

C# 07610

BEFORE THOMAS F. LEVAK, ARBITRATOR
REGULAR WESTERN REGIONAL PANEL

In the Matter of the
Arbitration Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Bakersfield, CA.)

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO
THE "UNION"

(E. Gifford, Grievant)

DISPUTES AND GRIEVANCES
CONCERNING REMOVAL AND
EMERGENCY SUSPENSION FOR
MISTREATMENT OF MAIL

ARBITRATOR'S OPINION
AND AWARD

W4N-5N-D 40950
W4N-5N-D 40951
W4N-5N-D 41967
W4N-5N-D 41968

These matters first came for hearing before the Arbitrator on October 20, 1987, at the offices of the Service, Bakersfield, California. The Service was represented by S.Jane Main. The Union was represented by Dale P. Hart. At the commencement of the proceedings, the parties stipulated that the issue to be resolved by the Arbitrator was whether the removal and emergency suspensions were for just cause and in accordance with the National Agreement; and if not, what would the appropriate remedy be?

On October 28, 1987, the Arbitrator rendered his Interim Award Regarding the Service's Denial of Opportunity To Interview Postal Inspector Jeff Scobba. A second day of hearing was scheduled for and held on December 1, 1987. At the commencement of the proceedings, the Union notified the Arbitrator that it had withdrawn the Emergency Suspension grievances, and then moved the Arbitration for an order and award setting aside the removal of the Grievant for the reason that the Service (1) had failed to provide requested copies of the mail involved in this case, and (2) refused to comply with its demand that the Service produce the notes taken by Postal Inspector Jeff Scobba relative to these cases.

The Arbitrator received into evidence: (1) a formal written request for information from the Union to Scobba dated October 21, 1987, which requested any and all information used to determine that the removal was for just cause and necessary, "specifically, but not limited to Kern Shopper Cards and all notes taken during interview of Jan 7th, 1987"; (2) a letter of response from Postal Inspector Charles E. Raymond, dated October 30, 1987, which enclosed photocopies of two of the approximately 135 valid address cards, and refused the Union's request for case notes for the reason that to do so might jeopardize an ongoing

investigation; (3) a letter dated November 10, 1987, from the Union to Raymond restating its demand for the notes, and asking for a specific reason for the denial, including any rule or regulation relied upon; (4) a November 20, 1987 letter from Hart to Main, reiterating the Union's demand, and asserting that the Service's failure to provide the requested materials denied the Grievant's right to due process; and, (5) a November 25, 1987 letter from Main to Hart stating that the request for notes would not be honored for the reason that an ongoing case might be compromised.

The Union argued: (1) that the Service's continuing refusal to provide all of the cards - which were in its possession, and its refusal to provide it Scobba's notes violated the Grievant's due process rights under the just cause clause of the National Agreement; (2) that the Service had never cited any specific rule or regulation relied upon; and, (3) that the Service had never specified the type of ongoing case - whether criminal or disciplinary - that might be jeopardized.

The Service responded: (1) that the Service had relied only upon the Investigative Memorandum and not the notes or the actual mail; (2) and that since the Union had been provided everything that the Service had relied upon, the Union's request should be denied; and (3) the Postal Inspectors involved had discussed the matter with their superiors, who instructed them not to provide the notes. The Service did not cite any Handbook or Manual provision, or any law, regulation or general rule, in support of its position; nor did it explain the nature of the ongoing investigation.

The Arbitrator informed the parties that his feeling was that the Union's motion was well-taken. With regard to the 135 pieces of mail, he noted that the mail was available and that there was no real reason for not producing it. After a short recess, the Service ultimately agreed and produced the mail. The Service also informed the Arbitrator that it was seeking further telephone advice regarding the notes.

With regard to the notes, the Arbitrator explained that the most fundamental due process right was the right to a hearing at which an accused is able to confront and cross-examine his accuser. The Arbitrator noted that where, as here, the sole evidence against a removed grievant is provided by a Postal Inspector, that a meaningful cross-examination necessarily encompasses use of the Inspector's notes. The Arbitrator elaborated by noting that information favorable to the Grievant, but not the Service, might be found in the notes; and that the notes could also properly be used to impeach the Inspector, an impeachment almost impossible without the notes. The Arbitrator also informed the Service that to that point it had merely stated its position, but had advanced no specific laws, rules, regulations or general authority in support of its position. Finally, the Arbitrator noted that the mere existence of some undisclosed ongoing case was not grounds for refusing to provide

the notes, and he noted that in a criminal case such disclosures must be made when directed under penalty of dismissal of a complaint.

After some further discussion, at 11:00 a.m., the Arbitrator called a second recess and advised the Service that unless the Service agreed to produce the notes by 12:00 p.m., the Arbitrator would grant the Union's motion. The Arbitrator advised the Service to seek further advice with regard to its position.

At 12:00 p.m. the proceedings reconvened. The Service stated that it would not produce the notes. The only reasons given were: (1) that it had not seen the notes nor relied upon them in issuing the removal; and (2) that the Arbitrator should simply hear the evidence presented and give whatever weight to that evidence as he might deem appropriate. The Arbitrator stated that the Union's motion was thereupon granted, and that the Grievant was to be immediately reinstated with full back pay. The Service then asked that its formal objection be recorded. The objection was noted and the hearing adjourned.

In memorializing his decision, the Arbitrator wishes the record to reflect the following:

First, National Agreement Article 16 requires that removal be for just cause. The Arbitrator construes and interprets just cause to include the due process requirement that a removed grievant have the right, through the Union, to effectively examine and cross examine her accuser; that notes taken by a Service manager or by a Postal Inspector relative to a removal are crucial to such an effective examination; and, that the denial of those notes therefore denies a grievant her rights under Article 16.

Second, where the Service utilizes Postal Inspectors to conduct an investigation in a removal case, it cannot be allowed to simply assert the defense that it relied only upon the formal Investigative Memorandum. The term "statement of facts relied upon," as used in the National Agreement, cannot be construed so narrowly. A Postal Inspector, in a discipline case, acts as the agent of the Service, and the Union is entitled to examine and explore all the facts within the knowledge of the Inspector, not just those favorable to the Service. In short, a Postal Inspector is to be treated as any other witness, and the Service's position is therefore contrary to the National Agreement.

Third, it must be stressed that in the instant case, the only evidence relied upon is that obtained by the Postal Inspectors; the Service itself conducted no independent investigation, and had no independent evidence of its own to submit. Had such independent evidence been offered, the Arbitrator would not have sustained the Union's motion, but instead would have stricken the Postal Inspector's Investigative

Memorandum and disallowed the Postal Inspector's testimony, allowing the Service to attempt to prove its case through other evidence.

Fourth, The Arbitrator's decision is supported by general case authority. See, e.g., Elkouri & Elkouri, How Arbitration Works, "Right of Cross-Examination," BNA 4th Ed., at p. 316, where it is noted that an arbitrator will not accept an offer of evidence if it is conditioned upon nondisclosure to the other party, and that like reasoning applies to employer reliance on allegedly confidential records not available as proof. See also, 5 C.F.R. 1201.64, relating to the production of witness statements in Merit System Protection Board proceedings. In general, the failure to produce such statements upon request, and prior to cross-examination, results in the striking of the direct testimony. The Arbitrator cites these examples only for illustrative purposes, not as binding authority. His decision is rooted in his interpretation of the just cause clause and the National Agreement.

Fifth, the Arbitrator also wishes to note that his decision was not made in a vacuum. The testimony of two Union witnesses, supported by video tape evidence, created an inference either that the Postal Inspector's Investigative Memorandum may have been in error or incomplete in significant areas. The Union was entitled to pursue possible support for that inference in the notes of the Inspector.

Sixth, the Arbitrator again notes that the Service never cited any Handbook or Manual provisions, laws, case law authority, regulations, general principles, or even general rules of evidence, in support of its position. More specifically, it cited no special laws, regulations, principles or rules relating to the Postal Inspection Service. Neither did it disclose even the bare nature of the purported ongoing investigation, or how perusal and use of the notes in this case might jeopardize that investigation. The Service cannot claim it did not have the opportunity to prepare and present argument and authorities. This dispute was placed at issue well in advance of the December 1 hearing, and the Union's written request to the Service that it state regulations and rules in support of its position was made in its November 10 letter.

AWARD

The removal of the Grievant was not for just cause under Article 16 and was not in compliance with the National Agreement. The grievance is sustained.

The Grievant is reinstated to her former position, without loss of seniority or benefits, and with full back pay.

The Arbitrator retains jurisdiction of this case solely for the purpose of resolving any disagreement concerning the amount of back pay due the Grievant.

DATED this 3rd day of November, 1987.

A handwritten signature in dark ink, appearing to read 'Thomas F. Levak', written in a cursive style.

Thomas F. Levak, Arbitrator.