

C-19628

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration
 between
 UNITED STATES POSTAL SERVICE
 -and-
 AMERICAN POSTAL WORKERS UNION

GRIEVANT: President of APWU

CASE NOS. H1C-NA-C 97 *Airs* 13,039
 H1C-NA-C 123 13,040
 H1C-NA-C 124 13,041

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: D. James Shipman
 Director, Human Resources
 Des Moines Division

For the APWU: Anton G. Hajjar
 Attorney (O'Donnell Schwartz
 & Anderson)

Place of Hearing: Washington, D.C.
 Date of Hearing: October 13, 1988
 Dates of Post-Hearing Briefs: December 7 and 16, 1988

AWARD: The remedy sought - namely,
 expunging discipline and consequently providing back
 pay and reinstatement - is not appropriate in this
 case.

Date of Award: February 3, 1989

Richard Mittenthal
 Richard Mittenthal
 Arbitrator

BACKGROUND

This case arises from the Postal Service's action in unilaterally implementing disciplinary programs in three cities and refusing to bargain with APWU over such programs. These actions were held by an arbitrator to be a violation of the National Agreement. The question here is the proper remedy for this violation. The Postal Service terminated these programs in response to that arbitration award. It believes no further remedy is necessary. APWU disagrees. It urges that any discipline imposed on employees pursuant to these programs (or any discipline which relies on penalties meted out earlier pursuant to these programs) should be expunged. It seeks reinstatement and back pay wherever appropriate.

The St. Louis, Missouri post office has always disciplined employees for poor attendance, that is, excessive absenteeism or tardiness or absence without leave. Normally, there were six steps in the disciplinary process: (1) a letter of warning; (2) a second letter of warning; (3) a 7-day suspension; (4) a 14-day suspension; (5) a second 14-day suspension; and (6) finally discharge. Management changed this process in November 1983 by introducing a program known as Positive Attendance Control (PAC). It still disciplined for attendance-related offenses but it reduced the number of disciplinary steps from six to four. They were: (1) a PAC #1 letter of warning; (2) a PAC #2 letter in lieu of a 7-day suspension, explaining that the offense was serious enough to justify such a suspension and that failure to correct the problem could result in discharge; (3) a PAC #3 letter in lieu of a 14-day suspension, explaining that the offense was serious enough to justify such a suspension and that failure to correct the problem would result in discharge; and (4) finally discharge. Management explained the PAC program to the APWU local but refused to negotiate with the local regarding this program. It believed it had a contractual right to implement PAC without negotiations and it did so.

These circumstances prompted APWU to file an unfair labor practice charge with the National Labor Relations Board (NLRB) in December 1983. It alleged that the unilateral implementation of PAC was a violation of Sections 8(a)(1) and (5) and 8(d) of the National Labor Relations Act (NLRA). The NLRB, applying its Collyer Insulated Wire principle, chose to defer the matter to the parties' grievance-arbitration procedure. APWU filed a Step 4 grievance in mid-March 1984, asserting that the unilateral implementation of PAC was a violation of various provisions of the National Agreement as well as the NLRA. It sought as a remedy:

"...The PAC program must be rescinded immediately; all discipline issued under it must be expunged and, where necessary, employees made whole with interest in accordance with NLRB practice; and an order...to cease-and-desist from issuing and implementing other attendance control programs or modifications in discipline systems without the APWU's consent..."

The grievance was discussed in Step 4 and appealed to national-level arbitration in May 1985. That became Case No. H1C-NA-C 97.

Essentially the same issue arose between the Postal Service and the Mailhandlers Union. That dispute, Case No. H1M-NA-C 99, was heard at the national level by Arbitrator Zumas. He held in May 1987 that Management had violated the National Agreement, apparently, Articles 5 and 16, "by unilaterally implementing the PAC, N-DEM and N-TOL pilot programs...and by failing and refusing to bargain with the [Mailhandlers] Union over these programs." He ordered the Postal Service "to enter into collective bargaining with the Union over these programs." He did not address any other remedy questions because none apparently had been raised.

Given the Zumas award, the Postal Service advised APWU in January 1988 that H1C-NA-C 97, the APWU protest against PAC, was "sustained...in part by terminating the...program...effective March 1, 1988." However, the parties disagreed on the propriety of the other remedies requested by APWU. The principal disagreement involves the APWU claim that any discipline issued under PAC, or any discipline issued after March 1, 1988 which relied in part on prior PAC discipline, should be expunged.

It appears that some 198 grievances in St. Louis have been held in abeyance pending a decision in the instant case. Of those, 98 were protests against PAC #2 letters, 67 against PAC #3 letters, and 17 against 7- or 14-day suspensions which were imposed after the March 1, 1988 termination of PAC but which relied on prior PAC letters. And there were 16 protests against discharges, some of which occurred before March 1, 1988 and some of which occurred after. APWU asks that the grievants who were discharged be reinstated with back pay and the grievants who were actually suspended be made whole.

The Postal Service objects to any such remedy. It contends that there is no justification for expunging the discipline under PAC simply because of a procedural failure by Management. It maintains that the grievants' work attendance and consequent

discipline can and should be measured by normal "just cause" standards without reference to PAC and that such determinations, largely factual in nature, are matters for regional arbitration.

Two other disciplinary programs are also before the arbitrator in this case. One, known as No Discipline Employee Motivation (N-DEM or NODEM), was unilaterally implemented at the St. Paul, Minnesota post office in January 1984. The other, known as No Time Off Letter of Warning (N-TOL or NOTOL), was unilaterally implemented at the Louisville, Kentucky post office in February 1984. Both programs applied to most employee misconduct, not just attendance-related offenses. N-DEM called for repeated counseling, rather than warning letters or suspensions, and permitted discharge only after Management concluded the employee was incorrigible. N-TOL called for the same series of warning letters (N-TOL #1, #2 and #3) as in PAC, followed by discharge. APWU filed charges with the NLRB in each of these situations. The NLRB deferred to the grievance-arbitration machinery. APWU submitted Step 4 grievances. Those grievances reached national-level arbitration and have been designated Case Nos. H1C-NA-C 123 and H1C-NA-C 124. Both N-DEM and N-TOL, like PAC, were terminated in March 1988 because of the Zumas award. There evidently are no pending grievances in St. Paul or Louisville against any discipline issued pursuant to N-DEM and N-TOL.

The following discussion of the remedy issue will refer to PAC alone in the interest of clarity. But the conclusions are applicable not just to PAC but to N-DEM and N-TOL as well.

DISCUSSION AND FINDINGS

The issue here is whether attendance-related discipline taken during the period PAC was in effect (or taken thereafter in reliance on prior PAC discipline) must be invalidated because Management's unilateral installation of PAC was itself a violation of the National Agreement. APWU believes this discipline must be invalidated; the Postal Service disagrees.

Several considerations support the Postal Service's position. First, there are two distinct features to any disciplinary policy. One concerns the misconduct for which employees may be disciplined; the other concerns the penalties that may be invoked for such misconduct. PAC dealt only with the penalties for attendance-related misconduct. It made no attempt to change St. Louis' long-standing rules (or practices) that treated poor attendance as the kind of misconduct that warrants discipline. Employees were surely aware that poor attendance was certain to prompt some form of discipline. The

fact that the penalties chosen by Management were determined by PAC, by a program prematurely introduced in violation of the National Agreement, does not diminish the existence of the alleged misconduct.

Second, the Zumas award struck down PAC on narrow grounds. He held that Management violated Article 5 and/or Article 16 by unilaterally implementing PAC, that is, by placing PAC in effect while at the same time refusing to negotiate over PAC with the Mailhandlers Union. His award, in short, was based on a procedural defect. Arbitrator Zumas did not find that PAC was unreasonable. Nor did he find that PAC could only be installed through mutual agreement of the parties. Thus, it was not the terms of PAC but rather the manner of its implementation that prompted Zumas to find a contract violation.

Third, the practical impact of the Zumas award was quite limited. The award said in effect that Management could not, without prior negotiations, use PAC to determine penalties for attendance-related offenses. But it does not follow that no penalty whatever was appropriate for such offenses. The invalidity of PAC simply meant that the discipline had to be judged by some standard other than PAC, presumably by the normal "just cause" standard the Postal Service has employed in countless discipline cases.

Fourth, perhaps most important, the purpose of a remedy is to place employees (and Management) in the position they would have been in had there been no contract violation. The remedy serves to restore the status quo ante. Consider the employees who allegedly committed attendance-related offenses. Where would they be now if PAC had not been introduced in November 1983, if its introduction had been delayed a substantial period of time because of the need for prior negotiation? The answer is clear. They would be awaiting a judgment on their grievances based on whether they were innocent or guilty of the charged offense and whether, if guilty, the penalty imposed was reasonable under all the circumstances (excluding PAC) of their case. The remedy here should assure them they will be exposed to a Management judgment, and an arbitral judgment, that is PAC-free.¹ APWU insists on much more, namely, the nullification not only of PAC but also of any discipline taken in reliance on PAC.

¹ Note that some of Management's penalties may have been more lenient (e.g., PAC #3 letters) and others may have been more harsh (e.g., PAC discharges) than what could have been justified under the practices in effect in St. Louis prior to the implementation of PAC in November 1983.

Such a remedy would go far beyond the notion of a status quo ante. It would reward employees for Management's procedural error by freeing them of any responsibility for their alleged misconduct. From the standpoint of collective bargaining reality, there is no necessary relationship between this Management error and the kind of employee exoneration sought by APWU.

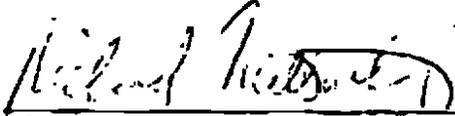
For these reasons, the relief requested by APWU cannot be granted.

Finally, APWU stresses that Article 5 prohibits "any actions affecting...terms and conditions of employment...which violate...or are otherwise inconsistent with its [the Postal Service's] obligations under law." It argues that the unilateral implementation of PAC was a violation of Section 8(a)(5) of the NLRA, that the remedy for this violation by the NLRB would have included expunging any discipline imposed pursuant to PAC, and that the arbitrator should do no less given the NLRB's deferral of this matter to the grievance-arbitration procedure.

My reading of the NLRA, as construed by the NLRB and the courts, suggests that there was indeed a violation of Section 8(a)(5). That constitutes in turn a violation of Article 5 of the National Agreement. And it may well be that the NLRB would expunge the discipline. However, Article 5 does not compel the arbitrator in these circumstances to embrace the NLRB remedy. Arbitrators have an extremely large measure of discretion in determining how a contract violation should be remedied. They can and should consider the nature of the wrong done, the damage (or lack thereof) to the employees, the practical impact of the remedy sought, the nature of the bargaining relationship, and other such matters. On the record in this case and for the reasons expressed earlier in this opinion, I do not believe it would be appropriate to expunge the discipline because of this contract violation.

AWARD

The remedy sought - namely, expunging discipline and consequently providing back pay and reinstatement - is not appropriate in this case.


Richard Mittenthal, Arbitrator