C#09975

REGULAR LABOR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION

BETWEEN

UNITED STATES POSTAL SERVICE
(the "Service")

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, BRANCH NO. 11
(the "Union")

GRIEVANT:

MARTIN S. GARDNER

Post Office: Chicago, IL
USPS Case No. C7N-4D-D 15801
NALC G.T.S. No.

ARB. NO. 89/150

OPINION AND AWARD

Before: Elliott H. Goldstein, Arbitrator

Appearances:

For The U.S. Postal Service:

Harvey E. Walden, III, Labor Relations Representative

For The Union:

Warren E. Fredrich, Regional Administrative Assistant

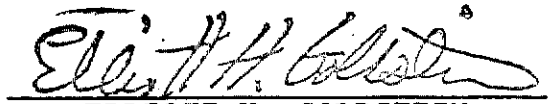
Place of Hearing: 433 West Van Buren, Room 311
Chicago, Illinois

Date of Hearing: Friday, January 19, 1990

Date of Award: Thursday, April 5, 1990

Award: For the reasons stated in the attached Opinion and Award incorporated herein as if fully rewritten, the Service did have just cause to issue the emergency suspension to Grievant, Martin S. Gardner, as required by the applicable provisions of the National Agreement, Jt. Ex. 1. The Union's attempt to have heard the removal case under this grievance was rejected by the Arbitrator as not justified by the language of Article 16, Section 7. That ruling is reaffirmed in this Award. Further, the Union's claim of a procedural defect based on the use of the

wrong form and the lack of notice prior to Grievant's being placed on an off-duty status or emergency suspension is also hereby rejected. Accordingly, it is therefore the Award of this Arbitrator that the subject grievance be denied in its entirety.



ELLIOTT H. GOLDSTEIN
Arbitrator

## I. STATEMENT OF THE CASE

The Grievant, Martin S. Gardner, was a full-time City Letter Carrier assigned to the Midwest Station, Chicago, Illinois. His seniority date was February 16, 1985.

On Friday, March 10, 1989, Grievant was arrested at a department store in the Evergreen Plaza, Evergreen Park, Illinois, for possessing a credit card which was stolen from the mail. According to the investigative memorandum, and the testimony of Postal Inspector P.L. Busscher, who conducted the investigation in this matter, the arrest of Grievant based on that particular charge, the fact that he spent the night of March 10th and a portion of March 11th in jail, and the circumstances surrounding the arrest, taken together, all constituted proper cause for an emergency suspension. Therefore, according to the testimony of Busscher, he set a "buck" or "routing slip" to the Employee and Labor Relations Section in Chicago on March 13, 1989 which informed Management of the arrest and the specific charge against Grievant. Further, on March 30, 1989, the investigative memorandum was forwarded through channels to Grievant's immediate supervisor, which resulted in a removal action for this Grievant, which the Service maintains is a totally separate action not covered by this grievance.

Prior to the receiving of evidence in this case, the Union voiced a strong objection to the admission of the investigative memorandum, P.S. Ex. 1, based on grounds of hearsay and

relevancy. It also strongly contended that the removal action could be tried with the emergency suspension case, relying on Section 16.7 of the National Agreement.

As I understand the Union's claim on this point, the very last phrase of Article 16, Section 7 provides, "... The emergency action taken under this Section may be the subject of a separate grievance." Since, according to the Union, the use of the term "may" connotes an option to do otherwise, there is no need for a separate grievance over the removal and the emergency suspension and removal cases could be heard together, if the Grievant and the Union chose not to file separate grievances on each, but just this one grievance at the time of the emergency suspension.

Management, of course, responded to that contention that this grievance had been processed throughout the grievance procedure as exclusively an emergency suspension, and not a grievance over the later removal. Management pointed out that the protest actually made in the grievance itself, dated April 3, 1989 (Jt. Ex. 2, last page), specifically requests in the "remedy" section only:

> "To rescind the 14 day emergency suspension and allow Grievant to return to work immediately, including the 4 days lost time, from 3-11 thru 3-16-89, and make Grievant whole for all lost time."

Management strongly argued that the "facts" and "Union contentions" portion of the grievance also do not contain any reference to a removal; pre-dates the removal action; and on its face is exclusively confined to the emergency suspension.

After careful review of the National Agreement Section referenced by the Union, Article 16, Section 7, and the underlying "grievance chain" documents, Jt. Ex. 2, I ruled at hearing that the removal action could not be presented as part of this specific grievance. This is so, as I read the record, because certainly no Management document references anything other than the emergency placement of Grievant in an off-duty status as being the subject of this specific grievance. There was obviously no meeting of the minds to make this grievance a protest of the removal, too. In fact, even the Union appeal to Step 3, one of the documents contained in Jt. Ex. 2, also references the fact that the Grievant, "Was issued an emergency suspension." The Union thus limited the case even at Step 2 to the emergency suspension.

The Union appeal to Step 3 goes on to state, "The Union appeals the Step 2 decision because Notice of Removal Not Warranted." That single reference to the removal certainly could refer to the lack of just cause for both the emergency suspension and the notice of removal, it does not constitute a separate grievance over the removal nor preserve that issue under this particular grievance. I so held at hearing and reaffirm that decision here.

I reject the Union's argument that the language of Section 7 of Article 16 permits a single grievance over the emergency suspension, rather than a specific protest of the actual termination action, which might include the suspension under the Union's reading of the clause in dispute in this case. To the

extent that the Union relies on Article 16, Section 7 to justify its attempt to hear the removal case at this arbitration hearing, the argument is found not to be persuasive, based on my reading of the actual language contained in the clause in question.

As far as the Union objection to the introduction of the investigative memorandum issued after the fact with regard to the emergency suspension, Jt. Ex. 3, as I understand the basis for the objection, putting aside the hearsay elements of that document, the Union believes the document to be simply legally irrelevant. The Union pointed out it was issued on March 30th, well after March 16th, when the emergency suspension notice was delivered in writing to Grievant. The Union makes the "after the fact" objection as to all evidence contained in the investigative memorandum, as a consequence of the legal relevancy argument.

However, I admitted the investigative memorandum at hearing as descriptive of the results of the Postal Inspector's investigation, and as corroboration for his direct testimony at hearing. On that limited basis, the document was properly placed into the record, I now hold.

Management presented only two witnesses in this case: Paul L. Busscher, Postal Inspector, and Eva S. Miller, Grievant's immediate supervisor, who issued the emergency suspension grieved here. Grievant was the sole witness in the Union's case.

The testimony of Postal Inspector Busscher tracks his investigative memorandum. Busscher essentially testified that he had no personal knowledge of Grievant's conduct on March 10, 1989 at the Carson, Pirie, Scott store in Evergreen Plaza prior to

Carson, Pirie, Scott store in Evergreen Plaza prior to Grievant's arrest. He stated that he relied upon the statements of police officers and the security personnel of the department store, and the police reports on file concerning the matter. He also testified that he talked to Grievant on March 10th at 3:54 p.m. at the department store, but that Grievant declined to give him a statement at that time.

Therefore, as to the underlying facts of what caused the arrest, Busscher's testimony is obviously hearsay and there is some basis for the Union's objection that the testimony should be given little weight. If this was the only evidence in this case, I might in fact have sustained the grievance. See my award in Case No. CIN-4B-D 31325 between these same parties (John Smith, Grievant, Detroit, Michigan, March 11, 1985). Grievant Smith was terminated for failure to discharge duties - consumption of alcohol during working hours. No evidence other than the hearsay complaints of neighbors was presented to substantiate Management's argument that Grievant was intoxicated on duty and breached his responsibilities as a letter carrier.

As I see it, this case stands on a drastically different footing from the Smith case cited immediately above. In this dispute, Postal Inspector Busscher gave direct testimony of the fact of Grievant's arrest by the Evergreen Park Police and that the charge was possession of a stolen credit card. Moreover, it is also an undisputed fact - not hearsay - that the credit card at issue was given by either Grievant or a companion to a clerk

at the department store in an attempt to purchase gift certificates. The card had been mailed by the credit card company from South Dakota and was addressed to Bernard Sarchi, 820 S. Damen, Chicago, Illinois, an address delivered from Midwest Station, the postal facility where Grievant was assigned at the time of the events under discussion. Further, the facts are undisputed that the credit card was mailed from Sioux Falls, South Dakota on March 7, 1989, but postal customer Sarchi never received it. Further, it is also undisputed that Grievant worked on both March 8th and March 9th at Midwest Station.

These uncontested facts far exceed the "irreducible minimum" of direct and non-hearsay evidence which I found in the Smith case is required in even arbitration under a sufficiency of proof standard to sustain a termination.

Once some minimum amount of direct evidence on the charges at issue has been presented, then the question becomes what is the burden of proof for an emergency suspension. That point will be discussed immediately below. Hearsay evidence then becomes usable in an arbitration case to prove actual facts in dispute. I recognize after all that arbitration is not a court of law and that the technical rules of evidence are intentionally made inapplicable in arbitration. As virtually all arbitrators recognize, hearsay is initially admissible in a case. It must be accorded the weight deemed appropriate by the individual arbitrator, considering all the facts and circumstances.

In this instance, Postal Inspector Busscher testified both through his memorandum and at hearing that his investigation

revealed that Grievant and a non-postal employee stood accused of attempting to purchase eight gift certificates at a department store in the Evergreen Plaza. The two men were alleged to have tried to pay for these certificates with a credit card stolen from the mail, according to the police and department store employees. Further, the card had actually been used by someone on March 9th in the same store to successfully purchase four $100.00 gift certificates. It also had apparently been used to make a purchase at the Great American Jewelers on March 9th by Bobby Joe Wynn, the non-postal employee who was with Grievant on March 10th, and the credit card receipt was then used by Wynn to attempt to serve as identification when employees at the department store raised questions about his possession of the card on March 10th.

Management claims that Grievant was accused of being present throughout the entire transaction by Wynn at the cashier's window in the department store on March 10th. At some point, according to Busscher, it was also reported to him by department store security that the other man, Wynn, became frightened when the cashier/clerk began to ask questions and demand identification. Grievant, Busscher reported he was told by the security officer, then asked the clerk, "What was taking so long?" and requested that the card be returned to him. When the cashier called security, Grievant quickly began to leave the area, and did not continue his demand for the credit card. He was immediately apprehended by the department store security personnel and later interviewed and arrested by Evergreen Park Police.

During this entire transaction, Grievant was in postal uniform, according to the report and testimony of Busscher, a fact Grievant concedes.

Busscher further testified that he was told by the police that Grievant made certain admissions to the Evergreen Park Police, including identifying the non-postal employee who had accompanied him as a friend and companion and also admitting that he was in the store when the attempt to purchase certificates was made on March 10th, and also on the prior day, March 9th, when four $100.00 gift certificates were in fact purchased from the Carson, Pirie, Scott department store. Last, according to the investigative memo, Grievant admitted to the Evergreen Park Police that "he knew the credit card was stolen." See Attachment A.

The testimony of Management witness Miller is that she was informed by Postal Inspector Busscher of Grievant's arrest just as she was beginning to close the Midwest Station in the late afternoon of March 10, 1989. Miller testified that Busscher briefly described to her the fact of Grievant's arrest, and the most salient of the details concerning the charges and underlying circumstances. The basic contents of the "buck slip" later written by Busscher and presented to Employee and Labor Relations on March 13th was also communicated to Miller by telephone at that time, she testified.

Based on the evidence that Grievant had indeed been arrested for receiving a lost or mislaid credit card that had been deposited in the United States Mails, a card that had been

addressed to a patron who lived in the area of the Midwest Station, Miller concluded there was sufficient basis for an emergency suspension, according to her testimony. She further denied that she spoke to Grievant and told him not to report to work, without further explanation, on either March 11th or March 13th or 14th. Instead, Miller testified that she did talk briefly to Grievant on March 13th and 14th, but only to receive a call from Grievant requesting to speak to Union Steward Turner. Miller testified that when that request to speak to Turner was made, she did put Turner on the phone, without discussing anything further with Grievant over the phone.

The testimony of Grievant differs sharply from that of Busscher and Miller. First, Grievant denies any involvement in, or knowledge about, any stolen credit card. He stated that he met the non-postal employee Wynn on March 10th, quite by accident when he was walking down a street on the way to visit his girlfriend to obtain a car from her to then proceed to visit Grievant's sick mother in the Cook County Hospital. He further claimed that he was in his postal uniform, because he "did not have a chance to change" after he had called in on the morning of March 10th to his assigned post office, and requested and obtained an emergency leave to make a visit to his hospitalized mother.

Grievant did not have any real explanation, however, as to how he wound up in Evergreen Park Plaza that afternoon with the non-postal employee, when he expressed an intent to go to Cook County Hospital, miles in the opposite direction. He somehow

attempted to explain the deviation by stating that he was walking in one direction to go to his girlfriend; met the non-postal employee, Wynn, who he did not know well, driving in the opposite direction; accepted a ride from that man to either Cook County Hospital or his girlfriend, but then permitted the man to drive in a third direction to the shopping center where the events under discussion occurred. I am not quite certain the logic of all that, but that is what Grievant testified.

It was the further testimony of Grievant that the events at the shopping center did not directly involve him at all. He suggested that the non-postal employee left Grievant in the car when he went into the department store to do some unknown task. Later, the man came back to obtain some identification. Grievant then accompanied him to the cashier at the store who had the questions about the credit card. According to Grievant, his "friend" then disappeared, stating he was going to the bathroom. Grievant remained, made inquiries about his friend and the status of the credit card, and then was unjustly arrested for being involved in purchases of goods with a stolen credit card Grievant knew nothing about.

Grievant further denied that he ever made admissions to the Evergreen Park Police concerning his accompanying the non-postal employee into the store or involvement with that man the day before. He specifically denied that he knew that the credit card at issue was stolen or that he ever told the police that that was the case.

It is in essence the Union's position on the merits that because Grievant was not convicted based on the criminal charges lodged against him, there was no basis for the earlier emergency suspension. Under cross-examination, however, Grievant conceded that the judge in the criminal case had not found him innocent, as Grievant had earlier testified. Instead, the record evidence disclosed that the case was dismissed because no complaining witness appeared in court after two continuances. U. Ex. 1. Therefore, I hold the finding and status of the court is legally irrelevant to the arbitration case. It does not prove guilt or innocence.

The primary thrust of the Union case, as I understand it, is based on the procedural arguments presented by the Union advocate concerning the circumstances of the actual issuance of Jt. Ex. 3, the Notice of Emergency Placement in an Off-Duty Status. The Union insists that the Emergency Suspension was tied into a specific 14 day time limit, which was actually the wrong form for an emergency suspension under Article 16, Section 7. Since the suspension was specifically limited to a time period of 14 days of less, according to the Union advocate, the provisions of Article 16, Section 4 and 5 were controlling, not the emergency suspension provisions of Article 16, Section 7, which has no such time limit requirement. Sections 4 and 5 require written notification prior to any suspension action. The Union insists that no such written notification occurred in this matter. Therefore, the suspension was defective and void.

The actual facts relating to the issuance of the emergency suspension notice are hotly contested by these parties. Supervisor Miller indicated that she was instructed to issue an emergency suspension on Monday, March 13, 1989 by labor relations. She drafted the notice on the form she was instructed to use. Moreover, she presented that form to Grievant on the first day he appeared at work, that is, on March 16th. She denies talking to Grievant on Saturday, March 11th, or on the next Monday or Tuesday, March 13th or 14th, and telling him during any conversation during that time that he was not to come to work until he was told to do so.

Her testimony is in direct conflict with that of Grievant, who claims that she told him those precise words about 1:00 p.m. on March 11th. He, therefore, he did not attempt to come to work until the Union Steward told him to do so on March 15th.

With reference to this procedural point, Grievant testified that he telephoned Supervisor Miller about 1:00 p.m. on Saturday, March 11th, when he was released from jail. He informed her that he had not been able to come to work that day, and told her why. It is Grievant's testimony that Miller then informed him that he should not come to work until he was told to do so, but gave no reason for that order. Miller did not tell him he was on off-duty status because of an emergency suspension, Grievant insists.

It was the further testimony of Grievant that he did not report to work on his next two scheduled days, Monday, March 13th, and Tuesday, March 14th, 1989, due to the

instructions of his immediate supervisor, Employer witness Miller. Instead, he talked to Miller on each day, and she reiterated her instructions for her not to report to work, Grievant indicated. On both days, however, he demanded to talk to his Union Steward, Turner, but did not get through on Monday because that was Turner's off-day. Grievant asserted that he did talk to Turner on Wednesday, which was Grievant's scheduled day off. Turner told him to report to work the next day, so Grievant reported that day.

Grievant testified that he reported to work at his normal starting time on Thursday, March 16th. He was not permitted to go the work floor, however, he stated. He finally talked to Supervisor Miller at approximately 11:30 on March 16th, when he came back to the postal facility to obtain his check and have a meeting with Union Steward Turner and Management. Only at that point, Grievant testified, was he presented with the formal notice of suspension (Jt. Ex. 3) and advised that he was in an off-duty status for the arrest and possession of a lost or mislaid credit card. According to the suspension notice, the basis for the placing of Grievant in an off-duty status was that his working, "May result in damages to government property or may be detrimental to the interests of the government ... or the general public."

It was upon these facts that the instant case came before this Arbitrator for final and binding resolution.

## II. CONTENTIONS OF THE PARTIES

### A. The Employer

Management argues that there was ample evidence to support its conclusion that an emergency suspension was justified under the circumstances involved in this case. The arrest of Grievant and the charges leveled at him are ample justification for this action. All that is necessary for an emergency suspension is reasonable basis to fear loss of property or danger of someone being harmed, not clear and convincing evidence of guilt, as might be an arbitrator's standard for a later discharge action. Moreover, the postal inspector's interviews with the department store security personnel and the police in Evergreen Park disclosed that Grievant had admitted to his participation and involvement in using the credit card. Therefore, there was certainly just cause for the issuance of the emergency suspension.

With reference to the procedural issue, Employer argues that this case comes down to a credibility contest. It suggests that the Grievant was absolutely incredible and Supervisor Miller has testified truthfully that she never told Grievant not to report to work, without explanation. The evidence discloses that Grievant made no attempt to come to work until his Union Steward advised him to do so on March 15th. Moreover, the case is in fact governed by Article 16, Section 7, and not by Sections 4 and 5, as the Union argues. The fact of the statement that the suspension was for 14 days does not make the suspension one done in a non-emergency basis. There is no need for prior written notice for an emergency suspension.

Therefore, the record supports just cause for the emergency suspension and no procedural defects exist. The grievance should be denied.

B. The Union

As noted above, the Union asserts that there is no probative evidence to connect Grievant with the use or possession of the credit card. The fact of his arrest is irrelevant to the emergency suspension, since the criminal case was later dismissed.

The conceded focus of the Union's case, however, is the procedural gaff of Supervisor Miller, according to the Union's interpretation of the facts. The Union argues strongly that Miller instructed Grievant on Saturday, March 11th, not to come to work until he was told to do so, but did not inform him that an emergency placement in an off-duty status had been issued to him. Moreover, Sections 4 and 5 require prior notice. Since Miller used a form which stipulated only a 14 day suspension, these clauses, rather than Section 7 of Article 16 control, and the contract was violated by the failure to give written notice before the emergency suspension went into effect.

The Union thus argues that the Service should not be permitted to violate the contract and deny this employee his rights; he should receive full back pay for the 14 days he served on emergency suspension, it urges.

III. DISCUSSION AND FINDINGS

It must be remembered, at the outset, that the burden upon the Service to prove just cause for an emergency suspension is substantially less than its burden of proving just cause for a termination. In this case, all the Service had to prove was that it had a reasonable basis to believe that the retention of Grievant on duty could result in damage to Service property or loss of mail or funds. I believe that Grievant's arrest on charges of possessing a stolen credit card was sufficient to give reasonable cause to fear a potential loss of public or postal service property if he continued in active duty status. It was reasonable to conclude that Grievant should be in an off-duty status, while charges were pending on those issues, especially given the fact that the police and security personnel reported to the postal inspector that Grievant had in essence admitted to those charges. No infraction of the just cause requirements can reasonably be found on the merits of the case.

Second, I note that in conjunction with the obvious seriousness of the charges leveled against Grievant, the actual explanations given by Grievant must be considered when his claims of procedural errors are reviewed. I believe this is one of those cases where a second extensive review of the details of Grievant's testimony is unnecessary, beyond that given above. Suffice it to say that I find his explanation of the events is absolutely unconvincing. Why did he request emergency annual leave in the morning of March 10th to visit a hospitalized mother and then go that afternoon, still in uniform, under the circum-

stances set out above, to a shopping plaza without ever going to see his mother? Inherent improbabilities abound in Grievant's testimony about his lack of knowledge of his companion, his lack of involvement with the transaction to obtain gift certificates with a credit card, and his denials of admissions to the police who arrested him. Simply put, I find Grievant an incredible and untrustworthy witness.

Because of this conclusion, I must also discredit Grievant's claim that Supervisor Miller gave him instructions not to report to work, without further explanation, on Saturday, March 11th, and perhaps Monday and Tuesday, March 13th and 14th. Miller, a disinterested and credible witness, directly denies having done so. That fact, considered in conjunction with the absolutely implausible nature of Grievant's testimony, causes me to determine that Grievant was not improperly instructed as to his status by Miller or any other supervisor working for the Service. I also find that Grievant never asked to report or tried to ascertain his status until March 16th, in line with Miller's testimony. Therefore, there was no violation of a notice requirement since Grievant was given notice at the first opportunity on March 16th, as Management argues.

The only remaining issue, then, is the Union's claim that the use of the "wrong form" for the emergency suspension converted that action to a suspension covered by Sections 4 and 5 of Article 16, rather than by Section 7. Although the Union strongly contended that in fact the setting out of the 14 day limitation on the emergency placement in off-duty status, and a

failure to tell Grievant earlier in writing of his suspension, converted the reason for the action to an ordinary discipline situation, it is plain that Jt. Ex. 3, on its face, does constitute an emergency suspension for an indefinite period, except for the one phrase, "... of 14 days or less."

From any fair reading of the actual document issued by Miller, it is plain that her intent was to issue an emergency suspension and no other type of disciplinary action. The reason she gave for the action, the cause of the placement on off-duty status, and the phrase, "Notice of Emergency Placement" all support that conclusion. I find that the reference to the status of 14 days or less is insufficient to convert this action from an emergency suspension to another kind of disciplinary action. Therefore, I specifically reject the Union's claim that there was a violation of any procedural requirement under Article 16 of the National Agreement. I so find.

Since the Service has established just cause for the emergency suspension in that it had a reasonable basis to take that action, and I have rejected all Union procedural claims, including the right to try the removal action claim under this specific grievance, I find that the grievance must be denied in its entirety. I so hold.

IV. AWARD

For the reasons stated in the attached Opinion and Award incorporated herein as if fully rewritten, the Service did have just cause to issue the emergency suspension to Grievant, Martin S. Gardner, as required by the applicable provisions of the National Agreement, Jt. Ex. 1. The Union's attempt to have heard the removal case under this grievance was rejected by the Arbitrator as not justified by the language of Article 16, Section 7. That ruling is reaffirmed in this Award. Further, the Union's claim of a procedural defect based on the use of the wrong form and the lack of notice prior to Grievant's being placed on an off-duty status or emergency suspension is also hereby rejected. Accordingly, it is therefore, the Award of this Arbitrator that the subject grievance be denied in its entirety.

ELLIOTT H. GOLDSTEIN
Arbitrator

Dated at Chicago, Illinois
April 5, 1990