C#10679

REGULAR ARBITRATION PANEL

In the Matter of Arbitration Between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

OPINION AND AWARD

Nicholas H. Zumas, Arbitrator

Grievant: L. Reformato
Case No.: N4C-1A-C 25151

Appearances:

For U.S. Postal Service: Helen Kendrick

For Union: Anthony Caniano

Place of Hearing: New York, New York

Date of Hearing: April 18, 1990

Award: Grievance sustained. The Letter of Demand was procedurally defective, and therefore improper.

Date of Award: July 16, 1990

Nicholas H. Zumas, Arbitrator

STATEMENT OF THE CASE

This is an arbitration proceeding pursuant to the provisions of Article 15 of the National Agreement between United States Postal Service (hereinafter "Service") and American Postal Workers Union, AFL-CIO (hereinafter "Union"). At the hearing, exhibits were offered and made part of the record and oral argument was heard.

Grievant was issued a Letter of Demand to repay a shortage in his flexible credit. The Union, on behalf of Grievant, contends that the Letter of Demand was procedurally defective because it was not signed by the Postmaster or his designee, and that Grievant was not apprised of his appeal rights as required. The Service contends that the Union did not raise these procedural issues during the various Steps of the grievance procedure; as such, they are new issues that may not be considered.

The parties, having failed to resolve the matter during the various Steps of the grievance procedure, referred the dispute to this Arbitrator for resolution.

ISSUE

The question to be resolved is whether the Letter of Demand was proper under the circumstances; and if not, what should the remedy be.

STATEMENT OF FACTS

At all times pertinent, Grievant was employed as a Window Clerk at the Madison Square Station in New York City.

On April 30, 1986, after an audit of Grievant's accountability, which revealed a shortage, Grievant was issued a Letter of Demand reading:

> "This will serve to notify you of the USPS's intention to collect from you the sum of $366.27 for a shortage found in your flexible credit of $14,996.73.
>
> Specifically, it was determined that you failed to exercise reasonable care in the performance of your duties in that on 4/29/86, as the result of an audit of your flexible credit of $14,996.73 a shortage was found amounting to $366.27.
>
> Said determination is based upon review of the facts as they are known and my investigation of same and is in accordance with Article 28 of the National Agreement.
>
> This indebtedness being more than $200.00, in accordance with Section 4A of Article 28 of the National Agreement, will be postponed until adjudicated through the grievance-arbitration mechanism if you so elect to grieve the shortage. If you elect not the grieve, deductions will be instituted as soon as reasonably possible in accordance with Section 4B of the National Agreement."

The Letter of Demand was signed by Grievant's supervisor. The Letter of Demand was grieved alleging inadequate security. During the various Steps of the grievance procedure, the Union did not present any arguments or allegations that the Letter of Demand was procedurally defective.

At the arbitration hearing, the Union advocate asserted that the Letter of Demand was not in compliance with the F-1 Handbook which required that it be signed by the Postmaster or designee, and that the employee be specifically advised of his rights of appeal under Article 15. Numerous awards were submitted by the Union advocate in support of his position. The Management advocate contended that the Union never raised the procedural defect defense until the arbitration hearing; and should be barred from presenting such a defense. In support of Management's position, the Service advocate cited a National level award by Arbitrator Aaron to the effect that parties under the National Agreement are barred from introducing evidence or arguments not presented at the preceding Steps of the grievance procedure.

FINDINGS AND CONCLUSIONS

After review of the record, it is this Arbitrator's finding that, under the circumstances, the Letter of Demand was sufficiently defective so as to warrant its rescission. This finding is based upon the following:

1. Section 473.1 of the Revision of the F-1 Handbook states that the Letter of Demand "must" include the following sentence:

> "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

In a recent case (September 1989) Arbitrator Marx in N7C-1E-C 4024 concluded that the Letter of Demand was improper, holding:

"...The Arbitrator has reviewed 16 arbitration awards which made findings on the technical issue of proper notification of grievant's rights. Virtually all found that the Letters of Demand must be withdrawn because of the failure of the Postal Service to follow its own notice regulations. ...There was unanimity in finding the Letters of Demand defective where no notice of grievant's options was indicated.

These findings were made, despite various Postal Service arguments, in one or more of the cases, that the employee was not harmed because a grievance was filed in any event; that the issue was not raised during the pre-arbitration Steps of the grievance procedure; or that the language should not be binding."

And Arbitrator Collins in N4C-1V-C 29495 (August 1989) stated as follows:

"As a general proposition, the doctrine of harmless error has, in this Arbitrator's opinion, much to be said for it. The doctrine looks to a fair result, i.e., to insure its integrity, that regulation will be enforced even though failure to comply with it has produced no actual injury.

The present situation seems to fall into the latter category. Part 563.1 [later designated as 473.11] of the F-1 Handbook unequivocally mandates inclusion of the language in every Letter of Demand. And under Articles 15.4A6 and 19 of the National Agreement an arbitrator may not vary or modify the language of ...the F-1.

The arbitrator has been referred to numerous arbitration decisions, some in the Northeast Region and some directly in point, that have set aside Letters of Demand where there has been a failure to include in the Letter advice as to appeals as required by applicable regulations. The apparent unanimity of that arbitrable view entitles it, in the opinion of this arbitrator, to considerable weight."

There can be no question, therefore, that Management's failure to advise Grievant of his appeal rights, is of sufficient gravity as to constitute an impermissible violation of the National Agreement to warrant rescission of the Letter of Demand.

2. As indicated above, the Union argues that the Letter of Demand was also procedurally defective because it was not signed by the Postmaster or his designee. This Arbitrator finds such argument to be without merit for two reasons:

First, there is a presumption, not rebutted by the Union, that a Superintendent of Window Services directly involved with employees with accountable responsibility, was the Postmaster's designee; this is the logical person, irrespective of the size of the facility, to issue Letters of Demand. Second, the Union's complaint that the designation was not in writing must be discounted; Grievant was in no way harmed by what can only be considered as a de minimus oversight. Moreover, there is no evidence that the Union had ever requested that such designation be in writing.

3. Arbitrator Aaron's admonition that parties to this Agreement are barred from introducing evidence or arguments not presented during the various Steps of the grievance procedure is a sound principle, but in this Arbitrator's judgment, is not applicable in this dispute. Here we have a glaring substantive procedural violation of Grievant's due process rights. Such violation of a clear contractural right may be raised at any stage of the grievance procedure, including arbitration.