

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WINNEBAGO COUNTY

and

PARK VIEW REHABILITATION PAVILION
AND PLEASANT ACRES EMPLOYEES UNION,
LOCAL 1280, AFSCME, AFL-CIO

November 3, 1989 grievance
re reduction of scheduled
hours of part-time employes

Case 184
No. 43883
MA-6098

Summary Ruling on
Procedural Arbitrability

Appearances:

Mr. John A. Bodnar, Corporation Counsel, 415 Jackson Street, PO Box 2808, Oshkosh, WI 54903-2808, appearing on behalf of the County.

Mr. Gregory N. Spring, Staff Representative, AFSCME Council 40, 1121 Winnebago Avenue, Oshkosh, WI 54901, appearing on behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned to hear and determine a dispute concerning the above-noted grievance arising pursuant to the grievance arbitration provisions of the parties' 1988-89 collective bargaining agreement (herein Agreement). The Commission designated the undersigned as Arbitrator in the matter on May 4, 1990.

Pursuant to notice, a hearing was conducted by the Arbitrator on July 17, 1990 at the County's Park View Health Center, Oshkosh, Wisconsin. When they were unable to agree on a statement of the issues, the parties mutually authorized the Arbitrator to frame the issues for determination. The Arbitrator thereupon advised the parties that the issues for determination were as follows:

ISSUES

1. Is the November 3, 1989, grievance procedurally arbitrable?
2. If 1 is so, did the Employer violate the Agreement

by its scheduling of hours of part-time employes in November of 1989?

3. If 2 is so, what is the appropriate remedy?

4. If 1 is so, Did the Employer violate the Agreement by any failure to give any required notice of change of scheduled hours of part-time employes in November of 1989?

5. If 4 is so, what is the appropriate remedy?

The Union objected to consideration of the County's procedural arbitrability contentions on the grounds that they had not been raised at any time prior to the arbitration hearing. The Union also asserted that it was surprised by the County's procedural defenses and it reserved the right to request an adjournment to allow it to prepare to meet those defenses if needed in light of the County's case on the procedural arbitrability issue.

The merits of the grievance were heard first due to time commitments of Union witnesses. The County then presented and rested its case with regard to Issue 1, procedural arbitrability. At that point, the Union stated that it intended to present evidence of its own regarding procedural arbitrability but that it was unable to do so without an adjournment to subpoena additional witnesses and documents. The Arbitrator directed, instead, that the arbitrability issue be briefed and decided as a Union request for summary ruling at the conclusion of the County's case on that issue, with the Union retaining the right to present its evidence and additional arguments regarding arbitrability if but only if the Arbitrator does not summarily rule in the Union's favor on Issue 1.

The parties agreed that they would brief the merits of the grievance on a less demanding briefing schedule than that established on the arbitrability question. Briefing on arbitrability was completed on August 21, 1990, with the filing of the County's brief on that issue. The Union did not submit any written arguments regarding Issue 1 to supplement its position as stated at the hearing. Briefing on Issues 2-5 has not as yet been completed.

This Award is limited to Issue 1, above, and does not address or rule upon the other pending Issues, 2-5.

PORTION OF THE AGREEMENT

ARTICLE VII GRIEVANCE PROCEDURE

The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Only matters involving the interpretation, application, or enforcement of the terms of this Agreement shall constitute a grievance.

. . .

All grievances which may arise involving an employee in the unit of representation shall be processed as follows:

Step 1. The grievance shall be presented in writing to the supervisor of the grieving employee within six (6) of the employee's scheduled work days after the date of the event or occurrence which gave rise to the complaint specifying the article or articles of the collective bargaining agreement alleged to be violated and signed by the grievant.....

. . .

FACTUAL BACKGROUND

The grievance giving rise to this matter was filed on November 31, 1989. The claim by the Union advanced on the merits of the grievance is that the County, without notifying the Union in advance, reduced the scheduled hours of certain part-time employees (not named in or signing the grievance) more than it had reduced the scheduled hours of less senior part-time Nurse Aides. The grievance alleges a violation of the Preamble, of Art. VIII Seniority, and of Art. XXIII Shifts and Work Week of the Agreement.

The grievance was processed through the various steps of the contractual procedure, which calls for two meetings and three written responses by management at various levels. It is undisputed that at no time during the pre-arbitral processing of the grievance did any County representative ever mention untimeliness or any other procedural deficiency of the grievance.

POSITION OF THE UNION

Among other contentions (including actual compliance mutual laxness of grievance time limit compliance, and the continuing nature of the grievance), the Union asserts for purposes of this summary ruling determination that the County's undisputed failure to raise procedural defenses during the pre-arbitral grievance processing steps, alone, constitutes a waiver of the defenses the County seeks to raise for the first time at the arbitration hearing. In making that argument, the Union has reserved the right to present additional evidence regarding Issue 1 if the Arbitrator does not rule in the Union's favor on the basis of the County's case alone.

In sum, the Union requests that the Arbitrator separately and summarily rule that the answer to Issue 1 is "yes, the grievance is procedurally arbitrable."

POSITION OF THE COUNTY

The County, in its brief, argues that the grievance is not procedurally arbitrable because it was filed on November 3, 1989, in excess of the Art. 7 Step 1 time limit of six scheduled working days after the posting of the work schedule giving rise to the grievance, which the County contends occurred on October 20, 1989. The County argues that the Arbitrator therefore "lacks jurisdiction as to the grievance filed in this action" and is "barred from entertaining jurisdiction of the grievance in this action."

In support of that position and in opposition to the Union's waiver argument, the County argues as follows:

The time limits presented in Article 7 of the collective Bargaining agreement are clear and unambiguous. . . . [T]he parties . . . agreed upon the language [and] must be presumed to have understood its intent and agreed to be bound by the terms of the Agreement [T]he Arbitrator in this case cannot disregard the fact that an effective grievance procedure requires a quick and efficient means of processing grievances. To waive adherence to the agreed upon rules would be to weaken the process itself. It is not for the Arbitrator to circumvent the meaning of a time limitation clause within the . . . Agreement, unless the parties who negotiated the clause have clearly done so themselves.

It was the Union's position at the time of the Arbitration Hearing, that Management had waived any right to assert the defense of nonarbitrability by its failure to raise this issue prior to the Arbitration Hearing. However, it is a well settled arbitral principle that time limitations are not waived by a party unless an express waiver is issued by that party. Arbitration law is well settled that the defenses of nonarbitrability need not be pleaded during the grievance procedure, let alone in documents processing the case to arbitration. The defense of nonarbitrability may be raised for the first time at the Arbitration Hearing. It is universally said that the jurisdiction of the Arbitrator may be questioned at any point just as may the jurisdiction of a court of law, unless that issue has been expressly waived. Citing, Publisher's Association of New York, 39 LA 379 (1962); and Joy Manufacturing Company, 44 LA 304 (1965).

County Brief at 4-6.

DISCUSSION

The Arbitrator agrees with the Union that the County's processing of the grievance at the various pre-arbitral steps without preserving the timeliness defense on which it relies in its brief, constitutes a waiver of that defense.

The arbitration awards cited by the County stand for the propositions the County asserts regarding waiver. However, those awards represent a minority viewpoint among arbitrators and, in the view of this Arbitrator, they are not as well reasoned as the cases representing the majority viewpoint.

The oft-cited arbitration reference, Elkouri and Elkouri, How Arbitration Works, (BNA, 4 ed., 1985) discusses this point at pp. 194-195. The authors state, "[i]n many cases time limits have been waived by a party in recognizing and negotiating a grievance without making clear and timely objection." For that proposition they cite a substantial number of awards. Id. at n.192. The Elkouris then go on to state, "But there are some cases holding to the contrary." For that proposition the authors cite a total of three awards, including the two cited by the County herein. Id. at n.193.

In that context, and in light of the excerpts from various published awards that follow, the Arbitrator does not agree with the County that the County's position is supported by well-settled arbitral principles.

Thus, in Columbian Carbon Co., 47 LA 1120, 1125 (Merrill, 1967), the arbitrator stated,

There are a number of reasons why the contention of untimeliness seems not well founded. I shall content myself with the reason which would be dispositive even if all the others were not present. This is that the Union has produced an abundance of evidence, both by its own witnesses and through cross-examination of Company witnesses, that at no time during the prearbitration handling of the grievance by the Company authorities did anyone on behalf of the Company raise the slightest objection to the procedural sufficiency of the presentation. Instead, at all levels, the Union's contention was considered and was denied upon the merits. No evidence to the contrary has been presented. By the clearly overwhelming preponderance of arbitral authority, this failure to object to the timeliness of presentation, coupled with disposition of the grievance on the merits, constituted a waiver of the objection of timeliness. [citations omitted]. Accordingly this objection is denied.

Similarly, in Ironrite, Inc., 28 LA 398, 399-400 (Whiting, 1956), the arbitrator stated,

Article XXIII, Step 1 of the contract provides that "Step One must be taken within five (5) working days after the occurrence complained of". The Company contends that the grievance is thereby barred. It will be noted that no such objection to the grievance was raised in the answer, nor does it appear that such objection was made in the discussion of the grievance prior to the arbitration hearing. The failure to make such objection when the grievance was presented or in prior steps of the grievance procedure must be deemed a waiver of the contractual time limitation. Procedural time limitations serve a useful purpose but may be extended or waived by agreement, and lack of a timely objection is always considered a waiver thereof."

In Denver Post, 41 LA 200, 204 (Gorsuch, 1963), the arbitrator stated,

It is a well recognized principle of the grievance and arbitration process that each step of the grievance procedure is to serve the function of amiably settling disputes, where possible. Arbitration is only to be resorted to when the parties cannot settle the case themselves. . . . Further, it is incumbent upon each party to raise all issues and defenses at each step of the grievance procedure, in order to appraise the other party of all relevant problems. The underlying rationale here is that by laying their cards on the table at each successive step of the grievance procedure, the parties greatly increase their chances for settling the case without resorting to arbitration. . . . For the same reasons, when objections to procedure have been raised during the grievance process, arbitrators will normally refuse to hear them.

The [union] had a right to know of management's intent to strictly adhere to the time limit for grievance initiation at the time it met to decide whether and how to proceed. Without such knowledge, the members could not make an intelligent choice as to whether or not to appeal the foreman's decision. [citations omitted].

In Harbison-Walker Refractories, Inc., 22 LA 775, 778 (Day, 1954), the arbitrator stated,

The evidence bears out the Company contention [that the grievance was not filed within the agreement time limit] However the merits of these contentions need not be labored in light of the company's conduct with respect to the grievance. That conduct makes it apparent that both lack of timeliness and the failure

to follow the grievance procedure were waived as possible defenses. For it is absolutely clear that management discussed the grievance at every step after the first It is also reasonably evident that there was never a clear reservation of the right to assert the procedural defenses while discussing the merits until the appeal to arbitration. By then it was too late. [footnote omitted]. The waiver had already been effected.

To the layman any invocation of a procedural rule to avoid dealing with the substance of an issue is apt to be regarded as a 'technical' and therefore reprehensible avoidance of the merits. The views expressed here should not be interpreted as embracing this conception. The doctrine of waiver is itself technical. And it is important to recognize frankly that there is a legitimate practical purpose to procedural requirements even in labor contract administration where technicalities are generally abhorred. It just happens, on the facts, that in the present instance one "technical rule" is overbalanced by another.

In Philips Industries, Inc., 63-3 ARB Par. 8358 (Stouffer, 1963 at 4179, the arbitrator stated,

[The company may not raise the question of timeliness of filing of the grievance in these arbitration proceedings]. The reasons therefor seem obvious. If [the arbitrator] were to find in favor of the Company on this issue, it could silently sit by and cause the Union to make unnecessary expenditures in preparation for arbitration. This would be unfair and inequitable. If the Company intends to press objections as to the arbitrability of issues, it should acquaint the Union with such objections in steps of the grievance procedure preliminary to arbitration. The question presented here is not a new or novel one. There is a division of opinion between Arbitrators thereon. However, in this Arbitrator's opinion, the better reasoned decisions hold that where, as here, there is an absence of contractual provisions on the subject, procedural objections are waived unless raised prior to arbitration. [citations omitted]

Discussion of the merits of grievances in steps of the grievance procedure does not bar the raising of procedural objections at the arbitration level so long as such objections are voiced in proceedings prior thereto. Full discussion of all aspects of grievances are conducive to settlement thereof, and the parties have,

in effect agreed by the terms of Section 8 [Grievance Procedure] of the Agreement, to do so.

In view of the foregoing, it is the finding of this Arbitrator that the Company may not for the first time raise the question of timeliness of filing of the grievance in these arbitration proceedings."

Also see, e.g., Pipe Fitters Local 636, 75 LA 449, 453 (Herman, 1980)("Timeliness is a procedural issue which, like the Statute of Limitations in a lawsuit, must be raised at an early step in the proceeding."); Aeolian Corp., 72 LA 1178, 1180 (Eyraud, 1979)("Arbitrators have held, and this Arbitrator agrees, that the timeliness argument must be raised during the discussion of the grievance at each appropriate step and that the defense must be preserved in oral discussions as well as final submission to arbitration."); and Patterson Steel Co., 38 LA 400, 403 (Autrey, 1962)(" . . . if there was a failure of the Union to file the grievance within the five (5) workday time limits, such failure was waived by the Company when it allowed the Union to proceed to arbitration and incur the expense thereof without advising the Union that the issue of the timely filing was specifically reserved for a determination by the arbitrator.").

The agreed-upon Art. VII time limits serve a useful purpose and must be applied where they have not been waived. However, as noted above, the overwhelming and better-reasoned view of arbitrators holds that such procedural requirements are ordinarily to be deemed waived not only by express agreement but also in other circumstances including where, as here, pre-arbitral grievance processing is engaged in without any reference to procedural noncompliance.

In the Arbitrator's opinion, the outcome herein does not weaken the Agreement grievance procedure, but rather strengthens it. The parties expressly sought not only "prompt" but also "just" settlement of grievances in their introductory provisions of Art. VII Grievance Procedure. Moreover, as noted above, grievances are more likely to be promptly resolved if both parties reveal their issues and defenses in the prearbitral steps. The parties, of course, remain free to discuss the merits of grievances as to which a procedural defense has been preserved. Furthermore, the County's has unilateral control over whether its designated grievance representative preserve procedural defenses when deficiencies are present in the grievances submitted to them.

It can also be noted that the County has not claimed or shown that its ability to preserve evidence and to present its case on the merits has been prejudiced by the timing of the grievance initiation involved here. cf. Mount Mary College, 44 LA 66, 73 (Anderson, 1965)(countervailing equities considered in determining whether pre-arbitral silence constituted waiver of procedural defense.)

For the foregoing reasons, thenr the Arbitrator concludes that the County waived its

timeliness defense by failing to raise it during the prearbitral processing of the grievance, such that the grievance is procedurally arbitrable.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the first of the abovenoted ISSUES that:

1. The November 3, 1989 grievance is procedurally arbitrable.
2. Accordingly, no further hearing on Issue 1 is needed, and the Arbitrator will address ISSUES 2-5 after receiving the parties' written arguments on those remaining issues.

Dated at Shorewood, Wisconsin this 22nd day of August, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator