the Service since those documents would have been prepared in any event by the Local Postmaster to be sent on to the Regional Labor Relations Representative to use in preparation for the Step 2B hearing. Those documents would have been prepared, even if the grievant were to elect to secure adjudication of the adverse action before the Commission rather than go to a Step 2B hearing, because a Local Postmaster would know that the Region would require him to fully document and substantiate any charges made to support the decision to remove a grievant.

The USPS alleged that, although the Arbitrator felt free to consider other factors in interpreting Article XVI, Section 6, of

the National Agreement because the American Postal Workers Union had previously declared that provision to contain ambiguous language in the White and McDonald arbitration cases,[1] that license was no longer available since the APWU had agreed with the USPS in a subsequent case[2] that, "the mere filing of a complaint by a preference eligible employee with the Civil Service Commission constitutes a waiver by that employee of access to arbitration."

The Postal Service argued further that the NALC was bound by such an interpretation of the National Agreement, later adopted as the correct one by the APWU, because the NALC had never asserted on any earlier occasion that it had not concurred in the views as to the purpose and intent of this provision that had been advanced in previous arbitration proceedings by the APWU.

With this apparent change in the position of APWU, so that its views regarding the application of Section 6 of Article XVI coincide with those previously expressed by the Postal Service in the White and McDonald cases, the Service contended that the Arbitrator could review his previous holdings on this issue and clarify the matter for the parties, once and for all, hopefully in a manner which would support the Service's position.

The Service alleged that the parties to the National Agreement were now in accord with regard to the meaning of Section 6, and that provision means, "that the mere filing of an appeal with the Civil Service Commission by a preference eligible employee constitutes a waiver by that employee of access to arbitration. It matters not whether the appeal is untimely, is later withdrawn by the

1/ Cases No. AB-W-11, 369-D; NB-N-4980-D decided August 25, 1976
2/ Robert Stephens v. Postmaster General, United States of America and American Postal Workers Union, AFL-CIO, Civil Action No.C76-122S (W.D.Wash.).

employee, or is adjudicated on the merits by the Commission." Since such an accord has been reached, the Postal Service argued that the Arbitrator had no authority, under the provisions of Article XV, Section 3 of the National Agreement to alter or amend the terms of the Agreement as they had been agreed to by the parties.

The Service also addressed other concerns of the Arbitrator regarding due process that must be accorded to a preference eligible employee. The USPS contended that a preference eligible is not guaranteed an impartial review of his grievance where a union settles a grievance filed on behalf of such an employee short of arbitration. A preference eligible is not guaranteed that his grievances will be arbitrated. His rights are satisfied by adherence to the grievance-arbitration procedures set forth in the collective bargaining agreement by those who represent his interests in good faith employing such dispute settlement machinery. Since no right to third-party review is guaranteed by the Constitution or by statute, the USPS argued that the interpretation of Section 6 which it considered the correct one would not subject the grievant to any forfeiture of any right which he ostensibly possessed.

The USPS argued further that, in view of the "boilerplate" language contained in the proposed adverse action letter which the grievant received, there is no question that he exercised an informed judgment when he chose to follow the CSC appeal procedure rather than avail himself of such efforts as the Union might put forth on his behalf under the grievance-arbitration procedure.

The Service perceived no unfair results where, as here, the grievant filed an untimely appeal with the Commission. The

Service was of the opinion that the grievant was responsible for filing his appeal in timely fashion and he must be held accountable, as the Commission found, for his actions. That he is left without a right either to a Commission hearing or to arbitration is a result of his own failure to abide by the procedural rules established by the Commission and by the terms of the collective bargaining agreement.

OPINION OF THE ARBITRATOR:

Section 6 of Article XVI reads as follows:

> Section 6. Veterans' Preference. A preference eligible is not hereunder deprived of whatever rights of appeal he pay have under the Veterans' Preference Act; however, if he appeals under the Veterans' Preference Act, he thereby waives access to any procedure under this Agreement beyond Step 2B of the grievance-arbitration procedure."

Once again, in this proceeding as in the White and McDonald cases referred to above and which this Arbitrator decided, the issue presented is whether a Preference Eligible, here Jack C. Bessee, "appealed", as that term was intended to be understood by these parties when they wrote the provision quoted above, to the Commission under the Statute and thereby no longer had the right to have his case processed in the grievance-arbitration procedures, set forth in Article XV, beyond Step 2B. Bessee's case was considered in Step 2B, and his grievance was denied.

The undersigned is fully cognizant of the inhibitions placed upon his power to interpret the clear and unambiguous language of the Agreement as specifically provided in Section 3 of Article XV. If the parties by their previous practice under the Agreement or by their written or spoken admissions had indicated there was

no dispute as to what actions taken by a grievant constituted an "appeal" under the terms of Section 6, this case, as well as the two previous cases mentioned would not have been brought before the Arbitrator, or, if pursued in arbitration, disposition of the first grievance so processed would have put to rest the controversy over the force and effect of the disputed provision. In each case presented, in some manner or another, the grievance was brought to the attention of the Commission. In White's case, his Union filed an appeal under the Veterans' Preference Act within fifteen days of the date that the Service proposed to terminate him and while the Step 2B decision was still being awaited from the USPS. In the McDonald case, the Step 2B decision also had not been issued when the grievant filed with the Commission under the Veterans' Preference Act and "conditionally" withdrew that request for a hearing before the Step 2B decision was announced.

In those earlier cases, the undersigned took the opportunity to review in some detail the statutory scheme to provide a Preference Eligible with safeguards against arbitrary or capricious adverse action being taken by his employer without such action being subject to review by an impartial third party, and the manner in which the Court in Malone v. U. S. Postal Service, et al. 526 F.2d 1099 (6th Cir. 1975), viewed the procedural safeguards that the Statute provided to protect the job tenure of such employees.

Such a review and consideration of these collateral sources of information regarding the purpose and intention of the parties would not have been necessary nor in order if these parties had not put in issue the facial meaning of the contract. In this proceeding, the

USPS argued that the previous differences of opinion expressed by these parties as to the meaning and intent of the language of Section 6 had been obliterated by statements made in the brief submitted by the American Postal Workers Union in Robert Stephens case referred to on page 8 above. The USPS alleged that in that case, the APWU clearly stated that it was adopting the interpretation of the contractual language urged in these proceedings by the Postal Service, i.e., that the plaintiff there precluded himself from going to arbitration by filing with the Commission before the Step 2B decision was rendered.

Rather than go into the lengthy controversy that was stirred up by this assertion made by the USPS, and the arguments filed by both the APWU as well as the NALC which attempted to distinguish the reason for the APWU position in that case from relevant considerations in this one, it will suffice to say that the undersigned does not find that the argument made in this regard by the USPS is persuasive. There is no doubt that there still exists, as witnessed by the vigor in which this case was prosecuted by the NALC, a good faith difference between the Service and the NALC as to the meaning and intent of the Section 6 provision under review here. Adopting this course will also obviate the necessity of analyzing the position taken by the USPS in its brief in the Johnson Case, No. AC-N-8662-D, decided April 20, 1977, which the NALC argued supported the interpretation of Section 6 that it was urging in this proceeding. The undersigned is of the opinion that he is on firm ground in deciding once again to attempt to define for the parties how the language of Section 6 impacts upon Bessee's right to have

grievance processed beyond Step 2B to arbitration.

As the undersigned found in the White and McDonald Decision issued on August 25, 1976, "a preference eligible, by statute and by virtue of the terms of the collective bargaining agreement, has been afforded special and unque protection against an adverse action by his employer. The preference eligible does not stand in the same position as any other employee in that regard." In this case, as in those two others, the grievant was required by the terms of the Civil Service Regulations to make up his mind if he wanted to avail himself of the CSC appeals procedure before he had knowledge of whether or not the President of his National Union would appeal his case beyond Step 2B. Bessee's appeal to the Commission should have been filed in early September, at the latest, since his discharge was effective on August 18, 1976. Then President Rademacher did not certify the case for arbitration until October 4th, just about ten days after he was apprised of the results of the Step 2B hearing.

On October 1, 1976, when Bessee did file with the Commission asking that his case be heard by the Appeals Authority he had just learned the results of the Step 2B appeal. In effect what Bessee filed was a non-enforceable request for review. He was seeking to assert a right which, by virtue of the Commission regulations, he no longer had the privilege to exercise. None of the reasons set out by the Commission as possibly warranting the consideration of an extension of time to file a viable appeal, i.e., "that he was not notified of the time limit and was not otherwise aware of it, or that he was presented by circumstances beyond his control from appealing within the time limit.",

applied to Bessee's situation. In effect the action which he took must be regarded as a nullity or as having no legal force or effect. This is confirmed by the way in which the Commission regarded his appeal. The papers which he submitted in support of his claim that the discharge was not for just cause were disregarded and the Commission proceeded to "adjudicate the matter on the information currently available in the file." This was only the information supplied by the Employer. As the Commission later informed Mr. Burchfiel, Bessee's representative, in its letter of January 5, 1976, the appeal was denied because it was not timely filed and would receive no further consideration. The Commission went on to inform Burchfiel that "No decision has been made on the issue of whether his removal from employment with the agency was warranted or unwarranted."

Again, in effect, Bessee's appeal received no consideration at all and there was no third-party review of the merits of the action taken against this Grievant by his Employer by the Commission or its Appeals Board.

Such disregard and disposition of Bessee's claim that the Employer did not have just cause to discharge him does not comport well with the requirements of the Statute and the National Agreement conferring special status on the job tenure of a Preference Eligible. Not only do the findings made above confirm that Bessee did not "appeal" as that term should be interpreted to be consistent with the special status afforded such Preference Eligibles and as it is used in referring to such employees in Section 6, but they also reveal that the Employer is attempting to secure a declaration that Bessee forfeited his right to have his case arbitrated by engaging in the meaningless act of writing to the Commission after his purely

personal right as a Preference Eligible no longer existed. The USPS appears to be seeking to place such a "special status" employee in a more vulnerable position than a non-preference employee. Obviously, that was not the intention of the parties when they agreed upon the language in Section 6.

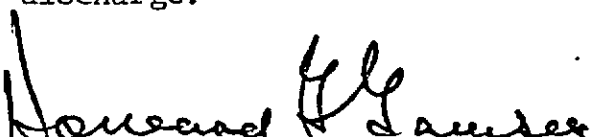
The Service also argued that it could not have been the intention of the parties nor was it equitable to require that it defend its actions in two different forums. It pointed out that it had been required to fully document the reasons for separating Bessee in the papers that the Commission requested that it file after Bessee wrote to the Commission and asked that the case be reviewed. An examination of the documents jointly submitted in this proceeding reveals that it was the Commission that requested that the Postal Service fully substantiate its charge against Bessee at a time when the Commission had reason to know that Bessee's request for consideration was no longer timely. The Commission had before it all the papers filed by Bessee on October 1, 1976, showing he had been terminated on August 18th, when, on October 20, 1976, it wrote to the Postal Service and asked for documentary evidence in support of its decision. It was the Commission that did not wait to ascertain whether Bessee filed a viable appeal, despite the fact that his papers were obviously late, before putting the Service to the trouble of documenting its case. Paranthetically, it should also be noted that the requirements imposed by the Commission were not too burdensome since ostensibly the Service had amassed all the evidence requested in order to process the case up to Step 2B.

Finally, to summarize the conclusions reached by the undersigned, it should be found that Section 6 contemplates that a Preference

Eligible make an election between proceeding before the Commission or utilizing the grievance-arbitration procedure. Section 6 further states that if that Preference Eligible does decide to appeal to the Commission he no longer has the right nor has his representative the right to have his case considered by the Employer beyond Step 2B. The language of the Section must provide, if the clear intention of the parties is to be realized, that the employee involved have a clear choice and not an illusory one. In the instant case, Bessee had no clear choice or election to make as of October 1,1976, when he posted his letter to the Commission. His only remaining avenue in seeking third-party review of the merits of his case was in an arbitration proceeding. Bessee did not make an election, an opportunity which the parties intended to provide in Section 6, and for that reason he did not lose his right to resort to arbitration.

A W A R D

Grievant Jack C. Bessee by filing an appeal of his discharge with the Civil Service Commission under the Veterans Preference Act, under the circumstances revealed in this case, did not waive access to arbitration under the National Agreement with respect to the merits of his discharge.



HOWARD G. GAMSER, ARBITRATOR

Washington, DC
November 30, 1977