

**ARBITRATION DECISION NO.:**

411

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Transportation

District 10

**DATE OF ARBITRATION:**

October 17, 1991

**DATE OF DECISION:**

January 5, 1992

**GRIEVANT:**

Floyd Dean Pullins

**OCB GRIEVANCE NO.:**

31-01-(91-05-06)-0013-01-06

**ARBITRATOR:**

David Pincus

**FOR THE UNION:**

Mike Muenchen

Advocate

Gene Freeland

Second Chair

**FOR THE EMPLOYER:**

Meril Price

Advocate

Louis Kitchen

Second Chair

**KEY WORDS:**

Probationary Removal

Arbitrability

**ARTICLES:**

Article 5-Management Rights

Article 6-Probational Employees

§6.01-Probationary Periods

§6.02-Conversion of

Temporary, Intermittent, Interim or

Seasonal Employees

Article 7-Other Than Permanent

Positions

§7.01-Temporary Positions  
 §7.02-Interim Positions  
 §7.03-Intermittent Positions  
 §7.04-Seasonal Employees  
 §7.05-Salaries of Temporary,  
 Intermittent and Interim Positions  
 §7.06-Seasonal, Intermittent,  
 Interim, Temporary Overtime  
 Article 25-Grievance Procedure  
 §25.01-Process  
 §25.02-Grievance Steps  
 §25.03-Arbitration Procedures  
 Article 43-Duration  
 §43.02-Preservation of  
 Benefits

**FACTS:**

The Grievant had held a variety of non permanent positions with the Ohio Department of Transportation. In March 1989 the Grievant attained seasonal employee status, and was classified as full time temporary. He was employed for approximately six weeks, when he apparently resigned on April 28, 1989. On July 31, 1989 the Grievant was appointed to a full time interim position with the District 10 garage in a position classified as Highway Worker 2. The Position Description for a Highway Worker specifies a number of job duties, including, in order of importance, general highway maintenance duties, snow and ice control duties, operation of various machinery, and related duties as required. The appointment was canceled as of December 1, 1989, when a full time employee returned to work, and Grievant was separated from employment.

On March 5, 1990 the Grievant was appointed to the another full time interim position, which was classified as a Highway Maintenance Worker II. The duties remained predominantly the same. The Grievant's appointment was terminated as a result of the incumbent employee's return to work.

While Grievant was employed as a Highway Maintenance Worker II, he applied for and was selected for the full time permanent position of Delivery Worker, effective December 24, 1990. As a Delivery Worker, the grievant's responsibilities included delivery of mail, parts, supplies and samples, signing and accounting for materials and parts delivered, and driving a snowplow in emergency situations. The grievant served 117 days as a Delivery Worker, at which time he was informed that he was being terminated as of April 19, 1991 as a probationary removal. The employer's justification was that the Grievant failed to exhibit satisfactory performance.

The grievant filed a complaint alleging that there was no just cause for the disciplinary action, and that the principles of progressive discipline had not been followed since he, at no time, received counseling, a reprimand, or any other form of discipline. No hearing was held to discuss his unsatisfactory job performance. The Deputy Director of Labor Relations advised the Grievant that a Step III meeting would not be scheduled because Article 25.01 (B) of the collective bargaining agreement provides that: "Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals."

**EMPLOYER'S POSITION:**

Because Grievant's removal occurred after 117 days, and the applicable probationary period was 120 days, the removal was not grievable. Since Section 25.01 (B) prohibits the grieving of any properly implemented probationary removal, the just cause standard specified in Section 24.01 is inapplicable. Also, Section 6.02, which provides for the crediting of one-half the length of the probationary period when the permanent position involves substantially the same work performed as a temporary, intermittent or seasonal employee, does not apply because the prior positions did not involve substantially the same work.

The Employer also argued that the grievance was not arbitrable because it was untimely filed. The

employee was aware of the 120 day probationary period, yet failed to file a grievance after 60 days as a Delivery Worker when under the Union's theory his probationary period should have ended. The Employer also argued that the face of the grievance failed to specify any claim dealing with the application of Section 6.02.

**UNION'S POSITION:**

The Union asserted that because Grievant's probationary tenure had elapsed when the removal took place that the removal was arbitrable and the just cause standard was applicable. Because the grievant's prior work as a Highway Maintenance Worker was substantially the same as the work he performed as a Delivery Worker, the probationary period should have been 60 days, pursuant to Section 6.02 of the contract.

The Union argued that the triggering event for the timeliness of filing the grievance was the removal grievance, not the passing of thirty days beyond the shortened probationary period. Furthermore, the Grievant could not be expected to grieve during this period because he was fearful of being fired if he raised this issue during his supposed probationary period.

Because the Employer refused to schedule a third step grievance review meeting, the Union had no opportunity to raise an objection concerning calculation of the grievant's probationary period. Thus the Employer's allegations that Section 6.02 claims are a surprise are not supported. The Collective Bargaining Agreement does not contain any penalty for a failure to specify any relevant provisions on the grievance form.

**ARBITRATOR'S OPINION:**

The grievance is not arbitrable because of timing deficiencies. Any questions regarding employment standing or status fall within the purview of the Union and its members, not the Employer. The Union and/or employee must initiate action to clarify such issues unless an employer intentionally misinforms an employee, and the employee relies on such information detrimentally. There was no such misinformation in the instant case. The Grievant should have filed the grievance no later than ten days after he "reasonably should have become aware of the occurrence giving rise to the grievance." By failing to determine within a reasonable time whether his probationary status had been properly credited, the Grievant waived his right to challenge any future disciplinary action on this basis. As such, at the time of his removal, he was properly characterized as a probationary employee, and was therefore removable under Section 25.01 (B) without any recourse to the grievance procedure.

**AWARD:**

Grievance denied.

**TEXT OF THE OPINION:**

**STATE OF OHIO AND OHIO CIVIL  
SERVICE EMPLOYEES ASSOCIATION  
LABOR ARBITRATION PROCEEDING**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**THE STATE OF OHIO,  
THE OHIO DEPARTMENT OF TRANSPORTATION**

-and-

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,  
LOCAL 11, AFSCME, AFL-CIO**

**GRIEVANT:**

Floyd Dean Pullins  
(Arbitrability and Probationary Removal)

**OCB Case No.:**

31-10 (050691) 013-01-06

**ARBITRATOR'S OPINION AND AWARD**

Arbitrator: David M. Pincus

Date: January 5, 1991

**APPEARANCES**

For the State

George M. Collins, District 10, D.A.A.  
George W. Landsittel, Stockroom Supervisor  
Carolyn K. Proctor, Personnel Officer  
Louis Kitchen, Second Chair  
Meril Price, Advocate

For the Union

Floyd Dean Pullins, Grievant  
Willa M. O'Neill, Union Steward  
Phillip A. Moon, Hwy. Maint. Wkr. IV  
Henry Hunter, Witness  
Jim Proffitt, Hwy. Supt. II  
Gene Freeland, Second Chair  
Mike Muenchen, Advocate

**INTRODUCTION**

This is a proceeding under Article 25, Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Transportation, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1989 to December 31, 1991 (Joint Exhibit 1).

The arbitration hearing was held on October 17, 1991 at the office of the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

**ISSUES**

Is the probationary removal of Floyd Dean Pullins, the Grievant, arbitrable?

If the matter is arbitrable, did the Employer violate  
the Collective Bargaining Agreement (Joint Exhibit 1)  
by removing the Grievant from employment?

If so, what shall the remedy be?

## **PERTINENT CONTRACT PROVISIONS**

### **ARTICLE 5 - MANAGEMENT RIGHTS**

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08 (C), Numbers 1-9.

### **ARTICLE 6 - PROBATIONAL EMPLOYEES**

#### **Section 6.01 - Probationary Periods**

All newly hired and promoted employees shall serve a probationary period. The probationary period shall be either one hundred twenty (120) days or one hundred eighty (180) days dependent upon the length that exists for the classification at the effective date of this Agreement. However, the Disability Claims Adjudicator 1 shall have a probationary period of nine (9) months.

The Employer will not modify the duration of a probationary period of a classification(s) without mutual consent except for Unit 3 and 6 employees in DYS and Rehabilitation and Corrections newly hired at new facilities which are not yet fully operational. In such a case, these employees may have their initial probationary period extended for 120 days or 180 days (in accordance with the probationary period for the classification) beyond the time the facility becomes fully operational. For the purposes of this Article, fully operational shall mean at the time when the first inmate or juvenile offender arrives.

#### **Section 6.02 - Conversion of Temporary, Intermittent, Interim or Seasonal Employees**

A temporary, intermittent, interim or seasonal employee who becomes a permanent employee in a position involving substantially the same work he/she performed as a temporary, intermittent or seasonal employee will be credited with one-half (1/2) the length of the probationary period for that classification.

A probationary employee shall have no seniority until he/she completes the probationary period. Upon the completion of probation he/she will acquire seniority from his/her date of hire. An employee who has a continuous period of temporary, intermittent, or seasonal employment prior to receiving a permanent appointment shall acquire seniority for such time.

Seasonal, intermittent, temporary, or interim employees who become permanent after July 1, 1989 will begin to earn seniority when they become permanent employees.

### **ARTICLE 7 - OTHER THAN PERMANENT POSITIONS**

#### **Section 7.01 - Temporary Positions**

Temporary positions are those positions in which work is of a temporary nature and a specified duration, not to exceed thirty (30) days. The Employer agrees not to use temporary positions to avoid filling permanent full time positions.

#### **Section 7.02 - Interim Positions**

Interim positions are those positions in which the work is of a temporary nature and the durations is fixed by the length of absence of an employee on an approved leave of absence. The duration of interim positions shall not exceed thirty (30) days plus the length of the leave of absence.

#### **Section 7.03 - Intermittent Positions**

Intermittent positions are those positions in which work is of an irregular and unpredictable nature and which do not exceed seven hundred twenty (720) hours per employee per twelve (12) month period, except for the Ohio Bureau of Employment, Services, the Department of Taxation, the Department of Commerce

and the Department of Administrative Services Data Processing Division which may utilize intermittent positions for a period not to exceed one thousand (1000) hours per employee per twelve (12) month period. The Employer agrees not to use intermittent positions to avoid filling permanent full-time positions. The allocation and use of intermittent positions shall be an appropriate subject for the Labor-Management Committee.

#### **Section 7.04 - Seasonal Employees**

A seasonal employee is one that works a certain regular season or period of the year performing some work or activity limited to that season or period of the year not to exceed fourteen (14) consecutive weeks except that Golf Course Workers and Lifeguards may work beyond 14 weeks. The Employer agrees not to abuse the designation of seasonal status.

#### **Section 7.05 - Salaries of Temporary, Intermittent and Interim Positions**

Salaries for temporary, intermittent and interim positions shall be equal to the hourly rate received by permanent employees in the same job classification with the same length of service.

#### **Section 7.06 - Seasonal, Intermittent, Interim, Temporary Overtime**

Overtime that is available when seasonal, intermittent, temporary and interim employee are on staff shall first be offered to permanent employees.

(Joint Exhibit 1, Pgs. 7-9)

### **ARTICLE 25 - GRIEVANCE PROCEDURE**

#### **Section 25.01 - Process**

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievant or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievant) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

(Joint Exhibit 1, Pg. 40)

#### **Section 25.02 - Grievance Steps**

##### **Step 1 - Immediate Supervisor**

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

(Joint Exhibit 1, Pg. 41)

### **Section 25.03 - Arbitration Procedures**

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

### **ARTICLE 43 - DURATION**

#### **Section 43.02 - Preservation of Benefits**

To the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

(Joint Exhibit 1, Pg. 71)

### **STIPULATED FACTS**

Mr. Floyd Dean Pullins was appointed to the position of Delivery Worker at the Ohio Department of Transportation, District 10, as a full time permanent on December 24, 1990.

Mr. Pullins had previously held positions with the Ohio Department of Transportation, first as a seasonal, approximately six weeks in the Spring of 1989.

His next position was an interim Highway Worker from July 31, 1989 to December 1, 1989.

On March 5, 1991, Mr. Pullins was again appointed as an interim Equipment Operator 1, which was later changed to a Highway Maintenance Worker 2. He was separated from that position on October 12, 1990.

The probationary period of the Delivery Worker classification is 120 days, as referenced in Article 6.01.

Mr. Pullins served 117 days as a Delivery Worker before he was removed.

### **CASE HISTORY**

Floyd Dean Pullins, the Grievant, has held a variety of positions with the Ohio Department of Transportation, the Employer. Since these prior appointments played such a critical role in the probationary removal initiated by the Employer, a brief review follows.

During March of 1989, the Grievant attained seasonal employee status with the Employer. This position was classified as full time and temporary (Employer Exhibit 4). The Grievant stated he was involved in spring litter control which lasted approximately six weeks. While performing a variety of tasks, the Grievant operated a pick up truck. It appears the Grievant resigned from this position on April 28, 1989 (Employer Exhibit 4).

On July 31, 1989, the Grievant was appointed to a full time interim external position with the District 10 garage. The position was classified as a Highway Worker 2. Section 7.02 indicates that an interim position involves work which is of a temporary nature because the duration is fixed as a consequence of an employee's approved leave of absence. Carolyn Proctor, the District Personnel Manager, stated employees enjoying this job status basically received no benefits and were not in the bargaining unit.

The Position Description (Joint Exhibit 3 (A)) for a Highway Worker specifies a number of job duties. In order of importance, the duties included: General highway maintenance duties (patching pavements, guardrail repairs, cuts brush and grass, etc.); snow and ice control duties; operates various machinery

(trucks, movers, loaders, and chain saw) ; and performs related duties as required.

A Personnel Action (Joint Exhibit 3 (A)) submitted at the hearing indicates the appointment was canceled as of December 1, 1989. A full time employee returned to work which engendered the separation in question.

On March 5, 1990, the Grievant was appointed to another full time interim external position. This time, he attained an Equipment Operator I position (Joint Exhibit 3 (b)) . During his tenure in this capacity, a classification modernization study was undertaken which renamed the job classification in question to a Highway Maintenance Worker II.

The duties, however, remained predominantly the same. The Position Description (Joint Exhibit 3 (B)) indicates the job duties of greatest import involved the operation of dump trucks, tractors, front end loaders, fork lifts and other similar equipment. In terms of import, the next tier of job duties concerned the performance of general maintenance duties.

Once again, this appointment was terminated as a result of a Personnel Action. This was an interim separation because an incumbent returned to work. The separation became effective on October 13, 1990 (Joint Exhibit 3 (B)).

While he was employed as a Highway Maintenance Worker II, a full time permanent vacancy was posted , for a Delivery Worker position. The Grievant applied for the position and was selected for full time permanent employment. His appointment became effective on December 24, 1990 (Joint Exhibit 3 (C)).

As a Delivery Worker or County Pony Driver, the Grievant's primary responsibilities dealt with the delivery of mail, parts, supplies and samples. Other duties concerned signing and accounting for materials and parts delivered. Of lesser import were the duties concerning the driving of snowplows in emergency conditions (Joint Exhibit 3 (C)).

The Grievant served 117 days as a Delivery Worker. On April 12, 1991, the Grievant was informed he was being terminated as of April 19, 1991 via a probationary removal (Joint Exhibit 2). As justification for the probationary removal, the Employer referenced the Grievant's failure to meet the minimum requirements.

On April 30, 1991, the Grievant filed a complaint which contested the probationary removal. It contained the following allegations:

“ . . .

On April 19, 1990, Floyd Pullins received a letter informing him of his termination for failing to meet minimum requirements for satisfactory performance of his duties. The Union contends that just cause for this disciplinary action has not been proven by management. We further state that the principles of progressive discipline have not been followed in regards to Mr. Pullins. He has at no time during his employment received counseling, a reprimand, either verbal or written or any other form of discipline. Further, no hearing was held to discuss the employee's alleged unsatisfactory job performance.

“ . . .”

(Joint Exhibit 2)

On May 10, 1991, Jim Miller, the Deputy Director of Labor Relations, advised the Grievant a Step III meeting would not be scheduled. As justification, he stated:

“ . . .

The issue of your complaint is your removal from employment during your initial probationary period. This is a non-grievable issue in accordance with Article 25.01(B) of the collective bargaining agreement which states: "Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

“ . . .”

(Joint Exhibit 2)

The Parties were unable to resolve the disputed matter. On May 14, 1991, the Union requested the grievance be taken to arbitration.



## **THE PARTIES' ARBITRABILITY CLAIMS**

### **The Position of the Employer**

In the opinion of the Employer, the probationary removal was proper and not arbitrable under the terms and conditions negotiated by the Parties. Several arbitrability arguments were raised in support of this premise.

The Employer asserted the probationary removal was not grievable because it lacked substantive arbitrability status. Section 6.01 defines the probationary period as one hundred and twenty days and was viewed as applicable in this instance. As such, the Grievant's removal after one hundred and seventeen days was well-within the specified probationary period. Also, the Grievant's tenure in his new position indicated he was removed during his initial probationary period.

With standing of this sort, it was alleged the Grievant was unable to file a grievance. Section 25.01(B) precludes the filing of grievances dealing with disciplinary actions or removals by probationary employees during their initial probationary period. This section allows probationary employees to grieve all matters other than the previously specified exceptions.

Since Section 25.01(B) prohibits the grieving of any properly implemented probationary removal, the just cause standard specified in section 24.01 is inapplicable; no standard exists, let alone a just cause requirement. As such, the Employer maintained it treated the Grievant as a probationary employee throughout the process. Under these circumstances, a Step 3 hearing would have conflicted with its probationary employee hypothesis.

The Employer contended the previous analysis prevents application of Section 6.02 particulars. This provision did not place the "probationary" removal outside the initial probationary period standard specified in Section 25.01(B). Section 6.02, moreover, only provides for the crediting of one-half the length of the probationary period when the permanent position involves substantially the same work performed as a temporary, intermittent or seasonal employee. The Employer claimed the prior positions did not involve substantially the same work.

In addition to the substantive arbitrability claim, the Employer also asserted the grievance was not arbitrable based on procedural arbitrability arguments. The Employer, more specifically, argued the grievance was untimely based on Section 25.02 requirements. Questions raised by the Grievant dealing with application of Section 6.02 credits should have been raised much earlier. He was fully informed during orientation about the length of the probationary period. And yet, he failed to file a grievance after sixty days of employment as a Delivery Worker; even though he was being carried as a probationary employee. As such, a valid filing would have taken place no later than ten days after February 21, 1991.

Another procedural defect claim was raised by the Employer. It alleged the face of the grievance failed to specify any claim dealing with the application of Section 6.02. As such, the Employer was surprised by some of the claims raised at the hearing, dealing, with the issues surrounding the application of Section 6.02.

The Employer claimed the requirements contained in Sections 25.01(B) and 25.02 were clear and unambiguous. Therefore, the grievance was not arbitrable. A contrary ruling would be outside the scope of the Arbitrator's authority as specified in Section 25.03.

### **The Position of the Union**

The Union asserted the grievance was, in fact, arbitrable. The probationary removal was illegal because the Grievant's probationary tenure had elapsed when the action took place. As such, the Employer's disciplinary action was implemented without just cause in violation of the Collective Bargaining Agreement (Joint Exhibit 1).

The Union argued the requirements contained in Section 25.01(B) are not clear and unambiguous. Thus, the grievance should be granted substantive standing to avoid a forfeiture.

Evidence and testimony indicated this was not the Grievant's initial probationary period. He served a similar probationary period as an Equipment Operator (Joint Exhibit 3 (B)). As such, the Grievant did not relinquish his right to grieve the questioned removal decision. Section 25.01(B), therefore, is inapplicable in

this instance.

The reference in Section 25.01(B) to probationary employees is equally ambiguous because it can not be defined without factoring the requirements contained in Sections 6.01 and 6.02. The one hundred and twenty day probationary period specified in Section 6.01 can be halved by meeting certain conditions contained in Section 6.02. Such a circumstance arises when a person becomes a permanent employee in a position involving substantially the same work he/she performed as a temporary, intermittent, or seasonal employee.

The Union argued the Grievant's prior work as a Highway Maintenance Worker was substantially the same as the work he performed as a Delivery Worker. This contention was supported by evidence and testimony. The Union placed a great deal of emphasis on a number of job specifications (Joint Exhibits 6 (A) and (B)) which exposed the sameness of two classification series: Delivery Worker and Highway Maintenance. Both of these classifications have identical minimum class qualifications. They, more specifically, state the classifications are unskilled labor and therefore are exempt from written examinations.

Testimony provided by several witnesses further supported the "substantial sameness" notion. Willa O'Neill, a Union Steward and a Highway Maintenance Worker, verified the virtual equivalence in the job specifications. The Grievant's testimony corroborated O'Neill's descriptions. He also indicated he had delivered parts in his previous capacity as a Highway Maintenance Worker. A critically important feature for both Highway Maintenance Worker and Delivery Worker positions.

The Union urged the Arbitrator to discount Proctor's testimony. Prior to the hearing, she never compared the three job descriptions (Joint Exhibits 3 (A), (B), and (C)) introduced by the Employer. As such, she lacked the intimate knowledge to critically appraise the various positions for common and differing characteristics. Union witnesses were viewed as more credible because, unlike Proctor, they have either performed the work described in the job specifications and descriptions, or observed others engaged in relevant tasks.

Several timeliness arguments raised by the Employer were also contested. First, the event which properly triggered the grievance procedure was the removal. It was not when thirty days had elapsed beyond the shortened probationary standard specified in Section 6.02. Second, the Grievant could not be expected to grieve during this time period. The Grievant was fearful of being fired if he raised this issue during his supposed probationary period. Also, timeliness requirements are negotiated to prevent delay in the processing of grievances. They are not designed as a trap for the unwary.

Surprise claims raised by the Employer were viewed as unsupported. The Union never had an opportunity to raise an objection concerning calculation of the probationary period. The Employer refused to schedule a grievance review meeting. As such, the Union should not have been precluded from processing the grievance through subsequent stages of the grievance procedure. The Employer, itself, engaged in a due process violation. Also, the Employer, in its response to the grievance, raised the entitlement argument and the Grievant's probationary status. As a consequence, it would be hard-pressed to suggest the Union's response to its action was untimely; the Union was merely responding to an issue raised by the Employer. The Union acknowledged it failed to specify Sections 25.01(B) and 6.02 in the grievance. Yet, this potential technical violations should not bar the Arbitrator from considering these potential violations. The Collective Bargaining Agreement (Joint Exhibit 1) does not contain any penalty for a failure to specify any relevant provisions on the grievance form.

### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony introduced at the hearing, it is my opinion the grievance is not arbitrable because of timing deficiencies. The filing of the grievance exceeded the timeliness standard contained in Section 25.02.

An arbitrator's jurisdiction as a mutual agent of the Parties to fashion a "contract settlement" is oftentimes restricted by specific limitations negotiated by the Parties. One of these limitations deals with grievance processing timing requirements. Unless there is a mutual extension in writing, a justifiable inference of a waiver on the Employer's part or other critical mitigating circumstances, mutually agreed to timing

requirements shall not be deviated.

Here, the Grievant's ability to grieve his removal based upon his probationary status is controlled by language contained in Section 25.01(B). This Section, moreover, is inextricably linked to Section 6.02, if an employee decides that his/her tenure in a prior position should somehow be converted into employment credits. When such an issue arises, the "sameness" of the prior decision must be determined or contested. However, the Union and/or the employee must initiate the action because an employee's probationary status has a potential impact on a series of future personnel transactions. Any questions regarding employment standing or status fall within the purview of the Union and its bargaining unit members, and not the Employer. It should be noted Section 25.01(B) does not preclude the filing of grievances to determine conversions under section 6.02.

Obviously, if an employer intentionally misinforms an employee, and reliance on this information leads to detrimental outcomes, the previously described burdens may shift to some degree. Such a circumstance played no role in the present analysis. In a like fashion, ambiguous contract language can sometimes lead to burden modifications. Once again, ambiguous language played no role in the present determination. Section 6.01 clearly specifies mutually agreed to probationary periods. Similarly, potential conversions are described in Section 6.02, while probationary employees' rights under the grievance procedure are specified in Section 25.02(B).

Based on the prior analysis, the Grievant, in accordance with Section 25.02-Step 1, should have filed a grievance questioning his probationary status approximately sixty days after his official appointment date to the position of Delivery Worker. Section 25.02 requirements applied to this situation indicate the Grievant should have filed a grievance no later than ten days after February 21, 1991. On this date, the Grievant "reasonably should have become aware of the occurrence giving rise to the grievance." His probationary status had not changed. Employee Performance Reviews (Joint Exhibit 2) submitted at the hearing indicate two probation evaluations for the period December 24, 1990 to April 22, 1991. And yet, he filed a grievance challenging his removal on April 30, 1991.

This grievance was inappropriately clothed as a Section 24.01 violation. By failing to determine within a reasonable time whether his probationary status had been properly credited, the Grievant waived his right to challenge any future disciplinary action on this basis. As such, at the time of his removal, he was properly characterized as a probationary employee, and therefore, removable under Section 25.01(B) without any recourse to the grievance procedure.

Some of the arguments proposed by the Union seem a bit misplaced. The Union's fear argument was never discussed by the Grievant at the hearing. When asked why he failed to file a grievance, he gave the following reasons: he did not know he could; there was no Union Steward in the garage; and no one told him his probationary time could be credited. He never stated he was fearful of being fired if he raised the issue earlier during his employment history. Also, the justifications provided by the Grievant were not the responsibility of the Employer.

This Arbitrator agrees most timeliness provisions have been negotiated to prevent processing delays. One cannot, however, discount their importance by saying they are traps for the unwary. If this Arbitrator held such a view, he would be forcing his world view and labor relations philosophy onto a document forged by the Parties as representations of their mutual intent. Such an outcome would further violate this Arbitrator's responsibility as the Parties mutual agent. It would also result in a potential expansion of the authority vested by the Parties in Section 25.03.

Based on this analysis, it is unnecessary to render a ruling on the substantive arbitrability arguments raised by the Parties.

### **AWARD**

The grievance is denied. It was procedurally defective because of timeliness problems dealing with Section 25.02 requirements. As a probationary employee, the Grievant could not grieve the probationary removal as specified in Section 25.01(B).

January 5, 1991

Dr. David M. Pincus  
Arbitrator