C # 10198

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration	**GRIEVANT:**	Class Action
between	**POST OFFICE:**	Miami, Florida
UNITED STATES POSTAL SERVICE	**USPS CASE NO:**	H7N-3S-C 21873
and	**NALC CASE NO:**	011599
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO		

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service:	J.K. Hellquist, Agency Representative
For the Union:	Keith E. Secular, Attorney
Place of Hearing:	Washington, D.C.
Date of Hearing:	April 27, 1990

AWARD:

For the reasons given, the grievance is sustained.

Date of Award: August 13, 1990

Raymond L. Britton

ISSUE

Whether Case No. H7N-3S-C 21873 is arbitrable?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

After the Hearing, it was agreed that the parties would submit Post-Hearing Cross-Briefs to the Arbitrator by placing such Cross-Briefs in the mails not later than June 27, 1990. A transcript of the Hearing prepared by Diversified Reporting Services, Inc., Washington, D.C., was received by the Arbitrator on May 18, 1990. The Post-Hearing Cross-Brief filed by the United States Postal Service (hereinafter referred to as "Employer") was received by the Arbitrator on June 25, 1990. The Post-Hearing Cross-Brief filed by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") was received by the Arbitrator on July 6, 1990.

SUMMARY STATEMENT OF THE CASE

The grievance now before the Arbitrator was initiated at the local level on August 14, 1987, by NALC Branch 1071, Miami, Florida. The grievance seeks monetary remedies for alleged violations of the overtime distribution rules of the National Agreement that took place at the Coral Gables Branch Office during the week of July 11-17, 1987. This case is one of approximately several thousand distinct grievances involving allegations of overtime violations by the Miami Division that were held in abeyance at Step 2 pending the final adjudication of three previously filed overtime grievances.

The three cases, Nos. S4N-3S-C-54290, 54291, and 54292, were designated by the Union as representative cases. After being denied by management at Step 3 on July 27, 1987, the Union appealed the cases to regional arbitration, despite management's statement in the denial that it considered the cases to be interpretive, and that any appeal should be to Step 4. The cases were heard by arbitrator Skelton on July 27, 1988, and, at the hearing, he rendered a verbal decision that the cases were not arbitrable because they were appealed to regional arbitration rather than to Step 4. After arbitrator Skelton's ruling, the Union advocate stated that the cases would be referred to Step 4, and the advocate for the Employer objected because a decision had already been rendered.

On May 12, 1989, a national level arbitration hearing concerning the three cases was convened. The parties set forth their understanding of a resolution that "obviated the need to go forward this morning." The Union acknowledged that the three cases were moot and voluntarily withdrew them without prejudice to any future positions in the other pending grievances.

Thereafter, on May 18, 1989, Union President Matthew Rose notified the Southern Regional Headquarters Office of the Employer that ". . . this correspondence is a timely appeal to Step 3 of the three, newly, agreed upon Representative cases. . ." (Joint Exhibit No. 2).

On August 16, 1989, Robert R. Templeton, the Regional Manager of Labor Relations, sent a letter to National Business Agent Wayne E. White, stating in relevant part as follows (Joint Exhibit No. 2):

* * *

Based on the information presented and contained in the grievance file, the grievance is denied. This issue is considered moot due to the arbitration decision rendered in Case Numbers S4N-3S-C 54290, S4N-3S-C 54291, and S4N-3S-C 54292, which the local parties had designated as representative cases for this case and other similar cases. Historically, the parties have applied the decisions rendered on representative cases to all the cases designated as being represented. Since the arbitrator denied the above cases as being procedurally defective and not arbitrable, which is final and binding, that decision applies to this case. Even if the above is not factual, which it is, this case is considered untimely appealed to Step 3.

On August 20, 1989, the Union appealed this matter to Step 4, and on March 1, 1990, the Union requested that the case be certified for arbitration. On March 19, 1990, Dominic J. Scola, Jr., USPS Grievance and Arbitration Division, sent a letter to Union President Vincent R. Sombrotto, stating in relevant part as follows (Joint Exhibit No. 2):

Recently, a meeting was held with the NALC Director of City Delivery, Brian Farris, to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issues in these grievances are whether a regional arbitration award is final and binding on the parties and whether the Union can change their representative cases subsequent to an arbitration decision.

It is our position that no national interpretive issue involving the terms and conditions of the National Agreement is fairly presented in these cases. However, inasmuch as the union did not agree, the following represents the decision of Postal Service on the particular fact circumstances involved.

On May 12, 1989, a national level arbitration hearing was conducted on cases H4N-3S-C 54290/54291/54292. At the hearing, the Union stated that ". . . These three cases had been designated at Step 2, at the local level, as representative cases which were to be used to assist in the resolution of a backlog of similar cases . . ." (Transcript, page 4). The Union further stipulated that ". . . The parties have now agreed that the question of the impact of the denial of these three cases on the backlog cases should not be treated as an interpretive issue and arbitrated at the national level. Rather, that question will be arbitrated at the regional level as a fact-specific issue, which focuses on the substance of the agreement that was initially reached in Miami to treat these three cases as representative." (T,p.5).

In response to the union's admission on the record, the Postal Service stated, "Well, I am not going to elaborate on what Keith has already indicated, but I think the award by the arbitrator is very clear. He found the grievances not to be arbitrable. The position that will be in fact arbitrated, would be whether or not that arbitration decision by that arbitrator encompassed grievances that would govern the outcome of any subsequent arbitrations of cases in that particular group of representative cases." (T,p.6).

As a result of the national level hearing, the president of the South Florida Letter Carriers, Branch 1071, appealed to Step 3 on May 18, 1989, the grievances that are the subject of this dispute. In those appeals, dated August 16, 1989, management reiterated that no interpretive issue was present in these cases. Despite the categorization of these matters by the NALC at the national level to be arbitrated at the regional level, these cases were appealed, not to regional arbitration as prescribed by the parties at the national level arbitration hearing, but directly to Step 4 for a decision.

As a result of the final and binding award by Arbitrator B.R. Skelton in cases S4N-3S-C 54290/54291/54292, dated August 4, 1988, these grievances are considered moot. These cases were disposed of by the arbitration award rendered in the above cases which had been designated as representative cases for these cases and other similar cases.

Additionally, these cases are procedurally defective as they were untimely appealed to Step 3.

Accordingly, these grievances are denied.

* * *

Provisions of the National Agreement effective July 21, 1987, to remain in full force and effect to and including 12 midnight November 20, 1990, (hereinafter referred to as "National Agreement") (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

* * *

Section 2. Grievance Procedure—Steps

* * *

Step 3:

* * *

(f) Where grievances appealed to Step 3 involve the same, or substantially similar issues or facts, one such grievance to be selected by the Union representative shall be designated the "representative" grievance. If not resolved at Step 3, the "representative" grievance may be appealed to Step 4 of the grievance procedure or to arbitration in accordance with the above. All other grievances which have been mutually agreed to as involving the same, or substantially similar issues or facts as those involved in the "representative" grievance shall be held at Step 3 pending resolution of the "representative" grievance, provided they were timely filed at Step 1 and properly appealed to Steps 2 and 3 in accordance with the grievance procedure.

Following resolution of the "representative" grievance, the parties involved in that grievance shall meet at Step 3 to apply the resolution to other pending grievances involving the same, or substantially similar issues or facts. Disputes over the applicability of the resolution of the "representative" grievance shall be resolved through the grievance-arbitration procedures contained in this Article; in the event it is decided that the resolution of the "representative" grievance is not applicable to a particular grievance, the merits of that grievance shall also be considered.

Section 4. Arbitration

* * *

A. General Provisions

* * *

(6) All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. . . .

* * *

(9) In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

* * *

POSITION OF THE PARTIES

The Position of the Employer

The Employer takes the position that all arbitration awards are final and binding and that such an award may be vacated only by a court of law or by mutual agreement of the parties. The Employer contends that the parties agreed, at Step 2, that the original representative cases would be binding on the parties. The Employer maintains, therefore, that the arbitration award rendered on August 4, 1988 by arbitrator Skelton is final and binding and as such prevents the Union from rehearing the subject grievance.

The Position of the Union

It is the position of the Union that the present grievance is arbitrable and was not rendered nonarbitrable by arbitrator Skelton's award. The Union contends that there is nothing in arbitrator Skelton's award that has any bearing on any of the pending Miami grievances other than Case No. S4N-3S-C 54290/1/2. The Union maintains that the purpose of the May 1987 agreement between the parties was to obtain a resolution on the merits of the underlying issues and that since no such resolution has occurred, the present grievance has not been rendered moot.

OPINION

In the resolution of this matter, the Arbitrator is required to determine whether the instant grievance has been resolved as a result of a previous arbitration award rendered in Case No. S4N-3S-C 54290/1/2. The referenced case arose out of a dispute between the parties that resulted in the filing of numerous grievances in the Miami area concerning allegations of violation of the overtime regulations. Due to the substantial volume of grievances filed, Local Union President Matthew Rose and E&LR Manager Alan Bame agreed, in May 1987, that a representative case would be selected in accordance with Article 15, Section 2, Step 3(f) of the National Agreement. On May 22, 1987, Rose sent a letter to Bame in which he made the following representation as to the nature of the agreement (Employer Exhibit No. 6):

This case MIA 86-752, is and will be considered to be a "Representative Case" for <u>all</u> grievances pertaining to the issues contained herein. A list of those grievances were supplied to you and will be

incorporated in the grievance file. The outcome of this grievance will apply to all those grievances represented by this case, which will be binding on both parties.

In support of its position that the binding nature of arbitration awards renders the instant grievance moot, the Employer argues that the "final and binding" language in the National Agreement was bargained for by both parties with the intention of creating industrial stability and predictability. According to the Employer, the parties did not bargain for an appellate arbitration process as the Union would like to institute in the present case. The Employer urges that Article 15 of the National Agreement requires that all decisions of an arbitrator will be final and binding. In this regard, the Employer references several prior arbitration awards that the Employer maintains are supportive of its position herein. Among these are Case Nos. H1M-NA-C 51 (Arbitrator Richard I. Bloch); S1C-3W-C 3665 (Arbitrator Elvis C. Stephens); E8C-2M-C 11505 (Arbitrator Philip W. Parkinson); E1C-2B-C 13724 (Arbitrator George Jacobs); N-C-178 (Arbitrator Patrick J. Fisher); and NC-E-989-D (Arbitrator G. Allen Dash, Jr.). After carefully reviewing the cited awards, however, the Arbitrator finds little support in such awards for the position taken by the Employer in the matter at hand. Some of these awards address the final nature of an arbitration award, and others relate to the binding nature of certain settlement agreements between the parties. Deemed to be noteworthy by the Arbitrator is that the first four of the referenced awards all concern the resolution of the issue or issues. Indeed, in discussing the principle of res judicata, a principle upon which the Employer heavily relies, arbitrator Stephens states that ". . . the arbitrator may adopt the principle of res judicata and rule that the issue has already been determined by a previous award . . ." Similarly, arbitrator Jacobs, in discussing the principle of res judicata, cites the definition in Black's Law Dictionary that it is a ". . . rule that final judgement or decree on merits . . . is conclusive . . ." Thus, the question that must be addressed herein is whether the award rendered by arbitrator Skelton was a final judgment of the merits of the issues raised by the underlying grievance.

It seems clear from an examination of the record presented that Rose and Bame, in agreeing to use the "representative grievance" approach to handle the numerous overtime grievances that had been filed, intended that three specific issues be resolved. Those issues were 1) whether a letter carrier on the overtime desired list who is improperly denied an opportunity to work overtime is entitled to a monetary remedy; 2) whether a letter carrier who is not on the overtime desired list and who is improperly denied an opportunity to work overtime is entitled to a monetary remedy; and 3) whether management must utilize a carrier from the overtime desired list to relieve a carrier who is not on the list even if the carrier on the list would be entitled to penalty pay. An examination of arbitrator Skelton's award reveals that he did not consider any of the three above-described issues. Rather, as stated in his award, the issue before him was "Are grievances S4N-3S-C 54290, S4N-3S-C 54291, and S4N-3S-C 54292 arbitrable?" In concluding that they were not, arbitrator Skelton stated only that ". . . the grievances are procedurally defective and can not he heard on their merits in regional arbitration at this time." Thus, although arbitrator Skelton's award is final and binding with respect to the procedural defect that precluded a hearing of the grievances on the merits in regional arbitration, the underlying issues that were the subject of those grievances have never been addressed.

Significantly, when the instant grievance was denied at Step 2 (Joint Exhibit No. 2), management stated its conclusion that "[I]t should be noted that the issues denied are being held in abeyance at Step 2 until a final resolution of this grievance can be determined by a final resolution of representative cases 86-752, 86-273, and 87-398." The case numbers are a reference to the grievances that ultimately were presented to arbitrator Skelton. Seemingly, therefore, the Employer's representative understood that no disposition of the instant grievance would be forthcoming until the issues raised in the three representative grievances had been addressed. Such a view comports with the understanding specified in Rose's letter to Bame that the grievance was " . . . considered to be a 'Representative Case' for <u>all</u> grievances pertaining to the issues contained herein."

Accordingly, it is the conclusion of the Arbitrator that inasmuch as the issues raised by the instant grievance have not been arbitrated, nothing prevents such grievance from proceeding to arbitration in accordance with the provisions of the National Agreement.