

REGULAR ARBITRATION PANEL

C#10021

In The Matter Of The Arbitration

Between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS, Branch No. 148,
Akron, Ohio

GRIEVANT:

Thomas Lovern

POST OFFICE:

Akron, Ohio

CASE NUMBER:

E7N-2K-C 22828

BEFORE:

Robert J. Ables, Arbitrator

APPEARANCES:

For The U.S. Postal Service:

Cheryl A. Duchnak, Labor
Relations Representative,
Akron, Ohio

For The Union:

John V. Carney, Akron, Ohio

PLACE OF HEARING:

Akron, Ohio

DATE OF HEARING:

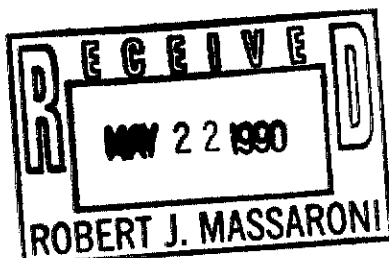
March 27, 1990

AWARD:

The grievance that a
probationary employee was
improperly removed from
service, under a local plan of
instruction for such employees,
is not grievable under Article
12, Section 1; therefore it is
denied.

DATE OF AWARD:

May 17, 1990.




Robert J. Ables

ARBITRATION AWARD

United States Postal Service

and

National Association of Letter Carriers,
Branch No. 148, Akron, Ohio

Dispute Concerning Separation
During Probationary Period

OPINION

I. ISSUE

At issue is whether the employer, U.S. Postal Service, at its post office in Akron, Ohio, on May 30, 1989, improperly removed from service probationary employee Thomas Lovern, where the employee, at the time, was training to be a letter carrier, under a local plan developed jointly by local management and union officials, which plan included

detailed provisions on how to train such employees, not observed by local management, according to the union.^{1/}

II. ARGUMENTS

Many union witnesses testified as to the making of the plan and how it was applied, or not applied, to probationary employee Lovern. They reported that the plan was jointly developed in July 1986 to help retain probationary employees who had had a high incidence of removals, upon findings by Postal Service officials that such employees did not give promise they would be satisfactory letter carriers if they were continued beyond the probationary period.

Union witnesses testified that the Postal Service violated the on-the-job instructor program (OJI) in six areas: Lovern was not assigned to one instructor for his entire training period; he did not receive two hours' casing time each day; there was no review of 30, 60 and 80 day evaluations or suggestions how to correct deficiencies; OJI

^{1/}

In a class action, the union states the issue to be whether the Postal Service "properly adhered to the provisions of the locally negotiated On-The-Job Instructor Agreement, or whether their failure to honor said agreement caused carrier Thomas Lovern to be deprived of his right to a fair and equal chance at employment".

instructors did not submit survey forms to the training center; designated officials did not review the removal prior to it being issued; and that the supervisor did not initial Form 1750 (Employee Probationary Period Evaluation Report).

These violations, according to the union, resulted in a denial of a fair and reasonable chance for employee Lovern to meet expectations during his probationary period.

To remedy such violations, the union asks that Lovern be awarded a new probationary period, with an independent evaluation of any medical restrictions that may be alleged to disqualify him for the position of letter carrier.

The Postal Service, in support of its action removing Lovern from employment, argues that the grievance is procedurally defective under Article 12, Section 1.A., which denies a probationary employee access to the grievance procedure.^{2/}

2/

Article 12, Section 1.A. provides in its entirety:

The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period, the employee will not be separated for prior scheme failure.

Also, the employer argues that the union is attempting to circumvent Article 12 by classifying the probationary employee's removal as a class action. In any event, according to the Postal Service, the OJI is a guideline, not an agreement, and, on the merits, that employee Lovern had physical difficulties performing as a letter carrier and he failed to show significant progress in learning required carrier functions.

III. FINDINGS

It is not clear on what theory the union proceeds to support its claim. The union seems determined to press its belief that Article 12, Section 1.A. does not mean what it says: the employer has the right to separate a probationary employee and such employee does not have access to the grievance procedure.^{3/}

^{3/}

The same local union pressed a claim to arbitration of a PTF carrier that he was wrongfully terminated during his probationary period. The arbitrator found that the employee did not have access to the grievance procedure because he had resigned. The arbitrator found that the Postal Service had committed several procedural errors; he added however that: "The grievance and arbitration procedure is not available to him to contest the merits or any other aspect of his separation". Case No. 34N-2K-D 37174. Arbitrator John W. McConnell (1987).

The section does provide an exception for the employee who is about to be separated "for scheme failure" who shall have seven days to show that he or she qualifies on the scheme, and, it may be inferred from Article 12, Section 1.A., that a probationary employee, who does not have access to the grievance and arbitration procedures of the contract, does have legal rights in a forum other than under contract procedures to contest a separation based on charges such as fraud, willful, wrongful, action or in violation of statutes against discrimination. But these very exceptional circumstances are not alleged in this case.

The union cloaks its complaint in a "class action". Presumably, the union believes it can both save employee Lovern's job and force local Postal Service management to substitute the OJI plan (which includes strong union participation in determining whether a probationary letter carrier employee is good material to be a permanent letter carrier) for the relative "at will" contract rights of management to determine the potential of a probationary employee to be a career employee.

The union's use of a class action complaint in this case is not proper. Its specific request for remedy is for an order giving employee Lovern a new probationary period and independent medical evaluation. That request is not in the nature of a request for remedy for a number of employees in a class. An arbitration decision in favor of a bargaining

unit employee presumably has the good effect on management not committing a like offense in the future. Thus, other employees may be seen as profiting from the success of one employee in a dispute with the employer, but a class action by its form is intended to be filed -- and argued -- on behalf of a group of employees or the entire membership in the class.

If the union in this case had cause to bring to judgment the Postal Service's failure to implement the OJI, the action should have been directed at that target.^{4/}

Probation is a derivative of the Greek word "pro", meaning for, before, in favor of. Thus, in "probate", the action is to prove a will. "Probable" is likely to occur or prove true. And, "probation" is the act of testing, as in qualifications for a job.

^{4/}

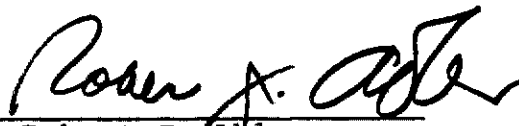
Although not directly relevant in this case because the conclusion here is that the grievance filed by the union is not arbitrable under Article 12, Section 1.A., it is pertinent to the long argument forced by the union (25 exhibits, 14 witnesses), that all witnesses agree the OJI is not a signed instrument. It therefore could not be a "negotiated agreement", as the union insists -- certainly not of a kind to contravene the specific contractual agreement in Article 12, Section 1.A. that management is not to be tested by the union under grievance or arbitration procedures whether a probationary employee shall become an employee covered by the collective bargaining agreement.

By tradition, long practice in industry generally, and by specific agreement of the parties in Article 12, Section 1.A., the decision whether a probationary employee has such potential is reserved to management.

Evaluation reports of employee Lovern's performance, a medical doctor's testimony in the arbitration hearing about Lovern's physical inability to perform letter carrier duties and some of the testimony of the employee himself about seeking work in a different classification in the Postal Service, establish, convincingly, that the Postal Service, in this case, took no action requiring extraordinary measures to consider employee Lovern's complaint under the grievance and arbitration procedures. Thus, the union's grievance is not arbitrable.

IV. DECISION

The grievance is not arbitrable; therefore it is denied.



Robert J. Ables

Dated: May 17, 1990

Washington, D.C.