C# 10000

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration -Between- UNITED STATES POSTAL SERVICE -And- NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	**GRIEVANT:** SCLISTER L. PERKINS **POST OFFICE:** San Francisco, California **CASE NO:** W7N-5M-C 17720 W7N-5M-C 17721 **NALC GTS NO:** 14607 14604

BEFORE: CARL B.A. LANGE III, Arbitrator

APPEARANCES:

For the U.S. Postal Service: RICHARD L. MUNSON
Labor Relations Representative
1300 Evans Avenue
San Francisco, CA 94188-9401

For the Union: DALE P. HART
Regional Administrative Assistant
1043 DiGiulio Avenue
Santa Clara, CA 95050

Place of Hearing: 151 Mendell
San Francisco, California

Date of Hearing: March 20, 1990

AWARD:

The grievances are arbitrable to the extent that the arbitration is limited to the question of the alleged violations of the "Last Chance Agreement" and whether or not the Grievant adhered to the terms of the "Last Chance Agreement."

Date of Award: April 20, 1990

CARL B. A. LANGE III

BACKGROUND
(Perkins - Arbitrability)

Pursuant to the National Collective Bargaining Agreement ("National Agreement") between the UNITED STATES POSTAL SERVICE ("Service" or "Employer") and the NATIONAL ASSOCIATION OF LETTER CARRIERS ("NALC" or "Union"), the undersigned was selected from the Western Region Regular Arbitration Panel to serve as the Arbitrator in this matter.

An evidentiary hearing was held on March 20, 1990, at the postal facility located at 151 Mendell, San Francisco, California. The Service was represented by Rick Munson, Labor Relations Representative. The NALC was represented by Dale Hart, Regional Administrative Assistant. The parties agreed that the initial issue of substantive arbitrability had to be resolved and that the arbitrability issue was properly before the Arbitrator. During the course of the hearing, the parties were afforded a full and complete opportunity to develop arguments and to present relevant support for their respective positions. Sclister Perkins ("Grievant" or "Employee") was present at the hearing. An official transcript of the hearing was not made. The hearing was tape recorded as an extension of the Arbitrator's personal notes. The parties made closing arguments on the record. The arbitrability issue was deemed submitted for decision as of March 20, 1990, at the close of the hearing.

The matter arises out of the initial issuance of a "Notice of Removal" dated June 16, 1989. The "Notice" was issued because of the Service's determination that the Employee had not complied with the terms of a "Last Chance Agreement" dated October 18, 1988, that was effective for a period of one calendar year from that date. On July 6, 1989, the Employee and his representative met with the Employee's immediate supervisor and the Station Manager. At some point during the day, it was agreed that the "Notice" would be rescinded and replaced with a 14-day suspension, plus a six-month extension of the "Last Chance Agreement." A few days later, the Station Manager informed the Employee and his representative that he had been overruled on the extension of the "Last Chance Agreement" by "Labor Relations." A second "Notice of Removal" was issued on July 17, 1989. The second "Notice" canceled and superseded the June 16, 1989 "Notice." The second "Notice" was similar in substantive content to its predecessor, but included a listing of relevant prior disciplinary actions imposed on the Employee.

The first grievance, W7N-5M-C 17720, was filed on July 24, 1989. The grievance alleged a violation of Articles 15 and 16 with regard to "reneging on a Step 1 Agreement" and sought implementation of the "Step 1 Agreement" of July 6, 1989, along with a make-whole remedy.

On August 1, 1989, the second grievance, W7N-5M-C 17721, was filed. It alleged a violation of Articles 15 and 16 with regard to the issuance of the July 17, 1989, "Notice" as "double jeopardy." It again raised the issue of the July 6, 1989, "Step 1 Agreement." It also challenged the "AWOL" designations set forth in support of the "Notice" and asserted that management "has now agreed that they were incorrect." It also asserted that the Service had violated the "Last Chance Agreement," that the Removal was not for just cause, and that it was punitive in nature rather than corrective. The second grievance reiterated the plea to rescind the "Notice" and expanded the make-whole remedy to include lost overtime opportunities plus interest. On August 10, 1989, a Step 2 meeting was held on both grievances. The Removal was effective on August 18, 1989.

During this same time period, the Employee also filed an appeal with the San Francisco office of the Merit Systems Protection Board ("MSPB"). On September 22, 1989, the Service filed a "Motion to Dismiss Appeal for Lack of Jurisdiction" in the MSPB matter. On October 3,1989, the Service issued Step 2 Decisions in both grievances. The Step 2 Decision in the first grievance asserted that the Grievant had not complied with the terms of the "Last Chance Agreement," and that he had waived any appeal rights with regard to the "Last Chance Agreement." Further, the Service denied that there was a "Step 1 Agreement" and asserted that there was "only the discussion of the possibility of an agreement." With regard to the second grievance, the Service asserted that there was no double jeopardy since the second "Notice" had canceled and superseded the earlier "Notice." The Service also reiterated its view that the Grievant had waived all appeal rights when he signed the "Last Chance Agreement." On October 17, 1989, the second grievance was appealed to Step 3. On October 19, 1989, the first grievance was appealed to Step 3. The Step 3 meetings on both grievances were held on November 21, 1989. On December 18, 1989, an "Initial Decision" of the MSPB Administrative Judge dismissed the Employee's MSPB appeal "for lack of jurisdiction." On December 19, 1989, the Service issued its Step 3 Decisions in both grievances.

The Service's Position

The Service argued that the grievances are not arbitrable in that the Grievant specifically waived any appeal rights through the grievance procedure when he signed the October 18, 1988 "Last Chance Agreement." Further, the Grievant's appeal to the MSPB and the subsequent MSPB decision "on the issue of the waiver of appeal rights" constituted a second waiver of appeal rights through the grievance arbitration procedure pursuant to Article 16.9 of the National Agreement.

The Union's Position

The Union argued that the grievances are per se arbitrable. The Union also argued that the MSPB processing was limited solely to the issue of whether the MSPB had jurisdiction in the matter of the Grievant's termination and was not a hearing "on the merits" of the Notice of Removal.

Relevant Provisions of the Collective Bargaining Agreement

The Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO (Jt. Exhibit 1) provides:

"ARTICLE 3

"MANAGEMENT RIGHTS

"The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

"A. To direct employees of the Employer in the performance of official duties;

"B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

"C. To maintain the efficiency of the operations entrusted to it;

"D. To determine the methods, means, and personnel by which such operations are to be conducted;

"E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

"F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

...

"ARTICLE 16

"DISCIPLINE PROCEDURE

"Section 1. Principles

"In the administration of this Article, a basic principle shall be that discipline shall be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for this Agreement, which could result in reinstatement and restitution, including back pay.

...

"Section 5. Suspensions of More Than 14 Days or Discharge

"In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. ... When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

...

"Section 7. Emergency Procedure

"An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

...

"Section 9. Veterans' Preference

"A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the mployee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure."

ANALYSIS AND CONCLUSION

In order for the Service to prevail on the threshold question of arbitrability, it must overcome the presumption that, where a labor agreement provides for arbitration of disputes that arise out of the terms of the agreement, a dispute will be deemed arbitrable unless the agreement can be read to specifically exclude the disputed issue from arbitration.

With regard to the Service's primary argument that the Grievant waived his right to appeal when he signed the "Last Chance Agreement," the Arbitrator is unconvinced. The Service's argument that the waiver contained in the "Last Chance Agreement" precludes arbitration if there is a dispute over whether or not the "Last Chance Agreement" was violated is without merit. If the Service's position in that regard were to be upheld, the Service would then become judge, jury, and executioner. An arbitration over the question of adherence to the terms of a "Last Chance Agreement" is limited solely to that issue and does not delve into the arena of just cause or other factors that are usually considered in a regular Removal action.

In the matter at issue here, the "Last Chance Agreement" was the product of a settlement at Step 1 of the grievance procedure. Thus, the election of the appeal forum pursuant to Article 16.9 took place with the filing of the original 1988 grievance over the "Notice of Removal" that was issued in August of that year. Since the "Last Chance Agreement" was worked out through the grievance procedure, the parties should have understood that final adjudication of whether there had been a violation of the "Last Chance Agreement" would take place in arbitration. A lengthy and detailed review of the transcript and the "Initial Decision" in the MSPB matter fails to indicate why the Service acquiesced to appear in the MSPB forum. It also fails to disclose why the MSPB accepted the case for an appeal hearing. Further, review of the arbitration cases submitted by both parties also fails to shed any light on why the Service made an unnecessary appearance in a forum that was not the birthplace of the original dispute. It should be noted that this Arbitrator would have determined this matter was not arbitrable if the "Last Chance Agreement" had its genesis in the MSPB appeal process rather than the grievance procedure.

AWARD

The grievances are arbitrable to the extent that the arbitration is limited to the question of the alleged violations of the "Last Chance Agreement" and whether or not the Grievant adhered to the terms of the "Last Chance Agreement."

Respectfully submitted,

By _____
CARL B. A. LANGE III