

USPS - NALC CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

C# 04494

In The Matter of Arbitration
Between:

THE UNITED STATES POSTAL SERVICE
Pilsen Station
Chicago Illinois

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS
AFL-CIO
Branch 11

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Case No. C1N-4D-D 30942

Decision Issued
October 24, 1984

APPEARANCES

FOR THE EMPLOYER

Delores C. Riley
Sadie Boles
M. D. Pfefer
W. P. Atkins

Labor Relations Specialist
Supervisor, Mails & Delivery
Postal Inspector
Postal Inspector

FOR THE UNION

Charles Keturoskey
Edward Grieco
Herman D. Boyd

Chief Steward
Vice President, Branch 11 Assistant
Grievant

ISSUE: Article XVI -- Termination for Unauthorized Removal of Mail

Jonathan Dworkin, Regional Arbitrator
1682 Chagrin Boulevard
Shaker Heights, Ohio 44120

BACKGROUND OF DISPUTE

This grievance stems from the discharge of a full-time City Carrier who was employed at the Pilsen Station of the Chicago, Illinois Post Office. The Employee, who had accumulated eleven years of seniority at the time of his termination, was charged with unauthorized removal of mail from the mailstream.

On March 15, 1984, after Grievant had completed his tour and was driving home, he was stopped by the Chicago police. It should be emphasized that the reason for the police action is irrelevant to this dispute because it formed no part of the Postal Service's charge against the Employee. However, during a search of Grievant's automobile, the arresting officers discovered a bundle of uncanceled mail beneath a newspaper on the front seat. A subsequent investigation by the Postal Inspection Service confirmed that the mail had been picked up by Grievant that morning from the collection box located on his route.

Removing mail from this collection box was part of Grievant's regular duties, but retaining it after the end of his workday violated postal regulations. The prescribed method for handling collection mail at the Pilsen Station is to deposit it in a designated gurney for processing and delivery. Grievant was aware of this obligation -- he had performed it routinely over the past eleven years. Moreover, the City Delivery Carriers Handbook repeatedly

sets forth the responsibility. Section 112.32 states, "Return all mail . . . to the post office at the end of the workday." Section 122.14 states, "Deposit mail collected as instructed." Section 420 is even more specific. It provides, "Place the mail collected on designated table or in receptacles."

Grievant's explanation for retaining the mail was that he forgot it was on the seat when he returned from his route. The excuse was essentially an admission of negligence for which discipline, or at least a job counseling, would have been appropriate. Management decided to impose the removal penalty for two reasons. First, the violation was regarded as an intolerable breach. Public confidence in the Postal Service would quickly disappear if employees could obstruct the flow of mail with impunity. Second, Grievant's prior record was so poor that Management believed a lesser penalty would not suffice. Between 1979 and the date of this incident, he was issued a letter of warning for failing to account for a registered item, a second letter of warning for failing to make a scheduled collection, a ten-day suspension for gambling in a postal vehicle and contributing to the purchase of beer while on duty, and a fourteen-day suspension for two AWOLs. Grievant served the fourteen-day suspension just five months earlier and, in Management's judgment, the instant violation demonstrated that he was not a suitable candidate for rehabilitation through still more corrective discipline.

A timely grievance was initiated on April 23, 1984. The Union's position was that Grievant's act consisted of nothing more

than excusable human oversight. The Employee had no malicious purpose, nor did he intend to steal mail. In fact, the Postal Service's notice of removal contained nothing indicating that suspicion of theft led to the discharge. The Union maintained that, under these circumstances, Supervision overreacted and that removal was far too harsh a penalty to stand. The Union's position is premised upon a contractual principle which protects employees against punitive discipline. This principle is set forth in Article 16, Section 1 of the Agreement as follows:

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause

The Employer denied the grievance at each Step, and an appeal was processed to arbitration. A hearing was convened in Chicago, Illinois on September 18, 1984. At the outset, the Postal Service challenged procedural arbitrability, contending that the Union waived its right to receive an award on the merits of the dispute because it did not submit a Request for Arbitration until twenty-eight days after the issuance of the Step 3 denial. Article 15, Section 2, Step 3(d) of the Agreement sets a mandatory twenty-one-day limitation on appeals to arbitration, and Article 15, Section 3(b) provides for dismissal of grievances which are untimely at any level. It states:

(b) The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance.

Although the parties presented evidence and arguments on the entire case at the hearing, it was agreed that the issue of just cause would not be addressed unless and until the arbitrability question was resolved in the Union's favor. It was understood that a determination that a waiver did occur at Step 3 would require dismissal of the grievance regardless of the merit of Grievant's position.

ARBITRABILITY

The Step 3 decision was issued on Friday, July 27, 1984. It was received by the National Business Agent of the Union on Monday, July 30. While the appeal to arbitration is dated August 20, the postmark on the envelope in which it was mailed to the Employer indicates that it was not processed until August 24. It was delivered to the Employer the same day. The Postal Service maintains that the postmark demonstrates that this case was not appealed to arbitration within twenty-one days; at best, it was submitted three days after the limitation period expired. By permitting the time for requesting arbitration to elapse, it is contended, the Union

relinquished its right to arbitral review. The Postal Service calls attention to Article 15, Section 4 A(6) of the Agreement which restricts the scope of an arbitrator's authority to applying contractual terms. This means, according to the Postal Service, that an arbitrator lacks jurisdiction to decide a matter unless contractually specified procedural requirements have been met. The Employer concludes that this grievance is not arbitrable and must be dismissed.

The Union maintains that the appeal to arbitration was timely. In addition, it argues that the job of an eleven-year employee should not depend upon whether a Request for Arbitration was mailed a day or two late through some administrative oversight. In the Union's judgment, dismissing Grievant's claim without consideration of its merits would be grossly unjust.

The Union's argument deserves comment. It is true that summary dismissals for procedural reasons often are unfair. The contractual grievance procedure provides the only legitimate avenue for employees to obtain redress for wrongs, and arbitrators should not lightly decline to review a complaint because of some minor flaw in its processing. On the other hand, no arbitrator has the power, even in the interest of justice, to disregard the Collective Bargaining Agreement. The Agreement which created Grievant's right to arbitration also imposed limits on that right, stating unambiguously that a grievance which is untimely is waived. The Arbitrator must follow this contractual mandate; he has absolutely no author-

ity to substitute his personal concept of fairness for what the Agreement says. If this brings about an unjust conclusion, it is an injustice which was approved at the bargaining table. It can be remedied only by negotiations between the parties, not by arbitral fiat.

The foregoing discussion is intended to clarify what is relevant to the arbitrability issue and what is not. If the Postal Service's evidence confirms that the grievance was untimely, it will be dismissed irrespective of the injustice that will befall Grievant as a result. However the burden of proving the defect must be borne by the Employer. The right to receive a conclusive arbitral award ending a dispute is an important one, and ought not to be carelessly set aside. Therefore, the Postal Service will prevail on its procedural argument only if its evidence is unequivocal. The resolutions of relevant evidentiary inconsistencies and ambiguities, if any, will favor survival of the grievance.

The Arbitrator finds that the evidence relied on by the Postal Service is deficient in one material respect. It does not clearly demonstrate that the appeal was perfected later than the contractual deadline. Article 15, Section 2, Step 3(d) provides in part:

The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision

Although the language of the Agreement is absolute with respect to when the Union had to respond to the Step 3 decision, it is less clear as to the manner in which a timely response had to be submitted. The Section provides that the limitation period begins to run when the Union receives the Employer's decision, but it does not state what must occur before an appeal is perfected. Does the Union complete an appeal when it deposits a Request for Arbitration in the mail; or when the envelope containing the Request is post-marked; or when Employer actually receives the Request? These questions are pertinent to this dispute because the Request for Arbitration is dated August 20, 1984. August 20 was the twenty-first day after the Union received the Step 3 decision, and if the appeal to arbitration was completed on that day, it was timely.

The Representative of the Postal Service presented no facts or arguments indicating that the Union must do something more than deposit a Request for Arbitration in the mail to perfect an appeal. In view of the contractual silence on the issue, the principle that uncertainties must be resolved in favor of arbitrability requires a finding that the appeal of this grievance was timely if it was mailed on August 20. However, the evidence does present a serious doubt that the Request was in fact mailed on that date. The envelope in which it was transmitted is postmarked August 24, and it is reasonable to believe that it was not mailed until then. If this is true, the limitation period was exceeded and the grievance was no longer arbitrable. It is also possible, however, that the ap-

peal was mailed on time and that an internal postal delay caused four days to pass before it was postmarked. Admittedly, an assumption favoring the Postal Service's position is more likely than the one favoring the Union's. However, both are possibilities, and neither is confirmed or refuted by the evidence. No matter which possibility is accepted, a presumption will have to be indulged. As has been stated, the Postal Service's procedural contention can succeed only if established by the evidence, and necessary presumptions not proven by the evidence should favor arbitrability. Applying this principle, it is concluded that the Request for Arbitration was mailed on August 20, 1984, twenty-one days after the Union received the Postal Service's Step 3 decision. The appeal was timely and the grievance is arbitrable on its merits.

FACTS AND CONTENTIONS

Grievant consistently maintained that what he did was unintentional. He testified that, on the March 15, he made his regular, 10:30 a.m. stop to collect mail from the box at Archer and Ashland. His normal routine was to empty the box and lock the mail in the trunk of his automobile. However, he was forced to use a different procedure on the day in question because his vehicle was blocking a bus stop and a bus was approaching. There was no time to unlock the trunk, so he put a rubber band around the mail and placed it on the front seat. Then he went to lunch. Because he

was concerned that the mail on the seat of his automobile would be vulnerable to theft, he concealed it beneath a newspaper.

According to Grievant, he finished his route approximately three hours early and, rather than returning to the post office for another assignment (as required), he spent the rest of the afternoon driving around and visiting friends. When he did return to the post office at 3:20 p.m., he removed the collection mail from the trunk of his automobile and deposited it in the gurney. But he forgot the mail on his front seat. He did not remember it was there until the police search uncovered it.

The Union contends that there was nothing more to Grievant's misconduct. It points out that the Postal Inspection Service's investigation revealed no purposeful diversion of the mail, nor did it raise even a suggestion of an intent to steal. In fact, the mail Grievant overlooked was not particularly valuable. It was no different than any of the other mail he collected that day. The Union concedes the Employee was negligent, but it argues that a simple human oversight cannot possibly support termination of a career employee's job. In the Union's judgment, an informal counseling, or perhaps even a letter of warning would have justified, but removal clearly was not.

The Postal Service contends that the seriousness of Grievant's misconduct should not be minimized. It points out that the Employee was not scheduled to work again until Monday March 19. If he had waited until then to return the letters to the mailstream,

processing and delivery would have been delayed for three days, and the Postal Service considers this to be intolerable. Grievant responded that he would not have waited that long. He stated that once he discovered his oversight, he would have deposited the letters in a mailbox for pickup by another carrier.

The Postal Service regards Grievant's explanation of what he would have done with the mail for which he was responsible as further indication of this Employee's unreconstructed attitude and basic dishonesty. He effectively stated that he would have forced another employee to perform his obligation in order to escape detection of the violation. The Representative of the Postal Service argued that, taken together, Grievant's admission to driving around and socializing while he was being paid to work, his unacceptable disciplinary background, and the offense which triggered this removal paint a picture of an employee whom "it is better not to retain than to take the risk of entrusting mail to him." In addition, the Employer calls attention to the fact that Grievant had already been issued a fourteen-day suspension, and contends that removal was the logical next level of progressive discipline.

OPINION

One of the tasks confronting the Arbitrator is to separate the single violation for which Grievant was discharged from all of the other violations he committed. His admission that he cava-

lierly abandoned his responsibilities after he finished his route and spent the day "just driving around and chatting with friends" was unpardonable. It was equivalent to stealing wages and, in the Arbitrator's opinion, was perhaps more reprehensible than forgetting the collection mail. Moreover, the record contains a strong suggestion that Grievant might have done more than just aimlessly wasting time -- he may have been involved in a drug transaction while he was supposed to have been working. However, none of this is relevant because none of it was included in the charge against Grievant. The only issue to be decided is whether Grievant's failure to place the collection mail into the mailstream was sufficient to support his removal. In reviewing this question, it is legitimate to consider Grievant's past record because it was an element of the decision to impose discharge rather than a lesser penalty. But Grievant's purposeful breach of his obligation to give a day's work for a day's wages and his possible involvement with drugs are not material factors.

Reduced to its essentials, the Postal Service's case against Grievant is composed of two ingredients: (1) The negligence and (2) The fact that in the last five years the Employee accumulated two written warnings, a ten-day suspension, and a fourteen-day suspension. The record contains no implication that Grievant intended to steal the mail. The Supervisor who issued the removal notice candidly admitted she never suspected a criminal motive. The Union's contention that the Employee's misconduct was not deliberate is entirely consistent with the evidence.

The Representative of the Postal Service presented a cogent, damaging case against Grievant. Although a simple oversight (which is all that Grievant committed) normally would be insufficient cause for removal, the unfavorable disciplinary record lends considerable weight to the contention that additional corrective measures would not have accomplished much. Nevertheless, Grievant's offense was not so severe nor his record so hopeless that removal was Management's only reasonable alternative. The fact that Supervision regarded discharge as the next step of progressive discipline suggests that a mechanical approach was taken in this case. The contractual standard for discipline is just cause, and although a progressive-discipline policy is an effective tool for preserving just cause, it is not a substitute for it. Individual aspects must also be considered, and parts of Grievant's employment history are positive. He had eleven years of seniority and, according to his Supervisor, his work performance in general was satisfactory. In light of these factors, the Arbitrator finds that the removal penalty exceeded the Postal Service's disciplinary authority as set forth in Article 16, Section 1 A of the Agreement.

Grievant will be reinstated to his job. However, he will not be awarded back wages. The Arbitrator finds that his offense, though not deliberate, was not trivial or inconsequential. In view of his previous discipline for negligence and his history of purposeful disregard for the rules governing his employment, it is apparent that the corrective goal of discipline will not be real-

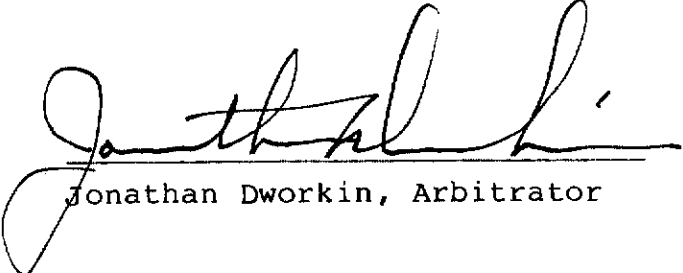
ized unless the penalty clearly informs Grievant that his course of misconduct cannot and will not be tolerated. The Arbitrator agrees that Supervision was entitled, and perhaps obligated, to respond to this violation with severe discipline, and while discharge was too harsh, a lengthy suspension would not have been. Therefore, the removal will be modified to a suspension covering the entire period from the effective date of Grievant's removal to the date of his reinstatement.

AWARD

The grievance is sustained in part and denied in part. The discharge is hereby modified to a disciplinary suspension extending from the date when Grievant's removal occurred to the date of his reinstatement.

The Postal Service is directed to reinstate Grievant to his employment forthwith, but it shall not be liable to Grievant for wages he lost during the term of his suspension.

Decision Issued:
October 24, 1984


Jonathan Dworkin, Arbitrator