

C#10115

A,B

BEFORE THOMAS F. LEVAK, ARBITRATOR  
REGULAR WESTERN REGIONAL PANEL

In the Matter of the Arbitration  
Between:

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

U. S. POSTAL SERVICE  
THE "SERVICE"

(Bakersfield, CA.)

ARBITRATOR'S INTERIM  
AWARD REGARDING DENIAL  
OF OPPORTUNITY TO  
INTERVIEW POSTAL  
INSPECTOR

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

(E. Gifford, Grievant)

These matters came for hearing before the Arbitrator at 9:00 a.m., October 20, 1987 at the offices of the Service, Bakersfield, California. The Service was represented by Jane Main. The Union was represented by Dale Hart. The Grievant appeared throughout the proceedings.

These combined cases concern an indefinite suspension, an emergency procedure and two removal actions initiated against the Grievant in January 1987 for mistreatment of mail and for the making of a false claim for compensation. Those actions were taken by Bakersfield, California management in reliance upon an investigation by the Postal Inspection Service, and specifically by the Investigative Memorandum of Postal Inspector Charles Raymond. Service management did not conduct an independent investigation of facts.

At the commencement of the arbitration hearing, the Service did not make an opening statement. The Union, as part of its opening statement, stated that it would object to receipt into evidence of any testimony by the Postal Inspectors and their investigative memorandum on the ground that the Union had sought throughout the grievance procedure and even subsequent to the Step 3 decision, but was refused, the right to interview Raymond and the other Postal Inspector involved in the case.

As the hearing proceeded, certain testimony and evidence were received on the merits. When Postal Inspector Raymond was called by the Service as a witness, the Union restated its objection. It also offered into evidence a decision of Regional arbitrator Joseph F. Gentile in Case No. W4N-5E-C 34020, dated May 23, 1987 (the "Gentile decision"), a Step 4 decision letter involving Springfield, Massachusetts in Case No. N8-N-0224, dated March 10, 1981 (the "4th Step decision") and post-Step 3 letters

from Dale Hart to James C. Williams, dated June 4, 1987 and June 11, 1987, in which the Union made reference to the Gentile decision and the 4th Step decision. Based upon the Gentile decision and the 4th Step decision, the Union asked the Arbitrator to sustain its objection and also to award backpay to the Grievant from the date of the emergency suspension, January 8, 1987 until the date of the arbitration hearing.

The Arbitrator then heard the arguments of the Service in opposition to the objection. In the interest of fairness, the Arbitrator allowed the Service advocate a recess so that she would be able to confer with her Regional Office. Following the recess, the Arbitrator heard further arguments from the parties.

At the conclusion of those arguments, the Arbitrator advised the parties that the Union's objection was well-taken, at least in part. The Arbitrator informed the parties that the Service was to arrange for an interview by the Union of the two Postal Inspectors in the presence of Service representatives prior to the continuation of the hearing; that the Arbitrator would retain jurisdiction of these cases in order to avoid any delay in the processing of the Grievant's case; that the Arbitrator would take the Union's request for backpay under advisement; and that the Arbitrator would make a final ruling on the Union's objection and memorialize his ruling in an interim award.

Upon due consideration and reflection, the Arbitrator has determined the following:

First, the Arbitrator agrees with the analysis and conclusions of arbitrator Gentile. The Service's failure to accord the Grievant the right to interview the two Postal Inspectors prior to the Step 2 meeting constituted violations of National Agreement Articles 15.2, Step 2(d), 17.3 and 31.2. Postal Inspectors constitute witnesses within the meaning of Article 17.3 whenever oral or written statements of a Postal Inspector are relied upon by management, in whole or in part, in reaching a disciplinary decision.

Since, in criminally-related cases, the Service ordinarily is entitled to utilize Postal Inspectors as their investigative agents, and is not obligated under due process considerations to conduct a separate, independent investigation, it necessarily follows that the Union is entitled to interview those investigative agents during the grievance process. Absent such a right, the Union would be left with nothing but a written investigative memorandum itself and a managerial disclaimer that, "I just relied on the investigative memorandum."

It goes without saying that an investigative memorandum will never contain all of the observations and events discovered by the investigator, and that observations and events - and the manner in which such were observed or not observed - may be crucial to the Union's defense. The Union is entitled to question

the Postal Inspectors on all their observations and also on the manner in which their surveillance was conducted, in order to determine whether it can be considered reliable.

Second, the Arbitrator agrees with arbitrator Gentile that the evidence at issue in this case should not be excluded. However, the Union must be allowed a reasonable time to analyze and weigh the facts that it uncovers during its interview of the Postal Inspectors prior to proceeding further on this case. Therefore, the only appropriate remedy, in light of the serious breach by the Service of the Union's National Agreement discovery rights, is the award of retroactive pay to the Grievant from the date of the emergency suspension to the date of the arbitration hearing.

Finally, while the matter was not raised in argument by the Service, the Arbitrator is cognizant of the fact that a separate contract grievance has been filed by the Union and is awaiting arbitration. In the Gentile case, the contract case and the removal case were combined. Such is the normal course of events in non-Service arbitration proceedings. The Arbitrator is uncertain why all cases of this nature involving inextricably involved contract and discipline issues are not combined by the parties as a matter of course, or, at the least, why the contract case is not scheduled for arbitration before the discipline case. It makes no sense, practically or procedurally, to separate such cases on the ground that the Arbitrator hearing the discipline case is not a member of the contract panel. In any event, the Arbitrator wishes the record to reflect that his decision relates only to the proper disposition of the Union's objection, and should not be construed as an attempt to interfere with the contract grievance process or with the jurisdiction of the arbitrator ultimately assigned to the contract case.

#### INTERIM AWARD

The Service violated the National Agreement when the Union was denied the right to interview the Postal Inspectors involved in this case. Therefore, the Union's objection is sustained to the following extent.

The hearing is in recess to allow sufficient time for the Union to interview those Postal Inspectors and to analyze its findings, with the Arbitrator retaining jurisdiction of this case on the merits, and with the hearing to be reconvened on Tuesday, December 1, 1987. It is the Service's affirmative responsibility to arrange for those interviews.

The Grievant forthwith shall be paid back pay for the period of January 8, 1987 through October 20, 1987, less money earned elsewhere, for the reasons stated above. This interim award is final and is not subject to further argument or reconsideration.

DATED this 18 day of October, 1987.



Thomas F. Levak, Arbitrator.