

C#10028

A+B

REGULAR ARBITRATION

SOUTHERN REGION

NALC - USPS

In The Matter of Arbitration)	Case #S7N-3S-D-88019
Between)	GTS #11919
United States Postal Service)	Chester Burks, Jr.
Key West, Florida)	(Grievant)
and)	
Local 818)	
National Association of Letter Carriers, AFL-CIO)	Record Closed: March 9, 1989

Before Irvin Sobel, Arbitrator of Record

Appearances:

For the United States Postal Service (USPS, Service, Management)

Stephen (Steve) Murray
Labor Relations Representative,
Miami, Florida.

For the National Association of Letter Carriers (NALC, Union)

Charles (Chuck) Windham
Regional Administrative Assistant,
Atlanta, Georgia.

Preliminary Statement:

The hearing of the enumerated issues was conducted pursuant to the Key West, Florida Human Relations Principles Agreement (H.R.P.A.) which is a modified procedure under Article 15 of the National Agreement. On August 24, 1989 the Union filed a written grievance on behalf of Letter Carrier Chester Burks, jr. alleging the Employer violated the parties National Agreement (LMRA) by simultaneously issuing on August 23, 1989 a Notice of Removal and Emergency Placement in Off Duty Status. The parties unable to resolve the issues resulting from the Employer's actions assigned them to final and binding arbitration. The hearing of the matters was conducted by the above cited arbitrator on February 2, 1990 at the Main Post Office, Key West, Florida. At the hearing the parties were accorded full opportunity to present witnesses for direct and cross examination and introduce such other evidence and argumentation each deemed pertinent to the issues under consideration. The parties, who combined the two enumerated matters, mutually stipulated the following issue:

Was the Notice of Removal and Emergency Placement in an Off Duty Status for just cause? If not, what is the appropriate remedy?

At the hearing no issues of arbitrability, timeliness or defect of form were raised by either party. The parties opted for Post-Hearing Briefs and consonant with the agreement between the parties and the arbitrator, as to the mode and timing of the submission of the such briefs, the hearing file was closed as of March 9, 1990. Although the two issues were officially combined into one action each of them will be treated separately.

Relevant Contractual Provisions:

Article 16, Section 7 - Emergency Procedure:

An employee may be immediately placed in an off duty status (without pay by the Employer but remain on the rolls where the allegation involves pilferage, or in cases when remaining on duty may result in damage to U.S. Postal Service property, loss of mail or funds (underlining by the arbitrator). The employee shall remain on the rolls (non-duty status) until disposition of the case has been made. If it proposed to suspend such an employee for more than thirty (30) days or discharge the employee the action taken under this section may be made the subject of a separate grievance.

Facts in Case:

On August 23, 1989 (received August 24) the grievant Letter Carrier Chester Burks, Jr. was issued two Notices, one of Emergency Placement on an Off Duty Status and the other of Removal, by Supervisor of Postal Operations, Mike Barker,. Since the wording of each Notice was identical with one exception, only the Notice of Removal will be cited: The Notices stated in their relevant parts:

You are hereby notified that you will be removed (placed in an Off Duty Status) from the Postal Service on September 27, 1989. the reasons for this action are:

An August 9, 1989 you were assigned to case and carry Route 4026. During your office duties you were observed by supervisor J. Ervin leaving a bundle of mail behind and endorsing it as undeliverable Bulk business Mail (UBBM). I, along with Supervisor Ervin, checked the mail in question and noticed an unusually high number (64) circulars for Fausto's Food Palace. the mail was left at the case to determine if you were coming back for it. When it was obvious you were not returning for the mail, the mail was removed by Mr. Ervin and myself.

A cursory check of the mail was made with the regular letter carrier on the route to determine if this mail was good as addressed. He commented that the majority of the circulars were good as addressed. When you were

questioned on this matter, you acknowledged that you knew what the bundle was. You were requested to go through the mail and identify which pieces were deliverable. You admitted that 7 pieces were deliverable. However, a further check with the regular assigned carrier revealed that a total of 48 pieces of mail were deliverable.

When you were accepted to the position of letter carrier, you signed a statement that you fully understood the sanctity of the mail. You also understood the consequences of any violations of that sanctity. Your actions, as described above, violated that sanctity. The seriousness of your action allows for no mitigation of the charge, and it would not be in the best interest of the Postal Service, or its customers, to allow you to continue your employment.

Your actions, as described above, specifically violate Sections 112.1, 112.3, and 131.14 of the M-41 Handbook.

You are charged with failure to meet the requirements of your position due to improper disposition of the mail.

The Union's rather lengthy and highly prolix statement cannot be replicated in full but the salient parts are as follows:

On Tuesday, August 8, 1989, the Grievant was assigned to letter route 4026 which he was serving on a temporary bid, as the carrier of record Lloyd Hull was assigned to a bicycle route for an undetermined period of time. The Grievant reported to work at 9:00 am and performed his normal work functions. the Grievant took 100% of the Faustos Food Palace circulars and loaded them in his postal vehicle, still stringed and strapped and still out of delivery order. The Grievant had Mr. Jerry Ervin's, SMD, permission to do this. The Grievant prepares the faustos circs. for delivery as he goes along (GRIEVANT EXPLAIN). Any circular out of order or not deliverable is put aside in his tray which he puts in the back of the truck for redelivery of mail; delivery of express mail, overflow parcels, special deliveries, collections and intra-station run. On this particular day, Tuesday, August 8, 1989, which is the heavierst day of express mail, after delivering the portion of the route and picking up the express mail from the airport, the Grievant returned to the Post Office with his outgoing mail and started delivery of the express mail. At the end of his day at approximately 6:45 pm, the Grievant returned the tray of mail wiich included the Faustos Circs that were not

delivered and laid it on top of the carrier case
(GRIEVANT EXPLAIN).

On Wednesday morning, August 9, 1989, the Grievant reported to work on letter route 4026 at 9:00 am. The Grievant began separating the mail that was in the tray which he had brought back the previous evening. At this time the Grievant separated the undeliverable mail from the deliverable mail, which included the Faustos circs. The Grievant inadvertently put the bundled bad UBBM letters and circs. on top of the good mail and set it aside in a blank flat slot in the carrier case. The Grievant then performed his usual AM duties. Before leaving the Grievant pulled the UBBM bundle that was set aside on the carrier case and upon noticing that the top bundle was bad mail, indorsed it UBBM, which he knew was bad. However he did not remember that there was good circs. on the bottom and rubber banded the bundle of mail and left it on top of the case for the clerk to pick up and go thru prior to being disposed of. The Grievant was not aware of this mistake until Thursday, August 10, 1989, when the Grievant was brought into the Office by SPO Mike Barker and questioned about the circs. Mr. Barker asked the Grievant to go thru the bundle of UBBM. The Grievant asked Mr. Barker what was going on and Mr. Barker told the Grievant to check the pieces to see if they was good or not. The grievant began checking thru a few pieces of letter size and then began checking the Faustos circs. and while going thru the pieces found approximately 7 pieces that he knew was good. The Grievant again asked Mr. Barker what all of this was about and Mr. Barker replied that it pertained about him not delivering circs. that were good. The Grievant did not finish going thru all of the circs and told Mr. Barker that there had to be some mistake. After this the Grievant was escorted out of the building by Mr. Barker and put on administrative pay. Mr. Barker told Mr. Linares, the Local Union President who was present at this meeting between the Grievant and Mr. Barker that he would have the regular carrier on the route, Lloyd Hull check the mail to determine how many pieces were good or bad. The next morning Mr. Barker advised Mr. Linares that he had goofed and the he was putting the Grievant on a non-pay status effective Friday, August 11, 1989. It was not until Thursday, August 24, 1989, that Management finally charged the Grievant 13 days after placing him on non-pay status. This is not only absurd, but punitive and vindictive on Managements part to keep the GRievant almost two (2) weeks on a non-pay status without charging him.

It is evident that it was mistake by the Grievant and not a wilfull and wantfull (sic) act not to deliver the

circs. After all, surely the Grievant would not have left the circs. in the office or brought them back to the office the previous day if he had no intentions to deliver them. He would have thrown them away out side of the Post Office.

In addition to this grievance the Grievant has also filed an EEO complaint for dispair (sic) treatment. Susan Kirchner, a female carrier employee was caught writing her name and address on a TV Guide and having it delivered to her home. Mr. Barker discussed this issue with Union President Linares. Mr. Barker told Mr. Linares that Carrier Kirchner would be taken before the Human Relations Review Board for this. Time passed and Carrier Kirchner was never brought before the HRB nor any disciplinary action taken against her.

The Union contends that Management did not properly investigate or verify the charges before taking action, even though they took 13 days to charge the Greivant which is adsurd, especially when the Postal Inspectors were not involved in the case. Management simply states that there were certain number of deliverable pieces of Faustos circs. that were not delivered which were good. Management did not take the time to ask the Grievant or give him time when he told Mr. Barker at the August 10, 1989 meeting that there had been a mistake. Managements charges are based on heresay and assumptions.

The Union contends that Management over re-acted with the Grievant. They did not act this way with Carrier Kirchner when a similar incident happened with her involving mail. Rules not applied even handedly.

The Union also contends that the discipline and charges were not timely. Surely 13 days to charge the Grievant while he has been on a non-pay status is absurd.

In view of the above the Union contends that Management did not have just cause to the following:

30 day suspension - Grievance #89-80
Removal from the Postal Service - Grievance #89-81

Arbitrator's Discussion:

Position of the Parties:

Introduction:

The above quoted statements adequately convey each party's major arguments. Since additional facts and contentions advanced by the advocates, which are deemed relevant to the resolution of this grievance, will be developed by the arbitrator in the body of his Opinion only a brief summary of each party's position will be developed at this juncture.

The Union's Position:

Essentially the Union challenged the Employer's interpretation of the events of April 8th and 9th especially in regard to the grievant's intentions and motivation. Management, it argued punitively, attempted to convert the grievant's honest mistake, which resulted from pressures of the moment induced by the grievant's very recent assumption of a highly overburdened route (4026), into the most severe form of discipline. The Employer's desire to remove the grievant at all cost caused it to treat him disparately.

SPO Barker utilized the incident, which could have been satisfactorily resolved had there been the slightest desire on his part to do so to further his own personal agenda, which was to remove the grievant of whom he had an invidious view. In fact, Barker's behavior was tantamount to entrapment. The predisciplinary interview was faulty in every regard, except for Union President Ray Linares' presence. The Predisciplinary Investigation (Pre-D) was conducted by

Management in such a high handed manner as to not afford the grievant the opportunity to explain what had transpired.

In short, not only was the grievant denied procedural due process but also Barker's biases and preconceptions prevented him from equitably evaluating the incident. The Service not only failed to provide a tenable basis for the Emergency Suspension but also the delay in notifying the grievant thereof was inordinately protracted.

The Employer's Position:

The Employer had every reason to remove the grievant whose wilful and wanton breach is the type most destructive of the Service's vital interests. The events of August 9th could only be interpreted as a deliberate effort by Burks to lighten his work day by not delivering the Fausto circulars. There was no way he could treat a separately banded and marked packet as Undeliverable Bulk Business Mail (UBBM) unless he did not intend to deliver that mail. He showed his intent by failing to attempt to case those circulars which he had failed to deliver on the 8th. It was the grievant, despite being accorded every opportunity to narrate his version of what had happened during the Predisciplinary Investigation, who advanced no explanation for his actions. Thus, his subsequent explanation of how his "honest mistake" came about, which he reiterated at the arbitration hearing, was contrived post-hoc.

Ray Linares an experienced and highly dedicated Union officer, who was present at the Pre-D, would not have permitted, during the course of the Pre-D hearing, any departure from due process and had the grievant's rights not been protected that contention would have

been vehemently articulated at that time by the Union President. Given the grievant's admission that he had placed the circulars in the UBBM destined for ultimate destruction the Employer's invocation of Article 16.7 was an entirely reasonable invocation of its rights under that provision of the LMRA.

The circumstances of Ms. Kirchner's violation were so entirely different that the charge of disparate treatment represented a desperate attempt by the Union to find a basis to relieve the grievant from responsibility for a serious breach which contractually is a dischargeable violations.

In short, the Employer contended that it had no alternative other than to discharge the grievant. His continued employment with the Service would not only give false signals to fellow employees about the Service's tolerance of employee irresponsibility but would apparently condone that offense which is the most subversive to the organization's well being.

Case #HRP 89-80 - Emergency Placement of Chester Burks
in Off Duty Status

On August 23, 1989 the grievant was issued a Notice of Emergency Suspension by Michael Barker Superintendent of Postal Operations (SPO) at the Key West, Florida Main Post Office. That Notice which was accompanied by a Notice of Removal was identical in its wording with the latter document with the exception of the first paragraph which stated:

You are hereby notified that you will be suspended for a period of 30 calendar days effective immediately. Do not return to duty until advised to do so.
The reasons for the suspension are:

It appears that your retentions in an active duty status may result on damage to Postal Service, loss of mail or funds or be contrary to the interest of the Postal Service.

The Union contended that the Emergency Suspension was not only unfounded and a case of overreaction for an honest mistake but also unnecessarily kept the grievant on a non-pay status for thirteen (13) days. Specifically it argued:

"The Union also contends that the discipline and charges were not timely. Surely thirteen days to charge the grievant while he has been on a non-pay status is absurd."

Opinion and Award:

At the risk of perhaps prematurely revealing the nature of my decision the above arguments can be answered succinctly in the following fashion. The Employer's invocation of Article 16.7 to place the grievant on Emergency Suspension was reasonably based. The two week delay in formal notification to the grievant that he was on a non-duty non-pay status was not only excessive but also the National Agreement cannot be interpreted to permit making such a suspension retroactive to the day in which the grievant was unofficially placed in an off duty status.

Non-delivery and improper disposition of the mail, either externally or internally, have long been considered violations of such serious magnitude by both signatories to the LMRA that the person who perpetrates such an offense can be removed immediately and placed in an off duty status. All that is required for such an action is that the Service have a reasonable basis for claiming that a violation took place which could have resulted on "loss of mail". The (Pre-D)

of the morning of August 10 provided more than sufficient evidence that the grievant had classified deliverable 3rd class mail as Undeliverable and thereby destined it for destruction. That evidence was sufficient to formally issue the Notice of Emergency Suspension either immediately or as quickly as such a Notice can be prepared.

The Service's argument that the issuance of the Notice of Suspension had to coincide with the issuance of the Notice of Removal is untenable. Both actions are not only separately arbitrable but also have different standards of proof. In similar circumstances within this arbitrators experience the normal delay between the time the grievant was sent home, albeit on a non-pay status to await instructions and the receipt of such a Notice ranged from one to three days.

Mistakes and failure for administrative reasons to issue notices within a reasonable time do not provide adequate justification for delaying formal notification. Had this arbitrator acceded to the grievant's rationale for the delay, namely its desire to utilize the same evidence as that cited in the Notice of Removal, he would be permitting on interpretation of the LMRA which would allow the Employer to keep the grievant "dangling" and his status undefined up to thirty days while it made up its mind as to what charge, if any, it wanted to bring forth.

Allowing the Employer the three days period deemed a reasonable time to prepare the Notice of Emergency Suspension would mean that it was issued ten days late. Accordingly the grievant will receive back pay for the number of working days between August 13 and August 23.

Award:

The grievance is denied. The Notice of Emergency Suspension was properly based. However, the Notice was untimely issued and accordingly the grievant will receive back pay for all working days lost between August 13 and August 23, 1989.

Case #HRP 89-81 - Notice of Removal

Introduction:

Since the salient issues and argumentation regarding the above Notice of Removal have already been stated, under the headings of Facts in Case and Position of the Parties, any attempt to restate them, even in the most encapsulated form, would be highly redundant.

Opinion and Award:

Three basic issues must be addressed to before the instant grievance can be resolved. These are: 1) Did the grievant, who admitted he had placed the banded packet of Fausto circulars in the UBBM destined for disposal, commit an inadvertent error. In short, was the grievant's version of the events credible; 2) Did procedural improprieties take place either in the initial Pre-D and if so, what, if any, is their mitigatory impact; and 3) If the Employer were deemed to have met its burden of proof responsibility, was the removal penalty assessed excessive and thereby punitive.

In cases of this genre in which the grievant mixes deliverable mail in the UBBM destined for destruction, and attempts to rationalize that act as an inadvertent mistake, credibility both of the individual and his explanation becomes crucial to the resolution of the issue.

In the instant situation the explanation advanced by the grievant fails the credibility criterion.

The grievant who impressed the arbitrator not only as an individual with considerable presence and poise but also as an intelligent and articulate person failed to advance a believable rationale for his comparative silence at the Pre-Disciplinary Investigation. Although accompanied by a veteran experienced, and dedicate Union Representative the grievant failed at that juncture to even attempt giving his version of what had transpired on August 9th. Frankly the conduct of the grievant at the Pre-D almost replicates that of two other grievant's who were presented with a bundles of deliverable mail, which they had destined for destruction as Undeliverable No Obvious Value mail. In each of the cases heard by this arbitrator [S7N-3S-D-3074 (Daniel Kaplan-Grievant)] and [S4N-3S-D-62566 (Wendy Sheriff-Grievant)] deliverable mail found its way into the UBBM destined for destruction. Both grievant's after identifying a few of the pieces as deliverable did not at their Pre-Ds go through the entirety of the packets placed before them. Both like the grievant, subsequently advanced post-hoc explanations which could cryptically be described as "mistake". The grievant who departed from the Pre-Disciplinary investigation after finding seven pieces of deliverable mail, unlike the others; however advanced his explanation by the time his grievance was introduced.

The grievant's account of the Pre-D and his explanation of why he did not give his version of how the "mistake" had come about, at that juncture, is unconvincing. The grievant after identifying the packet of Fausto circulars as that he had brought back on the 8th and

extracting seven deliverable pieces of mail asked, "what is this all about". Upon being told that "it had something to do with not delivering circulars", (Union Brief p3) and cryptically replying "there must be some mistake" the grievant said nothing further despite being informed that discipline was possible if not probable. Whether Burks went through the entire bundle and found only seven pieces of deliverable mail, as the Union implied or stopped looking after finding the seven pieces, as Management contends, cannot be ascertained although the Employer's arguments were far more convincing in this regard. After extracting the seven pieces Barker told the departing grievant that he would further check the packet to see if more pieces were deliverable and called Carrier Hull the incumbent of Route 4026 who initially extracted 41 more deliverable pieces. Although a subsequent recheck by Hull reduced the number of definitely deliverable pieces to thirty seven (37) the basic issue remains the same.

Mr. Burks explanation as to why he did not attempt to make a full explanation at the Pre-Disciplinary Investigation raises more question than it answers. Although stating Barker did not give him the chance to explain Burks also advanced the explanation that, since "he did not trust the SPO" he preferred to tell his story to Linares.

The fact that the undelivered packet of Fausto circulars was separately banded and marked was also damaging to the grievant's credibility. The grievant never satisfactorily explained why a separately banded packet, which he stated he fully intended to deliver, was placed below a packet he had marked as UBBM. One might conceivably understand his "mistake" if somehow the Fausto circulars

were in the same packet and intermingled with the UBBM but not with a separately banded entity. The volume of the combined packets, which was unusually high for route 4026, should have alerted the grievant. Notwithstanding the Union's protestations, to the contrary, the grievant had been carrying route 4026 long enough to have ascertained its normal volume of UBBM. Equally significant to this arbitrator's conclusion is the fact that despite the events of the 8th and the grievant's self proclaimed intention, to deliver the circulars on the 9th, he did not make the slightest effort to case the contents of the packet he claimed he intended to deliver. Instead on the morning of the 9th despite his proclaimed intent to deliver the circulars on that day he placed the packet under the one marked UBBM and "completely forgot" about the Fausto circulars. Thus, all of the numerous "sign posts" to the grievant's intent render the contention that the grievant "forgot" highly improbable.

Both the Pre-D and the subsequent investigation itself not only met minimal standards but also no substantial procedural damage either to the Union or the grievant was established. Mr. Linares, who was the Union President was present at the Pre-D and if he felt the grievant's rights had been violated he made no effort to correct the situation either, by protesting or by asking the grievant to make a more complete statement. The fact that Linares, who is known to this arbitrator not only as procedurally knowledgeable but also as highly dedicated to his memberships' welfare did not intervene actively before the termination of the Pre-D, was a major contributory factor in the conclusions reach herein.

Whatever procedural deficiencies existed were as much attributable to the grievant's reticence as to any Employer breach. This arbitrator is hard pressed to find what further investigation by the Employer would have been required after carrier Hull completed his perusal of the circulars. The Employer had all the evidence it needed to proceed with its charges. The grievant's explanation of what had transpired was not forthcoming before he was put on a non-pay status and even so it was of a nature which could not be "investigated"

In short, the Employer at least met minimum standards of propriety both in regard to the Pre-Disciplinary Investigation as well as the subsequent investigation itself. Neither the grievant nor the Union challenged the fact that the grievant had placed deliverable mail in a banded stack, the top packet of which he had labeled UBBM.

However in another regard the Employer's handling of Mr. Burks was so questionable as to raise questions of impropriety. On both July 15 and August 1 the grievant allegedly mishandled the mail in a manner somewhat analogous to the events of August 8th and 9th. Both breaches were reported to the Postal Inspector's Office of Miami which expressed concern but chose not to investigate the alleged serious violations. Instead the P.I. informed Key West Management to keep a close eye on Mr. Burks. In both prior situations there was more than adequate evidence to have charged the grievant with improper disposition of mail yet no charges were introduced and only tangential mention of possible violations was made to the grievant. For instance, on August 2nd Supervisor Ervin asked the grievant why 150 flyers whose "marriage cards were gone", were still undelivered on a route which had only 160 "stops". Although Mr. Burks advanced an

explanation, which upon checking proved to be false, no action was taken and the grievant was not warned what could occur if he persisted in his prevailing course of action.

Throughout the morning of the 9th SPO Barker and Supervisor Ervin were, as instructed by the P.I., "keeping their eyes" on the grievant, yet at no time did they ask him why the undelivered Fausto circulars from the 8th were not being cased. Admittedly they kept watching Mr. Burks until his departure to carry Route 4026. They were aware that he had not cased the circulars but made no effort to stop him. Since Management was continuously aware of the whereabouts of the Fausto's the two Supervisors could have confronted the grievant before his departure and ordered him to case his route. They not only could have alerted Burks to his improprieties but also they could have instituted corrective disciplinary action albeit of a lesser nature than discharge. That course of action might have salvaged a four year employee in whom the Service had made some investment.

SPO Barker however, gave every sign of wanting to give the grievant "enough rope to hang himself" and thereby chose the course of action which led to the Notice of Removal. In fact, very shortly after the grievant's departure Barker and Ervin extracted the packet they knew was there all along and called Mr. Hull in to verify that the mail was deliverable. Thus, when Carrier Hull was called in on August 10 he was reviewing the mail for the 2nd time and merely reconfirming that which he had told Barker the day before.

This behavior by the Employer, however, did not, as the Union inferred, constitute entrapment. Although SPO Barker might be faulted for his managerial style, the actions he took were well within his

prerogatives under the LMRA. The Arbitrator's admittedly cursory judgement that a different course of action might have been pursued does not provide grounds for mitigation.

For all of the above reasons, despite considerable misgiving, if not qualms, about the manner in which the Employer exercised its prerogatives no contractual basis for mitigation of the Removal action can be found. The grievance is thus denied.

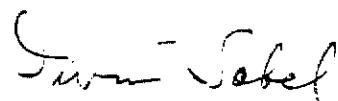
Award:

The grievance of Mr. Chester Burks, Jr. is hereby denied. His removal by the Postal Service at Key West is hereby confirmed.

Tallahassee, Florida

May 18, 1990

This is a certified true
copy of Arbitration Award



Irvin Sobel, Arbitrator

