Frankland #2

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between:

UNION
-and- RE: Employee 1

EMPLOYER

OPINION AND AWARD

The undersigned, Kenneth P. Frankland, was mutually selected by the parties under the auspices of the American Arbitration Association to render an Opinion and Award in its case number 00 000. Hearing was held at the Employer Office Building, City A, Michigan, on May 4, 2001. The parties presented testimony and written briefs were submitted to AAA on or before May 18 and the record was declared closed.

ISSUE

Is the grievance file in this matter on August 2, 2000 arbitrable under the terms of the Agreement?

PERTINENT CONTRACT PROVISIONS

Article XV, Section 2, Step 4A

STATEMENT OF PROCEEDINGS

A grievance was filed on April 25, 2000, by the Union and alleged "the Union finds the Employer in violation of Article XVII, Sec. 2. Union demands the Employer make the grievant whole." (J-2) On May 1, Jay Donaldson authorized a memo to Employee 1 called "Employment Termination" (J-3). By the terms of the Agreement, the termination was reviewed by the Human Resources Director, Person 1 and on May 4, he replied to Person 2 that Employee 1 was terminated for just cause and the grievance was denied. The matter then was presented to the Administrative Services/Personnel Committee on May 16 and they determined the grievance should be denied and Person 1 advised Person 2 by letter dated May 17 of the denial. On May 31, 2000 Person 2 wrote to Person 1, "This is to inform you the Union intends to pursue this grievance to arbitration." On May 31, Person 2's secretary called Person 1 and wrote a memo to Person 2 re: "Selection of Arbitrators". The memo said: "AAA will send a list of arbitrator's names to each party. Each party gets to strike so many names until you get a mutual selection". Karen" Nothing further transpired until the demand for arbitration was filed with AAA dated August 2, 2000.

On August 22, 2000 the Employer's counsel wrote to AAA and said the Employer objects to arbitration because the Union's demand was not timely filed pursuant to the parties' grievance procedures. He asserted that Step 4A requires a demand filed within fifteen (15) work days of the Committee decision which was sent to the union on May 17. August 2 would be 55 work days after the Committee decision. AAA requested Person 2's comments and they were sent by letter dated August 28, 2000. AAA responded that an issue of arbitrability exists that could be determined by the arbitrator and the undersigned was assigned the matter. Hearing was

commenced on May 4, 2001. The parties sought guidance from the arbitrator as to whether the arbitrability issue should be resolved first without proceeding to taking testimony on the merits, or proceeding with oral arguments regarding arbitrability, proceeding with the merits, and permitting the arbitrator to decide either or both issues after submission of briefs.

Although the question of arbitrability is sometimes perceived to be a judicial function that an arbitrator may decide the issue of arbitrability is perceived by most authorities to be an inherent part of an arbitrator's duty. *Barbet Mills, Inc.*, 19 LA 737, 738 (Maggs, 1952). Indeed, in this case, when the issue was raised by the Employer, the Union did not interpose an objection to the jurisdiction of the arbitrator and neither party challenged the authority of the arbitrator to be able to decide the issue. With respect to the process to be used, reserving a ruling on arbitrability until the full case has been heard is a common process as explained by Arbitrator Maggs in *Barbet Mills, Inc., supra* at 738: "The arbitrator may properly reserve his ruling upon arbitrability until after he has heard evidence and arguments upon the merits. A contrary ruling would cause needless delay and expense, necessitating two hearings whenever the arbitrator needed time to consider the question of arbitrability. Furthermore, in many cases it is only after a hearing on the merits has informed the arbitrator of the nature of the dispute that he is in a position to determine whether it is of the kind covered by the agreement to arbitrate." However, in this case the parties believed that a full hearing on the merits might unduly prejudice the matter and requested that the arbitrability issue be decided separately and so at the hearing factual testimony was taken from Person 1 and Person 2 in order to frame the case and the parties agreed to file briefs by May 18.

POSITIONS OF THE PARTIES

UNION

They argue that the Union notified the Employer of it's appeal in a timely manner on May 31 by letter to Person 1 under Article XV, Step 4A within 15 days of the Committee notice. This notice triggers the next step of the rules of AAA as to how the appeal will proceed. They assert that the contract has no time limit negotiated between the Union, the Employer and AAA and the Union is unaware of any AAA procedures that states a panel must be requested within 15 days of an appeal of a grievance by either party involved. It is unfortunate that the parties had a miscommunication but the contract does not prevent the grievance from being arbitrated

EMPLOYER

The grievance is untimely as the arbitration demand must be made within 15 days of the last appeal by invoking the rules of the AAA. Those require notifying the other party and filing the notice with the regional office of AAA. Here, no petition was filed with AAA within the 15 day period, therefore, the matter is not arbitrable.

DISCUSSION

The primary duty of an arbitrator is to interpret the contract of the parties to resolve a dispute. The basic rule is that we apply the words if there is no ambiguity in the language, if the language is clear there is no need to determine the intent of the parties. The pertinent language of Article XV, Section 2, Step 4A is quoted as follows:

> **The Administrative Services/Personnel Committee shall reply with its decision, in writing, no later than three (3) work days following said meeting. If the decision of the Administrative Services/Personnel Committee is unsatis-**

> **factory to the employee, said dispute may be submitted within fifteen (15) work days for arbitration in accordance with the procedures and rules of the American Arbitration Association. The fees and approved expenses of said arbitration shall be borne equally by the EMPLOYER and the UNION.**

The key phrase is if the employee is unsatisfied he must initiate the arbitration in accordance with the AAA rules and procedures. That is the first step and the Union has the burden to initiate the demand. The next question is how to do so. We thus look to the AAA rules and we find :

> **Arbitration under an arbitration clause in a collective bargaining agreement under these rules may be initiated by either party in the following manner:**
>
> **(a) by giving written notice to the other party of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute and the remedy sought, and**
>
> **(b) by filing at any regional office of AAA three copies of he notice, together with a copy of the collective bargaining agreement or such parts thereof as relate to the dispute including the arbitration provisions.**

To initiate the demand the Union here must give the notice to the Employer as they did but must also file the actual demand with the regional AAA office. This they did not do within 15 work days of May 17. They waited until August 2 which is 55 work days after the Committee decision. This is not what the plain meaning of the contract and the AAA rules, which the parties have agreed to follow, requires. Thus, by applying the clear contract language and the mandatory implementation language of the AAA rules, the demand is untimely and the grievance is not arbitrable. The grievance may not be heard.

AWARD

For the reasons stated above, the grievance is DENIED.

Dated: _____ _____

Kenneth P. Frankland - Arbitrator