

REGULAR ARBITRATION PANEL

C#09889

In the Matter of the Arbitration) GRIEVANT: J. L. Paden
)
 POST OFFICE: Branwood S.C.
)
 CASE NO:
UNITED STATES POSTAL SERVICE) USPS - E7N-2H-D 21126
)
 NALC - GTS-11582
and)
)
NATIONAL ASSOCIATION OF LETTER)
CARRIERS, AFL-CIO)
)

BEFORE: Carl F. Stoltenberg, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Carl J. Kelly

For the Union: Judson Vaughn

Place of Hearing: Greenville, South Carolina

Date of Hearing: November 2, 1989

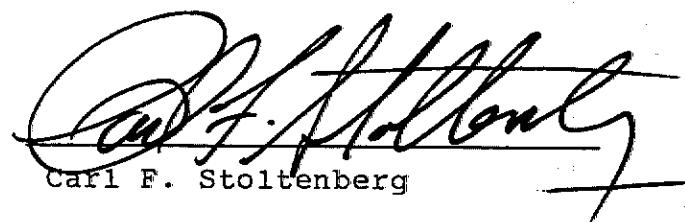
AWARD:

The grievance is arbitrable.

The Grievant's suspension is reduced to a thirty (30) day suspension. The Grievant is to receive back pay for earnings lost beyond the thirty day suspension period less any outside earnings acquired during that period of time.

Date of Award:

March 5, 1990


Carl F. Stoltenberg

ADMINISTRATION

By letter of October 10, 1989, the undersigned was notified of his selection by the Parties to hear and decide a matter then in dispute between them. A hearing went forward on November 2, 1989 where both Parties presented testimony, written evidence and arguments in support of their respective positions and where the Grievant appeared and testified in his own behalf. Post Hearing Briefs were duly filed and exchanged, whereupon the record was closed. The matter is now ready for final disposition.

GRIEVANCE AND QUESTION TO BE RESOLVED

On April 6, 1989 the following grievance (Joint Exhibit -2) was filed:

Facts: What happened On 2-3-89 Mr. Paden clocked out at 1716 hours. he then went back out on his route and finished delivering his mail because it was the third and he still had checks that needed to be delivered. He only did this because he was not given enough overtime to complete his route. It seems that everytime he asks for help he is harassed by his Supv. Ms. Posley.

UNION CONTENTIONS: Reasons for grievance Even though Mr. Paden admitted to all the charges that were brought against him, he only was trying the best he knew how to get the mail delivered. He was tired of the constant harassment he has to endure when he request overtime. To save another argument with his Supv. he took the mail and delivered it.

It is the unions contention that what Mr. Paden did is not just cause to fire him. The postal service has not followed principles of progressive discipline. The only elements of past discipline that Mr. Paden has in his record at this time have to do attendance. Elements 1-3 should not have been sighted in this charge because they have nothing to do with what took place on 3-3-89. Element 4 for attendance has been removed from record and is no longer sightable in this charge. In fact, it can no longer be used in any charge. Element 5 a 1-Day Suspension has also been removed from Mr. Padens records and is no longer sightable in this or anyother charge. Element 6 is over two years old and also not sightable in this charge.

What Mr. Paden did was wrong. He realizes he should't have been out on his route believering mail in his

jeep at that time. His misconduct in this needs to be brought to his attention. He knows that his behavior in situations like this will not be tolerated. His intent was not to break the rules but to get the mail delivered. What he did on this day was wrong but it is not an offense that warrants his dismissal.

To remove Mr. Paden for what he has been charged with would not be in the best interest of the postal service. First, the punishment asked for is penitive and not corrective. Second, none of the elements of past discipline have any direct bearing on this charge.

CORRECTIVE ACTION REQUEST: That Mr. Paden be given corrective action that would be more in line with what he has been charged with. A 7-day suspension is closer to what Mr. Paden did than a removal would be. (sic: Ronnie M. Vaughn)

The question to be resolved is whether or not just cause exists for the Grievant's ninety day suspension.

CITED PORTIONS OF THE AGREEMENT

The following portions of the Agreement (Joint Exhibit - 1) were cited:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance procedure--Steps

Step 2:

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in

cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

Step 3:

(b) The grievant shall be represented at the Employer's Regional Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any case where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. In such event, the parties' representatives at Step 2 shall meet within seven (7) days after the grievance is returned to Step 2. Thereafter, the time limits and procedures applicable to Step 2 grievances shall apply.

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.

ARTICLE 17
REPRESENTATION

Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

Section 2. Appointment of Stewards

A. Each Union signatory to this Agreement will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of each Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula hereinafter set forth.

Employees in the same craft per tour or station

Up to 49	1 steward
50 to 99	2 stewards
100 to 199	3 stewards
200 to 499	5 stewards
500 or more	5 stewards plus additional steward for each 100 employees

B. At an installation, a Union may designate in writing to the Employer one Union officer actively employed at that installation to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance. The activities of such Union officer shall be in lieu of a steward designated under the formula in Section 2. A and shall be in accordance with Section 3. Payment, when applicable, shall be in accordance with Section 4.

C. To provide steward service to installations with twenty or less craft employees where the Union has not certified a steward, a Union representative certified to the Employer in writing and compensated by the Union may perform the duties of a steward.

D. At the option of a Union, representatives not on the Employer's payroll shall be entitled to perform the functions of a steward or chief steward, provided such representatives are certified in writing to the Employer at the regional level and providing such representatives act in lieu of stewards designated under the provisions of 2.A or 2.B above.

E. A steward may be designated to represent more than one craft, or to act as a steward in a craft other than

his/her own, whenever the Union or Unions involved so agree, and notify the Employer in writing. Any steward designations across craft lines must be in accordance with the formula set forth in Section 2.A above.

FACTUAL BACKGROUND

The Grievant has been employed by the United States Postal Service for some nineteen years and is classified as a lettercarrier at the Branwood Branch of the Greenville, South Carolina Post Office. The Grievant's route entails some seven hundred stops and it is normally set up for 6.25 feet of trayed mail. On March 3, 1989 he had some 7 feet of trayed mail to deliver which consisted mainly of catalogs, first class mail, letter mail and social security checks.

The Grievant requested two hours of overtime in order to deliver the extra .75 feet of mail. His Supervisor, however, determined that he would only require one hour for the extra .75 feet, but instead she provided one and one-half hours of overtime. The Grievant worked his shift and the scheduled one and one-half hours of overtime without delivering all of his mail. He then returned to the Post Office, punched out and returned to his route in the Postal vehicle and continued to deliver mail. At some point after 7:00 p.m. the Grievant returned to the Station and locked his jeep with undelivered mail still remaining inside of it. He then placed his keys and a COD slip into a drop box.

On the next day the Supervisor of Delivery received a note from the Check-in Clerk that the Grievant had not checked in. The Supervisor noted that the Grievant's jeep was parked in the lot and

upon investigation she observed undelivered mail in the Grievant's jeep. Around 7:00 a.m. the Grievant reported to the Post Office and requested sick leave. The Supervisor requested that the Grievant unlock his jeep for cleaning. Shortly thereafter she observed the Grievant pushing a 1033 from the jeep to the Station with mail in it. The 1033 contained both first and second class mail that had not been delivered. The Supervisor began to receive phone calls that mail had been delivered after 5:45 p.m. up to 7:00 p.m. by the Grievant. The Grievant admitted delivering the mail at night. The Supervisor then requested that disciplinary action be taken against the Grievant.

On April 12, 1989 the Grievant received a "Letter of Decision" informing him of his termination. The basis for his removal was for (1) Performing work off the clock without permission, (2) Unauthorized use of vehicle, (3) Unauthorized use of overtime and (4) Failure to unload vehicle and return vehicle keys to account clerk. A grievance was subsequently filed and during the processing of the grievance, Management reduced the discharge to a ninety day suspension. When the Parties could not agree on the Grievant's penalty the matter was processed to arbitration hereunder.

CONTENTIONS OF THE PARTIES

POSTAL SERVICE CONTENTIONS

The Postal Service contends that the grievance is procedurally infirm inasmuch as the grievance was filed by the Local President who was not properly certified in accordance with Article 17 of the

Agreement. Moreover, it argues that its failure to raise this argument prior to the arbitration hearing does not estopp Management from raising such argument during the arbitration hearing. The Postal Service cites several Arbitrators who have held that failure to raise an arbitrability argument does not bar that argument from the arbitration process.

Turning to the merits of the case, the Postal Service contends that when the Grievant's actions are taken together with the elements in his past disciplinary record, just cause exists for the ninety day suspension. The elements of the Grievant's past record relied upon by the Postal Service are:

In addition the following elements os your past record have been considered in arriving at this decision: (sic)

1. You were issued a 7-day suspension dated January 30, 1989, reduced to 3-days for being AWOL.
2. You were issued a 7-day suspension dated December 15, 1988 reduced to a Letter of Warning for being AWOL.
3. You were issued a Letter of Waring dated November 1, 1988 for Failure to Maintain Regular Attendance.
4. You were issued a Letter of Warning dated June 30, 1987 for Failure to Maintain Regular Attendance.
5. You were issued a 7-Day Suspension dated February 9, 1987 reduced to 1-Day Suspension for Failure to Follow Instructions/Unauthorized Overtime.
6. You were issued a Letter of Warning dated December 11, 1986 for Failure to Follow Instructions/Unauthorized Overtime.

The Postal Service also argues that Article 15.2, Step 1 (d) requires, inter alia, that the Union stated the "remedy sought" when processing a grievance. It notes that in Step 2 the Union makes no specific request as to back wages and it maintains that the "make the Grievant

"whole" statement in Step 3 neither requests back wages upon reinstatement nor does it comply with the Step 2 contractual requirements. The Postal Service concludes that if any portion of the grievance is granted it must be found that the Union by omission has waived any back pay entitlement.

UNION CONTENTIONS

The Union contends that the issue of arbitrability cannot be raised unless it was raised prior to arbitration. It argues that allowing an arbitrability argument to initially be introduced during the arbitration process would violate the full disclosure requirements of Article 15, Section 2, Step 2 (d) of the Agreement.

Turning to the merits of the dispute the Union contends that just cause does not exist to support a ninety day suspension. It argues that the Supervisor was unreasonable when she only provided 1-1/2 hours of overtime when the Grievant had requested 2 hours in the face of the fact of the additional mail that the Grievant was required to deliver and inasmuch as he had no authorization to curtail the mail. It submits that the past disciplinary elements introduced by the Postal Service can be given no weight inasmuch as they were not related to the present charges against the Grievant. The Union charges that the discipline at hand is punitive and not corrective. It maintains that the proper discipline in the normal process of progressive discipline would be seven days. In this connection the Union requests that the ninety day suspension be reduced to a seven day suspension.

DISCUSSION AND FINDINGS

The Agreement at Article 15, Section 2, Step 2 (d) provides in pertinent part that:

...The Employer representative shall also
make a full and detailed statement of facts
and contractual provisions relied upon...
(emphasis added)

While the Union may have violated Article 17 when a uncertified Local President filed the instant grievance, Management sat on its rights when it failed to raise this issue prior to the instant hearing. Controlling here is the express language of Article 15, Section 2, Step 2 (d) of the Agreement, supra, which serves as a contractual bar to expansion of the declared "statement of facts and contractual provisions relied upon" by Management. Moreover, the record indicates that the Grievant's Supervisor was aware of the Article 17 requirement, however, she never raised the issue with either the Local President or the Grievant at any of the grievance procedure steps. By not raising the procedural question with the Grievant at the outset rather than waiting until arbitration, Management denied the Grievant of any opportunity to refile his grievance properly. By waiting until arbitration, Management efficiently engineered, knowingly or unknowingly, a "gotcha" - the precise impact that Article 15, Section 2, Step 2(d) attempts to avoid. Inasmuch as Management did not include arbitrability in its statement of facts and contractual provision - it is now barred from raising arbitrability as a surprise argument.

Turning then to the merits of the case there is no factual dispute as to the Grievant's action or the impropriety attaching thereto. The Union argues that the Supervisor was unreasonable

in only providing the Grievant with 1-1/2 hours of overtime in the face of his request for 2 hours of overtime. This is just 30 minutes short of the Grievant's request. The record reveals that the Grievant worked the 1-1/2 hours of overtime, returned to the Station at 5:00 p.m., punched out and returned to his route and worked to some point beyond 7:00 p.m. Significantly, this is some two hours of work in addition to the 1-1/2 hours of overtime provided to him for a total of some three and one-half hours beyond his normal work day to deliver an increase of less than one seventh of his normal tray footage. Critically, even with this additional time the Grievant still returned to the Post Office with undelivered mail. It simply does not follow that an increase of .75 feet of trayed mail would require an increased work day within an approximation of a 30% expansion. There simply exists no basis for a finding that the Grievant's Supervisor acted in an unreasonable manner.

While on its face it might appear to be a noble act that the Grievant went out on his own time to deliver mail, it cannot be ascertained that he was in fact on his route delivering mail throughout the entirety of his regular tour. It simply strains the bounds of logic to accept that a lettercarrier of the Grievant's experience would not have called in from his route for assistance if in fact he did not have sufficient time to deliver his mail, if in fact he was on his route.

The Grievant is charged with performing work off the clock without permission, unauthorized use of vehicle, unauthorized use of overtime and failure to unload vehicle and return vehicle keys to accountable clerk. Of these four charges only the use of

unauthorized overtime was not fully supported as there was no evidence adduced that the Grievant requested overtime beyond the one and one-half hours originally awarded by his Supervisor. While the Union argues that the Grievant's prior discipline should not be considered as it is not of the same nature as the charges at hand, it must be found that even standing alone, the Grievant's actions of March 3, 1989 warrants severe discipline. However, at the same time it must also be found that the ninety day suspension is simply too severe as the Grievant's record shows no prior discipline for such gross misuse of time. Accordingly, the Grievant's suspension is reduced to a thirty (30) day disciplinary suspension.

The Postal Service argues that Step 1, (2) and Step 3 of the grievance procedure requires that the Union state on the grievance form the relief sought. It concludes that inasmuch as back pay is not mentioned in either Step 1 or 2 of the grievance form, no back pay can be awarded. Over and against this argument is the language of Step 3 (b) of the grievance procedure where it provides in pertinent part that:

...Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered...

It must be observed that the grievance form for the appeal to Step 3 states, under the "Corrective Action Requests", in pertinent part that:

...That the carrier be made whole.

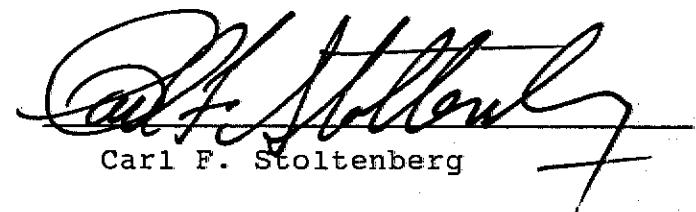
As such it must be found that the matter of back pay was properly addressed and requested during the course of the grievance processing. Management's argument is rejected.

Based on all of the foregoing, the grievance is found to be arbitrable. While the grievance was not properly initiated it was processed through the Steps of the grievance procedure without challenge by Management. As such, it must be found that Management's failure to make full disclosure of the arbitrability issue until the arbitration hearing violated Article 15, Section 2, Step 2(d) of the Agreement. Accordingly, the grievance is found to be arbitrable. On the merits of the dispute it must be found that while the Grievant's actions warrant a severe penalty, the ninety day suspension is too severe. Accordingly, the ninety day suspension is reduced to a thirty day suspension. The Grievant is to be provided back pay for all days of suspension beyond thirty days less any outside earnings he may have had during the period beyond the thirty day suspension.

A W A R D

The grievance is arbitrable.

The Grievant's suspension is reduced to a thirty (30) day suspension. The Grievant is to receive back pay for earnings lost beyond the thirty day suspension period less any outside earnings acquired during that period of time.



Carl F. Stoltenberg

March 5, 1990

Pittsburgh, Pennsylvania