C-32965

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: M. Jamison
)	
between)	Post Office: New Haven CT.
)	
The U.S. Postal Service)	Case Number: B11N-4B-D 17326130
)	
and)	Union Number: 1962016KIL
)	
The National Association of)	DRT Number: 14-389472
Letter Carriers, AFL-CIO)	
)	

Before: Donald J. Barrett, Arbitrator

Appearances:

For the U.S. Postal Service: Ms. Rebecca Peperni, Labor Relations Specialist

For the National Association of Letter Carriers: Mr. Vincent J. Mase, Esq.

Place of Hearing: Wallingford, CT & New Haven CT Postal Facilities

Date of Hearing: June 8 & 27, 2017

Award: This grievance is denied

Date of Award: July 5, 2017

AWARD SUMMARY

The Service argues that this grievance is untimely filed, and therefore not arbitrable, and because of such there can be no consideration, and decision on the merits.

I find that the Service prevails on the question of arbitrability. The Union was untimely filing a grievance(s) for the Notice of Removal issued to the grievant, pursuant to Article 15.2(a) & 15.3B of the Agreement. As such, without good cause shown the arbitrator is estopped from deciding any further merits associated with this matter.

STATEMENT OF PROCEEDINGS:

This matter was brought to an arbitration hearing held on June 8th, and June 27th 2017 pursuant to the provisions stated in the parties 2011-2016 National Agreement, or Contract, or Agreement between the US Postal Service, also known as the Service, or Management, and the National Association of Letter Carriers, also known as the Union.

The June 8th hearing was held at the Wallingford CT postal facility, and the June 27th continuation was held at the New Haven CT Post Office.

The parties to these hearing were afforded a fair, full, and objective opportunity to be heard, to present argument, evidence, exhibit(s), and testimony on behalf of their respective positions. The party(s) availed themselves fully in doing so at each hearing.

The parties exercised their opportunities to present witness(s), and at the request of both counsel each witness was duly sworn prior to offering their testimony.

The Service called the following witness(s):

Hon. Thomas H. Sullivan, Postmaster, New Haven, CT

Mr. Christopher Rodgers, Manager, Customer Services, New Haven, CT

Ms. Kelly Powell, Supervisor, Customer Services, New Haven, CT

Mr. William Ocasio, Supervisor, Customer Services, New Haven, CT

Ms. Elizabeth A. Urbani, (Acting) Supervisor, - City Carrier Assistant, New Haven, CT

The Union called the following witness:

Ms. Meagan Jamison, Grievant.

Ms. Patricia Johnson, Customer

Ms. Stephanie Cotton, Customer

The Service provided the arbitrator with an oral and written Opening & Closing Statement.

The Union provided the arbitrator with an oral Opening & Closing Statement.

At the conclusion of the June 27th hearing, counsel for the parties provided the following documents for consideration by the arbitrator.

The Service:

Two regional arbitration awards.

The Union: Eight regional arbitration awards.

Step B decision – Dunlop

M-39, Administration of City Delivery Service, 115.1 & 115.3

How Arbitration Works, Elkouri & Elkouri, Pages 673-674

JOINT EXHIBITS:

Joint 1 – The National Agreement, inclusive of the parties Joint Contract Administration Manual (J-CAM)

Joint 2 – The Moving Papers, Pages 1-90

MANAGEMENT EXHIBITS:

M-1, Arbitrator Cenci award, M. Jamison, March 31, 2017

M-2, Vehicle Utilization Report, August 23, 2016

M-3, TAC's report, August 23, 2016

M-4, Grievant pre-disciplinary interview notes (3 pages, inclusive of grievant's handwritten statement.

M-5, Suspension, 14 day no-time off, M. Jamison dated June 16, 2016

M-6, Statement of Mr. Calvin West, dated October 27. 2016

UNION EXHIBITS:

U-1, J-CAM, Article 15.3.B

U-2, Picture (Children on rear of postal vehicle)

U-3, K. Powell interview notes, dated February 22, 2017

U-4, E. Urbani interview notes, dated February 22, 2017

U-5, W. Ocasio interview notes, dated February 22, 2017

STIPULATED FACTS NOT IN DISPUTE BY THE PARTIES:

The parties at hearing stipulated that the subject picture was provided to Supervisor Ocasio by a friend, who remained unidentified throughout the grievance process.

(Mr. Ocasio identified the person at hearing)

ISSUE TO BE DECIDED BY THE ARBITRATOR:

"Did Management violate Article 16 and the just Cause provision when they issued the Grievant a Letter of Removal dated October 24, 2016. If so, what shall the remedy be?"

Note: This is the issue statement of the parties Step B Team

Further Note: The Service objected to the inclusion of the words, "and the Just Cause provision..." The arbitrator offered that Article 16 itself is inclusive of the "just cause" wording.

Further Note: The Service at hearing motioned that the matter before the arbitrator be Bi-ficated. The Service argues the arbitrability of this grievance is questionable as the Union filed the grievance in this matter beyond the time limits mandated in the party's Agreement, Article 15.2 (a)

The arbitrator denied the Service motion explaining that the risk of hearing only this motion's arguments and evidence alone, leaving the merits of the grievance to a separate time would incur additional costs, time, and burden on all the parties, therefore both issues of bifurcation and merits would be heard simultaneously.

BACKGROUND:

The grievant, a City Carrier Assistant was issued a Notice of Removal (NOR) dated October 24, 2016, charged with "Failure to Perform Your Duties in a Satisfactory Manner/Failure to Follow Instructions."

The grievant is alleged to have failed to operate her postal vehicle on August 23, 2016 in a safe manner by allowing four children to stand on the back of her postal vehicle while she was stopped in the middle of Stevens Street on August 23, 2016.

Further, it is alleged that the grievant, on August 30, 2016 failed to perform her duties in a safe manner, when walking her route that day, she failed to have her satchel and dog spray. The grievant suffered a dog bite this date, and supervisors investigating this incident offer that the grievant did not have this equipment on her person at the time of the encounter with the dog, and/or when they interviewed the grievant at the front home of a customer.

The Service maintains that the grievant had been previously directed to carry the satchel and dog spray.

The Union filed a grievance at "Informal Step A" dated December 28, 2016, and February 20, 2017 disputing the allegations,[1] the matter worked its way, in a somewhat conflicted manner between the parties through the grievance process, ultimately resulting in the matter being heard at arbitration. [2]

CONTRACT PROVISIONS CITED:

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, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, 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."[3]

[1] See Moving Papers, Pages 18 & 27
[2] See Moving Papers, Pages 18-42
[3] See Agreement, Page 79

THE POSITION OF THE PARTIES IN THIS MATTER:

The US Postal Service

The Service argues as a threshold issue that this grievance is untimely filed by the Union, and therefore lacks arbitrability.

That the subject Notice of Removal (NOR) was issued to the grievant dated October 24, 2016, and was not grieved until a PS Form 8190, Informal Step A was submitted to the Dispute Resolution Team on December 28, 2016, citing an incident date of December 1, 2016.

The Service maintains that Union steward West was aware of the NOR as early as October 27, 2016, and had been provided a copy of the NOR, therefore any argument by the Union to the contrary is moot, and therefore this grievance should be denied as untimely, and not arbitral.

Further, counsel argues regarding the merits that the Service has met its burden of proving just cause existed to remove the grievant for the charges cited in the NOR.

That the grievant was aware of her obligations to perform her duties safely, and to obey all rules and regulations – that the grievant had been issued a 14 day, no time off suspension previously related to her conduct, and that such discipline was upheld at arbitration.

The Service maintains further that on August 23, 2016, the grievant knowingly allowed four children to stand on the back of her postal vehicle while she was stopped in the middle of the street, and acknowledged such during her pre-disciplinary interview.[4]

The Service states that on August 30, 2016, the grievant was bitten by a dog while on her route, and as a result two supervisors immediately went to her route to investigate and found that the grievant did not have her satchel and/or dog spray on her person. That it was observed inside her vehicle. And that the grievant had been instructed in the past regarding keeping her satchel and dog spray with her.

The Service states further that they have proven just cause existed for the issuance of the NOR to the grievant, that it was timely issued after consideration of all relevant procedures, that it is progressive, and warrants such a conclusion to be denied in its entirety.

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[4] See M-4, Number 13

The National Association of Letter Carriers

The Union argues that the Service lacks any just cause to remove the grievant from her employment, and that they have failed to demonstrate the accuracy of any of their allegations.

The Union maintains that it is the Service that has been untimely in moving this grievance. That they have failed to notify the Union president of all personnel actions, failed to contact the Union to meet, and failed to abide by the remands issued by the Step B Team. That it is the Service who has failed in their obligation to meet with the Union, even after mandated to do so by the parties representatives at Step B.

The Union maintains further that at no time did anyone from Management at the informal, or formal A process state that this grievance is untimely, and to do so at arbitration must be disallowed.

Further, that the Service has failed to prove the grievant ever received the Notice of Removal, as the Express Mail slip fails to demonstrate the grievant's signature as a recipient. [5]

Counsel argues that regarding August 23rd, the grievant was called out by a customer on her route, and she pulled over in the street enough to let other vehicles through, left her vehicle to answer the customer's questions, and as she was returning to her vehicle, observed the kids jumping down from her vehicle, she yelled at them and they ran away.

That there is no evidence the vehicle was moving with children on it, or that the grievant was aware the children were on the back.

The Union strongly argues that the Service violated the grievant's right to due process by refusing to divulge who took the picture of the children on the back of the vehicle, or even when the picture was taken, and therefore this picture, and its resultant discipline must be discarded.[6]

The Union states that regarding the events of August 30, 2016, the Service has failed to offer any proof that the grievant did not have her satchel and dog spray on her at the time of the attack. That the two supervisors failed to even ask her if she had it, and did not question any witnesses.

The Union further states that unrefuted witness testimony from a customer who was present offers that the grievant had her satchel on her shoulder at the time of the attack, and used it to swing at the dog.

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[5] See Moving Papers, Page 56

[6] See Moving Papers, pages 59 & 60, and Union 2

The Union argues that there was no need for this hearing(s) as the charges are all unproven by the Service, that the Service failed to give the grievant her due process rights, and they failed to issue this discipline timely, and that they failed to meet their obligation, pursuant to the M-39 to ascertain all the facts before taking such serious actions.

The Union maintains that the entire case by Management is fraught with inaccuracies, unfairness, improprieties, half-truths, and violations of due process. That the Service had ample time to claim the grievance was untimely but failed to do so until arbitration, which must be ignored.

The Union asks that this grievance be sustained in favor of the grievant, that she be made whole, and restored to her prior position without delay.

FINDINGS & OPINION OF THE ARBITRATOR:

In life there is always a beginning. Sometimes the beginning is difficult to find, to start, or to acknowledge. Often the beginning can be misinterpreted, misunderstood or misapplied, but nonetheless, there is a beginning.

In the matter before me, I find after a thorough review of all the argument, evidence, submissions, and research that this grievance, in the final analysis rests on the beginning.

The Service issued the grievant a Notice of Removal (NOR) dated October 24, 2016.[7]

The record reflects the NOR was mailed/delivered to her last known address on October 25, 2016, with a "waiver of signature."[8]

While there is some conflict regarding the NOR being mailed/delivered on two different dates, October 26th and October 29th, this is of de minimis value.[9]

Testimony offered by the grievant at hearing established that she was no longer residing at the address due to a conflict of interests with the other parties residing there, and that she believed the other residents at this address were not inclined to notify her of any mail that was delivered for her at this former residence, nor did she ask anyone there if she had received mail.

The grievant acknowledged, under cross examination her obligation to notify the Service of any change of address should one occur, yet failed to do so.

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[7] See J-2, Pages 42-51
[8] See J-2, Page 56
[9] See J-2, Page 55

Under these fact circumstances, I believe the Service employed due diligence in their attempt to notify the grievant of the action they were taking.

Of particular relevance to this issue noted is that the grievant was, at that time in an emergency non-duty status and her obligation to leave open this form of communication between the Service and herself was especially important, and the failure to do so cannot be prudently held against the Service.

Returning to the beginning, the equally important issue is when did the Union first become aware, or "may reasonably have been expected to have learned...." of the NOR?

Article 15.2 (a) of the Agreement states in relevant part, "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.* This constitutes the Informal Step A filing date."

"The Union also may initiate a grievance at Informal Step A within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance."

This language outlines the beginning of the process available to the grievant, and the Union to file a grievance regarding action taken by the Service, in this case the NOR.

The record before me reflects the Informal Step A filing by the Union in this matter as December 28, 2016, with an incident date of December 1, 2016.[10]

There is yet another PS Form 8190, Informal Step A grievance filing related to the same NOR dated February 20, 2017, with an incident date of February 1, 2017.[11]

Further, there is much apparent confusion between the parties at Step B where the team members "remand" these two grievances back to the parties to meet at the lower levels of the process, which they apparently failed to do.

The Union, in the record before me, and through their very learned counsel at hearing argues that Management bears the burden to set up a meeting with the Union's president, in writing, and failed repeatedly to do so, therefore to meet the time limits of this grievance, he moved it to the next steps in the process.

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[10] See J-2, Page 27

[11] See J-2, Page 18

While one could easily apply that infamous movie statement, "What we have here is a failure to communicate"[12], I find despite that we must return to the beginning.

The Agreement states clearly, in the beginning and is amplified in the parties J-CAM that the grievant, or the Union has fourteen (14) days from the date they first learned, or may reasonably have been expected to learn, to file a grievance.

In a statement dated October 27, 2016 Union steward Calvin West acknowledges that "William Ocasio who *sent a notice of removal on October 24, 2016 to Meagan Jamison."*

The steward also acknowledges interviewing supervisor Ocasio on October 27th, and again mentions the "Notice of Removal." And again the steward mentions, on the second page that the Service waited twenty three days to send the grievant a "NOTICE OF REMOVAL on October 24, 2016..."[13]

It is clear from this document that Mr. West was acting in his capacity as an officially recognized Union Steward, pursuant to Article 17 of the Agreement. (REPRESENTATION)

The steward was clearly investigating the issues surrounding, and related to the notice of removal. He was unequivocally aware of the removal notice, however there is no evidence before me that implies, nor demonstrates he, or anyone else from the Union filed a grievance regarding this removal notice until the first PS Form 8190, Informal Step A was submitted dated December 28, 2016 – 62 days later than the stewards statement.

Further, unrefuted testimony was offered at hearing by manager Rodgers that he personally provided steward West with a copy of the subject Notice of Removal on October 25th.

While there is much confusion surrounding this grievance, one simply cannot ignore the beginning. When did the Union first become aware of the Notice of Removal, and when did they first file a grievance? There is no doubt as to the answers, as stated above.

While one can, and has argued that the Service must communicate with the president of the Union, and their failure to do so is responsible for the time associated with when they filed the grievance at Informal Step A, the fact remains that the steward is also the Union, and the primary role of a steward, pursuant to Article 17 is, "...for the purpose of investigating, presenting and adjusting grievances."[14]

The Service argues, through their very capable counsel that it is not their role to seek out a grievance, only to respond to one when filed, and I am in agreement.

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[12] Cool Hand Luke

[13] See M-6, West Statement

[14] See National Agreement, Page 83

Further, the Agreement, pursuant to Article 15.3 B states in relevant part that, "The failure of the employee or the Union in Informal Step A, 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. However, if the Employer fails to raise the issue of timeliness at Formal Step A, or the step at which the employee or Union failed to meet the prescribed time limits, *whichever is later*, such objection to the processing of the grievance is waived."[15]

In the instant matter, evidence establishes that the Service, having no grievance presented in the removal of the grievant during a lengthy period of time removed the grievant from the rolls. Therefore, they found no reason to meet with the Union during that time at any step because no grievance existed.

There is further evidence, confusing as it may be that after the December 28th filing of the Informal Step A grievance form, the Union still cited an incident date of December 1, 2016, well beyond the fourteen days cited to file such a grievance, that they were clearly aware of on October 27th, even if there be nothing else conflicting the grievance.

While Article 15.3 B details what constitutes a waiver of a grievance, I am convinced that the Union, by their failure to file a grievance in this removal timely did waive such a grievance.

Further, this article details that if, "the Employer fails to raise the issue of timeliness at Formal Step A, or at the step at which the employee or Union failed to meet the prescribed time limits, *whichever is later*, such objection....is waived."[16]

There is no evidence of any grievance to object to until the December 28, 2016 submission by the Union of the Informal Step A form, at which time the Step B Team remanded back to the parties because no file existed. I would submit that no file existed because no grievance had been filed until that date, long after the grievant had been removed from the rolls.

For whatever reason the parties did not meet again – I find such confusion throughout this process, inclusive of the Step B Team, that once again the Team remanded the February 20, 2017 Informal Step A form, with an entirely new incident date of February 1, 2017 instead of the appropriate date of October 24, 2016 back to the parties, and again they failed to meet, necessitating the final Step B Team impasse to arbitration.

Clearly there is complicity by both parties. It is apparent that the Union believed the Service had to take the first step, and the Service believed the matter waived.

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[15] See Agreement, Page 71-72

[16] See Agreement, Page 72

Based on all the evidence before me, I find that the Service did not raise the issue of timeliness at Formal Step A because there simply was not such, and that the Service did not raise the issue of timeliness until the team gave the parties an opportunity to provide sufficient information to make a valued decision, yet still no information was provided of sufficient worth, therefore the Team impassed this matter.

However, the Service did raise the issue of timeliness at the later time during this decision to impasse when the Service Team member recognized that the, "instant grievance took approximately 37 days to be processed from Informal A (in this case the date of incident) to Step B."[17]

Further, the Service's Step B Team member acknowledges the Union is untimely throughout the entire period when stated, "....that the grievance is by all means UNTIMELY FILED." Further, it states, "So what happened between 11/4/16 and 12/15/16 when the Union claims Management 'failed to meet' at Informal Step A? A whole month and 11 days went by before the Union made its next move."

I find that the time limits were not met by the Union at any of the steps of the grievance procedure, and at the time when the Service was formally given the opportunity to respond, they did raise the issue of the grievance being untimely. [18] I find this to meet the criteria outlined in Article 15.3B as it states, "or at the step at which the employee or Union failed to meet the prescribed time limits, *whichever is later.....*"

There is no doubt as to the conflict between the parties regarding the processing of this grievance, with little to be gained by responding to every slight or perception.

In the final analysis, the Union failed to file a timely grievance, and initially there was no acknowledgment because the grievant was long off the postal rolls, and no grievance had been filed, even though the Union was fully aware of the removal.

I can find no circumstances that the time limits imposed on the Union to file a grievance are unreasonable, or gave sufficient reason for pause.[19]

The court stated that, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.[20]

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[17] See J-2, Page 2

[18] See J-2, Page 4

[19] See Arbitrator Riker in 95 LA 393, 395

[20] See United Steelworkers v. Enterprise Wheel & Car Corp. 363 U.S. 593 LRRM 2423 (1960)

It also states that an award must draw its essence from the Agreement. I find that the time limits imposed on the parties in their Agreement are not ambiguous, or open to interpretation, and therefore absent any extenuating circumstances (none were offered) the arbitrator is constrained to interpret the time limits literally, without opportunity to modify such an interpretation.

Arbitrator Holly stated that, "where the contract between the parties provides for definite time limits in processing grievances, the arbitrator is bound to respect these limits, which have been imposed by the parties themselves by mutual agreement."[21]

All of which brings me back to the beginning, from which and throughout no grievance was timely filed, without good cause for such demonstrated. This is unfortunate, but simply cannot be viewed any other way.

I find the Service's argument that this grievance is not arbitral, based upon the findings above to be meritorious.

I am of the opinion that the Union represented the grievant well and good, but was unable to overcome the timeliness issue. The Service prevails on that issue alone.

I am also of the opinion that had this matter proceeded to the merits that the outcome very likely may have been different.

It is my final opinion that no one "wins" in such a situation as this. The parties to the grievance procedure, both sides, should reevaluate their opportunities to seek a newer, better way to communicate, and to be aware of each other's responsibilities. There is reason to do so sooner rather than later.

AWARD:

This grievance is denied.

Donald J. Barrett, Arbitrator

Date: July 5, 17

[21] See Robins Air Force Base, GA and AFGE, Local 987, 85 FLRR 2-1472 (1985)