

C#04085

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE

Case No. NC-E-11359

and

Johnstown, PA

NATIONAL ASSOCIATION OF LETTER CARRIERS

APPEARANCES: R. Andrew German, Esq., for the Postal Service;  
Cohen, Weiss and Simon, by Richard N. Gilberg, Esq.,  
for NALC

#### DECISION

This grievance arose under and is governed by the 1975-1978 National Agreement (JX-1) between the above-named parties and the 1975 Memorandum of Understanding (JX-3) between the Johnstown, Pennsylvania Post Office and Branch 451, NALC. The undersigned having been jointly selected by the parties to serve as sole arbitrator, a hearing was held on 7 July 1983, in Washington, D. C. Both parties appeared and presented evidence and argument on the following agreed-upon issue (Tr. 7, 8):

Was the grievance timely submitted?

If so, what is the appropriate remedy?

A verbatim transcript was made of the arbitration proceeding, and each side filed a post-hearing brief. Upon

receipt of the briefs, the arbitrator closed the record on 29 July 1983.

On the basis of the entire record, the arbitrator makes the following

AWARD

The grievance was timely submitted.

The Postal Service shall immediately cease its violation of the Memorandum of Understanding between the Johnstown, Pennsylvania Post Office and Branch 451, NALC, and shall assign non-scheduled days on a rotating basis.



Benjamin Aaron  
Arbitrator

25 January 1984  
Los Angeles, California

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NATIONAL ASSOCIATION OF LETTER CARRIERS

OPINION

I

The parties have stipulated the following facts:

Beginning 9 August 1975, the Postal Service assigned Letter Carrier Edward Baich to a fixed Saturday nonwork day. Baich has continued, since that time, to have Saturday as his nonwork day.

Item 2 of the 1975 Memorandum of Understanding (MOU) between the Johnstown, Pennsylvania Post Office and Branch 451, NALC, provides in part:

NON-SCHEDULED DAYS SHALL BE ON A ROTATING BASIS [EXCEPT FOR PARCEL POST ROUTES] FOR ALL CARRIERS. CARRIERS WILL ROTATE ON A WEEKLY BASIS.

The assignment of Baich to a fixed Saturday nonwork day was thus contrary to the specific terms of the MOU.

On 23 June 1977, Letter Carrier Carl Slavick filed a grievance claiming that the assignment of Baich to a fixed

nonwork day violated his (Slavick's) seniority rights.

Slavick's grievance was denied at all steps solely on the ground that it was untimely.

At the arbitration hearing, the Postal Service explained, by way of background information, that Baich had been assigned Saturday as his fixed nonwork day in settlement of his complaint, filed in 1974, under Title VII of the Civil Rights Act, 1964, that he was being made to work Saturdays, despite the fact that his religious beliefs did not permit him to work on that day.

Relying on Article XV of the 1975-1978 National Agreement, NALC argued that the Postal Service had not disclosed the reason for its assignment of Baich to a nonrotating day off, nor relied upon it as a defense to Slavick's grievance, at any step of the grievance procedure. It claimed, therefore, that the Postal Service had waived its right to present any claims other than timeliness in this arbitration.

In reply, the Postal Service contended that Slavick was fully aware of the reason for Baich's assignment. Patrick F. O'Donnell, Director of Customer Services in the Johnstown Management area -- the only witness called by either party at the arbitration hearing -- testified (Tr. 19): "Repeatedly after Mr. Baich's schedule was posted, Mr. Slavick would request his religious holidays off when they didn't fall on a Sunday." Slavick's grievance (JX-2) also charged that he had been subjected to "reverse discrimination."

On the timeliness issue, NALC contends that Slavick's grievance was not untimely because the Postal Service's violation of the MOU was a continuing one. It explains that the grievance was filed in accordance with Article XV, in that it could be initiated within 14 days of any point along the continuum of the violation. In this case the grievance was filed on 23 June 1977, less than 14 days after the United States Supreme Court handed down its decision in Trans World Airlines, Inc. v. Hardison, 432 U.S. 78 (1977), in which the Court ruled that "reasonable accommodation" under Title VII to an employee's religious beliefs did not require the employer to deny shift and job preferences guaranteed to other employees by an applicable collective bargaining agreement.

The Postal Service asserts, in reply, that NALC acquiesced in its arrangement with Baich for almost two years before filing a grievance, and that if Baich's schedule violated the MOU, the violation occurred in 1975, and was not suddenly transformed into a violation by the Hardison decision or any other court decision.

## II

It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed.


The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument. The spirit of the rule, however, should not be diminished by excessively technical construction. The evidence establishes to my satisfaction that Slavick and the other carriers at the Johnstown Post Office were aware from the outset of the reason for Baich's assignment to a fixed nonwork day, contrary to the terms of the MOU. NALC is therefore in no position to claim surprise by the testimony and argument offered by the Postal Service during the arbitration hearing. Accordingly, I conclude that on this point NALC's objections must be overruled.

On the timeliness issue, however, I agree with NALC that the Postal Service's clear violation of the MOU in the case of Baich was a continuing one and that Slavick's grievance was timely. The failure of NALC or of any employee at the Johnstown Post Office to grieve for almost two years following the assignment to Baich of a fixed nonwork day did not constitute a waiver of the right to protest. Although it is true, as the Postal Service asserts, that the Supreme Court's decision in Hardison should be accorded no special significance, the grievance could have been filed at any time. Mere silence, in itself, is seldom conclusive proof of waiver; I do not think it can be so construed in this case. Here, the violation

of the MOU is so patent that any alleged waiver by NALC of its right to challenge it would have to be clear and unequivocal.

The remedy requested by NALC is simply that the Postal Service comply with the terms of the MOU. No retroactive relief is involved. My decision is based on the terms of the National Agreement and of the MOU. Although NALC has cited court decisions indicating that compliance by an employer with an administrative settlement or court decree does not excuse a violation of a collective bargaining agreement, I expressly refrain from dealing with that issue. My function is to construe and apply the agreements and does not extend to applying external law.

For the foregoing reasons, I rule that the grievance was timely and that the Postal Service must immediately cease its violation of the MOU between the Johnstown, Pennsylvania Post Office and Branch 451, NALC.

  
Benjamin Aaron  
Arbitrator