

C# 11105

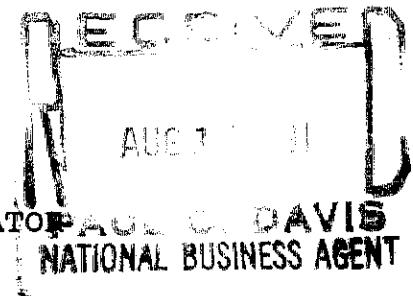
REGULAR ARBITRATION

In the Matter of the Arbitration ()
between ()
UNITED STATES POSTAL SERVICE ()
and ()
NATIONAL ASSOCIATION OF LETTER ()
CARRIERS, AFL-CIO ()

GRIEVANT: D. LeBouef

POST OFFICE: Oklahoma City, OK

CASE NO: S7N-3B-C 30844
GTS #004670



BEFORE: I. B. Helburn

APPEARANCES:

For the U. S. Postal Service: Rodney W. Randall, Labor Rels. Asst.

For the Union: Beryl D. Jones, Local Business Agent

Place of Hearing: Oklahoma City, OK

Date of Hearing: July 24, 1991

AWARD: Because of the condoned departure from proper practice and the inadequate investigation by the Postal Service, Dorene LeBouef is not found to have failed to exercise reasonable care under the provisions of Article 28, Section 2 of the National Agreement in the delivery of registered mail on September 30, 1989. The Letter of Demand issued to her is to be rescinded.

Date of Award: August 15, 1991

I. B. Helburn

SOUTHERN REGION REGULAR ARBITRATION

In the Matter of the Arbitration
between

UNITED STATES POSTAL SERVICE
Oklahoma City, Oklahoma

-and-

NATIONAL ASSOCIATION OF
LETTER CARRIERS
Branch 458

OPINION AND AWARD

OF THE

ARBITRATOR

S7N-3B-C 30844
GTS #004670
D. LeBouef

APPEARANCES

For the Postal Service:

Rodney W. Randall;
Sheryl Smith;

Labor Relations Asst.
Sup., Stations & Del.

For the Union:

Beryl D. Jones;
Dorene LeBouef;
Cameron Carter;

Local Business Agent
Grievant/Letter Carrier
Letter Carrier

PERTINENT NATIONAL AGREEMENT PROVISIONS (JX-1)¹

ARTICLE 28

EMPLOYER CLAIMS

The parties agree that continued public confidence in the Postal Service requires the proper care and handling of the USPS property, postal funds and the mails. In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefor.

Section 2. Loss or Damage of the Mails

An employee is responsible for the protection of the mails

¹Where used, JX, MX and UX refer to Joint, Management and Union Exhibits.

entrusted to the employee. Such employee shall not be financially liable for any loss, rifling, damage, wrong delivery of, or depriviation on, the mails or failure to collect or remit C.O.D. funds unless the employee failed to exercise reasonable care.

* * *

BACKGROUND

Dorene LeBouf, the grievant, is a 20 year Postal Service employee with a spotless disciplinary record and several performance awards. She has worked her present route out of Lakeside Station for 10 years. One customer on the route throughout the 10 years has been Gem Appraisers Lab, 1140 NW 63rd St., Oklahoma City. Gem is located in a building with a VIM room.

For 10 years the grievant, based on a verbal understanding with Gem owner Jason Leffler, has signed for registered packages on Saturday in Leffler's absence and left them in the lock box in the VIM room. On Saturday, September 30, 1989, consistent with her past practice, LeBouef signed for two registered pieces. The one of concern was number R37689430, from Peggy Spencer, P. O. Box 3095, Lawton, OK 73502 to Gem Appraisers Lab, 1140 NW 63rd ST., Oklahoma City, OK 73116. According to LeBouef, on Monday, October 2, per her custom, she asked Leffler if he had received the registered package. He responded that he had not been in on Saturday and asked his new partner, John Pinkerton if he had received it. Pinkerton said that he had.

However, the package was not found and on November 27, 1989 Ms. Spencer filed PS Form 565, Registered Mail Application for

Indemnity/Inquiry. The package had contained a diamond ring valued at \$15,000. The filing triggered an investigation. LeBouef was interviewed by Postal Inspector (PI) J. A. Factor on January 12, 1990 and acknowledged signing the Form 3849 receipt for the package. Leffler was interviewed by Factor on January 19, 1990. A written statement was not provided until April 4, 1990. Leffler confirmed the long-standing, informal arrangement with LeBouef, could not explain the loss, stated that he was certain the LeBouef was innocent and offered to share the financial responsibility with her. Factor's Investigative Memorandum did not include affidavits from either Pinkerton or the secretary at Gem.

On April 20, 1990, the Postal Service sent LeBouef a Letter of Demand for \$15,000.00 for "loss of or damage to the Mail," specifically the loss of the registered article number R376894360. A written Step 2 grievance was filed on July 27, 1990. The written response, dated August 14, 1990, reduced the demand to \$14,000.00. When the grievance was not resolved, arbitration was requested on September 25, 1990.

The undersigned heard the case on July 24, 1991 at the main post office, Oklahoma City, OK. Witnesses were sequestered, affirmed before testifying and cross examined. Documentary and testimonial evidence was entered into the record. The parties stipulated that the grievance was properly before the arbitrator. The record was closed with the receipt of the management brief on August 12, 1991, the Union brief having been received on August 5.

ISSUE

The stipulated issue is:

Did Dorene LeBouef fail to exercise reasonable care under the provisions of Article 28, Section 2 of the National Agreement in the delivery of registered mail on September 30, 1989? If not, what is the appropriate remedy?

POSTAL SERVICE POSITION

The Postal Service asks that the grievance be denied for reasons summarized below.

1. The Union bears the burden of proof and must show that the grievant exercised reasonable care in the handling of accountable mail. This interpretation of Article 28 of the National Agreement is supported by the awards of Arbitrators Philip W. Parkinson (E7N-2B-C 16971), Joseph F. Gentile (W1C-5L-C 11338), Peter DiLeone (C1N-4K-C 19484), Alan Walt (C8N-4F-C 16987) and Albert A. Epstein (C1N-4K-C 7177). Each of the above cases was one in which the arbitrator found just cause for management's action. All but Arbitrator DiLeone's case involved situations where the carrier was the last to sign for the registered mail before it was lost. Arbitrator DiLeone dealt with an instance where the carrier delivered a registered package to the wrong address and the package was subsequently lost.

2. The Union has not shown a contract violation. LeBouef did not follow proper procedure when she signed Form 3849. She did so without the knowledge of her supervisor. She did not follow the procedures of the M-41 handbook. In following the directions of addressee Leffler, LeBouef disregarded proper procedures for

handling accountable mail. A copy of the Domestic Mail Manual was available, but the Union did not show that the grievant had complied with that manual. Testimony of Carter and Smith shows that LeBouef did not exercise reasonable care with the registered article in question.

3. In a written statement, LeBouef noted that she had declined requests of other businesses to sign for receipt of registered mail because she did not trust them. However, she testified that she did sign for some other businesses. The written statement implies knowledge that she could be held financially liable, inconsistent with testimony that she did not know she could be held responsible and had not received adequate training.

UNION POSITION

For reasons summarized below, the Union asks that the grievance be sustained and that the Letter of Demand be dismissed.

1. The Letter of Demand was not timely. LeBouef was not questioned until over three months after the incident and the Letter was not issued until almost seven months after the incident. Furthermore, LeBouef did not receive advance written notice of the demand, as required by the National Agreement.

2. Neither the Postal Inspector nor the Manager of the Lakeside Station, who issued the Letter of Demand, testified. The Inspector could not be cross examined about the conduct of his inspection and his apparent failure to interview Pinkerton, who admitted receiving the registered package on Saturday, or the

secretary. The Station Manager could not be questioned about matters related to the Letter.

3. The Postal Service did not meet its burden to show that the grievant did not use reasonable care. Evidence shows that she was the designated agent for Gem, which was known to the Station Manager. No regulation prohibits this. She was trained to deliver mail in accordance with the instructions of the customer, and did so, as she had been doing for 10 years. Only after the incident did the Postal Service produce cards to be used by the designated agents for customers.

4. LeBouef followed the requirements in the Methods Handbook, Series M-41, including the following (UX-1):

- 131.35 Deliver mail according to the instruction or known desire of the addressee. . .
- 335.11 Deliver numbered insured parcels, registered articles, and certified letters to addressee or anyone authorized to receive mail for the addressee: . . .
- 335.13 Articles not endorsed Restricted Delivery may be delivered to an adult member of the family or agent or hotel clerk whose name appears on Form 3801-A, Agreement by Hotel or Apartment House for Care of Mail.

She exercised reasonable care in signing for the registered package and putting it in the lock box in the VIM room. There was no allegation by Leffler that the package was not received.

5. Arbitrator Joseph F. Gentile (W8N-5H-C 19842) disallowed a Letter of Demand because management's untimely investigation prejudiced the grievant. Arbitrator William Eaton (W1N-5H-C 9580) rescinded a Letter of Demand when loss occurred as a consequence

of a rule violation which management knew of and condoned. Arbitrator J. Fred Holley (NB-S-5327) refused to allow a Letter of Demand when he found that management laxity may have contributed to the loss and refused to hold the grievant to a higher demand than management. Arbitrator Robert B. Moberly (S8N-3D-13003) sustained a grievance and reinstated an employee who had been discharged for deviation from an assigned route and misuse of a vehicle when no rules violation was found. Arbitrator Arthur R. Porter, Jr. (C4N-4K-C 7016) sustained a discharge grievance, in part because a key witness was unavailable for cross examination.

DISCUSSION

Management would place the burden of proof in this case on the Union to show that the grievant exercised "reasonable care" while the Union claims that the burden is management's to show a lack of "reasonable care." Five regional awards from three regions clearly place the burden on the Union. The Union submitted no contradictory awards. Thus the record in this case indicates that the issue is settled. I find no compelling reason to depart from previous rulings on burden of proof.

Did the grievant "exercise reasonable care?" She broke no rules when she signed as the Agent of Gem. Form 3801-A, called for in the M-41, Section 335.13 and placed into use by the Postal Service after the incident, is an acknowledgement that carriers may sign for accountable articles. And, there was no dispute that LeBouef was complying with Leffler's wishes when she signed on

Saturdays. But, none of the above eliminates the obvious fact that by signing, LeBouef made herself responsible for the item. The testimony of Cameron Carter and Sheryl Smith makes clear that responsibility was the grievant's. Her own written statement acknowledges an understanding that she could be held responsible, as she noted that she would not sign in instances where she felt that the mail was not secure. As an experienced carrier, particularly one with an excellent record, LeBouef had to have known that she was not obligated to sign for the convenience of the customer when doing so put herself at risk. Indeed, a reading of the awards submitted by the parties shows that carriers have the right to refuse to accept registered mail. What LeBouef did was well meaning, but wrong. She did not exercise the "reasonable care" that is necessary to protect herself and the Postal Service from liability.

If these were the only facts in the case, it would be resolved in management's favor. But, there are additional elements in the case which dictate a different outcome. The grievant provided unchallenged testimony that the Station Manager at the time knew of her arrangement with Leffler and said nothing. In essence, he condoned a deviation from correct procedure. Smith, in contrast, testified that if she had known about such an arrangement, she would have stopped it.

There is a parallel in the 1985 arbitration award of William Eaton, referred to above. In that case management had condoned the practice of putting accountable items in relay sacks--a practice

outlawed by the M-41. Arbitrator Eaton wrote that because management condoned the practice, it was "not entitled to apply the 'reasonable care' standard as strictly as it normally would be" (p. 14). The logic applies to the instant case, particularly when the practice has existed for 10 years.

Far more critical to the outcome of this case is the PI's investigation. The time lapse between the incident and the PI's interview of LeBouef is not troublesome. Spencer filed her claim on November 27, 1989 and LeBouef was interviewed on January 12, 1990. Leffler was interviewed a week later. The slight delays, particularly in light of the size of the claim, are surprising, but not fatal to management's case. However, no justification was advanced for what appears from the record to be the PI's failure to interview Pinkerton and the secretary. These omissions are puzzling--even astounding--in that Pinkerton was identified as the individual who took the package from the lock box in the VIM room on Saturday, September 30. If only because of this, he must be viewed as a "prime suspect," particularly because LeBouef herself is not suspected of theft. The investigation must be considered incomplete, again surprising because of the size of the claim against the Postal Service.

Again, a prior award is relevant to the instant case. In 1985, Arbitrator Joseph F. Gentile (W8N-5H-C 19842) overruled a Demand Letter, writing, "Implicit in Article 28 is that there be a timely and thorough investigation of the incident. The Union must prove that there was an absence of such a 'timely and thorough

investigation'" (p. 11).

In the instant case, the lack of a thorough investigation compromised the ability of the Postal Service to recover the lost package and to protect its own and the grievant's interests. The Postal Service cannot compensate for such an investigation by then asking the grievant to bear the burden.

AWARD

Because of the condoned departure from proper practice and the inadequate investigation by the Postal Service, Dorene LeBouef is not found to have failed to exercise reasonable care under the provisions of Article 28, Section 2 of the National Agreement in the delivery of registered mail on September 30, 1989. The Letter of Demand issued to her is to be rescinded.



I. B. Helburn, Arbitrator

Austin, Texas
August 15, 1991