C-19372

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	Case No. E94 N-4E-D 96075418
between	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
	)	
and	)	
	)	
UNITED STATES POSTAL SERVICE	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Union: Mr. Keith E. Secular

For the Employer: Mr. David A. Stanton

PLACE OF HEARINGS: Washington, D.C.

DATE OF HEARING: October 16, 1998

POST-HEARING BRIEFS: January 15, 1999

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that Article 15.4.B.4 of the parties' collective bargaining agreement does not preclude an arbitrator from granting a continuance in a removal hearing pending resolution of an underlying disciplinary grievance. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: April 19, 1999

IN THE MATTER OF ARBITRATION

BETWEEN

NATIONAL ASSOCIATION OF LETTER CARRIERS

AND

UNITED STATES POSTAL SERVICE

(Case No. E94 N-4E-D 96075418)

ANALYSIS AND AWARD

Carlton J. Snow
Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from August 19, 1995 to November 20, 1998. A hearing was held on October 16, 1998 in a conference room of the United States Postal Service headquarters building located at 475 L'Enfant Plaza in Washington, D.C. Mr. Keith E. Secular, an attorney with the law firm of Cohen, Weiss and Simon in New York, N.Y., represented the National Association of Letter Carriers. Mr. David A.

Stanton, National Litigation Attorney, represented the United States Postal Service.

The hearing proceeded in an orderly manner. The parties had a full opportunity to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Mr. Peter K. Shonerd of Diversified Reporting Services, Inc. recorded the proceeding and submitted a transcript of 59 pages. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter properly had been submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. They elected to submit the matter on the basis of evidence presented at the hearing as well as simultaneous post-hearing briefs. The arbitrator officially closed the hearing on January 15, 1999 after receipt of the final post-hearing brief in the matter.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

> Does Article 15.4.B.4 of the parties' agreement preclude regional arbitrators from granting a continuance for the sole purpose of allowing underlying discipline to be adjudicated prior to hearing a removal case?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 4. Arbitration

A. General Provisions

3. All grievances appealed to arbitration will be placed on the appropriate pending arbitration list in the order in which appealed.

B. Arbitration - Regular

1. At the Grievance/Arbitration Processing Center three (3) separate lists of cases to be heard in arbitration shall be maintained: (a) one for all removal cases and cases involving suspensions for more than 14 days, (b) one for all cases referred to Expedited Arbitration, and (c) one for all other cases appealed to Regular Arbitration. Separate panels will be established for scheduling (a) removal cases and cases involving suspensions

for more than 14 days, (b) for all cases referred to Expedited Arbitration, and (c) for all other cases appealed to Regular Arbitration.

2. Cases will be scheduled for arbitration in the order in which appealed, unless the Union and Employer otherwise agree.

3. Only discipline cases involving suspensions of 14 days or less and those other disputes as may be mutually determined by the parties shall be referred to Expedited Arbitration in accordance with Section C hereof.

4. Cases referred to arbitration, which involve removals or suspensions for more than 14 days, shall be scheduled for hearing at the earliest possible date in the order in which appealed.

IV. STATEMENT OF FACTS

In this case, the parties disagree with regard to whether an arbitrator's discretionary authority to postpone an arbitration hearing is limited by their collective bargaining agreement. The dispute presents an interpretive issue that arose in the context of an individual grievance. Because resolution of the interpretive issue was not necessary for arbitrating the grievance, the parties remanded the interpretive matter separately and seek resolution of it in national arbitration.

In other words, there is no factual dispute before the arbitrator. The narrow interpretive question concerns the authority of an arbitrator, under Article 15.4 of the parties' agreement, to postpone an arbitration hearing in a removal case because of prior disciplinary matters that are not yet resolved. When the parties reached no consensus on an appropriate interpretation, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

The Union contends that, although arbitrators generally have authority over procedural questions in a hearing, Article 15.4.B.4 preempts an arbitrator's authority to postpone a hearing by requiring that the parties schedule a removal grievance at the earliest possible date. If an arbitrator were to have authority to grant a continuance in order to await the outcome of another grievance, he or she would directly contradict explicit language in the parties' agreement, according to the Union. The Union does not deny that an arbitrator has authority to postpone a hearing if a witness or advocate were unavailable, but the Union reasons that these circumstances must be

distinguished as legitimate grounds for a postponement based on the inability of the parties to conduct a hearing.

In support of its conclusion that an unresolved prior disciplinary action does not constitute a valid basis for postponing an arbitration hearing, the Union points to a past practice between the parties in which unresolved actions are given no weight in arbitration hearings. In other words, if a prior disciplinary action has been grieved and the grievance has not been resolved, the Employer is not permitted to rely on the earlier discipline as support for subsequent discipline in a related discharge hearing. The Union relies on a 1977 national award in which Arbitrator Fasser concluded that an appeal in an arbitration case which had not been finally adjudicated had no standing in a subsequent removal proceeding. The Union also cites four regional arbitration decisions that recognized the Fasser Award as dispositive. It is the contention of the Union this past practice establishes that unresolved grievances are to be disregarded in removal hearings, even with respect to postponement decisions.

The Union maintains that specific language in the parties' collective bargaining agreement, combined with the authority of the national

arbitration award reached in the Fasser decision, compel a conclusion that arbitration cases must be heard on the date scheduled without regard to any unadjudicated grievances. The Union contends that the Employer has had ample opportunity to negotiate a change in response to the Fasser award but has chosen not to do so. Hence, the Union concludes that its position must be sustained as the correct interpretation of the parties' collective bargaining agreement.

B. The Employer

The Employer argues, first, that the Union went beyond the scope of the proceeding in this case and raised a new issue. The new issue allegedly is the admissibility of unresolved disciplinary actions in removal hearings. The Employer relies on four awards as authority for the proposition that it is inappropriate for a party to raise a new issue at an arbitration hearing. (*See* Employer's Post-hearing Brief, 3). Because the issue to which the parties stipulated prior to the hearing in this case did not include any reference to the substantive effect of unresolved grievances, the Employer contends that the Union may not raise the new matter during this

arbitration proceeding. The Employer also maintains that the issue of unresolved grievances is not relevant to the narrow issue before the arbitrator.

With regard to the stipulated issue, the Employer contends that Article 15.4.B.4 of the parties' agreement constitutes merely a scheduling device and is part of a larger design that separates grievances by type in order to provide a different forum for each type of case. The parties' system of arbitration also gives priority to removal cases within the regular arbitration forum but does not absolutely require that removal cases be heard before cases involving lesser degrees of discipline which are subject to expedited arbitration, according to the Employer. The Employer contends that the plain and unambiguous meaning of language in the parties' agreement does not preclude arbitrators from granting a continuance on any basis.

It is the belief of the Employer that the Union's improper interpretation of the parties' agreement will produce a "Catch 22" situation which will allow some employees to escape consequences of their misconduct merely because their removal hearing is held before earlier discipline has been adjudicated. The Employer contends that, if the Union were of a mind to do so, it, then, would be in a position to manipulate the

grievance system by delaying some grievances in an effort to prevent management from relying on any prior discipline when discharging employees. The Employer also argues there is no basis for the Union's contention that, on one hand, the disputed provision prevents continuance of a case because of unresolved grievances but, on the other hand, does not prevent postponement because of such factors as the unavailability of witnesses or counsel.

It is the position of the Employer that there is no evidence in the well-documented history of negotiations between the parties revealing any intent to limit the discretionary authority of arbitrators to grant continuances in removal hearings. Had the parties so intended, the Employer maintains that they certainly would have expressed their intent with clarity. Instead, Article 15.4.B.4 of the parties' agreement is precisely what it appears to be, namely, a scheduling device, according to the Employer.

Past practice supports its position, according to the Employer. The Employer points to the absence of decisions interpreting language in Article 15.4.B.4 as support for its position that the contractual provision has not been used to prevent arbitrators from granting continuances. The Employer also believes that several prior arbitration decisions lend support

to its position. In one such case, the arbitrator noted neither party had requested that a decision be delayed until an earlier grievance could be resolved, implying that such delay was possible, in the view of the Employer. (*See* Employer's Exhibit No. 4.) In another decision, both parties to a removal case agreed that a decision should be postponed until an award could be made in the earlier grievance. (*See* Employer's Exhibit No. 5.) In a third decision, a removal case was held to be not right because an earlier grievance was still outstanding. (*See* Employer's Exhibit No. 6.) In that case, the arbitrator waited five months for the impending result before issuing a final decision. The Employer believes such decisions are evidence that the parties did not view unresolved grievances as irrelevant to removal hearings.

Finally, the Employer maintains that an arbitrator's inherent authority to determine procedural questions with regard to arbitral issues is controlling. In this case, the parties' agreement sets forth no limitation on an arbitrator's authority to grant a continuance to await the results of a prior grievance, according to the Employer. Hence, it is the Employer's conclusion that, because the parties' agreement is silent on the issue of continuances, the parties intended such decisions to be left to the discretionary authority of an arbitrator.

VI. ANALYSIS

A. Arbitral Jurisprudence

The U.S. Supreme Court has been unequivocal in its conclusion that, "once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." (*See John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964).) The Court has expanded its teaching about procedural arbitrability in subsequent decisions. Even procedural issues that are not directly a part of a collective bargaining agreement, such as *laches,* should be resolved by an arbitrator. (*See, e.g.,Flair Builders*, 406 U.S. 487 (1972).) As a general rule, courts defer issues of procedural arbitrability to an arbitrator. (*See, e.g., McAllister Bros.*, 671 F. Supp. 309 (S.D.N.Y. 1987); *Washington Hospital Center*, 746 F.2d 1503 (D.C. Cir. 1984); and *Dunn Country Ford*, 709 F. Supp. 509 (8th Cir. 1983).)

Arbitrators have adopted the teaching of the Court as a part of their own jurisprudence. As one scholar observed, "issues of procedural arbitrability are for an arbitrator to decide." (*See* St. Antoine, The Common Law of the Workplace 88 (1998).) Scores of arbitration decisions recognize that, as a general rule, an arbitrator is authorized to resolve issues of

procedural arbitrability, and questions of substantive arbitrability constitute a matter of law unless the parties designed their system differently. (*See, e.g.,Frazee Education Association*, 110 LA 1117 (1998).)

There, of course, is nothing immutable about the general rule that an arbitrator resolves issues of procedural arbitrability. It is merely a default rule around which parties may bargain at their pleasure. If parties wish to design their grievance procedure to exclude procedural arbitrability from an arbitrator's jurisdiction, they have every right to reach such an agreement. Otherwise, an arbitrator's discretionary authority over procedural arbitrability is limited only to the extent that the parties' agreement provides clear-cut restrictions. Without express restrictions, the default rule applies.

In this case, the parties are highly experienced in labor-management matters and have negotiated a detailed grievance-arbitration procedure. They divided grievances into three groups and provided a different forum and scheduling procedure for each group. The important question in this dispute is whether the parties' agreement dictates the extent of an arbitrator's authority to continue an arbitration hearing for the purpose of awaiting resolution of underlying disciplinary actions. Despite their carefully negotiated grievance provisions, the parties have not seen fit to

draft contractual language specifically limiting an arbitrator's discretionary authority to make that particular procedural ruling. The parties concede that the situation in dispute arises rarely and that underlying grievances generally do not remain unresolved at the time of a removal hearing.

B. Teaching of the Contract

The Union argued that, in fact, the parties have restricted an arbitrator's discretionary authority and that Article 15.4.B.4 in the parties' agreement operates to limit an arbitrator's authority. This contractual provision states:

> Cases referred to arbitration, which involve removals or suspensions for more than 14 days, shall be scheduled for hearing at the earliest possible date in the order in which appealed. (*See* Joint Exhibit No. 1, emphasis added.)

The provision does not specifically address the issue of postponement in cases involving an employee's removal. It, however, makes clear that removal hearings are to occur with a minimum of delay. This is made clear both by the fact that removal hearings are placed in a separate category with their own arbitration panel as well as by the fact that the contractual

provision requires that such hearings be scheduled "at the earliest possible date."

The commitment to proceed expeditiously in removal hearings reflects a general consensus of the parties that discharging an employee is the ultimate discipline and deserves special attention within the grievance procedure. But does the conclusion that one purpose of Article 15 is to accelerate processing removal grievances necessarily imply that an arbitrator may not postpone a hearing in order to allow a related grievance to be resolved? The Union would answer the question in the affirmative and rely, in part, on a past practice that unresolved grievances are not admissible in removal cases. (The Employer protested the Union's use of such an argument and characterized it as raising a new issue to which the parties did not stipulate. It, however, is merely an argument in support of the Union's position and does not constitute a new issue to be resolved.) The Union maintained the past practice clearly showed the intent of the parties that unresolved grievances are to have no effect on removal cases, even including their postponement.

The Employer reasoned that it is unnecessary in this case to resort to extrinsic evidence such as past practice because the contractual language is clear and unambiguous. The actual words of Article 15.4.B.4,

however, do not address the issue of continuances. Neither does the context of the provision specifically require that removal cases be given top priority in the grievance procedure. The fact that removal cases are heard first as an ordinary result of the provision does not mean that this sequential order is a necessary result of the contractual provision. The language simply does not state that the priority given removal cases is absolute.

The contractual provision in dispute does not clearly limit the authority of an arbitrator to grant a continuance in a removal case. It makes no mention at all of an arbitrator's authority to make procedural decisions. Rather, the provision is part of a larger scheduling scheme that directs the flow of arbitration cases in an orderly manner. It specifically provides that the most serious disciplinary cases must receive special treatment, but it does not set up an absolute priority for removal cases over all others.

The Union argues the contractual provision implies that, once a hearing is scheduled, an arbitrator is without authority to change that schedule in order to await the outcome of another hearing. This conclusion, however, is not a necessary implication. In fact, the Union concedes that an arbitrator has authority to postpone a scheduled hearing for certain reasons, such as the unavailability of a witness or advocate. The Union recognizes that the contractual provision does not foreclose all scheduling discretion.

It would be reasonable to expect the parties to remain silent in their agreement (meaning that an arbitrator's discretion to postpone a hearing remained unfettered) or, alternatively, to control such arbitral discretion completely. In the absence of clear contractual language or documentary and testimonial evidence of the parties' contractual intent, it is reasonable to conclude that the collective bargaining agreement does not preclude a discretionary postponement by an arbitrator.

That the parties have a past practice of giving unresolved grievances no standing in removal hearings fails to be dispositive in the case. Weight actually given evidence by an arbitrator says nothing at all about valid grounds for postponing a hearing. In fact, because an unresolved grievance can have no impact on a removal arbitration hearing, postponement becomes all the more important.

It is one thing to rely on an unresolved grievance when deciding a removal case and quite another merely to postpone a hearing or a decision. In the case of postponement, substantive rights of a party are not at stake. Postponement is merely a method to insure the most accurate decision-making possible. Where an arbitrator concludes that postponement is vital to making a correct arbitral decision, the parties' agreement does not prevent such a postponement. Moreover, the Employer provided evidence

of another past practice, namely, that of delaying decisions pending resolution of underlying grievances; and such evidence indicated that the parties do not treat unresolved disputes uniformly.

Not only did the asserted limitation on an arbitrator's authority not prove to be abstractly persuasive, but also it failed the test of reasonableness and practicality. The Union's interpretation of the parties' agreement would open the door to manipulation of the system for scheduling grievances. For example, it would be possible to delay resolution of an underlying grievance in order to prevent the issue from being used in a removal hearing if an arbitrator were without authority to postpone it. Neither language in the parties' agreement nor evidence of any past practice established that the parties intended to prevent an arbitrator from granting a continuance in a removal case for the purpose of allowing an underlying grievance to be resolved.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that Article 15.4.B.4 of the parties' collective bargaining agreement does not preclude an arbitrator from granting a continuance in a removal hearing pending resolution of an underlying disciplinary grievance. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: April 19, 1999