

* * * * *

IN THE MATTER OF THE ARBITRATION

Between

UNITED STATES POSTAL SERVICE

And

NATIONAL ASSOCIATION OF LETTER CARRIERS
Branch 3649

* REGULAR ARBITRATION

* Case No. S1N-3P-D-30035

* Grievant:
Gene W. McDowell

* Hearing: April 17, 1984
Location: Conway, SC

* Arbitrator:
P. M. Williams

* * * * *

APPEARANCES: Gloria A. Means, SCD E & LR, Florence, SC,
for the EMPLOYER.

Q. L. Pittman, Regional Administrative Assistant,
for the UNION.

DECISION AND AWARD

BACKGROUND:

On November 4, 1983, the grievant was given a Notice of Proposed Removal. In pertinent part the Notice was as follows:

"*** This is notice that it is proposed to remove you from the Postal Service no earlier than 30 days from the date you receive this letter. The reason(s) for this proposed action are as follows:

"CHARGE I: Obstruction and Delay of the Mails.

"...
"Specifically, on October 8, 1983, mail matter as follows was found by me in your personal vehicle behind the driver's seat: 296 WAL-MART circulars - 163 pieces for delivery on City Route 2 which should have been delivered on October 4, 1983, and 133 pieces for City Route 1, to have been delivered on October 6, 1983. You were assigned to carry the routes on the subject dates. Additionally, there were also seven (7) other pieces of third class mail for delivery on route 2 and an opened parcel of medical samples. A first class letter labeled "sexually oriented ad," postmarked October 4, 1983, and addressed to Mr. S.F., Sr., for delivery on Route 4 was opened and in the vehicle. This route was serviced by you on October 7, 1983. The mail found in the vehicle was all deliverable as addressed.

"...
"Charge II. Unauthorized Possession of Mail in Your Personal Vehicle

"Specifically, on October 8, 1983, the mail matter as outlined above was found by me in your personal vehicle in the Conway, SC, Post Office parking lot. Your personal vehicle is not utilized by you in the delivery of your route; and as such, should not have contained mail for any reason. The mails involved were for routes serviced by you on October 4, 6, and 7, 1983.

"...
The Notice was signed by the Postmaster of the Conway Post Office.

Under date of November 22, 1983, the SC Manager/Postmaster, Florence, SC, issued a Notice of Decision to the grievant, the pertinent part of which was as follows:

"*** I have given full consideration to your written answer of November 9, 1983, and all other evidence of record. I find that the charges stated in the notice of November 4, 1983, are fully supported by the evidence and warrant your removal from the Postal Service. Accordingly, it is my decision that you be removed effective December 9, 1983.

..."

A timely grievance was filed on the Notice of Proposed Removal. The Step 1 hearing on it was held on November 9, 1983. The Employer's representative there was the grievant's immediate supervisor, JLS. He was the Supervisor of Postal Operations, Conway, SC. He denied the grievance. A timely appeal to Step 2 was then made. The Step 2 hearing was held before the SCD, E&LR, Florence, on November 23, 1983. The decision denying the grievance at Step 2 was given in a letter dated December 2, 1983. An appeal to Step 3 was lodged. The SCD, E&LR at Charlotte, NC, was the Step 3 Designee for the Employer. He denied the grievance in a letter dated February 8, 1984, after having held a hearing on it on February 2nd.

At the hearing before the undersigned the parties stipulated that the matter of the grievant's removal was before him for the purpose of his rendering a decision and award. All interested parties appeared and were given an opportunity to present such evidence and argument as each deemed appropriate under the circumstances. The grievant appeared and testified on his own behalf.

POSITION OF THE PARTIES:

United States Postal Service:

The Employer contended the grievant was required to provide reliable and efficient service to Postal customers through prompt delivery of all mails entrusted to his care. It said he failed to meet his responsibility to deliver the mail distributed to him and that the mail found in his personal vehicle was there without authorization. It further said the level of discipline imposed for his infractions was appropriate to the circumstances. It also said just cause existed for his removal. It asked that his grievance be denied.

National Association of Letter Carriers:

The Union contended the grievant had been denied procedural due process at Step 1 and again at Step 2 when the Employer's representatives at those Steps worked under either the Postmaster, Conway, or the SC Manager/Postmaster, Florence, SC, who, respectively, had issued the Notice of Proposed Removal and the Notice of Decision. It said it was unrealistic to believe the decision makers at either Step 1 or Step 2 had authority to settle the grievance because were they to, they would effectively be countermanaging the decisions of their superiors.

It also contended the circumstances surrounding the incident of mail matter being found in his personal vehicle were suspicious to say the very least. It said it had not been timely furnished all of the necessary information it had requested and that as a result its ability to conduct an investigation was adversely affected. It further said in all events he was not guilty of the charges, therefore there was no just cause for his removal. It asked that the grievance be sustained and the grievant reinstated to his City Delivery letter carrier position, being made whole in the process and having record of the entire episode expunged from his personnel records.

ISSUE: "Was the removal of the grievant for just cause and in accordance with the provisions of the National Agreement and applicable rules and regulations, and if not what is the proper remedy?"

OPINION:

For reasons that will become apparent momentarily the undersigned will but briefly outline the events which happened on October 8, 1983, and which precipitated the grievant's removal.

The SC Manager/Postmaster, Florence, SC, received a telephone call at his home on the morning of Saturday, October 8, 1983. He identified the caller as a female. He obtained her name and address. (At the time of the hearing however he was unable to recall either her name or the address, and had no record of it. Neither the name or the address was ever disclosed to the grievant or the Union. The address was said to have been a non-existent Rural Route Box.) The caller advised him that mail was in the personal vehicle of [grievant's name], said to be a letter carrier, and that the vehicle at that time was parked in the parking lot of the Conway Post Office. The mail was said to have been in the vehicle for 2 or more days. He immediately called the Conway Post Office and advised the employee answering the telephone to have the Postmaster call him at his home. A short time later the Postmaster called. He repeated what he had been told and instructed the latter to investigate and report back to him.

The Postmaster quickly went to the Post Office where he saw the grievant's vehicle in the parking lot. Upon inspecting it he observed circulars on the floor behind the driver's seat. They were partially covered by a raincoat. He went inside the Office to obtain a witness to what he had observed. A clerk returned to the car with him. The clerk observed the mail matter in the vehicle. The mail was removed and taken to his office where it was placed on the floor. He then went in search of the grievant. Upon finding him he asked what was in his car. The grievant was said to have replied, "Nothing", but when confronted with what had been seen and also being shown the Polaroid photographs of the car he was also said to have said, "Oh, my God. I forgot 'em. I put them in and was going to take them back out and deliver them the next day." [The grievant has a different recollection of what he said to the Postmaster, and also about what was the general tenor of their conversation at that time.]

The Postmaster returned to the Office. He called the SC Manager/Postmaster and reported what he had observed and also what the grievant had said. He was instructed to contact the customer and explain what had happened to the circulars. He was also told to continue investigating, and to call the Postal Inspection Service.

When the customer's manager was contacted the Postmaster was told that an anonymous caller had called earlier and had said its circulars were undelivered and had been seen in a letter carrier's vehicle at the Post Office parking lot.

While the Postmaster was in his office on October 8th he received a call from the Conway Police Department. He was told that someone had contacted the Department earlier, identifying himself as the Postmaster and asking that an investigation be made of mail matter being in the grievant's car at the Office parking lot. The person receiving the call was familiar with the Postmaster's voice, therefore, rather than investigating as had been requested by the caller the Postmaster was called instead.

For reasons unexplained at the hearing neither of the conversations mentioned in the two preceding paragraphs were reported to the grievant or to the Union. Moreover, the Employer acknowledged that the call to the Police Department was recorded but when the Union learned of it from sources within the Police Department the tape had been reused, thus it was impossible for the Union to attempt to identify the caller's voice, and, as far as the record is concerned, no one from the Employer made any attempt in that regard.

From the date of finding the mail in the grievant's vehicle, which was unlocked with its driver side window down, until the date of the Notice of Proposed removal, i.e., November 4th, it was said the investigation of the circumstances was ongoing. The Conway Postmaster testified about it thusly, "I was looking for evidence that would relieve the employee of having done this thing. Of course, after having made the statement that he put them in there, then there was no point in my looking for evidence that said he didn't do it because I had a statement from him that said he did do it. So from that point on the investigation was relatively closed except regarding the first class letter."

The "first class letter" mentioned above and referred to in the Notice was addressed to "SNF" at a Conway address. It contained "sexually oriented material". It, along with another piece of first class mail was delivered by the grievant to the proper address, which was either, or also, the address of SNF's brother. The brother gave the Postmaster a statement to the effect that the two men joked about the fact that the addressee would not need the material any longer because he was being married in a short time, and that he gave the letter to grievant. The grievant testified that the brother opened the letter in his presence and that both men observed the material. He said he was then given the material and the envelope, which he accepted. He said he saw nothing wrong with what he did because the brother had already opened the letter. The undersigned finds the testimony very credible in light of the brother's 2 statements that were made a part of the record.

The mail matter was removed from the vehicle on the October 8th, and was placed on the floor of the Postmaster's office. It was not checked and/or counted until the 14th when the Postal Inspectors arrived. In the interim it was readily accessible whenever the office was not locked, which it was not at all times the Post Office was staffed or open. Under such circumstances, and if view of the fact that at least 2 of the anonymous callers had obvious ready access to the Conway facility, the undersigned is unable to find that significance should be attached to the fact that mail other than the circulars constitutes a part of the charges in this case. Put differently, if the Employer is to appropriately charge someone with having had possession of specific mail matter it must establish that it has maintained an unbroken chain of secure custody of the material, including showing a lack of access to others for the period between discovery and its being examined or introduced as evidence at an arbitration hearing or federal trial. It did not do that in this case. Consequently, to the extent the charges include allegations of the grievant possessing mail matter other than the circulars, which it is undisputed were found in his vehicle, it is to be said no probative proof was made that such was a fact.

From shortly after the Union became aware of the Postal Inspectors having been on the scene it sought a copy of their report. The record shows it was received on October 21st, having been prepared on the 20th. It was not made available to the Union however until the day of the Step 2 hearing. When this fact is coupled with the non-disclosure of the anonymous callers calls the undersigned is of the opinion that the Employer failed to follow the directives of Article 31.2A insofar as apprising the Union of the pertinent facts surrounding the incident. Moreover, he believes the statement made by the grievant when he was confronted by the Postmaster on his route on October 8th was not as damaging as the latter later indicated it was, for had it been there would have been little, if any, need to pursue the investigation further because, per the Postmaster, a confession had been made that the mail was delayed, albeit said it was inadvertent and unintended.

Turning now to the Union's contention that the grievant was denied procedural due process at Steps 1 and 2.

The threshold question on that issue, or so it seems to the undersigned, is whether hearings at each or both of the Steps is mandated by the National Agreement? He believes they are. He reaches this conclusion because of the language of Articles 2, 14 and 15, wherein provision is made for skipping Step 1 in certain matters. It seems to him that to specifically enunciate when Step 1 may be omitted is to also specifically exclude the possibility that it may be omitted in any situation other than the one or ones described. Moreover, such specificity tends to add to the importance to be attached to Step 1 in the regular course of processing disciplinary grievances. It seems proper to find therefore that a Step 1 hearing was required in this instance, and that Step 2 was likewise a necessity, both of course, being conducted in good faith.

As a part of its presentation the Union referred the undersigned to 2 Awards of Arbitrator J. Fred Holly. The cases were with this Union and the Employer. The earlier of the cases was decided on August 2, 1979. The case number was NC-S-18,027-D from Mamou, LA. In that case the Employer had failed to notify the designated Union representative of the upcoming Step 2B hearing as was required by Article XV. The arbitrator ruled that "Because of a fatal Employer procedural defect the Grievant must be returned to his former job and made whole in all respects." The later case was decided by Mr. Holly on May 20, 1980. The case number was S8N-3F-D-9885 from Little Rock, AR. In the part pertinent to this case the Award's language was as follows:

"*** In the instant case, the appropriate representatives met at Step 1, but a serious question arises regarding the Supervisor's authority to settle the grievance. Can one realistically assume that the Supervisor had authority to settle the grievance in this situation where the removal action had been initiated by the Sectional Center Director of Employee and Labor Relations? Obviously not, and the Step 1 procedure was no more than a charade.

" The contractual provisions regarding Step 2 provide that on an appealed grievance 'the installation heard or designee will meet with the steward...'. The clear intent of this provision is to assure that an authority higher than the Employer representative who initiated the action which gave rise to the grievance will be the Employer's hearing representative. This condition was not met since the Employer representative at Step 2 was the same official who initiated the removal"

"action; that is, the Sectional Center Director of Employee and Labor Relations. Hence Step 2, like Step 1, was ineffective and meaningless and as a consequence the Grievant was deprived of procedural due process."

"..."

"These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprived the Grievant of his right to due process. In the absence of due process the grievance must be sustained without any consideration of its substantive merits. This means that the Grievant must be returned to his position as expeditiously as possible. Moreover, he is to be made whole in all respects except backpay. His claim for backpay is denied because he made no attempt to obtain employment and mitigate losses after his discharge. ..."

In the interest of continuity of Arbitration Awards the undersigned feels obliged to follow the lead of such a distinguished and able arbitrator as Mr. Holly and to sustain this grievance because its facts and those facing Mr. Holly are the same in every essential facet. He hastens to add however that while this case does not fall within such a category he can foresee situations when the lack of due process in the early stages of the processing of the grievance might not necessarily mean that the grievance should automatically be sustained. Rather he can envisage a host of situations where the proper remedy for the procedural error would be to remand the matter to the Step where or behind which it occurred; provided of course, the time lapse was not a factor for gleaning the true facts of the situation. It seems to him that to conclude otherwise is to say that a forfeiture is to be exacted on the errant party despite the fact that there is no provision for such in the National Agreement. He believes had the parties wanted such an exaction to be made it would have been a simple matter for them to have put it in their agreement.

Lastly he wishes to note he believes there was no conscious effort on the part of the Employer's representatives to single out the grievant or deprive him of his rights. Rather, what happened was the result of an unfamiliarity with what was required of them. He also believes the grievant, after more than 11 years of service as a letter carrier, had no intent, criminal or otherwise, to delay the mail, if indeed he was responsible for the circulars being placed in his car in the first instance -- and there is some very small doubt in the undersigned's mind that that happened.

In sum, the grievant was deprived of procedural due process in several particulars during the processing of his grievance. The errors made cannot be corrected or overlooked hence the only appropriate remedy that can be afforded him is to reinstate him to his former position without loss of seniority, or fringe benefits, and to make him whole for the earnings, including overtime earnings, he would have made but for his removal. His reinstatement shall be within 5 days of the date of this award, and his compensation shall be paid not later than the second pay day following his return to duty. All record of his removal shall be expunged from his personnel files.

On the basis of the entire record in this case the undersigned makes the following

AWARD

The grievance is sustained in accordance with the opinion expressed above. The grievant shall be reinstated to his former position as a city delivery letter carrier at the Employer's Conway, SC, Post Office within 5 days of the date of this Award. He shall be made whole for all earnings lost during the period he was not allowed to work in his position. His reinstatement shall be without loss of seniority or fringe benefits. His compensation shall be as soon as practicable, but in no event later than the second pay day following his return to duty. All record of his removal shall be expunged from his record immediately upon receipt of this award by either party.



P. M. Williams
Arbitrator

Dated at Oklahoma City, Oklahoma,
this 2nd day of May, 1984.