IN THE MATTER OF THE ARBITRATION

BETWEEN

BELLSOUTH TELECOMMUNICATIONS, INC.

(Company)

and

COMMUNICATIONS WORKERS OF AMERICA

(Union)

FULL ARBITRATION

Grievance No. B15-ALL-003

The hearing was held on March 8, 2017, in a conference room at the Marriott Courtyard in Decatur, Georgia, before James J. Odom, Jr., Arbitrator.

APPEARANCES

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INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth" or "Company") and Communications Workers of America ("CWA" or "Union") are parties to a collective bargaining agreement ("CBA" or "Contract") which provides dispute resolution procedures that include binding arbitration. This is the arbitration of a dispute under these procedures.

BACKGROUND

On May 12, 2016, CWA filed a grievance (the "grievance") at the Executive Level, stating:

> The Company refuses to comply with language in Article 18.01.A, mandating that an entry shall be placed in an employee's personnel record within 7 days.

BellSouth's same-day response:

> The Company is committed to following the provisions of Article 18.01.A of the Contract. However, an entry not placed in the file within 7 days does not void the disciplinary action that was taken. Employees have the right to, and typically are provided, Union representation at the announcement of discipline, as well as provided a copy of the discipline entry. There is no argument that employees are unaware of the discipline and reason for it. Similarly, an entry that is not removed in the specified time-frame (6 months for counseling, 24 months for a warning, or 36 months for all other entries) does not retain validity.

CWA appealed its grievance to arbitration under Article 23.01 after the parties failed to resolve the dispute through negotiation. The undersigned was selected as Arbitrator, and a hearing was held in Decatur, Georgia on March 8, 2017.

POSITIONS OF THE PARTIES

UNION POSITION

(Summarized from its post-hearing brief)

In 2015, AT&T SE advised the Union that it was taking the position that the validity of the discipline would not be affected by the failure of the Company to place entries of that discipline in the employees' personnel records within the seven-day period of time required by Article 18.01.A. This was and is unacceptable to the Union because having the discipline remain valid would take away the only remedy to enforce compliance by the Company. It would grant the Company a license to violate Article 18.01.A at its pleasure.

When BellSouth refused to change its position, CWA filed the grievance and appealed it to arbitration. At the hearing, the Union proposed as the question to be decided by the arbitrator, "Is AT&T's failure or refusal to place disciplinary entries in employee personnel files within 7 days as required by the contract merely a technical violation with no remedy?"

Here is the critical Article 18.01.A language that the parties agreed to in bargaining years ago:

> When entries other than those of a routine nature are made to an employee's personnel record which affect conditions of his/her employment, the employee will be given a copy of the entry. The employee will be given the opportunity to affix his/her signature and date acknowledging that the employee has inspected the entry. The acknowledged entry shall be placed in the employee's personnel record within 7 days from the discussion and does not indicate the employee concurs with the entry.

"Shall be placed in the employee's personnel record within 7 days," is a clear and unambiguous instruction that BellSouth is *required* to perform a specific physical act within a stated

period of time. The provision is not, as BellSouth appears to contend, an incidental or elective option for which the failure to comply is a mere technical violation with no remedy.

To the Company's contention that at most it has committed a technical violation for which there is no remedy, the Union counters with the common law maxim that where there is a right, there is a remedy. It is clear that for a purportedly granted right to have any meaning, it must be accompanied with the right to an award of remedy if and when the granted right is violated. Legal authority and common sense say that the parties had no intention to create a right that has no remedy when violated. That a remedy is available in such circumstance is evidenced by precedent-setting grievance settlements and HR's acquiescence in this principle.

The Union is due an award stating that the failure or refusal of the Company to place an entry in the employee's personnel record within 7 days as required by Article 18.01.A constitutes a violation of the Contract and calls for an actual remedy–removal of the entry.

BELLSOUTH POSITION

(Summarized from its post-hearing brief)

Background

The parties have long addressed the matter of written discipline entries without having a penalty. Initially the issue was about telling employees about "entries" that could affect them. The early Article 18.01.A language read, "When entries other than those of a routine nature are made to an employee's personnel record which may affect the conditions of his employment, the employee shall be so advised."

In 1955 the parties added the concept that management create the entry within a reasonable

length of time *of the occurrence* and make records available for inspection. In 1974 Southern Bell and CWA changed the language regarding "when such an entry is made" to "within a reasonable time (three days) from day on which the discussion occurred in which the employee was told that the entry would be placed in his record." In 1980, "reasonable length of time" was removed, but the "three (3) days" from the discussion was retained. Plus, the employee was given the right to review and acknowledge receiving the disciplinary entry. Importantly, at this time, there was no electronic transmission of personnel or other records.

In 1980 the parties discussed what it meant to "place an entry in the record." The Company took the position that when the entry was on the printed form and initialed, it was "in" the record." Both parties focused principally on the length of time between the discussion and putting the entry in writing and giving it to the employee to be reviewed and signed acknowledging receipt.

In 1983 negotiations the Company proposed increasing the time from 3 to 5 days. The Union said that it would agree, but only if the Company would agree to a penalty if the limit were missed. The Company refused and withdrew its proposal.

In 1990 the Company's Labor Relations department issued a guide for managers to reference when applying the CBA. In it, the term "placed in the employee's personnel record under Article 18.01.A" was said to mean recording the discussion on Form 3181B, not filing the form with other records.

The Union has sought a penalty in negotiations, but failed to get it. The issue of possible penalty for violating Article 18.01.A was raised in 2005 at a "Lunch and Learn" presentation for Labor Relations managers with this question: "If an entry is not placed in the record within 7 days, does this make the entry null and void? The answer given was, "No, there is no language in the Contract that

the entry is null and void if it is not placed in personnel record within the 7 day period." Then there is the testimony of retired Labor Relations Vice President Matthews that in his 40 years with the Company there never was a penalty imposed for not meeting a timeline.

Argument

The CWA cannot meet its burden of proof that the Company violated Article 18.01.A., because the parties have never specified that a document must be physically transmitted to some other location. And at no time during more than sixty years have they agreed to a penalty.

1. Creating the Entry in Writing and Giving it to the Employee Put it "in the Record."

There has never been any single repository of records, nor any identified place that should hold the discipline entries, and the 18.01.A language never concerned shipping the discipline entry anywhere; it concerned when the entry was written and given to the employee.

2. Even Assuming a Violation, There is No Penalty.

Creating the document and giving it to a disciplined employee satisfies Article 18.01.A.The Union cannot establish a violation. But even if it could, the CBA and the parties' history establish that there is no associated penalty. The CBA does not provide one, and twice in negotiations–once with this very provision–the Union sought a contractual penalty for missing a records deadline and the Company refused to agree.

There is no past practice that supports the claim that penalties have been imposed for missing an Article 18.01.A deadline.

3. CWA's Proposed Remedy Does Not Address a Problem And Provides Employees a Windfall.

Any delay in the Company's shipping and storing a disciplinary form has nothing to do with progressive discipline or a grievant's ability to conform his behavior to avoid discharge. Employees are entitled to a Union rep and a copy of the disciplinary form when they receive discipline. Managers are encouraged to create the document within the seven days of the discussion. However, if the manager fails to mail it to some centralized file, it does not render the entry null and void. Similarly, failing to remove an entry within the contractual time frame would not make the entry valid because it still exists in a file somewhere. The parties have bargained over Article 18.01.A many times, but they have never agreed to a penalty. History shows no penalty applies and the time refers to the discussion and write-up, not mailing an entry to a central file.

PERTINENT CONTRACT PROVISION

Article 18.01.A

> When entries other than those of a routine nature are made to an employee's personnel record which affect conditions of his/her employment, the employee will be given a copy of the entry. The employee will be given the opportunity to affix his/her signature and date acknowledging that the employee has inspected the entry. The acknowledged entry shall be placed in the employee's personnel record within 7 days from the discussion and does not indicate the employee concurs with the entry.

ISSUE

As proposed by the Union: Is BellSouth's failure or refusal to place disciplinary entries in employee personnel files within 7 days as required by the Contract merely a technical violation with no remedy?

As proposed by BellSouth: Should just cause for discipline be nullified because a supervisor delays sending a document to a clerk, even though the form was completed properly, on time, and provided to the employee with the right to Union representation at a disciplinary hearing?

DISCUSSION

The Company and the Union have worked together under Article 18.01.A from the middle of the last century. One of the few changes made in the language along the way was to fix a minimum time within which the subject non-routine entry is to be placed in the employee's personnel record. This grievance was triggered by the Company's recent assertion that the validity of a discipline imposed by a supervisor would not be affected by the failure of the Company to place the entry of that discipline in the employee's personnel records within the time required by Article 18.01.A.

This runs directly counter to the Union's position that the Company's failure or refusal to comply with Article 18.01.A constitutes a contract breach that invalidates the discipline. Taking "shall be placed in the employee's personnel record within . . . ." as an express and unambiguous obligation for the Company, the Union says the announced position renders the heart of Article 18.01.A meaningless by freeing the Company from any enforceable duty to place the entry in the employee's file within the 7 days, if ever.

The Company insists that there has never been the need for a penalty to enforce the terms of Article 18.01.A, and certainly never an agreement with the Union for a penalty. As to past use of a penalty to enforce compliance, the parties' work history does include settlements of grievances for not meeting the 18.01.A deadline and remedies that can be interpreted as penalties. However, the examples that have been offered fall far short of establishing any enforceable practice. This is sufficient background to move on to the parties' statements of the issues. BellSouth's is first:

> Should just cause for discipline be nullified because a supervisor delays sending a document to a clerk, even though the form was completed properly, on time, and provided to the employee with the right to Union representation at a disciplinary hearing?

The question as phrased signals strongly for the response that nullifying the discipline would be disproportionately punitive, given that it penalizes the Company for what impliedly is a benign and minor infraction. For the question to be useful or realistic, the term "delay" must be qualified to assume the ultimate, though tardy, delivery of the document.

I understand that in the long experience dealing with Article 18.01.A, there have been disagreements and competing contentions as to the purpose of placing the entry in the personnel file, when the entry is considered to have been placed in the file, and the significance of the timing deadlines. For example, the Company has contended that compliance with 18.01.A is complete once the discipline form has been completed, shown to the employee, signed for, and been given a copy. I remain curious as to what extent this scenario does or does not satisfy the Union's stated need for the entry to be available to it within 7 days.

Now the Union's statement of the issue:

> Is BellSouth's failure or refusal to place disciplinary entries in employee personnel files within 7 days as required by the Contract merely a technical violation with no remedy?

BellSouth argues in its brief that CWA cannot meet its burden to prove a contractual violation of Article18.01.A, in part because it cannot show that BellSouth failed to deliver a discipline entry to a designated central location within the prescribed 7-day period. The reason is that there has never been any single repository of records that has been identified to receive and hold discipline entries. And CWA failed to refer to or identify such a repository.

Another BellSouth contention, as already noted, is that it complies with the delivery language when it completes the discipline on the form and obtained the employee's signature acknowledging that he/she had read and received a copy of it. According to BellSouth, the entry is deemed in the personnel records at the moment this is accomplished.

BellSouth also argues that the delivery time restrictions in Article 18.01.A never dealt with shipping the discipline entries anywhere. Rather, they concerned the time between the offense and when the entry was written and given to the employee, the length of time before holding interviews with employees, and making entries in the employee's personnel records. It supports these interpretations with the history of negotiations in which the allowed time was changed from a reasonable time to 3 days to 7 days.

CONCLUSION

Grounded in the Company's proffered statement of position, the Issue in this arbitration is whether the failure or refusal by the Company to place the acknowledged entry in the employee's personnel record within 7 days from the discussion constitutes a violation of Article 18.01.A, the consequence of which is the invalidity of the discipline evidenced by the entry.

In reflecting on the parties' long experience working under Article 18.10.A, I have been open to–even expecting–contentions and explanations that over time technological progress in transportation, communications and in electronic record sharing, together and combined with the parties' practices, have eliminated the need for parts or all of Article 18.01.A. While there has been mention of changes in practice regarding meeting the demands of the language, nothing has been introduced that authorizes this arbitrator to conclude that time, technical progress in communications, or the parties themselves, through their actions, have altered or made ineffective this current language of Article 18.01.A. that:

"The acknowledged entry shall be placed in the employee's personnel record within 7 days from the discussion. . . ." The evidence in the record gives me no authority whatsoever as arbitrator to edit or amend the mutually agreed-upon language.

It follows that BellSouth's failing or refusing to comply with this unambiguous requirement will constitute a material breach of the Article. And it follows further that because of the non-compliance, the discipline that is the subject of the entry not placed in the employee's personnel record within the required time loses validity. I have no basis whatsoever to conclude that failure to meet the stated deadline is a technical deficiency not to be considered a full violation.

AWARD

For the reasons given above, I find that under Article 18.01.A, the failure or refusal of the Company to comply with the requirement that, "The acknowledged entry shall be placed in the employee's personnel record within 7 days from the discussion . . . ." shall constitute a violation of Article 18.01.A, the consequence being that the discipline for which the entry was issued is invalid.

James J. Odom, Jr., Arbitrator
Birmingham, Alabama
June 7, 2017