Heekin #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

GRIEVANCE:

The instant grievance protests the disputed discharge action taken as not supported by just cause.

AWARD: The grievance is denied.

HEARING: September 26, 1995

ADMINISTRATION

By way of a letter dated May 30, 1995, the undersigned was informed of his designation to serve as impartial referee on a system board of adjustment (the Board) established to resolve the instant grievance dispute at issue between the Parties. On September 26, 1995, per a joint understanding of the Parties, a hearing went forward on the sole issue of grievance timeliness as referred to in the Employer's MOTION FOR SUMMARY JUDGEMENT (Employer Exhibit 1). On that occasion, the Parties presented testimony and document evidence supportive of positions taken where the Employee appeared and testified in his own behalf, Upon the Board having met in executive session at the conclusion of the hearing, the record was closed and the matter is now ready for final resolution.

GRIEVANCE/ANSWER

The following grievance (Exhibit-8) was filed on February 7, 1994, and is the pertinent subject of this dispute:

* * *

> I received a letter of termination dated Jan 3rd due to not extending my leave of absence for medical reasons. I had made several attempts to contact the Employer - I did not receive the letter until mid-January and due to mitigating circumstances, exceeded the 5 day time limit for a special hearing. I am requesting a special hearing and that I be reinstated with Employer as I was unjustifiably terminated.

* * *

The following Step One answer to this grievance was submitted the same day (Exhibit - B):

* * *

Grievance denied. Per contract Article 14, Paragraph S. 1 Time limitations have been exceeded.

CITED PORTIONS OF THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT

The following portion of the Partials' collective bargaining agreement in effect at the time of the instant matter (Joint Exhibit - 1), otherwise referred to herein as "the Agreement," was cited:

* * *

ARTICLE 14.
GRIEVANCE PROCEDURE
* * *

> (D).Any employee suspended or discharged from the service shall be granted a special hearing, providing a request is made therefore in writing to the proper vice President of Maintenance, with a copy to the Local Committee within five (5) days of the suspension or discharge. The requested hearing will be held within five (5) days of receipt of much request. Within five (5) days after the close of such investigation or hearing, the Employer shall render its decision in writing, and shall furnish the employee and his accredited Union representative a copy thereof. If the decision reached as a result of the hearing is not satisfactory to the Local Committee, the case may then be processed in

> accordance with the regular grievance procedure, beginning with Step Three (3). Notice of intent to process under Step Three (3) will then be given within fifteen (15) days of the decision reached under this provision.
>
> * * *

FACTUAL BACKGROUND

The Employer is an airline carrier headquartered in City 1, State 1. The Union represents the instant bargaining unit made up of the Employer's mechanics and related employees.

The Employee was for five years a bargaining unit, utility employee. For several months prior to the time in question, the Employee, a third shift employee, was off work on a medical leave. On January 3, 1994, he was sent the following termination letter (Exhibit - A):

> Dear Employee:
>
> This will serve as notification that you are hereby terminated from the Employer, effective immediately.
>
> Your termination is the result of your failure to return to work at the end of your medical leave of absence, January 3, 1994, as indicated on your Application for Leave of Absence dated
> September 9, 1993.
>
> Sincerely,
>
> Person 1

This letter was sent by way of certified mail and, undisputedly, received at the Employee's residence on January 13, 1994 (Employer Exhibit - 2).

This Employee's account of what took place in this connection is mainly set forth in the following telephone log first submitted at an earlier stage of the grievance procedure (Exhibit - 3):

> 1/4/94 - called about 11:15 p.m. ask to speak Person 2 someone answered and said he wasn’t (sic) in and that he wouldn’t (sic) be in until 4:00 a.m.

- called back at 4:30 a.m. was told that he wasn't (sic) around.

1/5/94 - called at 11:30 p.m. was told that he wasn't (sic) in.

1/6/94 - called to Person 3's office that morning but got the secretary who said that Person 3 wasn't (sic) in.

1/6/94 - called about 11:35 p.m. or so, Person 4 answered. I asked for Person 2, he said he wasn't (sic) in. I proceeded to tell him why I wasn't (sic) at work. He asked didn't (sic) you receive a letter. I asked what letter? He said a letter of termination. I said no, and asked why I was terminated? He said that I had abandoned my job. I said that's not true and that I have a letter from my doctor explaining why I'm not able to be at work. He said that he would have talk to Person 5.

1/7/94 - I call again at 6:00 a.m. and was told that he wasn't (sic) in. (Person 2)
- So I called his home and found out from him that he was no longer employed with the Employer. With all the calling that I had made and no one ever told me that he was no longer with the Employer. The reason I was trying to talk to him personally, because in past practice occasionally he would not get his messages. So I was trying to make sure he got the message. I asked him who was taking his place; he wasn't (sic) sure and told me to talk to Person 5.

1/20/94 - I called Person 5 and he asked me had I received a letter? I told him that I hadn't (sic).
-He said that I was terminated for job abandonment. I asked him if he had received my letter of explanation that I had mailed to him from my doctor in reference to my medical condition. He said no, and that it was out of his hands now and that I would have to talk to my union representative.

* * *

Much of this information was testified to at the arbitration hearing, in addition to the Employee having then been in contact with Union representative Person 6.

In answer to this termination action, the instant grievance was filed on February 7, 1994 (Exhibit 21). Upon completing the steps of the grievance procedure, the matter was appealed to arbitration hereunder.

DISCUSSION AND FINDINGS

In addressing this procedural arbitrability/MOTION FOR SUMMARY JUDGEMENT question, Article 14(D), "Grievance Procedure', is controlling. It provides that "Any employee suspended or discharged from the service shall be granted a special hearing, providing a request is made therefore in writing to the proper Vice President of Maintenance, with a copy to the Local committee within five days of the suspension or discharge." Accordingly, this wording clearly mandates that a grievance not filed "...in writing..." and "...within five (5) days..." of when the subject employee became aware, or reasonably should have known, that he/she had been suspended or discharged cannot be processed furthers and therefore is not appealable to arbitration. Thus, it seems the Agreement places strong emphasis on the widely accepted principle that the early resolution of grievances is important to the furtherance of labor relations stability. Indeed the value attendant in not allowing disputes to fester and damages to unnecessarily mount is obvious. Regardless, this "in writing"/"five (5) days" grievance filing requirement is what the Parties have contractually agreed to and, therefore, what the undersigned is bound to follow.

At the same time, it is well established that an employer raising a procedural timeliness issue bears the burden of proof when contending the applicable time limits have been exceeded. Accordingly, any doubts in this regard are typically resolved in favor of finding the grievance timely processed, thus, able to be decided on the merits. The reason for this approach is that a procedural default is generally not favored in labor arbitration.

Against this backdrop, the instant procedural arbitrability question is centered on the "mitigating circumstances" referred to by the Employee in his February 7, 1994, written grievance (Exhibit 9) and argued for by the Union at the hearing. Here, the emphasis placed by the Union on the

Employee's lack of familiarity with the Agreement, in never having previously been disciplined or filed a grievance, cannot be accepted as one such circumstance. Indeed it is fundamental that anyone covered by a contract is expected to know its requirements, especially as to the particular claim at hand. Accordingly, when an employee is discharged under the Agreement as here, it is felt that, at a minimum, he/she reasonably would immediately look to the Article 14(D) discharge appeal procedure. Regardless, it could defeat the whole purpose of having a contract if its terms could be escaped merely by way of ignorance.

The other argued for mitigating circumstance is centered on the Employee's efforts to contact various management officials between January 3, 1994, and January 10, 1994. However, the key to the resolution of this procedural timeliness question lies in the fact that, without question, the Employee knew of his discharge by January 13, 1994, when he received the January 3, 1994, termination letter sent by certified mail (Employer Exhibit -2). Accordingly, at that point and as the Employee acknowledges in his written grievance (Exhibit - B), the initial Article 14(D) five days time period for filing a grievance in writing was triggered and yet did not occur until some three weeks later. Therefore, whatever took place prior to January 13, 1994, is irrelevant to this procedural issue. In essence, there is no conclusion to be gathered from the January 4-10, 1994, communications testified to by the Employee - much of which is set out in the telephone log submitted (Exhibit - E) - that he had a reasonable basis for believing either a grievance had been filed on his behalf by a Union representative such as Person 6, or that this time limit would not be enforced. Thus, there is no premise upon which to conclude that he relied to his detriment in not filing earlier. Indeed it seems that virtually all of these communications concerned the separate matter of his medical leave possibly being extended. Importantly, this timeliness issue was immediately raised by the Employer in its step One answer (Exhibit - B); while the record

establishes that the Article 14(D) five days time limit, as well as other Article 14 time limits, in the past have been consistently followed and/or enforced in arbitration (Exhibits F & G). Based upon all of the foregoing, it is held that there exists no basis upon which there can be a grant of the relief sought. Ultimately, while stressing there is no question but that the Article 14(D) grievance filing five days time limit was exceeded, the undersigned has no choice but to dismiss this grievance as untimely. Therefore, the grievance must be, and is, denied.

AWARD

The grievance is denied,