IN THE MATTER OF THE ARBITRATION C# 6363

between

UNITED STATES POSTAL SERVICE)
)
and)
)
NATIONAL ASSOCIATION OF LETTER)
CARRIERS, AFL-CIO)

Case No. H1N-4E-C-9678)
(Joseph Kisak)

Before
Neil N. Bernstein
Arbitrator

APPEARING:

FOR THE SERVICE: D. James Shipman, Field Director
Human Resources
1165 Second Avenue
Des Moines, Iowa 50318-9994

FOR THE ASSOCIATION: Richard N. Gilberg, Esq.
Cohen, Weiss & Simon
330 W. 42nd Street
New York, NY 10036

Youngstown, Ohio

OPINION OF THE ARBITRATOR

I.

This proceeding concerns a grievance that was filed on August 9, 1982 by Mr. Joseph Kisak. Mr. Kisak was first employed by the Postal Service in the Struthers, Ohio Post Office as a temporary carrier on March 22, 1961; he received a career appointment as a substitute carrier on December 31, 1966. Mr. Kisak was removed from Service employment on June 3, 1977 for inability to perform the duties of his position. That discharge had been previously upheld by Arbitrator Harry Casselman in a May 26, 1977 decision.

In the instant grievance, Mr. Kisak claims that the Service had violated the applicable collective bargaining agreement in late 1975 or early 1976 because the Struthers Postmaster failed to submit Mr. Kisak's application for disability retirement under the Civil Service Retirement Act to the U. S. Civil Service Commission within the time limit provided by law. The Postal Service denied the grievance both on the merits and as being "untimely and inappropriate" in view of Mr. Kisak's 1977 separation from the Postal Service. Mr. Kisak's grievance was processed through the prearbitration steps in the parties' disputes procedure. When in all such prior steps the Service continued to deny the grievance, the Union invoked arbitration of it in this proceeding.

The Postal Service made a limited appearance at the arbitration hearing and confined its presentation to an argument that the grievance is not arbitrable for four different reasons. Because the Arbitrator agrees with the Service on at least one of its contentions, and because his ruling thereon will completely dispose of this case, the remainder of the opinion will be limited to that matter.

II.

A.

The Service's first argument was that Mr. Kisak was not an employee of the Service at the time he filed the grievance and therefore could not invoke the grievance machinery. It points out that the agreement by its terms is applicable only to "all employees in the regular work force," which does not include former employees who have been separated from the Service rolls. The grievance procedure is strictly a creature of the collective bargaining agreement, the Service argues, and therefore is limited to the people covered by the terms of the agreement. Similarly, it maintains, the Union can acquire no greater rights than Mr. Kisak enjoyed.

B.

The Union argues that the grievance is proper. It points out first of all that the Union has an independent right to file a grievance. Therefore, it can institute the proceeding on its own even if Mr. Kisak

cannot.

Secondly, the Union contends that the parties have negotiated a Memorandum of Understanding that specifically protects the right of a former employee to process a grievance.

Third, the Union asserts that the Service's position denies a forum to any employee whose disability retirement application is improperly processed by management.

Finally, the Union points to several arbitration decisions from other industries which have allowed former employees to file grievances.

C.

The Arbitrator agrees with the Service that Mr. Kisak did not have a right to file the grievance. The arbitration machinery is strictly a creation of collective bargaining agreements and applies only where the parties have agreed it will apply. Article XV, Section 2 of the applicable labor contract provides for grievances to be initiated only by "the employee" or "the union." At the time of the filing of this grievance in 1982, Mr. Kisak was clearly no longer an employee, and he obviously never was a Union.

The fact that the Union might have initiated the grievance in its own right is of no relevance to the present case. The grievance before the Arbitrator shows Joseph Kisak to be the only grievant. The question of whether the Union might have been able to initiate a grievance in its

name on behalf of Mr. Kisak is a matter that should be left for resolution in an appropriate case.

In addition, the Arbitrator does not believe that the Memorandum of Understanding cited by the Union supports its position. That Memorandum provides:

> It is agreed...that the processing and/or arbitration of a grievance is not barred by the separation of the grievant, whether such separation is by resignation, retirement or death.

This Arbitrator agrees with Arbitrator John Caraway that the normal and natural interpretation of the Memorandum is to limit it to cases where the Grievant is separated after the grievance has been filed but before it has been resolved. It was not intended to apply where the Grievant was separated before he filed.

With respect to the arbitrators who have upheld similar grievances in other industries, this Arbitrator believes that they have confused substance (benefits due under an agreement), which would survive employment separation, and form (using the arbitration process rather than a court action to obtain those benefits), which would not. Moreover, their decisions appear to have been overruled by the Supreme Court's decision in Schneider Moving & Storage Company v. Robbins, 456 U.S. 322 (1984).

III.

The Service put forth three other grounds for dismissing this grievance. The Arbitrator makes no ruling on them other than to indicate that none of them is devoid of merit.

THE AWARD

The August 9, 1982 grievance of Mr. Joseph Kisak is denied.

Neil N. Bernstein
Arbitrator

July 21, 1986