OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

CORPUS CHRISTI ARMY DEPOT,
CORPUS CHRISTI, TEXAS

Respondent

and

Case No. DA-CA-20305

AMERICAN FEDERATION OF

GOVERNMENT EMPLOYEES, LOCAL 2142

Charging Party

Captain Laura A. Cushler

For the Respondent

James Lemos

For the Charging Party

Julie Garnett Griffin, Esq.

For the General Counsel

Before: SALVATORE J. ARRIGO

Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Dallas Region, issued a Complaint and Notice of Hearing alleging

Respondent violated the Statute by refusing to proceed to arbitration on a grievance filed by the Union on behalf of a bargaining unit employee.

A hearing on the Complaint was conducted in Corpus Christi, Texas at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative for various of Respondent's employees. On April 22, 1991 the Union filed a grievance pursuant to the parties' negotiated collective bargaining agreement alleging the Agency failed to properly compensate employee Phillip Haddock while working on a detail. The grievance was not resolved and on August 15, 1991 Chief Steward Leonard Mencio notified Respondent that the Union was requesting arbitration of the grievance.

In late October 1991 the parties selected Dr. Wallace Nelson to arbitrate the Haddock grievance. The general procedure for setting a date for hearing is for the arbitrator to contact both parties, or at times only the Agency, by telephone or letter and from a number of available dates the parties would agree on a specific date and notify the arbitrator of that date. Respondent and the Union disagree on various events concerning the setting of the date for the Haddock arbitration.

Respondent's Chief Counsel James Abbott testified that in mid - November 1991 Dr. Nelson called and told him he had December 11 and 12 available to arbitrate the Haddock grievance. Abbott informed Nelson he had no problem with those days. According to Abbott, Nelson told him he was having difficulty reaching Chief Steward Mencio at the Union hall and asked that the Agency contact Mencio with the dates.[1] Abbott testified he had his secretary, Olga Escamilla, call Mencio and give him those dates.

Olga Escamilla testified she first received a telephone call from Dr. Nelson in the "latter part of November" 1991 during which he indicated he was available to arbitrate the Haddock grievance on December 11 or 12. She replied that she would relay the information to Respondent's Chief Counsel Abbott and Nelson asked her to also notify the Union, probably naming Chief Steward Mencio. Escamilla testified Abbott stated either of the two days were acceptable to him and in a conversation with Mencio the following day, Mencio indicated he had "no problem" with the two December dates. Sometime thereafter, according to Escamilla, she telephoned Dr. Nelson and told him that the December 11 or 12 dates "seemed to be okay."

Chief Counsel Abbott also testified that on November 21, 1991 he had a telephone conversation with Chief Steward Mencio to set up a meeting for November 25 in order to discuss the possible settlement of another case set for arbitration involving an employee named Martin, which had been scheduled for a December 3 arbitration and the Haddock matter. According to Abbott, during the conversation Menico again said he had no problem with either the December 11 or 12 arbitration dates for the Haddock grievance.

The parties met on November 25, 1991. Abbott and Rachel Amaya, a representative from the Agency's Civilian Personnel Office, represented the Respondent. The Union was represented by Mencio, David Carroll, Union Vice-President who, as part of his duties, represents the Union in numerous arbitration cases, and Randolph Wilson a Steward who was the Union's designated representative for employee Haddock during the prior processing of his grievance and was serving as a technical advisor. Abbott testified that he indicated at the meeting that the Martin and Haddock grievances were essentially the same and that the Agency was willing to acknowledge various "procedural errors" made in the two cases. Abbott further testified that he proposed to settle both cases and also suggested the two cases be arbitrated together. Settlement did not occur and the meeting was continued to the following day when Carroll, who was representing the Union in both arbitrations, was to notify management whether the cases could be combined for arbitration and which of the December dates was acceptable to the Union. On November 26, according to Abbott's testimony, the Union informed him that the two cases could not be combined for hearing and the Union still had not had a chance to contact Dr. Nelson regarding the date to arbitrate the Haddock grievance.(2)

Chief Steward Mencio had no recollection of a conversation with Chief Counsel Abbott's secretary Escamilla concerning the December 11 or 12 dates for the Haddock arbitration. He testified the first he became aware of the December dates was when Vice-President Carroll complained to him on December 3 that the Agency had unilaterally set the date for the Haddock arbitration for December 11 or 12.(3) At that time, according to Mencio, he and Carroll decided not to accept the December arbitration dates and to contact the arbitrator to get an alternative date.

Mencio further testified that at the November 25 or 26, 1991 meeting between he, Carroll and Wilson with Agency representatives Abbott and Amaya, the discussion was limited to possibly consolidating the Martin and Haddock disputes into one arbitration or settling both. However the Union rejected consolidation and the Agency's settlement offer.

Union Vice-President Carroll and Union Steward Wilson both denied any mention of setting December 11 or 12 for the Haddock arbitration was made at the November 25-26 meeting with management. Both also testified that the first they heard of the December 11-12 dates was on December 3, 1991. Carroll whose testimony was more thorough than that of Wilson, testified that at the November meeting with management only combining and settling the Martin and Haddock grievances was discussed and while the December 3 date for the Martin arbitration was known, he did not become aware of the December 11-12 date for the Haddock grievance until so informed by Abbott's secretary, Escamilla, during a break in the Martin arbitration.

On December 3, 1991 the Martin grievance was arbitrated. Carroll was the Union representative. Abbott's secretary, Olga Escamilla, testified that on that day she talked to Union representative Carroll in a lobby, apparently outside of the Martin arbitration room, and told him of Dr. Nelson's availability on December 11 or 12 to conduct the Haddock arbitration.(4) Carroll replied he "couldn't make it" on those two days. Escamilla testified that "right after that" she related to Abbott the conversation she had just had with Carroll.

According to Carroll, after being notified by Escamilla that the arbitration was set for December 11 or 12, he told her those dates were too soon and asked for an alternative date. Carroll testified that Escamilla thought something might be available in January or February and she would check and get back to him. Carroll further testified that Escamilla called him the following day (December 4) and told him that no other date was available and that was the "date" set for the hearing.

Chief Counsel Abbott testified that the first indication he received that there was a date problem for the Haddock arbitration was on December 4, 1991 when he received a telephone call from Dr. Nelson who indicated he had called the Union hall several times in an attempt to contact Chief Steward Mencio regarding the December 11 or 12 date for the Haddock arbitration. Although according to Abbott's testimony he told Nelson that Carroll was handling the matter, Nelson supposedly asked Abbott if he would call Mencio to "firm up" the date. Thereupon Abbott, according to his account, called Carroll and told him Nelson was still waiting to hear from the Union regarding whether they wanted December 11 or 12 for the hearing. Carroll replied that he would not be able to proceed on those dates because it did not give him adequate time to prepare for the arbitration. Abbott expressed his belief that Carroll had sufficient time to prepare for the arbitration since a similar matter had just been arbitrated on the prior day and Abbott complained that Carroll had not raised the matter previously.(5)

Abbott and the Civilian Personnel Officer met with Carroll and the Union President on December 5 and discussed the question of proceeding with the Haddock arbitration.(6) Abbott urged the matter be arbitrated on December 11 or 12 but the Union remained adamant that it did not have adequate time to prepare for arbitration, contending the Union never agreed to a December date. Abbott stated that the Agency was ready to proceed with the arbitration and if the Union was not, the Agency would consider that a failure to prosecute. Prepara tion time was also discussed but the matter remained unresolved.

Abbott concluded that there had been a commitment for arbitration and it appeared that the Union was now not willing to go forward and on December 5 the Agency sent the following letter to the Union:

> This letter is to serve notice that the Agency stands prepared to arbitrate the above-referenced case on December 12, 1991, as proposed by the Arbitrator.
>
> Since Monday, November 25, 1991, the Agency through its representative, James Abbott, has attempted to finalize a date for the Phillip Haddock arbitration with your Local's identified representative, David Carroll. Mr. Carroll was identified as the representative on November 25, 1991, for both the Haddock arbitration and an arbitration involving Keith Martin.
>
> On December 3, 1991, the Agency and your Local arbitrated the Keith Martin arbitration which contained nearly identical issues with this case. Since the issues, evidence, and witnesses in both arbitrations are similar, the amount of time necessary for preparation is negligible. Accordingly, I exercise my right under the Negotiated Agreement to determine what amount of official time is appropriate. I, therefore, authorize the use of no more than 30 hours of official time for the Union representative, Mr. Carroll, and any designated technical advisor for preparation for the Haddock

arbitration.

Since official time in excess of 30 hours is unnecessary, unless a conflict stands with the date of December 12, 1991, the Agency is prepared to arbitrate this matter on December 12, 1991. The failure to do so will be considered a refusal to arbitrate and will relieve the Agency of further obligation to consider this grievance.

After receiving the Agency's December 5 letter, Union Vice-President Carroll testified he telephoned Dr. Nelson on December 6 and explained to him the Union's position on setting the date for the Haddock arbitration.(7) The essence of that conversation was reduced to a letter to Nelson dated December 9, a copy of which was sent to Agency Chief Counsel Abbott. That letter stated:

This letter is to serve notice that the Union is not prepared to Arbitrate the above referenced case on December 12, 1991 as proposed by Mr. James T. Abbott, Chief Counsel, Corpus Christi Army Depot.

On December 3, 1991 the Agency and the Union Arbitrated a similar case. The agency wanted to combine this case with the instant case. However, due to there being major differences, the Union decided to keep the two separate.

During one of the breaks of this hearing, I was informed by Ms. Olga Escamilla, secretary, Agency Local Office, that you would be available on December 11th or 12th. I informed her that this was to (sic) early for us and asked what the next available dates were. She said she thought you may be available in January or February but Mr. Abbot (sic) wanted to have the hearing on the 12th. I again informed her this was to (sic) soon for us. She then said she would inform Mr. Abbot (sic) and check on other dates tomorrow. As we understand it the above dates were only recommended by you as being the only dates you were available at the present time.

As per your conversations with our Chief Steward, Mr. Leonard Mencio and again with myself on December 5, 1991, you will not be available again until March 1992. Although this date is in the

distant future, if it is the next date you have available we will accept the proposed dates, but we do need some specific dates in March to choose from and offer to the Agency.

As previously stated, we will not be prepared to Arbitrate this case on December 12th as requested by the Agency. It has been and will continue to be the practice of this organization, to review the proposed dates offered by the arbitrators, and with mutual consent between the agency and the union, a date selected.

It is not conducive to good labor relations, for a selection of an arbitration date to be based on the sole opinion of one side or the other, as it appears in this particular case. Therefore, we respectfully request that the proposed date of December 12, 1991, be canceled and alternate dates be offered.

Thank you for your consideration in this matter.

On December 12, 1991 Dr. Nelson sent the following letter to Chief Counsel Abbott and Chief Steward Mencio:

This will update you on our effort over the past two weeks to set up a Hearing date for the above-entitled matter, and to apologize if anything I said or did contributed to the apparent confusion generated.

I've been unable to contact the Union at all; (telephone number) is always busy, and the number Mr. Carroll gave me to call him at home . . . got me a repeated operator message, "we're having trouble on this line, try later." Mr. Mencio called me and I proposed December 11 or 12 to him, and did the same to Olga in Mr. Abbott's office. Those dates were satisfactory to the Agency, but apparently not to the Union.

On December 10, Mr. Carroll called me (following up on a FAX message saying the December 11-12 dates were not satisfactory to the Union), and I proposed February 27 or March 19. Mr. Carroll agreed to check those dates with Mr. Abbott. This is where we stand. Let me know if either

of these dates is satisfactory.

The parties have not resolved the matter and the unfair labor practice charge herein was filed.[8]

Additional Findings, Discussion and Conclusions

Counsel for the General Counsel contends Respondent refused to proceed to arbitration on the Haddock grievance and thereby failed to comply with the requirements of section 7121(b)(3) of the Statute and failed to bargain in good faith with the Union in violation of section 7116(a)(1), (5) and (8) of the Statute.[9]

Counsel for Respondent denies the Agency's conduct constituted a refusal to arbitrate the Haddock grievance and contends Respondent dealt with the Union in good faith and urges the Haddock grievance be declared nonarbitrable based upon the Union's alleged bad faith delay.

Basically the General Counsel's case is that the December 11-12, 1991 date for the Haddock arbitration was unilaterally set by Respondent and notification of the date was first given to the Union on December 3. Respondent's case is essentially that the Union, by Mencio being notified early on of the December arbitration date and accepting it, and the Union again being notified during the late November meeting and voicing no objection, had irrevocably committed itself to the December arbitration date and the Union's refusal to go to arbitration as scheduled was tantamount to a withdrawal of its request for arbitration.

In my view of the evidence the Union never clearly agreed to the December date to arbitrate the Haddock grievance, and in any event, Respondent was not misled to its detriment by the Union's conduct.[10]

I find that sometime in late November 1991 Dr. Nelson, the designated arbitrator for the Haddock grievance, contacted the Agency and indicated he would be available to arbitrate the matter on December 11 or 12. The date was acceptable to Chief Counsel Abbott. Soon thereafter Abbott's secretary Escamilla telephoned Chief Steward Mencio and told him of Nelson's availability. Mencio indicated he had "no problem" with the date. Escamilla then called Nelson and told him that the December 11-12 timeframe for the arbitration "seemed to be okay" with the parties.

The December 11-12 dates were not further communicated between the parties until December 3, 1991 at a break during the Martin arbitration when Escamilla, apparently not sure that the Union's arbitration representative Carroll was aware of the available dates for the Haddock arbitration, told him of the dates. Carroll objected since he wished to have more preparation time and felt the date was unilaterally selected. Respondent wished to proceed with the Haddock arbitration since it was similar to the Martin matter.[11] However, the evidence does not disclose that Respondent engaged in any action or incurred any detrimental liability of any sort by December 3 when it became aware that the December 11-12 arbitration date would not occur.

Indeed I find that the December 11-12 date for the Haddock arbitration never was a certainty in the minds of the parties. Even after Mencio indicated to Escamilla that he had "no problem" with the date and Escamilla passed the date on to Dr. Nelson, Chief Counsel Abbott still obviously felt the Union had not completely consented to the date. Thus he testified that at a November 26, 1991 meeting with the Union, the Union rejected combining the Martin and Haddock arbitrations and "still had not contacted Dr. Nelson," which indicates to me that Abbott was aware that the December 11-12 date was still tentative at this point and the Union was expected to confirm the specific date with Nelson if it was agreeable. Further, Dr. Nelson's December 12 letter to the parties recounting his attempts to set up a hearing indicates uncertainty on his part as well.

Even were I to have found that the Union was put on notice in November that the Haddock arbitration was scheduled for December 11-12 and indeed agreed to arbitrate the matter at that time, the Union's actions clearly indicate a withdrawal from that agreement on December 3 and 4. In such circumstances I would find that such conduct would not vitiate Respondent's obligation to proceed to arbitration when a date could be agreed upon. The collective bargaining agreement is silent as to setting a date for arbitration and the Agency offered no evidence of an exigency or compelling reason, nor presented any evidence of detriment to the process or to Respondent that would result if the arbitration was not held when scheduled. In my view, such a showing must be made in the circumstances of this case before the Union would forfeit its Statutory right to have the matter arbitrated for essentially merely seeking a postponement of a scheduled arbitration.

Accordingly, in view of the entire foregoing and the record herein I conclude Respondent's conduct constituted a refusal to arbitrate the Haddock grievance violative of section 7116(a)(1), (5) and (8) of the Statute. Cf. American Federation of Government Employees, Local 1457, 39 FLRA 519, 528 (1990); U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York and American Federation of Government Employees, Local 2612, 38 FLRA 276, 280 (1990); and Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C., 10 FLRA 316 (1982). I therefore recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Corpus Christi Army Depot, Corpus Christi, Texas, shall:

1. Cease and desist from:

(a) Refusing or failing to proceed to arbitration regarding a grievance filed by the American Federation of Government Employees, Local 2142, the employees' exclusive representative, on April 22, 1991, concerning employee Phillip Haddock, contrary to the requirements of section 7121 of the Statute.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, and after mutually agreeing with the Union on a hearing date, proceed to arbitration regarding the grievance filed by the American Federation of Government Employees, Local 2142 on April 22, 1991, concerning employee Phillip Haddock.

(b) Post at its Corpus Christi, Texas facility, copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Army Depot Commander, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 25, 1993

_____

SALVATORE J. ARRIGO

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to proceed to arbitration regarding a grievance filed by the American Federation of Government Employees, Local 2142, the employees' exclusive representative, on April 22, 1991, concerning employee Phillip Haddock.

WE WILL NOT in any like or related manner interfere with, restrain , or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL upon request, and after mutually agreeing with the Union on a hearing date, proceed to arbitration regarding the grievance filed on April 22, 1991, concerning employee Phillip Haddock.

_____

(Activity)

Date: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Region, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202 and whose telephone number is: (214) 767-4996.

1. Mencio heads the Union's arbitration committee and was the Union's representative when requesting arbitration and selecting the arbitrator.

2. Rachael Amaya, the other management representative present at these meetings, was not called to testify even though the Union witnesses' version of significant aspects of this meeting was at odds with Abbott's testimony.

3. Such testimony indicates Mencio, if asked, would have denied discussing the December dates with Abbott on

November 21, as Abbott testified.

4. Escamilla testified she told Carroll of Dr. Nelson's availability, even though she had previously given this information to Chief Steward Mencio, to "make sure" that he knew of the date. Escamilla had no satisfactory explanation for why she felt it necessary to tell Carroll of these arbitration dates.

5. Abbott testified that at the December 3 arbitration Carroll requested an extension of time to file briefs in the case stating he had an arbitration scheduled for the following week.

6. Carroll testified that this meeting was his only contact with the Agency relating to the Haddock arbitration following December 3, notwithstanding his testifying to a call

December 4 with Escamilla, supra.

7. Carroll testified Dr. Nelson assured him there had been no agreement to arbitrate the Haddock grievance on December 12 and he had not made any arrangement to be there.

8. The record discloses Respondent also filed an unfair labor practice charge against the Union concerning this matter.

9. Section 7121(b)(3) of the Statute provides:

"(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

"(3) include procedures that--

"(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

"(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

"(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

10. These findings and conclusions are based not only upon my determination of the credibility of each witness, but also upon my evaluation of the probabilities of events when considering the acknowledged conduct of the parties and the evidence at hand. Due to the divergent accounts of the witnesses, while not expressly stated, it will be evident that I have credited some, but not all, of the testimony of various witnesses to make a composite account of events I have found most likely to have occurred herein.

11. While Carroll might have told the Martin arbitrator that he needed more time to file a brief because he had another arbitration in a week, such statement might have been made after he was put on notice during a break in the arbitration that the Agency was preparing to go ahead with the Haddock hearing on December 11-12.