

C - 20825

REGULAR ARBITRATION

In the Matter of Arbitration Under the Labor Agreement Between) GRIEVANT: James A. Herbert
)
) POST OFFICE: Wichita Falls, Texas
)
UNITED STATES POSTAL SERVICE The Employer or Service -and-) MANAGEMENT CASE NO: G94N-4G-D 00022123
)
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO The Union or NALC) UNION CASE NO: 999R / GTS 31316
)
) ND NO: 2377
)
)

BEFORE: NICHOLAS DUDA JR., ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:

John Merritt
Labor Relations Specialist
U.S. Postal Service
Fort Worth, TX 76161-9400

For the NALC:

Dana R. Culpepper
Local Business Agent
National Association of Letter Carriers
906 E. Monica Drive
Garland, TX 75041

Contractual Provision Involved:

Articles 15 and 16

Place of Hearing:

Wichita Falls, Texas

Date of Hearing:

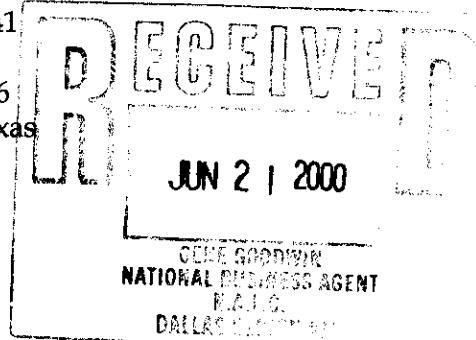
April 13, 2000

Date Record Closed:

May 12, 2000

OVS

AWARD



The grievance is sustained in part.

First, the grievance is arbitrable for the reasons stated. Second, there was just cause for discipline, but not for removal. The Service is directed to reinstate Grievant within two weeks of receiving this Award and make him whole for wages and/or benefits lost from February 1, 2000 until the date of his reinstatement based solely on his regular wages and without consideration of possible overtime or other benefits. His absence under the Removal Notice until January 31, 2000 is to be deemed an extended suspension for the charges stated by the Postmaster in his Notice of Decision dated September 14, 1999. Appropriate changes must be made in the personnel records.



Nicholas Duda Jr., Arbitrator
June 16, 2000

NATURE OF THE CASE

Grievant's Station Manager issued him a Notice of Proposed Removal on August 16, 1999 charging "failure to perform the duties of your position in a satisfactory manner" when he allegedly violated Postal Handbooks and Regulations by being "involved in a controversy with Postal customer, Joel Adams, that led to your assault of Mr. Adams." Grievant submitted a written response and met with the Wichita Falls Postmaster about the Proposal to Remove. Later the Postmaster concluded removal was "warranted" and told Grievant he was discharged effective September 18, 1999. A grievance protesting the removal was processed without resolution in the "USPS-NALC Revised Dispute Resolution Process" and then appealed to arbitration by NBA Gene Goodwin.

This Opinion and Award decides the issues in the subject case.

GRIEVANCE CASE FILE

8/17/99 Notice of Proposed Removal from Manager Scarrott to Grievant with a copy to the Postmaster.

...it is proposed to remove you...no sooner than 30 days from the date of your receipt of this letter.

Charge - Unacceptable Conduct - ...failure to perform the duties of your position in a satisfactory manner. Part 668.26 of the Employee and Labor Relations Manual states in part, "Employees will not engage in controversies with customers, ...while on duty.... Part 112.61 of the M-41 Handbook, ...states, "Do not engage in controversies with customers ... when on duty." Part 112.25 states, "Be ...courteous... Section 338.13 of the Administrative Support Manual (ASM) states, "Employees assaulting or threatening other employees or postal customers may be subject to remedial or disciplinary action, including discharge."

...on August 3, 1999, ...you were involved in a controversy with postal customer, Joel Adams, that led to your assault of Mr. Adams. ...

...

A pre-discipline interview was conducted on August 13, 1999, at which time you offered no reasonable explanation for your actions. ...you are aware of the Postal Service's Zero Tolerance Policy on Workplace Violence and Inappropriate Workplace Behavior. Even so, you acknowledge striking Mr. Adams, an act that I find egregious. Your actions are an embarrassment to the good name of the Postal Service strives to maintain.

Your removal is therefore warranted to promote the efficiency of the Service.

You and/or your representative may review the material relied upon to support the reasons for this notice...

Your and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing or both, before Mr. Roby Christie, Postmaster, Wichita Falls Post Office... You may also furnish affidavits or other written material to Mr. Christie within 10 days from your receipt of this letter....After the expiration of the 10-day time limit for reply, all the facts in the case, including any reply you submit, will be given full consideration before a decision is rendered. You will receive a written decision from Mr. Christie.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this letter.

8/25/99 Letter from Grievant to Postmaster Roby Christie

This is my written response to...letter dated August 16, 1999: Notice of Proposed Removal

On August 3, 1999, I was driving northbound in the nineteen hundred block of Minnestaska St., at or below the posted speed limit in search of city letter carrier Jay Conklin so I could provide him with auxiliary assistance. I noticed a vehicle backing out of the driveway at 1909 Minnetaska St. I later learned this vehicle was occupied by Mr. Raymundo Rangel who resides at 1909 Minnetaska St. As I passed behind the rear of the vehicle I noticed Mr. Adams walking toward the street not knowing if he was going to stop. As I passed Mr. Adams yelled at me to "Slow Down", I responded by recommending that Mr. Adams get out of the street. I then looked in my rear view mirror to see Mr. Adams running down the middle of the street chasing the LLV. He was screaming obscenities and waving his arms in the air with clinched fists. Thinking that I might have hit something or someone, I immediately stopped my vehicle stepped out and began to survey my LLV to ensure that I had not been involved in an accident.

As Mr. Adams approached me I noticed that he was visibly angry and upset, as he was very animated. Mr. Adams, screaming in my face, asking if I wanted a piece of his ass, he then violently hit me in the chest with both hands knocking me off

balance. Fearing for my own safety and as a reflex action to protect myself, I swatted Mr. Adams striking him in the lower jaw and neck area.

I then had to deliver a parcel to 1917 Minnetaska as I was going down the street Mr. Adams came running out of his residence and began to chase the LLV down the street. This again is stated in his statement. After delivering the parcel I stopped to ask the regular carrier Jay Conklin if he had the right key to his vehicle. Upon returning to the LLV, Mr. Adams came running out of 1911 Minnetaska, he was running towards me whaling his arms in the air screaming at me and asking if I wanted to take another punch at him as stated in his statement. I got into my vehicle and as I began pulling away from the curb, Mr. Adams began to violently beat on the side of my LLV with his fists as this is also stated in his statement. I immediately left the area and found the nearest telephone so I could report what had just occurred to my immediate supervisor, Mrs. Mary Boyce.

Although I do not deny the confrontation with Mr. Adams it was only in self-defense. I do firmly attest to the fact that Mr. Adams initiated the incident and was the aggressor and that can be seen by reading the statements. I only responded to his aggressive violent behavior by protecting myself.

I would ask you to consider my thirteen years and eight months of exemplary service with the Postal Service. I have been awarded numerous commendation for service that I would list at this time but I do not have access to my official personal file as it was send to Forth Worth. In consideration of all the above, I ask that you reinstate me back to full duty as a level five city letter carrier so I can prove myself to you and all other's concerned.

...

9/14/99 "Notice of Decision" from Postmaster notifying Grievant he would be removed.

...

I have given consideration to your personal answer of August 25, 1999, and your written answer dated August 25, 1999, and all other evidence of record. I find, however, that the charge is fully supported by the evidence and warrants your removal.

In accordance with Douglas v. Veterans Administration, I have considered the following facts to determine if the penalty is appropriate.

1. I have considered the nature and seriousness of your conduct and how your conduct relates to your duties and responsibilities. ...
2. I have considered your past work record, your length of service and your ability to get along with fellow workers. You have a long work history and I

view that as an aggravating factor rather than mitigating. I have reviewed your work record and I personally placed you on notice of a complaint from a customer. You were said to be rude and almost violent when a customer asked you about a misdelivery. I have also received reports of your inability to get along with some of your co-workers.

5. Your conduct was observed by another postal customer and his story does not coincide with your account of what took place. He stated that you were the aggressor. ...

6. I have considered the possibility of the customer being the aggressor and if so, whether your actions were warranted. I find by your own statement that you contributed to the confrontation by telling the customer to get out of the street and then getting out of your vehicle as he approached you. ...

7. I find that there is no alternative sanction that would deter such conduct. Your removal will promote the efficiency of the Postal Service.

Your removal will be effective September 18, 1999.

As a preference eligible, you have the right to appeal this decision in writing to the Merit Systems Protection Board, ...within 30 calendar days...

...

If you appeal to the Merit Systems Protection Board, you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance/Arbitration procedure. You have the right to file an MSPB appeal and a grievance on the same matter. ...

After Grievant received the Postmaster's letter, their representatives met at great length about the Notice of Removal but reached impasse as to whether the grievance was timely and whether there was just cause to remove Grievant.

10/22/99 Joint Step A Grievance Form

Date Discussed with Supervisor (Filing Date): 9/28/99

13. Issue Statement/Contract Provision(s) Did Management violate Article 15 and 16 of the National Agreement in it's letter of removal of [grievant]?

14. Undisputed Facts [None entered]

15. Union: Disputed Facts and Contentions: Article 15 was violated when the action of the removal was taken away from the immediate supervisor and given to the Postmaster. Article 16 was violated when Management removed Mr. Herbert without "just cause." Mr. Herbert was treated disparately.

16. Management: Disputed Facts and Contentions

Timelines: This grievance is not timely. The letter of proposed removal...was received by the employee and not grieved until after the 30 days. Article 15...provides a 14-day time limit during which a grievance can be initiated.... The employee chose not to use those grievance/arbitration procedures in a timely manner.... Article 15 ...does not define the administrative process of letter writing and Letters of Decision.

11/12/99 Step B Impasse

Issue Statement: Did Management violate Article 15 and 16 of the National Agreement in it's Letter of Removal of James A. Herbert?

UNION CONTENTIONS

...The grievance was initiated on 9/28/99. The Notice of Decision was received on 9/16/99. The grievance was timely.

...

...the grievant could expect to receive some sort of discipline, but NOT a Notice of Removal [which violates...the just cause tenets,]

MANAGEMENT CONTENTIONS

B. The failure...to meet the prescribed time limits of the Steps of this procedure...shall be considered as a waiver of the grievance.

...

...This grievance is untimely.

...

...in this case the removal was the only logical step in progression.

THE ARBITRATION HEARING

Before the hearing the Arbitrator had signed subpoenas requested by the Service for three witnesses to appear at the hearing. Joel Adams and R. Rangel did not appear as ordered. The Service elected to proceed without further effort to get those witnesses to the hearing.

Then the Parties stipulated to the Arbitrator as follows:

1. The Notice of Proposed Removal issued to Grievant [on August 17, 1999] was not grieved.
2. The "Notice of Decision" issued to Grievant [on 9/14/99] was challenged in the subject grievance filed within 14 days after the decision notice was issued.
3. "ISSUE: Did Grievant have a right to grieve the Notice of Decision after not grieving the Notice of Proposed Removal? If so, was there just cause for the Notice of Removal?"

Both Parties offered argument and evidence, documentary and testimonial. After the hearing Grievant expressed his satisfaction and appreciation for his representation by the Union.

Extensive post-hearing briefs were filed by the Service (with 6 arbitration citations) and the Union (with 11 cited decisions).

POSITIONS OF THE PARTIES

POSTAL SERVICE POSITION

...

Mr. Arbitrator, many Postal Service arbitration authorities have supported the management in their understanding of the National Agreement as it relates to Article 15, section 2

On...No. 3-2-4MV (1974) Arbitrator Merton C. Bernstein wrote,

And it is well established under this agreement that the prescribed time limit is measured from the time the employee received notice that discipline will be imposed. ...while ignorance of the agreement's requirements, and poor and inadequate record keeping may have been a factor in this case, so were calculated attempts to mislead [by false testimony about when the Step 1 meeting was held].

Arbitrator J. Fred Holly in case no. AC-S-356-D, pages 6, 7 and 8 wrote,

The employee must discuss a grievance with his immediate supervisor within fourteen (14) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause.

...any grievance not discussed with the immediate supervisor within fourteen (14) days would be procedurally defective and invalid.

Arbitrator Carl A. Warns, Jr., in case No AB-S-7678-D...wrote,

...Step One of the agreement is reasonably clear. The mandatory "must" regarding the discussion of the grievance between the employee and his immediate supervisor has been selected by the parties as the standard or span of time to initiate a proper and lawful grievance. Step One that measures the 14 days from the time when either "the employee or Union has learned or may reasonably been expected to have learned of its cause" the contract does not say that the 14 days do not begin to run until the Union has learned, if the employee himself has either learned or may reasonably be expected to learn of the contention of Management.

Arbitrator Albert A. Epstein in case no C8N-4E-D 34803...wrote,

Under the terms of Article XV, the failure of an employee or his Union in Step 1, or thereafter, to meet the prescribed limits set forth in the grievance procedure, are considered as a waiver of the grievance. ...

Arbitrator Elvis C. Stephens in case no. G90N-4G-D 94038011 page 3 wrote,

...there is a long line of arbitration cases from 1976 forward, which holds that any Grievant who receives a proposed removal must file a grievance on that notice, and any subsequent filing of a grievance on the letter of decision is untimely. Thus, this grievance on the letter of decision was held to be untimely.

Management believes without a doubt that this case was untimely filed and therefore should be considered not arbitrable.

However, even in considering the merits of this case, the grievant was familiar with the rules and regulations which state, Part 668.26 of the Employee and Labor Relations Manual states in part,

Employees will not engage in controversies with customers...while on duty or on federal property.

Part 112.61 of the M-41 Handbook, Carrier Duties and Responsibilities, states,

Do not engage in controversies with customers...

Section 338.13 of the Administrative Support Manual (ASM) states,

Employees assaulting or threatening other employees or postal customers maybe subject to remedial or disciplinary action, including discharge.

Despite those rules and regulations, the grievant took it upon himself to violate those rules. He chose to take matters into his own hands. Employer witness Steven Scarlett, testified under direct examination and without union rebuttal that the grievant told him he struck the postal patron, Joel Adams. He also testified that based on his investigation of the situation, the altercation could have been avoided by the grievant. Therefore he believes removal was warranted.

The police report also shows the grievant was a little taller and heavier than the postal patron.

The requirement in Article 16 for corrective action has been satisfied because removal is the only reasonable effective level of discipline to be imposed in this situation. Supervision has lost faith in Grievant's ability to perform his duties.

Considering all of the evidence in this case, we pray that the arbitrator denies this grievance in its entirety.

NALC POSITION

...
When must something be grieved? The answer to that question comes under Article 15.2 of the National Agreement.

Article 15.2 Step 1...states very clearly any employee who feels, aggrieved. ...what is the definition of aggrieved. Aggrieved party one who has been injured, who has suffered a loss; "a party or person is aggrieved by a judgement, order, or decree whenever it operates prejudicially and directly upon his property, pecuniary, or personal rights. This definition is taken from Barron's Law Dictionary. Another definition will be taken from the Random House Dictionary.

1. wronged, offended, or injured.
2. Law. Deprived of legal rights or claims.

As one can tell from the above definitions the only way an employee can feel aggrieved if there has been something lost or made to suffer. When the Notice of Proposed Removal was issued, there was no harm or no loss to the Grievant. ...A

proposal is something that has not taken place yet and until a decision is made on that proposal, no harm or action has been taken against the Grievant. The definition stated below proves this fact.

The next word that must be looked at very closely is proposed. The definition of this word will be taken from the Random House Dictionary.

1. To offer or suggest (a matter, subject, case, etc.) for consideration, acceptance, or action: to propose a new method.
...
9. To form or consider a purpose or design.

...Article 16 deals with discipline: 16.3 deals with a letter of warning, 16.4 deals with suspensions of fourteen days or less, 16.5 deals with suspensions of more than fourteen days or discharge, 16.6 deals with indefinite suspensions—crime situation, 16.7 deals with emergency procedure. If any of the above action is taken against employee, harm has been brought upon the employee. ...This case did not deal with any of the above articles; this case dealt with Article 16.9, which deals with Veterans' Preference. Article 16.8 deals with review of discipline; in no case may supervisor impose suspension or discharge upon employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred by the installation head or designee. The Notice of Proposed Removal could not been reviewed and concurred until it became a removal. ...

At this time I would like to cite two arbitration's, the first cite was before arbitrator Wayne E. Howard the date of the award was July 18, 1989 and case No. is E7C-2B-D3329. ...

The second cite was before arbitrator Raymond L. Britton the date of the award was July 17, 1992 case No . is S0N-2W-D 04320, NALC Case No. is 066872. ...

...

There's no question or doubt that the union had the right not to file a grievance on the Notice of Proposed Removal. The union fulfilled its contractual obligation when it filed a grievance on the Notice of Decision in a timely manner. From the above proof, the union has proved without a doubt that this grievance is timely. The next issue that must be looked at is:

Was there just cause to remove the Grievant? The answer is NO.

...there were numerous just cause reasons for not removing Mr. Herbert. The just cause reasons that the union put forth can be found in joint exhibit 2...and there's no reason for the union to cite them again. The case changed on the day of arbitration due to the fact neither Mr. Adams no Mr. Rangel showed up at the arbitration to testify. ...the Grievant was the only person who had knowledge

about the alleged assault of Mr. Adams. Mr. Herbert and Mr. Conklin were the only two who had knowledge of what took place after the alleged assault of Mr. Adams. Mr. Scarlott..., Inspector A.J. Reid and Police Officer Tracy Robinson did not see what took place on August 3, 1999. ...what this comes down to his hearsay. Mr. Adams and Mr. Rangel never gave sworn statements to the Postal Inspectors or to the Police Officers. Therefore, we come back to hearsay again; the reports from the Postal Inspector and the Police Officer when dealing with Mr. Adams or Mr. Rangel cannot and should not carry any weight in this arbitration. ...

...When Police Officer Tracy Robinson took the stand, she didn't even bring her notes. It must also be noted that Officer Robinson couldn't remember many facts about the incident that took place on August 3, 1999.

Mr. Herbert testified under oath that he was only defending himself on August 3, 1999. Mr. Scarlott stated at the hearing that a carrier has a right to defend himself. Mr. Herbert has been accused of assaulting Mr. Adams. Mr. Herbert has a right to face his accuser in arbitration and Mr. Herbert was never given that right. The union also has the right to cross-examine Mr. Herbert's accuser and that right was taken away from the Union. Mr. Herbert's due process was violated when he could not face his accuser and the Union could not cross-examine his accuser. The only proof (hearsay) that management had about the incident on August 3, 1999 was the Postal Inspector report and the Police Officer report. There was no sworn statements or testimony under oath from Mr. Adams or Mr. Rangel to prove that these reports were accurate or correct for the incident that took place on August 3, 1999.

...

...Arbitration No. CIN-4D-D-37460 Before Arbitrator Elliott H. Goldstein.

... hearsay evidence alone cannot support a discharge and that an irreducibly minimum or residual of appropriate evidence is required.

...

When dealing with any type of discipline, the burden of proof lies with management At the arbitration, management did not provide any evidence of what took place between Mr. Herbert and Mr. Adams; management biggest proof was built on hearsay instead of evidence. Management never proved at arbitration that Mr. Herbert was guilty of the charges. ...

...

...Mr. Herbert has been given numerous awards throughout his 13 years with the Postal Service. ...When an employee has worked for their employer over many years without any demonstrated disciplinary penalty Arbitrators has referred to this as a Bank of Good Will.

...No. S4N-3W-D-3658 before Arbitrator P.M. Williams...

There is no question from this record but that the Grievant engaged in a "cuss-fight" with a customer. The question is: does that fact serve as just cause for his removal, or do the circumstances here—some already discussed and some not—tend to mitigate such a harsh penalty? The undersigned is of the opinion they do.

...

...the Union request that the Arbitrator make the grievant whole for all lost wages, benefits which came as a result of the actions of the Postal Service. In addition, we would request that the Notice of Decision...be rescinded and removed from all the records of the Grievant.

...

ISSUES

Did Grievant have a right to grieve [the Decision to Remove] after not grieving the Notice of Proposed Removal? If so, was there Just Cause to remove Grievant, and if not, what remedy is appropriate?

RELEVANT PROVISIONS FROM THE SUBMISSIONS

FROM THE LABOR AGREEMENT

Article 15 Grievance-Arbitration Procedure

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include...the complaint of an employee...which involves the interpretation, application of or compliance with the provisions of this Agreement.

Section 2. Grievance Procedure-Steps

Step 1:

- (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been

expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. ...

- (b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. ...
- (c) If no resolution is reached as a result of such discussion, the supervisor shall render a decision orally stating the reasons for the decision. ...

Section 3. Grievance Procedure-General

- A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.
- 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. ...

Section 4. Arbitration

A. General Provisions

- 6. ...All decisions of arbitrators shall be limited to the terms and conditions of this Agreement....

Article 16. Discipline Procedure

Section 1. Principles

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 such as, ...violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

...

Section 5. Suspension of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job

or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. ...

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

... where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

9/26/74 Letter by Management Sustaining Grievance NB-E 1681(N-24) E2-COL-PO

Dear Mr. Huerta: (Assistant Secretary-Treasurer of NALC)

...we met with you to discuss the above captioned grievance at the fourth step...

...

This grievance involves the refusal on management's part to accept a grievance pertaining to a Notice of Charges-Proposed Removal from a Steward prior to the time that a decision had been rendered on the previously mentioned proposal.

We are sustaining this grievance to the extent that management is being advised that, in future situations such as the one with which this grievance is concerned, a grievance may be filed upon receipt of the proposal notice.

...

1996 MUTUALLY AGREED "GUIDELINES FOR HANDLING GRIEVANCES UNDER THE USPS-NALC REVISED DISPUTE RESOLUTION PROCESS"

Step A: Employee and/or Union Steward define and discuss the complaint with the immediate supervisor within fourteen days of the cause. This constitutes the Step A filing date.

COMMENDATIONS OF GRIEVANT**February 1990 Letter to Grievant from Wichita Falls Postmaster Reed**

SUBJECT: Attendance Award Program

Congratulations! Records show that during the 1989 leave year you had no unscheduled absences from work. Such an attendance record indicates that you are a conscientious employee who realizes the impact that unscheduled absences can have on postal operations.

Employees with outstanding attendance records such as yours are a valuable asset to the Postal Service. I am pleased to present you with this attendance award, and it is my hope that you will also look forward to receiving an award for no unscheduled absences during the 1990 leave year.

March 1991 Letter to Grievant from Wichita Postmaster Reed

SUBJECT: Attendance Award Program

Congratulations! Records show that during the 1990 leave year you had no unscheduled absences from work. Such an attendance record indicates that you are a conscientious employee who realizes the impact that unscheduled absences can have on postal operations.

...

May 1995 Memorandum for James Herbert From Postmaster Christie

SUBJECT: Sick Leave Award

Congratulations! Records show that you have saved 500 hours of sick leave. The saving of your sick leave indicates you are a conscientious employee who realizes the benefit of conserving your sick leave and appreciate the value of your sick leave as disability insurance protection.

I am pleased to present you with this leave pin and look forward to the time you will have accumulated 1000 hours of sick leave.

12/12/97 Certificate of Appreciation

This certificate presented to

JAMES A. HERBERT

An official commendation and recognition of your contributions to the United States Postal Service.

...

Roby E. Christie
Postmaster

During the past several months, Jim Herbert has made significant contributions to USPS goals by improving delivery methods on Route 906, and more recently on his new Route 502.

Using his own talent and initiative, Jim contacted customers on his route to sell them on the benefits of changing over from their current door delivery to curbside delivery. Convincing customers to voluntarily give up door delivery is not an easy task, and takes dedication, patience and good customer relations skills. Jim managed to convert approximately 150 deliveries from door to curbside, saving the USPS hundreds of dollars in annual delivery costs while at the same time reducing the risk of injury to carriers at these addresses.

Jim's success in this project contributed to each of the USPS' three major goals: customer satisfaction, financial performance and employee commitment. Jim is well deserving of recognition and reward for his extra efforts to improve delivery service on his route.

In recognition of his contributions, I recommend awarding 8 hours of administrative leave.

8/11/99 "Investigative Memorandum" by Postal Inspectors.

On August 3, 1999, Steven Scarrott, Manager, Morningside Station, Wichita Falls, reported... that Carrier James A. Herbert had been involved in an alleged assault with a customer while on duty. Mr. Scarrott stated Mr. Herbert claimed he had been shoved by the customer before striking him with his left hand; the customer claimed Mr. Herbert hit him first. Mr. Scarrott said he had been informed by the Wichita Falls Police Department at 3:10 p.m. that they were on the scene of the incident at the request of the customer.

On August 4, 1999, James A. Herbert was interviewed by Postal Inspectors A.J. Reid and G.R. Bond. Mr. Herbert maintained he had been hit first by the customer, Joel Adams. ...Mr. Herbert provided a sworn written statement, a copy of which his attached as Exhibit 2.

On August 4, 1999, Jay Conklin, Mail Carrier, was interviewed by Inspectors Reid and Bond. Mr. Conklin stated he had not witnessed the assault, but spoke with Herbert after the fact and also witnessed a subsequent encounter. A copy of the Memorandum of Interview of Jay Conklin is attached as Exhibit 3. Mr. Conklin provided a sworn statement regarding the incident, a copy of which is attached as Exhibit 4.

On August 4, 1999, Postal Inspectors Reid and Bond interviewed Joel Adams, ... Mr. Adams stated that the mail carrier knew as Jim had punched him the jaw area the day before. He stated he was angry with the way the carrier was driving and the irrational way the carrier was acting, but he did not hit the carrier at all. He stated after the carrier punched him in the right jaw area, he grabbed the carrier's shirt and pulled his right arm back to hit back, but his neighbor, Rey, yelled at him not to do it and he thought better of hitting him. A copy of the Memorandum of Joel Adams is attached as Exhibit 5.

On August 4, 1999, Postal Inspector Reid spoke with Reymundo Rangel via the telephone from his place of employment. Mr. Rangel stated that he was the driver of the pickup backing out of the driveway. He said that the mail carrier was the aggressor and that he yelled at his neighbor not to hit the carrier back. A copy of the Memorandum of Interview of Reymundo Rangel is attached as Exhibit 6.

On August 5, 1999, the Wichita Falls Police Department provided Inspector Reid with a copy of the report of the August 3, 1999 incident between Herbert and Adams. A copy of the report is attached as Exhibit 7.

...

8/3/99 Report by Wichita Falls Policewoman

...
The victim states that he was assaulted by the suspect [Grievant Herbert] when the suspect became angry and struck the victim in the face. I spoke to the victim, Joel Adams. Adams stated that he was standing in the front yard of his residence located at 1911 Minnetaska when he observed a Postal van driving fast down the street. Adams yelled, "Slow down." Adams stated that the white male driver of the postal truck yelled back, "Fuck you" and continued down the street. Adams stated that he walked into the street to get the number off of the postal truck. Adams stated that at that time, the truck slammed on its' brakes and began backing up towards him. Adams stated that the male stepped out of the truck

and walked toward him. Adams stated that the postal worker walked up onto his grass and then they had some words. Adams stated that the man drew back his fist and struck him on the right side of his jaw. Adams stated that he told the postal worker, "you just screwed up!" Adams walked back into the house to call police. A neighbor, Ray Rangel, observed the entire incident and stated that Adams neither provoked or struck the postal worker. Rangel got the number of the postal truck #218209.

I notified the Morningside Post Office and the Postmaster Stephen Scarrott arrived at the scene to gather information. Adams told Scarrott that if the suspect, Jim Herbert, came back and apologized he would not prosecute and would even sign a waiver in front of us which would further state that he would not sue. Herbert arrived at the scene and I explained the situation and asked if he would tell me what happened. Herbert related the same incident except stated that Adams shoved him first and that he then struck him. I told Herbert that Adams wanted an apology and that after the apology, the matter would be dropped. Herbert stated that he would not apologize because he did not do anything.

I observed a faint red mark to Adams right jaw. Adams will not seek medical attention but does wish to prosecute.

Another postal worker was present during part of the incident. The other postal worker refused to give his name and stated, "I don't want to get involved." Scarrott stated that the post office would conduct its own investigation.

ANALYSIS

FINDINGS OF FACT

Background

Before coming to the Postal Service Grievant served for several years in the United States Army and then worked as a Policeman. Grievant was hired by the Postal Service about 13 years ago. For the last few years he has worked at Morningside Station of the Wichita Falls Post Office as a Letter Carrier. He has also served his Union and fellow Carriers as Vice President of Wichita Falls NALC Branch 999 R. His wife is a Postal Service employee.

Grievant is about six feet tall and well muscled for a man of 53 years of age. He weighs about 220-225 pounds.

In arbitration Grievant came across as a fairly outspoken person with self-confidence, particularly in his ability to handle language and other people. This Arbitrator carefully compared what Grievant said at arbitration with what he had told the City Police officer, Mr. Scarlett, and the Postal Inspectors, all in the light of his testimony and that of Mr. Conkle. I did not consider the hearsay statements of Adams and Rangel except where they were confirmed by other statements or documents submitted at the hearing. My conclusions about the facts are stated below.

The Incident on August 3, 1999

In General

We note that Grievant actually came to the scene of the altercation he had with Mr. Adams more times than he had given in his statements, and, in fact, failed to report the second of his three stops at 1911 Minnetaska, where he talked to Mr. Rangel alone without Adams. Furthermore, his third stop was totally unnecessary and predictably led to the second controversy with Adams. In addition we find Grievant skewed some of his version of facts to make himself look less, and Adams more, culpable.

The Details

On this date Grievant returned early from his route and was given a slip to help on Route 902. He left the station and drove looking for 902 Carrier Conklin to get the vehicle's key and instruction on mail to take.

As Grievant drove up Minnetaska Street at about 2:55 PM he approached a pickup truck (driven by Rangel) that was backing out of a driveway at 1909 Minnetaska. Across the street on the grass stood Joel Adams, a 26-year-old man slightly taller and heavier than Grievant. Grievant swerved his vehicle as he passed between the pickup truck and Adams. As Grievant drove past, Adams shouted, "Slow down." Grievant yelled something back; he claims he said, "Get out of

the street." (This would be a strange remark, because Adams, by Grievant's written account, was "standing on the curb.") Adams claims Grievant said, "Fuck you." Adams shouted and started running after the LLV. Grievant slammed on his vehicle's brakes, stopping the vehicle. Grievant left his vehicle and walked toward Adams, who ran up to the vehicle. As they stood two or three feet apart, the men engaged in an insulting, profane exchange with each challenging the other to a physical confrontation. At about the same time Adam pushed Grievant and the latter swung and hit Adams in the face. Adams pinned Grievant's arms, said he was calling the police, released Grievant and went into the home at 911 Minnetaska. Grievant got into his vehicle and drove until he found Conklin ahead at a corner of Minnetaska. From Conklin Grievant got the keys and instruction for the "cut" and request to deliver a parcel at 917 Minnetaska. Grievant asked Conklin "who is the guy in the black shirt on Minnetaska?" Adam had been wearing a black shirt. They looked down the block, but no one wearing a black shirt was in sight. Herbert took the keys and said he was going for the mail. About five minutes later Conklin walked down Minnetaska and observed Grievant apparently writing down the license plate of a pickup truck at 1909 Minnetaska. Rangel, who was present, protested Grievant's taking the number, arguing he had not been involved in the problem between Grievant and Adams. Grievant left got into his vehicle and drove the short distance to 1901 Minnetaska. He gave the key to Conklin and explained the altercation with the man in a black shirt who had gone into 1911. Conklin recognized Adams and told Herbert that Adams was a "tough" man Grievant should "watch out " for. Grievant said he was not afraid and drove his vehicle back down to deliver the parcel at 1917. As Grievant drove past 1911 the man in the black t-Shirt (Adams) emerged shouting and shaking his fist at the Postal Vehicle. Several minutes later Grievant drove back up the street, parked in front of 1911 and got out of the vehicle. He asked Grievant if he had returned Conklin's vehicle key. Conklin confirmed that he had. Adam came out of his home, and another verbal match occurred about

who would get a piece of the other's "ass." Grievant went into the vehicle, whose window was open and started laughing at Adams. Adams became furious and pounded on the LLV roof or door five or six times until Grievant closed the window and drove off. When Grievant telephoned in about the incident Manager Scarlott had already been contacted by the police and was going to Minnetaska. Grievant was told to return to 1911 Minnetaska. Scarlott came out to the scene where Grievant was interviewed by the police. There were discussions about settling this problem, but Grievant would not apologize as requested by Adams.

EVALUATION

The Timeliness/Arbitrability Issue.

According to the Postal Service, the subject grievance is not arbitrable, because Grievant did not file it, as allegedly required, within fourteen (14) days after his receipt of Scarlott's letter on August 17, 1999. The sole contractual basis claimed for this position is Section 15.2 Step 1 (a). That cited language provides:

Any employee who feels aggrieved must discuss the grievance ...within fourteen (14) days of the date on which the employee...first learned...of it's cause.

That language must be interpreted in the light of the provisions in Section 15.1, which proceeds it:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include...the complaint of an employee, which involves the interpretation, application of, or compliance with the provisions of this Agreement...

Scarlott's letter to Grievant was notification of the recommendation to the Postmaster to remove Grievant on charges of having violated specific sections in the M-41, ELM and ASM, based on Scarlott's conclusions of fact about the incident(s) in which Grievant was involved on August 3,

1999. On receiving that letter Grievant had several options as to what he could do: 1) Grievant could accept or ignore the invitation to answer the proposal in writing or in person to the Postmaster, who was to make the decision; and or 2) if Grievant disputed, differed, disagreed with or had a complaint about or felt aggrieved by the contents in Scarlott's letter in relation to interpreting, applying or complying with the Labor Agreement, including the cited Handbook items, Grievant had a right, recognized by Scarlott, to file a grievance in Step 1 within fourteen days of his receipt of that letter.

Grievant exercised his right to communicate with the Postmaster within ten days in an attempt to persuade the Postmaster not to follow or implement Scarlott's recommendations. Grievant did not file a grievance about the Notice of Proposed Removal; that failure would constitute a waiver of grievance about the contents of Scarlott's letter.

On September 14, 1999 the Postmaster issued a letter announcing his review and conclusions about the evidence, including Grievant's communications with the Postmaster. The latter announced Grievant was to be removed on September 18, 1999, four days later.

On the date of removal Grievant protested his removal with his Supervisor in Step 1 of the grievance procedure, claiming the Letter of Removal violated Articles 15 and 16 of the National Agreement. The Parties in Joint Step A stated the dispute as follows:

Did Management violate Article 15 and 16 of the National Agreement in it's Letter of Removal of James A. Herbert?

No mention is made in the Joint Step A or Joint Step B process of this grievance about Scarlott's Letter of Proposed Removal. The subject grievance is only about the Postmaster's action.

The grievance filed September 18, 1999 would be barred from adjudication based on the timeliness provision only if it were the same grievance as waived by failure to grieve the Notice of Proposed Removal. We find the September 28, 1999 grievance is not "the grievance" he might

have filed, but did not, in protest of the Notice of Proposed Removal. The Union's brief excerpted above points out additional reasons for distinguishing between the two situations. We would also point out that Grievant could not waive his grievance about the Notice of Removal before the removal was even issued. Under the clear wording in Section 15.1, 2, and 3, there is no merit to the Postal Service claim that an employee is denied the right to grieve a Notice of Removal if he had not grieved timely a prior Notice of Proposed Removal. Accordingly, we find the subject grievance filed on September 18, 1999 in protest of his removal on that day was a proper complaint, timely made and therefore subject to adjudication under the grievance and arbitration procedure of the Labor Agreement.

We think it appropriate to make some general comments. Six arbitration decisions were submitted by the Service to support its untimeliness defense. Some of these "decisions" have no real discussion. For example, the "Discussion and Opinion" given by one arbitrator in 1995 for finding a case untimely consisted solely of the following:

The arbitrator issued a bench decision...on the issue of arbitrability. There is a long line of arbitration cases from 1976...which holds that any Grievant who receives a proposed removal must file a grievance on that notice, and any subsequent filing on the letter of decision is untimely.

Nothing in the contract language justifies blindly accepting that conclusion. The fact that some arbitrators each handling a case with different facts decided their cases were untimely does not persuade me. I must find this case to be untimely. The language controls.

In fairness, I acknowledge that other arbitrators finding untimeliness had more extensive decisions, although they did not consider the points I made above, which incidentally are not unique to me.

Certainly the Postal Service has not been consistent in its explanation on this subject. More than 27 years ago, under essentially the same language, the Postal Service insisted that a

grievance about a Notice of Proposed Removal could not be filed before a Letter of Decision. Then, on September 26, 1974, the Postal Service sent the NALC a letter about NB-E-1681 (N-24) E2-COL-80. Management's letter said, "We are sustaining this grievance to the extent that Management is being advised that in future situations such as the one with which this grievance is concerned, a grievance may be filed upon receipt of the proposed notice." Not long after that change some units of the Postal Service adapted the position requiring a grievance on the Notice of Proposed Removal. Sometimes a Service unit argued that a grievance on the Notice of Proposed Removal must be filed, but no grievance may be filed on the removal thereafter.

There have been situations, as in the subject grievance, where an employee attempted unsuccessfully to dissuade Management from approving a recommendation to remove without grieving; after 14 days the employee grieved the removal and Supervision asserted untimeliness. There were decisions (AB-C-2897-D) to that effect as early as 1974, only a month after the 4th Step decision mentioned above. That same fact situation and result occurred in several other arbitration decisions which were cited by the Postal Service in regional arbitration.

No national arbitration on this issue was shown to this Arbitrator or even alleged to have occurred. Some arbitrators who considered essentially the same situation argued that they disagreed but felt that because decisions cited had been issued more than 20 years earlier, they were binding. This regional Arbitrator must respectfully disagree. The regional arbitration is not binding and if incorrect decisions are cited they need not be followed.

We find that Grievant had a right to grieve the decision to remove, although he had not grieved the Notice of Proposed Removal; the subject grievance is timely and arbitrable.

Issue 2: The Issue For Just Cause For Removal

The Notice of Removal claimed Grievant had engaged in controversies with and assaulted Mr. Adams in violation of various Postal Service regulations, justifying removal. The Union's basic

position in its post-hearing brief is that the Service had the burden of proving the violation, and since neither Adams or Rangel were present to testify at arbitration there was no proof of the violations alleged, so there was not just cause for the removal, and Grievant should be reinstated and made whole.

The Union's position on what is shown by the evidence ignores the testimony by Grievant himself and other Postal employees.

Although we do not agree with the Union position that all hearsay evidence must be excluded, we find in this situation that the case can be decided without referring to the statements given by Adams and Rangel to the postal inspectors.

Grievant was charged with two improper actions. The first improper action attributed to Grievant was that he engaged in a controversy with a customer. The evidence shows that he engaged in two controversies with Mr. Adams. First, after passing Adams he slammed on his brakes and jumped out ostensibly, he claims, to look at whether he had run anybody down. That explanation we think is very suspect; however, we need not make a ruling on it. By his own testimony Grievant admitted that he stayed in the center of the street with Adams with both of them using profanity and insults toward the other and challenging the other to a physical confrontation. When Grievant, who had worked as a police officer, saw how angry Adams was he could have simply gotten back into his vehicle and left, which is what he should have done. That controversy was just cause for discipline.

However, instead of staying away, Grievant found excuse to return directly in front of Adam's home three more times, including twice when he stopped. Grievant had inconsistent and misleading statements about why he returned. He did not mention or explain why he talked with Rangel right next to Adam's home barely five minutes after the middle of the street "macho" confrontation. His next trip past was marked by Adams shouting and running after him. The

fourth time back he parked his LLV directly in front of Adams' home to ask Conkle if he had returned his key. Not five minutes before he had gone to the other Carrier expressly to give him the key. Grievant explained that he did not remember from five minutes before. Secondly, if he really thought that he might have a key in his pocket that belonged to Conkle, he could have simply stopped and looked at it and discovered it was one of the two sets of his own keys. On this return there was another confrontation, hollering and pounding on his vehicle in the street in front of other customers. Grievant laughed on that occasion, knowing that he was simply taunting Adams, who was outside the vehicle. That was just another controversy and one that Grievant provoked, justifying discipline.

Grievant admits hitting Mr. Adams in the face, but he says he was just engaged in self-defense after Adam had pushed him in the chest. As a former police officer, Grievant had to know that his assault on Adams under these circumstances was not justifiable self-defense. When Adams pushed him he should just have walked away, not performed like macho man.

Under these circumstances we find that Grievant improperly assaulted a customer. Therefore, the controversies and assault violated the specified section of Handbooks and Regulations. Grievant provided just cause for discipline.

Section 16.1 requires that in the administration of discipline "a basic principle shall be that discipline should be corrective in nature, rather than punitive." The Postmaster decided that Grievant's almost 14 years of excellent service do not mitigate against removal but really were "an aggravating factor" rather than a mitigating factor. The Postmaster said, "I have reviewed your work record and I personally placed you on notice of a complaint from a customer." The reference was to an incident about five years earlier when a customer had complained about Grievant. There was no investigation of the complaint, it was about a relatively minor matter, and there was no charge or finding that Grievant had been at fault. The Postmaster only said, "I have also

received reports of your inability to get along with some of your co-workers."

Notes about one incident were given to Supervision after the events in question in response to inquiries by Supervision about controversies Grievant might have had with employees. Grievant was not confronted with the specific charge, and no basis was shown to find that he had been at fault.

Finally, the Postmaster said, "There is no alternative sanction that would deter such conduct." He said that removal was a necessary logical discipline, the only one that could be corrective. The Postmaster was free to consider an extended suspension. Losing several months of work at a cost of thousands of dollars could very well be considered as a deterrent to a repeat behavior of this nature. Furthermore, there is no showing of any prior behavior of this kind by Grievant. Something less than removal can be corrective in this case. At the same time we find Grievant still minimizes the seriousness of his misconduct. To impress that seriousness on him, an extensive suspension is appropriate.

We find under the circumstances of this case that removal was excessive, arbitrary and unreasonable for a 14-year employee with an excellent record and no prior similar history when correction by extended suspension was available.