

REGULAR ARBITRATION

IN the Matter of the Arbitration) GRIEVANT: R. Thompson
 BETWEEN) POST OFFICE: Milford, Ct.
 UNITED STATES POSTAL SERVICE) CASE No.: B16N-4B-D 18038930
 and) DRT No.: 14-418031
 NATIONAL ASSOCIATION OF LETTER CARRIERS) UNION No.: 17Z1388D

BEFORE: DONALD J. BARRETT, ARBITRATOR

APPEARANCES:

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

For the Union: Mr. Charles Page, Pres. Ct. State Association

Place of Hearing: Milford Ct. Post Office

Date of Hearing: April 13, 2018

AWARD: This grievance is sustained

Date of Award: April 17, 2018

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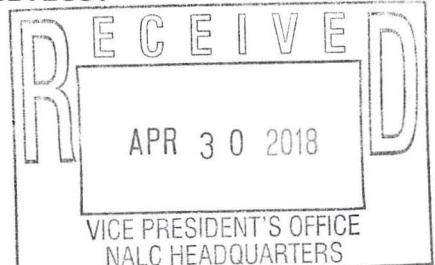
APR 23 2018

John J. Casciano, NBA
NALC-New England Region

Award Summary

After a careful review of all relevant facts in this matter, the arbitrator finds that the Service lacked just cause to remove the grievant.

The removal notice was flawed, the request for discipline appeared to lack independence, and the case in chief was lacking relevant documentation to support the position taken by the Service.





Arbitrator

2.

STATEMENT OF PROCEEDINGS:

This grievance was brought to hearing pursuant to the provisions of the parties 2011-2016 National Agreement, also known as the Agreement, or Contract.

The hearing in this matter was held on April 13, 2018 at the Milford Ct. Post Office between the U.S. Postal Service, also known as the Service, or Management, and the National Association of Letter Carriers, also known as the Union.

Counsel for the parties were fully prepared, professional, and articulate throughout the hearing. I thank them for their efforts.

The parties were afforded the opportunity to present argument, evidence, and witnesses on behalf of their respective positions, to which they fully availed themselves. At the request of the parties, each witness was duly sworn an oath prior to offering their testimony.

The **Service** presented the following witnesses:

Mr. James J. Bickford, Supervisor, Customer Services, Milford Ct.

Ms. Jeanette Sherrod, Officer in Charge, Milford Ct. Post Office

The **Union** presented the following witnesses:

Mr. Alfred Curry, Steward, Milford Ct.

Mr. Anthony Constantinople, Steward, Certified Trainer at Milford¹

The Service and Union provided written and oral **Opening Statements**, and oral **Closing Statements**.

JOINT EXHIBITS:

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

Joint 2 - Moving Papers (The File), Pages 1-47

¹ Due to unforeseen circumstances, this witness testified telephonically. The parties were in agreement to this arrangement, and the arbitrator offered no objection but did note the disadvantages to a witness not being in the hearing room.

Service Exhibit:

Service 1 - Last Chance Agreement Template (5 pages)

Union Exhibit:

Union 1 - J-CAM, Page 16.3 (Examples of Behavior)

STIPULATED FACTS NOT IN DISPUTE BY THE PARTIES:

The parties agreed that the Union was no longer raising the issue of concurrence as it did in the moving papers, without waiving their right to do so at hearing.

ISSUE TO BE DECIDED BY THIS ARBITRATOR:

The parties agreed that the Step B Team's issue statement would serve as the issue to be decided.

"Did Management violate Article 16 of the National Agreement and have Just Cause when issuing a Notice of Removal to the grievant? If not, what then should the remedy be?

BACKGROUND:

The grievant was issued a Notice of Removal (NOR) dated November 16, 2017, and charged with "Failure To Perform Your Duties In A Satisfactory Manner."

It was stated that the grievant, on October 26, 2017 scanned six packages for delivery on the route (Route 6039) that he was covering this date as delivered when in fact he returned the packages to the post office, and failed to notify Management that he had returned these packages. This provided false information to the customers of the six packages, and delayed delivery.

The grievant also has prior discipline listed as one seven (7) day suspension, and two (2) fourteen (14) day suspensions.

CONTRACT PROVISION(S) 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 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."

POSITION OF THE PARTIES IN THIS MATTER:

The US Postal Service

The Service maintains that there is no dispute the grievant improperly scanned six packages as delivered on October 26, 2017 and returned those same packages to the post office, failing to notify Management that he did so. That only when the regular letter carrier for route 6039 discovered these packages the next work day did it come to the Service's attention.

The grievant's intentional failure to properly scan, deliver, and/or inform Management that he had returned these packages directly impacts the service standards, and the customer's erroneous information that the package has been delivered, when in fact it has not.

That the grievant was provided the opportunity to respond to his actions during a pre-disciplinary interview (PDI), and stated that, "I just scan them delivered because I didn't know where to go", and "I do my job most of the time."

The Service argues that the grievant has been repeatedly trained on the proper way to scan deliverable, and non-deliverable mail, has received discussions, counseling by Management, and the Union yet still fails to perform his duties satisfactorily.

The Service offers that there is just cause, they have met their burden of proof, and asks that this grievance be denied in its entirety.

The National Association of Letter Carriers

The Union maintains that Just Cause does not exist, and certainly not removal.

That the grievant has not been properly trained, or informed how to handle returned parcels. That he has not been forewarned about not following these very procedures he is accused of violating.

The Union maintains further that Management has falsely accused the grievant of delaying six packages, yet can only account for four packages. That Management failed to conduct a thorough investigation, even failing to ask the grievant pertinent questions during the pre-disciplinary interview. And that Management failed to consider the grievant's written response before issuing the NOR.

The Union argues that parcels are mis-scanned daily at the Milford Post Office, yet only the grievant is being held accountable. That the Service is well aware the grievant suffers from PTSD yet gave that no consideration before quickly issuing the Notice of Removal.

The Union argues further that the Service has failed to meet their burden of proof, that they violated the tenants of just cause, and that this grievance should be sustained in favor of the grievant, and the remedy granted in full.

FINDINGS AND OPINION OF THIS ARBITRATOR:

Sir Francis Bacon (1561-1626) once said, "If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts he shall end in certainties."

The Service presents a compelling argument through its very able advocate, and the case in chief. It certainly appeared, without doubt to be a disciplinary action taken for good cause, with the elements of just cause applied appropriately.

However, the arbitrator has an obligation, borne through the contract, and his fidelity to the parties, as well as his fiduciary duty to the role entrusted to him, or her.

In the instant matter before me, it appears that on October 26, 2017 the grievant did return to the post office packages that were meant for delivery.

However, this is where the road diverts into differing versions of events, requiring the arbitrator to rightfully view each argument, and submitted evidence with certainty, and attempt to eliminate the doubt.

The Service maintains throughout the case file, and more importantly in the Notice of Removal issued to the grievant on November 16, 2017 that, "...6 (Six) of these packages were falsely scanned by you as delivered."

The Union maintains that there is no evidence that the subject packages were scanned as "delivered", but insists that they were scanned as "no access" in error.

The Service argues that the grievant failed to notify Management of the returned packages upon his return to the post office on October 26th.

The Union argues that the grievant did in fact notify Supervisor's Franko and Kelley that he returned the packages.

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The Service maintains further that the grievant has received training on the proper use of the scanner, and what to do if a piece was undeliverable. That the grievant has received this training from Management, and the Union.

The Union maintains that the grievant has not received such training by either party. That the scanners the grievant was trained on originally was the older version used in another post office the grievant previously worked, than the newer ones used in the Milford office.

The Service argues that inappropriate scans are a problem with the grievant, while the Union argues that it is a persistent problem by others in the Milford office.

Where does doubt leave, and certainty arrive? As is often the case with various versions of events, offered by people directly involved in the same events, truth is presented with varying degrees of certainty from those same people. Often no one is untruthful, but only sees the events from their own point of view. This usually leads to the employment of an arbitrator.

The Service presented two very sincere, and capable witnesses. I have no doubt whatsoever as to their dedication to their responsibilities.

The Union's witnesses were no less credible, and sincere, and did not appear to have an acrimonious relationship with Management.

The grievant appeared to be a very sincere, and passionate young man.

My impression, brief as it was is that he does have some degree of difficulty regarding the full duties associated with the city letter carrier position, yet tries hard to adapt.

When all the parties appear sincere, the facts can always be found throughout the entire case file, and the witness testimony.

The Service has the accepted burden to prove that the terms of just cause have been met in order to prevail. This provision is recognized in Article 16 of the Agreement, as well as in their Joint Contract Administration Manual (J-CAM).

The J-CAM states that "Just Cause" is a "term of art" created by labor arbitrators. It has no precise definition."²

The basic elements of just cause that most arbitrator's, and practitioners of labor-management relations refer to were first reduced by Arbitrator Carroll Daugherty in 1966.

² See J-CAM, Page 16.1

Arbitrator Daugherty reduced these elements to seven (7) tests, in the form of questions that have been relied upon by the parties. These questions are referred to in the parties J-CAM as six sub questions. The parties apply this criteria through the following language.

"These criteria are the *basic* considerations that the supervisor must use before initiating disciplinary action."³

The Service argues that have fully considered these questions before issuing the subject discipline, while the Union argues that they have not.

The first question for consideration is, "**Is there a rule?**"

Clearly there is a rule that all employees are expected to perform their assigned duties in a satisfactory manner. The Employee and Labor Relations Manual, Section 665.13 Discharge of Duties states that, "Employees are expected to discharge their assigned duties conscientiously and effectively." To do anything less may lead to the loss of business, revenue, and customer support.

The J-CAM also asks, "**Was the employee forewarned of the disciplinary consequences for failure to follow the rule?**"⁴

The Service maintains that the grievant, because of the prior discipline issued to him and the training given to him fully understood what the consequences could be for a failure to properly scan deliverable, and non-deliverable mail, and what to do if you return mail to the office. The Union disagrees.

While the grievant has received prior discipline for "unsatisfactory performance", the only reference offered that it may be directly related to scanning parcels is a statement in the file from Supervisor Kelly from October 23, 2017.⁵ However, this reference is not related to the dates cited on the grievant's prior discipline, and absent any other evidence it is unclear what the grievant's "Failure to follow instructions" is related to, and therefore cannot be used to support a finding that the grievant because of prior discipline was aware of a rule regarding scanning mails, or returning such to the office.

The Service counters that they have trained him on the proper procedures, and also used their certified trainer in this regard. However, the certified trainer during his offered testimony denies being told to train the grievant on the scanners used at the Milford office.

³ See J-CAM, Page 16.1, Just Cause Principle

⁴ See J-CAM, Page 16.1 Is there a rule?

⁵ See J-2, Page 42

Another question from the tests is, "**Is the rule a reasonable rule?**"

There is no dispute offered that serves to undermine this question.

"Is the rule consistently and equitably enforced?"

Here we have another disagreement between the parties. The Service, through local Management offers that the grievant has had issues with properly scanning packages in the past, and that other than the grievant it is not an issue in the Milford Post Office.

However, both Union stewards, one of which is the office's certified trainer offered that missed, or improper scans are a problem in the office shared by many letter carriers, and is not limited to the grievant, yet only the grievant has been disciplined.

"Was a thorough investigation completed?"

A relevant part of this question as stated in the parties J-CAM is the following: "Management must ensure that its investigation is thorough and objective."

The Service argues that the grievant was given his "day in court" and through his answers did acknowledge his failure to properly scan the packages. The Union disagrees.

The supervisor who conducted this pre-disciplinary interview (PDI) testified that he asked five (5) questions of the grievant. This was confirmed by the Union steward present during the PDI.

However, a disagreement between these two parties is that while the supervisor states that he accurately wrote down the grievant's responses to the five questions, the grievant, and the steward disagree that these were his answers.⁶

Both offer that the grievant informed the supervisor that he scanned the packages as "no access", and had informed Management of this when he returned to the office on October 26th.⁷

"Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as the seriousness of the employee's past record?"

There can be no doubt that failures such as outlined in the subject NOR are very serious, and negatively impact the Service's mission.

Added to the seriousness of such failures is prior discipline that together may sustain the imposition of such discipline.

⁶ See J-2, Page 46

⁷ See J-2, Page 21, and hearing testimony.

However, for this question to be answered affirmatively, one must be assured with clear, and convincing evidence that the charged infraction did take place as outlined.

"Was the disciplinary action taken in a timely manner?"

There is no dispute offered by the parties to this question.

The parties add that discipline be corrective, rather than punitive.

I would suspect that the issuance of any discipline to any employee would be considered punishment. It likely could not be considered rewarding, however that does not diminish Management's right to discipline when warranted, and fully supported by the facts.

The umbrella over all of the tests of just cause is the doctrine of due process. This is a concept normally associated with criminal proceedings, however arbitrators most often take the position that the employer must observe certain basic standards of fairness when dealing with their employees. This is known as the industrial version of due process.⁸

Of concern to this arbitrator as it relates to the fairness of the Service's investigation, and implementation of the subject discipline before me starts with the reliance upon documentation to support their charge that the grievant scanned six (6) packages as delivered, yet returned them to the office on October 26, 2017.

The NOR states specifically there were six packages⁹, and the file offers support of this charge with "Product Tracking & Reporting" reports.¹⁰ However, these reports do not detail how they were scanned, and the second page of each day's report is not included.

The Service's witnesses offer that they pulled up the full report on the following work day, and read the inappropriate scan but could not offer why it was not a part of the case file, nor why it was not provided to the Union upon their request for such reports throughout the grievance process.

The Service witnesses offer that this second page demonstrated the incorrect scans for the packages and should be believed as such.

Faith is an important part of life, and sustains us daily, however in judicial, as well as industrial arbitration faith cannot be applied blindly. It is the evidentiary facts that must be applied faithfully.

⁸ See Flintkote Co. 59 LA 329, 330 (1970) Just Cause, The Seven Tests, Koven & Smith BNA

⁹ See J-2, Page 14

¹⁰ See J-2, Pages 27-30

The Service also charged the grievant with six packages falsely scanned on October 26th but the file, through the "Product Tracking & Reporting" reports only references four (4) packages.

Further, at hearing Management acknowledged that it was four packages shown on the report as "delivered", not the six as charged.

Another issue of concern is the fairness of the investigation. Article 16.8 of the Agreement states in relevant part, "In no case may a supervisor impose discipline 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."¹¹

While there is no question the installation head concurred in this action, what is troubling is the very strong impression that the supervisor played a secondary role in this disciplinary action, and the Officer in Charge, the installation head took the lead in proposing this discipline.

In response to examination during the hearing, this witness acknowledged that she wrote the proposal to discipline the grievant, and the supervisor only signed it.

The arbitrator urged the Service to recall the supervisor to obtain further clarification of this information. The supervisor acknowledged that the OIC did write it, because, "she wrote it out for me - she is a better writer." He did acknowledge again that it was his decision.¹²

This document, which asks if an "independent investigation" occurred leaves an impression as it is written by the concurring official, and not the proposing official that it was not "independent" at all, that the higher level Management official may have been the initiator.¹³

While management's officials denied this was the case, even a simple impression that the grievant's due process rights have been impacted will give the impression of prejudice toward the grievant's rights, and the process as a whole.

As Arbitrator Marlatt stated, "The essential question for an arbitrator is not whether disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair.

¹¹ At hearing the Union withdrew any previous argument that this disciplinary action was not concurred in by the installation head.

¹² The Union passionately objected to the supervisor being recalled. The arbitrator considered their objection but in the interest of full disclosure allowed the testimony.

¹³ See J-2, Page 47

The arbitrator must find in order to overturn the employer's action on procedural grounds, that there was at least a possibility, however remote, that the procedural error may have deprived the grievant a fair consideration of his case."¹⁴

The Service, I believe has legitimate concerns regarding the grievant's performance of his daily duties as a city letter carrier.

However those shared concerns cannot be used as a reason to overlook what I also believe to be violations of the grievant's due process rights. Those rights directly flow from the collective bargaining agreement, and an injustice toward one is an injustice toward all.

The Service relies upon charges of six falsely scanned packages but only accounts for four.

The Service offers that proof of this misdeed is contained on the second page of the "tracking report", and that they pulled up the first and second page the following work morning after being informed by the regular letter carrier, yet after many months of the grievance process failed to enter this very important evidence into the record, and at hearing relied only on faith in their recounting. Such applies in church but cannot be relied upon in arbitration, particularly when the subject discipline is a removal action.

The Service offers that they employed the Union, and the certified trainer to assist the grievant with the proper utilization of the scanner's used at Milford, yet the Union, and the trainer offer that they were never asked to assist the grievant regarding the scanners, only other performance, and attendance issues.

The Service offers that they "trained" the grievant in the proper procedures for using the scanner, and returning undeliverable mail. I have no reason to doubt the sincerity of this information offered by the supervisor and Officer in Charge. However, when such information is disputed, only direct evidence will overcome blind faith, and there is no evidence at hand of reported service talks, or training records to substantiate this disputed offerings.

Lastly, the impression that the OIC was the driving force behind the grievant's Notice of Removal because she literally wrote the entire review and concurrence form, and the supervisor had only to sign it, even done sincerely, and without any malice whatsoever leaves, even remotely the impression that the grievant was given less than his full due process rights, and anything less than that is a denial of due process.

¹⁴ See Cameron Iron Works, 73 LA 878 (1979)

12.

Arbitrators will normally apply a "reasonable person" standard in determining if just cause exists, and/or if the penalty is warranted, excessive, or improperly issued. What would a reasonable person decide after a review of all relevant facts before him/her? In the matter before me, I find that the Service did violate Article 16 of the Agreement, and it's just cause provision for the reasons cited above.

I believe that is the most reasonable conclusion one can reach. I also believe, as stated above that the Service has valid concerns over the grievant's ability to perform his city letter carrier duties satisfactorily. However, that belief cannot be substituted for the obligation of the arbitrator to render a fair, impartial decision on the facts only before him. I only hope that the grievant can apply himself in such a way as to be successful in the future.

AWARD:

This grievance is sustained.

The grievant shall be returned, without unreasonable delay to a duty status, pursuant to postal service rules and regulations. The grievant is entitled to back pay/benefits, pursuant to all postal service rules/regulations.

Nothing Follows