C#04519

(1)

In the Matter of Arbitration

between

Case No. H1N- 5-FD-2560

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

and

AMERICAN POSTAL WORKERS UNION

APPEARANCES: Karen A. Intrator, Esq., for Postal Service; Cohen, Weiss and Simon, by Keith E. Secular, Esq., for NALC; O'Donnell & Schwartz, by Susan L. Catler, Esq., for APWU.

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 Postal Service and NALC to serve as sole arbitrator, a hearing was held on 8 December 1983, in Washington, D.C. Exercising its rights under Article 15, Section 4.A(9) of the National Agreement, APWU intervened. The stipulated issue on which the arbitrator heard evidence and argument was as follows (Tr. 5):

> Whether an arbitrator is authorized by the National Agreement to award interest as part of a back-pay award when sustaining a disciplinary grievance.

A verbatim transcript was made of the arbitration proceeding. All three parties filed post-hearing briefs (NALC and APWU filed a joint brief). The record was closed on 26 June 1984.

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

AWARD

An arbitrator is authorized by the National Agreement, in his discretion, to award interest as part of a back-pay award when sustaining a disciplinary grievance.

Benjamin Aaron
Arbitrator

Los Angeles, California
19 December 1984

In the Matter of Arbitration

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UNITED STATES POSTAL SERVICE

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NATIONAL ASSOCIATION OF LETTER CARRIERS

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OPINION

I

The instant grievance arose in the Denver Post Office, following a five-day disciplinary suspension imposed upon Charles Lane, a letter carrier. At all stages of the grievance procedure, the local union asked that the grievant "be made whole all wages and benefits lost due to this suspension, plus interest at the rate of one and one-half (1½) percent per month from the date wages were withheld until the date lost wages are paid." (JX-2) No settlement of the grievance was reached, and it was scheduled for arbitration at the regional level. During the arbitration hearing, Postal Service withdrew the case and referred it to Step 4 of the grievance procedure, pursuant to Article 15, Section 41B.(5) of the National Agreement, for resolution at the national level of

the issue whether the Agreement prohibits an arbitrator from awarding interest on a back-pay award. No agreement was reached at Step 4, and the matter was ultimately submitted to arbitration at the national level.

The merits of the Lane grievance are not involved in this case; following my decision, the grievance will be remanded to the regional level for disposition. Unions do not seek a ruling that an arbitrator must award interest in this or any other discipline case; they seek only a decision that arbitrators in national, regional, and expedited discipline cases have the authority to consider a request for interest. Postal Service insists that arbitrators have no such authority in Postal Service cases. The decision in this case, therefore, is in the nature of a declaratory judgment.

II

All three parties concede that Article 16 (Discipline Procedure), Section 1 (Principles) is relevant to this case. That provision states in pertinent part that any discipline or discharge alleged to be for just cause "shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay."

Postal Service claims that Article 19 (Handbooks and Manuals) is also relevant. That provision reads in part:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect . . . .

In addition, Postal Service argues that Section 436.1 of the Employee and Labor Relations Manual (ELM) (Ex-2), by virtue of Article 19, is also relevant to this dispute. Section 436.1 (Corrective Entitlement) provides in pertinent part:

> .11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employement [sic] benefits which the employee would have earned during the period.

Although Unions are, of course, the moving parties, I think the respective positions of all concerned will be better understood if I set forth Postal Service's arguments first, and follow them with Unions' responses.

III

First, Postal Service points out that the pertinent language in Aricle 16, Section 1 of the National Agreement, which has been in every agreement since the 1970 Postal Reorganization Act (PRA), makes no provision for an award of interest on back pay.

Unions counter with the assertion that nothing in Article 16, Section 1 prohibits an award of interest on back

pay in appropriate cases. Moreover, they maintain that the word "restitution" is broad enough to encompass interest on back pay.

Second, Postal Service finds it significant that Unions have three times previously sought, unsuccessfully, to include language in the National Agreement to the effect that back pay awards must always include interest at a predetermined rate (EX-3, EX-4, EX-5).

Unions respond that on the three occasions referred to by Postal Service (twice in the 1975 negotiations and once in the 1981 negotiations) they sought what they concede that they still do not have. They insist, however, that none of the three proposals embodied an admission that the National Agreement precludes any and all interest awards. Indeed, in the 1981 negotiations, Unions prefaced their written bargaining proposals with the following statement (UX-1):

> The withdrawal of any proposals made by the Joint Bargaining Committee on April 22, 1981 or on any date thereafter is without prejudice to the Unions' position that such proposals express the existing rights of the Unions and of the employees and the obligations of the United States Postal Service and that such proposals were made for purposes of clarification only.

Third, Postal Service points out that there is no stated entitlement to interest in Section 436.1 of the ELM, which specifically provides for only "back pay" and "employment benefits" as restitution in appropriate cases.

By way of rebuttal, Unions point out that the ELM provisions cited by Postal Service appear in a chapter entitled "Pay Administration" in a section headed "Basic and Special Pay Provisions," and not in one dealing with arbitral remedies. Thus, they assert that no significance should attach to the absence of a reference to interest, because the regulations have nothing to do with arbitral remedies. Furthermore, Unions argue that the absence of any prohibition against the granting of interest could lead to the opposite conclusion from the one reached by Postal Service.

Dealing with Unions' reliance upon the absence of exclusionary language, Postal Service argues, fourth, that it is well-established that interest is not allowed on claims against the Government, unless Congress or a contract expressly authorizes such a remedy. It cites a number of judicial decisions in support of its position, placing special emphasis on Cross v. United States Postal Service (8th Cir. May 14, 1984).

Unions, in turn, declare that Section 401 of the PRA provides a broad waiver of sovereign immunity and that traditional restrictive doctrines of government liability are inapplicable to the Postal Service. They rely, particularly, on Franchise Tax Board of California v. United States Postal Service (U.S. S. Ct. June 11, 1984).

Fifth, Postal Service claims that its predecessor, Post Office Department, was specifically covered by the Back Pay

Act of 1966 (BPA), which provides "for the payment of certain amounts and restoration of employment benefits" to federal employees who have been "improperly deprived thereof." The argument is that inasmuch as the BPA did not contain an express provision for payment of interest, no interest could be recovered by federal employees on back-pay claims. Following passage of the BPA, but prior to enactment of the PRA, Post Office Department promulgated regulations in its former Postal Manual to govern the application of the BPA to postal employees (EX-1). Postal Service asserts that although those regulations (755.741-742) made no reference either way to interest payments, they obviously contemplated that interest would not be paid.

Postal Service concedes that the PRA reserved postal employees' terms and conditions of employment for collective bargaining. It states, however, that rules affecting terms and conditions were left as they existed before reorganization unless and until changed by collective bargaining. It concludes, therefore, that the pre-reorganization back-pay provisions of the now obsolete Postal Manual were carried over, unchanged in their meaning and application, into post-reorganization rules; thus Section 755.74 of the Postal Manual has been reincarnated in the almost identical language of Section 436.1 of the ELM. That the BPA no longer applies to postal employees is irrelevant, Postal Service insists, because of the provision in the PRA (39 U.S.C. §1005(f)) that makes the original interpretation

of Post Office Department's back pay provisions applicable to current Postal Service employee-management relations.

Unions challenge both the facts and the arguments advanced by Postal Service on this point. They emphasize that the BPA became inapplicable to postal employees when the PRA was enacted. Moreover, they assert that there is no evidence that the parties who negotiated Article 16 of the National Agreement intended to limit arbitrators to remedies available under the BPA; and in that connection they maintain that even in the cited provisions of the old Postal Manual there is nothing amounting to a restriction on the remedial authority of arbitrators. Unions also contend that when the parties negotiated Article 16 of the National Agreement in 1971, there was no settled law to the effect that interest could not be awarded under the BPA. Even today, they state, the federal Courts of Appeals are split on the issue, and those decisions rejecting interest awards in favor of employees have been based solely on the government's defense of sovereign immunity.

Sixth, Postal Service argues that arbitrators hearing cases covered by the National Agreement are required to abide by Section 436.1 of the ELM, which it asserts is incorporated constructively in Article 16. For them to do otherwise, it insists, would be to exceed their authority, in violation of the principles laid down by the Supreme Court in United Steelworkers v. Enterprise Car & Wheel Corp. (1960), by dispensing

their "own brand of industrial justice" instead of confining themselves to the "interpretation and application of the collective bargaining agreement."

Unions also cite Enterprise Car & Wheel for the proposition that in formulating remedies, an arbitrator must be allowed flexibility and the discretion "to bring his informed judgment to bear in order to reach a fair solution of a problem." They note, also, that at least one federal district court has ruled that the awarding of interest is "within the traditional inherent powers" of an arbitrator "in order to make an employee whose rights have been violated reasonably whole" (Falstaff Brewing Corp. v. Local 153 (1978), affirmed on appeal, certiorari denied).

Finally, Postal Service asserts that the awarding of interest on back pay in postal arbitration cases is an isolated and recent phenomenon. Sherry Barber, the General Manager, Arbitration Division, whose office indexes all Postal Service arbitrations, testified that until approximately 1982 she was "not aware of any awards in which interest was involved on back pay," (Tr. 33) and that of approximately 2000 back pay awards under the 1978 and 1981 National Agreements, she was "not aware of any more than about a dozen in which an Arbitrator has awarded interest on back pay" (Tr. 35).

Unions respond by citing ten cases since 1982 in which regional arbitrators have awarded interest on back pay in postal cases. They also note that by Barber's own admission,

Postal Service has paid past awards of interest without complaint, and has previously not contested either in arbitration or in court an arbitrator's authority to award interest under the National Agreement.

IV

This is a case of first impression. As Postal Service points out, even in those previous cases in which regional arbitrators awarded interest on back pay, the question whether they had authority to do so was neither raised nor considered.

My decision is based squarely on my interpretation of Article 16 of the National Agreement. In making that interpretation I have carefully considered the possible effect of Section 436.1 of the ELM on the meaning of Article 16, and have concluded that it has none. The crux of the issue, as I see it, is the meaning of the phrase in Article 16, "reinstatement and restitution, including back pay" and more specifically, the meaning of "restitution".

A phrase commonly employed in reference to arbitral remedies for wrongful disciplinary suspensions or terminations is that the grievants should be "made whole" for what they have lost in wages, seniority, and other benefits. When a successful grievant is forced to wait a long time before recovering back pay he has lost as a result of an unjust disciplinary penalty, denial of interest means that he cannot be

"made whole." Although, generally, interest on a back-pay award has been neither asked for nor granted in the bulk of disciplinary cases in which the grievances have been sustained, I can see no logical reason why it should not be granted in circumstances in which the penalty was excessive or vindictive, or imposed in bad faith or in violation of an established public policy, particularly when the grievant has had to wait a long time before being paid. Indeed, at least one reason for the practice of denying interest on back pay in arbitration cases may be that the average length of time between the filing of a grievance and the arbitrator's decision used to be considerably less than it is today, and the denial of interest did not significantly affect the "made-whole" remedy of reinstatment with back pay.

It is true that Article 16 does not expressly authorize the granting of interest, but neither does it prohibit that remedy. Court decisions affecting such awards under specific statutes seem to me to have no bearing on arbitration cases. Thus, I do not find either the Cross case cited by Postal Service or the Franchise Tax Board case relied upon by Unions to be very helpful. Cross involved the right of a successful complainant to recover interest in an action under Title VII of the Civil Rights Act of 1964; Franchise Tax Board involved an action by a state agency to compel Postal Service to withhold delinquent taxes from employees' wages. The mere fact that

Postal Service was a defendant in both cases does not invest them with any particular significance so far as the issue of recovery of interest in arbitrations of discipline cases is concerned.

Postal Service's arguments based on the BPA and the ELM, as well as its invocation of Justice Douglas' dicta in Enterprise, are all based on the assumption, which I do not accept, that the ELM was expressly intended to preclude the awarding of interest on a back-pay claim in discipline cases. By its own admission, Postal Service did not challenge interest awards until it became alarmed by their increasing frequency. Section 436.11 of the ELM, like Article 16 of the National Agreement, is silent on the matter of interest on back-pay awards. Insistence that the absence of specific language in the National Agreement or the ELM requiring or permitting the granting of interest absolutely deprives an arbitrator of the authority to award interest in any case is unwarranted. Arbitrators are often called upon to interpret ambiguous language, the meaning of which is disputed by the parties. To do this, they require some leeway in the exercise of their discretion, especially in formulating appropriate types of relief for employees who have been unfairly punished.

On the basis of my interpretation of Article 16 and Section 436.11 of the ELM, I conclude that under the National

Agreement arbitrators have discretionary authority to grant or to refuse interest on back-pay awards when sustaining disciplinary grievances.

Benjamin Aaron
Arbitrator

(2)

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case Nos. S1N-3U-D
27273 through 27291

SUPPLEMENTARY DECISION

On 18 May 1983, the undersigned arbitrator issued his decision in the above matter, holding that the discharges of Jerry Warren, Derwin Ray Beasley, Roger Davis, P. A. Smith, Angeline E. Law, J. P. Vargas, Adan Mata, Ralph Chavez, L. F. Herrera, Mary H. Salinas, V. Ramos, Jr., C. J. Lazard, Melvin L. Clarence, and W. E. Walker, Jr. were without just cause, and ordering that all of them be reinstated with full back pay and seniority.

The arbitrator also retained jurisdiction over the Union's request for interest on the back pay due each of the above-named grievants until he decided Case No. H1N-5-FD-2560 between United States Postal Service and NALC and American Postal Workers Union.

On 19 December 1984, the undersigned arbitrator ruled in Case No. H1N-5-FD-2560 that an arbitrator is authorized by the National Agreement between the above-named parties, in

his discretion, to award interest as part of a back-pay award when sustaining a disciplinary grievance.

In his opinion in Case Nos. S1N-3U-D 27273-27291, the arbitrator found, among other things, that the discharges of the above-named grievances constituted excessive and unwarranted punishment, and that the procedures followed by the Postal Service in determining that the grievants should be discharged denied them due process. As explained in his opinion in Case No. H1N- 5-FD-2560, those circumstances justify a discretionary award to each of the above-named grievants of interest on the back pay to which each of them is entitled.

In the absence of a pre-determined interest rate in the National Agreement, the arbitrator adopts as appropriate the "adjusted prime rate" used by the United States Internal Revenue Service in calculating interest on the underpayment or overpayment of taxes. This is the standard used by the National Labor Relations Board (see Florida Steel Corp., 231 N.L.R.B. 651 (1977)). For the period 1 January to 30 June 1984, the adjusted prime rate was 11 percent. Accordingly, the arbitrator makes the following

SUPPLEMENTARY AWARD

Postal Service shall pay to each of the above-named grievants interest on their respective back-pay awards in the amount of 11 percent. Interest shall be computed from the date of discharge to the date when back pay was actually paid to the individual grievants.

Benjamin Aaron
Arbitrator

Los Angeles, California
19 December 1984