IN ARBITRATION

UNITED STATES DEPARTMENT OF LABOR, (OSHA),	)	
Agency,	)	
and	)	**FMCS Case No. 87-01667**
	)	**OLMR # ARB-OSHA-86-44-(86-49)**
NATIONAL COUNCIL OF FIELD LABOR LOCALS,	)	
Union.	)	

Appearances:

For the Agency: H. Alice Jacks, Esq., Attorney; Mr. James Armshaw, Director, Division of Case Management; and Mr. Tom Garcia, Regional Labor/Management Relations Officer.

For the Union: Mr. Ben F. Furlong, NCFLL Representative; Mr. Michael Harcourt, Vice President; and Mr. Jesse Rios, President.

OPINION AND AWARD

The Issue:

The question at hand is whether any contract violation was involved when, in processing an adverse action involving a proposed 30 day suspension, the Agency insisted upon using a court reporter to keep a verbatim stenographic transcript of the proceeding in which an employee exercised his right under Article 14 of the parties' contract and 5 USC 7513(b)(2) to "answer orally and writing," the required "advance written notice" of a proposed adverse action. For the reasons set forth below, I hold that the contract was violated.

A further question is raised by the Agency as to the timeliness of the Union's grievance. I find the grievance to have been timely.

The grievance, filed May 30, 1986, reads, in pertinent part:

Nature and Facts of Grievance On Friday, May 30, 1986 the Union was informed that it was OSHA policy to have a court reporter present to take verbatim transcriptions at an adverse hearing by the deciding Official. . . Efforts to resolve the issue prior to the meeting failed. At the meeting the Union refused to proceed at long as the meeting was transcribed. Management ordered the Union and the employee back to work and left the meeting without allowing the employee the opportunity to present his oral response as prescribed by Art 14 of the Contract. This may well be "Harmful error" on management's part. This Union has never agreed to the use of verbatim transcriptions at these types of meeting.

Remedy Desired Halt the use of verbatim transcriptions. Give the employee a fair and unencumbered meeting on the proposed action.

The Facts:

Early in 1986 an adverse action involving a proposed 30 day suspension was being processed against an employee whose name is no longer material to this case, and who did not appear or testify in this arbitration. The opportunity required by Article 14 of the parties' contract and 5 USC 7513 (b)(2) to be provided for an employee "to answer orally and in writing" a notice of such a proposed adverse action was scheduled for Friday, May 30, 1986. The employee was represented by his Union.

The proceeding was to begin at 11:00 AM, before the Agency's Regional Administrator. When the grievant and his union representative arrived, they found a court reporter present, with a stenotype machine. The Union Representative asked for and was given time to consult, and conferred by telephone with higher union and management authorities. He then returned to the conference room and advised the Regional Administrator that the Union would not participate orally in an "employee response" procedure in which a verbatim transcript was kept by a court reporter.

The then grievant and his union representative had prepared written materials in response to the notice of adverse action. These were submitted and

received, but the Union stood upon its refusal to participate orally, and the Agency refused to recede from its insistence upon a verbatim transcript. The proceeding terminated without ever going "on the record"; the court reporter never commenced making any notes, and no oral presentation answering the notice of proposed adverse action was made.

The Union then, to wit on the same day, filed the "Union Grievance" set forth above that is the subject of this arbitration. Some issue exists as to whether or not the Union knew in advance a court reporter was to be used. The Agency's Regional Administrator testified that he had earlier advised the then grievant personally, in connection with a direct request from that grievant to the Regional Administrator for a further continuance in the "oral response" procedure, that a court reporter would be present. The grievant's Union Representative testified that he had no advance knowledge that a court reporter would be present until he appeared and found one there. The Agency does not contend that anyone other then the grievant himself was told in advance that a reporter would be present.

Inconclusive evidence was offered upon two more points. First, the Agency sought to show that court reporters have been used in this situation before. Suffice it for now to say that I am not persuaded court reporters have been used in this situation with the knowledge or consent of this Local of NCFLL, in this Region.

Second, the Union sought to show the existence of an area-wide or nation-wide OSHA policy of using court reporters at this stage of this kind of an adverse action. Such a representation is asserted to have been made over the telephone to the Union Representative on May 30, 1986, but I have no com-

petent evidence as to the authority of that individual to make admissions binding upon the Agency, and Agency witneses testified otherwise in the hearing. Hence no competent evidence supporting the existence of a region-wide or nation-wide policy is before me. As a practical matter, it may make little difference; I think the Agency's attempt to use a court reporter in the instance at hand presents a litigable issue, whether or not a broad policy of insisting upon verbatim transcripts in these hearings has been shown to exist. In any event, however, my present consideration is confined to the question whether the contract was violated by what the Agency sought to do on May 30, 1986.

There was also some testimony by a Union officer that he does not object, and has not in the past objected, if the Agency had secretaries sit in on meetings of this kind and take shorthand notes, and also has not objected if the Agency, for its own purposes, used a small tape recorder in such an "employee answer" meeting. This testimony is discussed infra.

Contentions of The Parties

The Union contends that presence of a court reporter at the kind of oral response contemplated by the contract and the statute has a chilling effect on what is essentially a part of the collective bargaining process; that proposed adverse actions are often negotiated to a settlement at this stage and the use of court reporters in bargaining (as in contradistinction to their use in any kind of a formal adversary hearing) has often been condemned.

The Agency contends that the oral and written answer contemplated by the contract arises under 5 USC 7513(b)(2) and is a part of a formal process that can lead to an appeal to the Merit Systems Protective Board, and that the

Agency is required by 5 USC 7513(e) to maintain, and furnish to the Board and the affected employee upon request, among other things, "the answer of the employee when written, [and] a summary thereof when made orally."[1] The Agency argues that the decision how best to meet its statutory obligation to keep the required "summary" is a matter lying within its sole discretion. It also points out that it makes copies of the transcript available, without charge, to the employee and his or her representative and affords them a chance to make corrections--which are then preserved and sent up as part of the record.

The Agency also argues that the Union's grievance is not timely, as the Regional Administrator told the original grievant some weeks before May 30, 1986 that a court reporter would be present, and no protest was received either from the grievant or from the Union.

Discussion and Determination:

Preliminary matters: At risk of belaboring the obvious, I repeat that the grievance before me is not the adverse action involved on May 30, 1986. That grievant's case has been settled; he is not a party to this Union grievance, has since voluntarily resigned and did not participate, appear or testify in the arbitration before me. The grievance here at issue is the one filed May 30, 1986 as a "Union Grievance," and it addresses itself strictly to the procedural question presented by the Agency's insistence upon using a court reporter at the "oral answer" stage of the processing of this "adverse action."

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1 Emphasis added, here and below.

Article 14 of the parties' contract deals with "adverse actions" as defined in Chapter 752 of the Federal Personnel Manual, which itself incorporates the concepts and much of the language of 5 USC 7501, 7512 and 7513. The contract then provides:

> **Section 2—Written Notice**
> In all cases of proposed adverse action, the employee will be given written notice, which will state any and all reasons for the proposed action specifically and in detail, at least 30 calendar days in advance of the action, except when there is reasonable cause to believe that an employee is guilty of a crime for which a sentence of imprisonment can be imposed. The employee will be given the opportunity to respond orally and/or in writing to the reasons for the action prior to a decision. The response may include written statements of persons having relevant information.

This procedure involved arises under particular statutory language. 5 USC 7513 governs, inter alia, adverse actions involving suspensions for more than 15 days and provides, in pertinent part:

> (b) An employee against whom an action is proposed is entitled to--
> (1) at least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime, . . . stating the specific reasons for the proposed action;
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
> to be represented . . . , and
> (4) a written decision and the specific reasons therefore at the earliest practicable date.
> (c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(3) of this section.
> (d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 . . .
> (e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and an order effecting an action covered by this subchapter, together with any supporting material shall be maintained by the agency and shall be furnished

to the Board upon its request and to the employee affected upon the employee's request.[2]

The parties' contract makes no express reference to the use of court reporters in this situation, and there is no express statutory or regulatory language in point. The contract does provide for the filing of a "union grievance" (as opposed to request for personal relief by a bargaining unit employee) and provides for the waiving of steps 1 and 2 in processing "union grievances." Article 15, 2(B). Article 15, 8(A) contains the time limit relied upon by the Agency, and provides

> **Step 1—Informal Step**
> (1) A grievance must be presented within 30 calendar days of when the bargaining unit employee of NCFLL or its affiliates has learned or may reasonably have been expected to have learned of its cause.

The Agency's argument that the grievance was not timely is based chiefly upon the contention that the Union had notice more than 30 days before this grievance was filed that a court reporter would be used. Upon this point, however, I may as well say immediately that I deem the Union's grievance to have been timely filed. The original grievant was not an agent of the Union and his knowledge is not attributable to his Union. Further, to the extent that a Union's grievance raises--as this one clearly does--a general question as to the propriety of a particular procedure in a particular stage of the collective bargaining relationship, the preferences of the grievant cannot operate to waive the Union's rights. It is the exclusive perquisite of the Union to select the positions it will or will not assert as to the meaning and

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2 Language that for present purposes is not significantly different governs suspensions for 14 days or less, cf. 5 USC 7501, et seq.

interpretation of collective bargaining agreement provisions that affect all bargaining unit employees.

The Merits: There can be no doubt that the contractually provided opportunity to make oral answer to a proposed adverse action is a critically important right of the affected employee, guaranteed him or her not only by this contract, but by federal statute. Under the statute (or its predecessors) failure to accord an opportunity deemed adequate by a reviewing court will void adverse action taken, **Wittner v. United States,** 110 Ct.Cl. 231, 76 F.Supp. 110 (1948); **Ricucci v. United States,** 192 Ct.Cl. 1, 425 F.2d 1252, motion den. 193 Ct.Cl. 120, 432 F.2d 453 (1970), although it has sometimes been held that any defect asserted must be shown to have been harmful, **Handy v. U. S. Postal Service,** 754 F.2d 335 (1985).

Under this statutory language, it has also been held that this right to answer orally and in writing does not contemplate an adversary proceeding, with a right to confront and cross-examine witnesses, **Deviny v. Campbell,** 90 App.D.C. 171, 194 F.2d 876, cert. den. 344 U.S. 826, 97 L.Ed.2d 265, 73 S.Ct. 27 (1952); nor an inquisitorial proceeding, designed to investigate and develop the facts, **Paterson v. United States,** 162 Ct.Cl. 675, 319 F.2d 882 (1963).

There has indeed been very substantial criticism of the use of court reporters in collective bargaining, both administratively and in the courts. The NLRB has held that an employer may not insist to impasse on the tape recording of a grievance proceeding, **Hutchinson Fruit Co.**, (1985) 277 NLRB No. 54, 120 BNA LRRM 1258, 1985-86, CCH NLRB Para 17529. The Board has applied the same rule to unions, and the Courts have enforced the Board's orders,

Bartlett-Collins, (1978) 237 NLRB 770, 99 BNA LRRM 1034, 1978 CCH NLRB Para 19539, enforcement granted (CA10) 639 F.2d 652, 106 BNA LRRM 2272, 90 CCH LC Para 12504, cert. den. 452 U.S. 961, 69 L.Ed. 2d 971, 101 S.Ct. 3109, 107 BNA LRRM 2768, 91 CCH L.C. Para 12848.

The rational was spelled out in **Pennsylvania Tel. Guild,** (1985) 277 NLRB No. 55, 120 BNA LRRM 1257, 1985-86, CCH NLRB Para 17528, enforced (CA3) 799 F.2d 84, 123 BNA LRRM 2214, 104 CCH L.C. Para 11940, 86 A.L.R.Fed. 831 (the last reference is to a particularly informative A.L.R. annotation on the whole subject). In this case, the union representative insisted on the use of a tape recorder at a third level grievance meeting. The employer objected to the use of the tape recorder on the grounds that it would inhibit open and honest discussion, would cause people to talk "for the record" instead of trying to solve the problem, and would formalize the process. Ruling that insistence on a nonmandatory subject as a precondition to bargaining is a refusal to bargain about mandatory subjects of bargaining and violates the National Labor Relations Act even in the absence of bad faith,[3] the court concluded that grievance meetings were similar to collective bargaining negotiations in character and methodology, because both proceedings are informal mechanisms used to negotiate the settlement of a dispute and both require a free and open exchange of views so that resolution may be reached. The union's concern with the preparation of a record for arbitration was held subordinate to the need for an atmosphere in negotiation which facilitates agreement. Moreover, the court stated that whether a practice of tape recording grievance

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3 Emphasis added.

meetings existed between parties is irrelevant where insistence concerns the nonmandatory subject of bargaining because a nonmandatory subject does not become mandatory through past practice. The union was ordered to bargain in good faith with the employer and to refrain from insisting to impasse on the use of a recording device during grievance meetings.

Not all courts have gone so far as to hold the matter non-bargainable, but they clearly forbid either party to insist unilaterally upon a verbatim transcript in situations like this, **Chemical Workers, Local 29 (Morton-Norwich Products, Inc.),** (1977) 228 NLRB 1101, 94 BNA LRRM 1696, 1977-78 CCH NLRB Para 18030 and **Latrobe Steel Co. v NLRB,** (1980, CA3) 630 F.2d 171, 105 BNA LRRM 2393, 89 CCH L.C. Para 12231, cert. den. **Latrobe Steel Co. v NLRB,** (1981) 454 U.S. 821, 70 L. Ed.2d 92, 102 S.Ct. 104, 108 BNA LRRM 2558, 92 CCH L.C. Para 13018

And in both **NLRB v Pennsylvania Tel. Guild,** (1986, CA3) 799 F.2d 84, 123 BNA LRRM 2214, 104 CCH L.C. Para 11940, 86 A.L.R.Fed 831, supra and **Chicago Cartage Co. v International Brotherhood of Teamsters,** (1981, CA7, Ill) 659 F.2d 825, 108 BNA LRRM 2567, 92 CCH L.C. Para 13030, bargaining parties--the employer in one case and the union in the other--were clearly held privileged to refuse to meet in grievance negotiation with the other party, where the other party insisted upon keeping a verbatim record of the proceedings.

In light of this very heavy weight of authority, I have little hesitation in adopting the Union's point of view here; the only countervailing consideration is whether the testimony of one of the Union's officers that he has not in the past, in oral reply sessions of this kind, objected to the Agency's use of secretaries to take shorthand notes, and would not object to its use of

a small tape recorder, must be viewed as a waiver of the position The Union has adopted and is urging in this arbitration.

As noted, among the cases I have referred to above is some authority for the argument that such a waiver would not in any case be binding. I need not, and do not, however, go so far as to adopt that position in the case at hand. The fact is, I do not think the Union officer's testimony constitutes a binding concession of the position for which the Union here contends, for the reason that I think there is a very considerable practical difference between regulating--by statute, contract or decision--the kind of notes a party keeps for its own use and benefit, and regulating whether a professional court reporter may be used.

A court reporter is an outside neutral. He or she customarily verifies the transcript under oath. The reporter stakes his or her professional reptation not only on the general accuracy and the relative absence of error in the transcript, but also--and perhaps even more importantly--on its freedom from any partisan bias or intentional distortion. No transcript is perfect, but the reporter certifies at least that there are no partisan, intentional, omissions or misrepresentations. A party's own notes, taken (by whatever method) for its own use and purposes, do not carry or purport to carry such a weight of authenticity.

Further, a professional court report reporter, unless instructed not to, is quite likely to expect to "swear the witness." Even if no oath or affirmation is in fact administered, the mere presence of a court reporter, poised before his or her stenotype machine or speaking into a hush-a-phone, may lead

lay participants in the proceeding to think they are speaking under penalty of perjury.[4]

Needless to say, swearing the grievant or his representatives is quite inconsistent with the give and take involved in collective bargaining. In a formal adversary proceeding, nothing less than scrupulously honest and truthful testimony is acceptable,[5] but in such a proceeding, an outside trier of fact is being asked to make findings and determinations. Collective bargaining is not such an adversary hearing; the parties involved know the facts, and they are negotiating, not testifying; the kind of atmosphere invoked by the notion of sworn testimony and penalties of perjury has no place whatever in the free give and take of negotiation.

In the circumstances, I am satisfied that the Agency had no right to insist upon the presence of a court reporter or the taking of a stenographic transcript in an Article 14 oral answer proceeding, and the Union was within its rights in refusing, and privileged to refuse, to continue with the proceeding under these circumstances.

Award:

The grievance is sustained.

Date: 9/19/1988

Robert H. Kubie, Arbitrator

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4 It should be noted that this objectionable element would be present, even if in a particular case a trained stenotypist were used who happened to be an employee of the Agency and not an outside neutral; while no such facts are now before me, I should think the appearances created by such a situation would fall within the prohibitions set forth in the cases I have discussed.

5 At least, nothing less is acceptable to me.