

C# 02713

In the matter between
United States Postal Service
Mobile, Alabama
and
National Association of Mail
Carriers

Arbitration Decision
in Case No. S1N-3D-D-9534
(C. C. Fountain)
Mobile, AL

Appearances: For the Employer, Lewis A. Bender, Jr.

For the Union, Collier M. Jones ~~JAMES~~

The Issue

The parties submitted to me as arbitrator during a hearing held in Mobile, Alabama on November 17, 1982 the question of whether there was just cause under Article 16 for the removal notice dated May 27, 1982 sent to Carver C. Fountain and, if not, what the remedy shall be. Each party had a full opportunity to present and examine witnesses and exhibits at the hearing, also to summarize their positions. At the conclusion both parties waived the filing of written briefs.

When the hearing began I was informed that the grievant was named as one of the complainants in a charge pending before the National Labor Relations Board. A communication sent by the Regional Director to the parties in this arbitration had informed them that because of arbitration and pending grievance proceedings the NLRB charge was being administratively deferred as there was "substantial likelihood that this matter will be set to rest by the grievance arbitration procedure."

(Notice of 8-9-82, NLRB case 15CA-8631)

(2)

The NLRB charge filed for Branch 469 of the Union and signed by Steward Kyser, alleges that from April 1, 1981 the Postal Service at Mobile has discriminated against a number of employees including Carver Fountain "because of their union and/or protected concerted activities."

(Mgt. 2)

Prior to beginning their presentation of witnesses the parties stipulated that the NLRB charge concerning the grievant, Fountain, is a direct concern in this arbitration.

Two references to Union matters in the Union presentation relate to prior discipline and to steward assistance ~~for~~ Fountain and other employees during differences of opinions with supervisors over the amount of overtime needed to complete an assignment. The Union claims and management denies that grievant and other Union members have not been allowed steward participation in such discussions.

The Facts

As a result of conduct on May 13, 1982 Carrier Fountain, a city carrier at the Prichard Branch Station with 23 years of service, received a notice of his proposed removal on the charge of a "failure to follow instructions". Included in the letter were listed two previous items of disciplinary actions. (Jt. 2)

- (1) A suspension for 14 calendar days effective March 27, 1982 for "Failure to follow instructions."

- (2) a letter of warning dated October 16, 1980 for "Unauthorized curtailment of Mail."

The suspension was later reduced to seven days by an expedited arbitration decision of October 19, 1982; the prior warning had been changed by agreement to an official discussion.

According to undisputed testimony the grievant on May 13, 1982 had requested two hours of auxiliary assistance because of unusually heavy mail for delivery on his route, including circulars and utility bills. After examining this volume supervision had instructed him to curtail 25 per cent of the circulars and bills for part of the route, allowing 50 minutes of overtime. Fifteen minutes later Manager George Moody saw Fountain casing some bills for delivery beyond what had been his instruction, thus using unnecessary time and causing a delay in leaving. Leaving some 30 minutes late, grievant Fountain conversed with Postal Inspector Willis on the phone, requesting that he meet him as quickly as possible for an emergency he called not discussable over the telephone. Going out to assist Fountain for an expected crisis or police matter, the Inspector was handed a note in which Fountain complained of an "impossible task with the volume of mail", also requesting that someone stay with him all day to verify that fact. He added further that being "refused request to speak to shop steward, I have to explain to someone." (Un. 6) After a short talk the Inspector informed Fountain that he had no authority in regard to managing Prichard Station.

Later at about 3:45 P.M. the grievant phoned the Sectional Manager, Jackson, for instruction; he then finished delivering, his overtime pay being 106 minutes instead of the fifty minutes originally estimated by Supervision.

The Management Position

Instructions to the grievant were clear, reasonable and simple, according to management. Overtime originally authorized was adequate had there been no delays. Instructions to curtail 50 circulars and to case only the same number of utility bills contained no threat to health or to safety, thus subject to the rule of "obey now and grieve later." He failed to do this.

Denying carriers are ever deprived of help by having a steward participate, management states his instructions concerned work, not discipline; and management had no request for steward participation.

Further Fountain had received many counsellings and discussions regarding the need to follow instructions in earlier disciplinary actions. His warning letter in 1980 followed his unauthorized curtailing of a full tray of third class mail along with a set of circulars; there were several previous similar instances of leaving mail behind without informing the management. The 1980 warning had been settled with grievant acknowledging that he would not curtail mail again without permission. (Mgt. 6)

Management says union or protected activity is no issue; the grievant is not a Union official or representative, never was involved in union activities with management. The only problem arose over his refusing to follow instructions by supervision, losing time from deliveries by his refusal, also by telephoning unnecessarily instead of attempting to perform and complete his work.

In view of previous unsuccessful corrective disciplinary efforts this grievance should be denied. According to management, just cause existed for removal.

The Union Position

The Union contends that his lengthy performance record with many years of satisfactory service at Prichard Station shows Fountain was a satisfactory employee. He only had objected to insufficient overtime allowed for an exceptionally heavy assignment. There had been continuing failure by management to give clear instructions, with dual conflicting instructions, and management was at fault. Sufficient time for that amount of work included necessary time for matching addresses, with no chance of completion under the allowed overtime of fifty minutes. But when he attempted to correct the situation over allowed time for completion he was treated harshly and punitively.

Instructions by different supervisors estimated first an insufficient thirty minutes, corrected then to 50 minutes. He then was arbitrarily ordered to complete the delivery and on time. Since there was almost

twice the average workload on October 13, he was afraid that he was being persecuted because of the previous suspension for two weeks in March. Although on May 13 he had taken no breaks the assigned work actually required more than the corrected allowed overtime, proving unfair treatment.

In view of his entire record over 20 years, the Union asserts a just cause for removal is not supportable and cannot be sustained.

Opinion

From the presentations of the parties there are three factors that need to be considered: (1) the events of May 13, 1982; (2) the previous record of the grievant; (3) the union activity question. Examination of what is relative to each of these points will precede discussion of just cause for removal as based on charges of failing to follow instructions.

Grievant's past record shows substantial seniority of twenty-three years, during which the grievant was subject to a number of consultations and warnings for the correction of the incidents of unsatisfactory performance, including curtailing mail without authorization. The letter of warning dated October 16, 1980 for that misconduct was followed by the March 27, 1982 fourteen day suspension for failing to deliver all the mail as instructed. The arbitration award dated October 19, 1982, which is five months after the present matter on May 23, found

the 1980 warning letter "had been removed and should not have been considered." Management now disputes that fact. However the decision of the arbitrator found that "Mr. Fountain failed to carry out his supervisor's instructions." Reducing the suspension to seven days of corrective discipline, it did not exonerate the grievant of the charge.

In my judgment therefore further discipline would be reasonable if in fact Fountain again failed to follow instructions only weeks after returning from that suspension. This depends on the May 13 incident when heavy assignment of mail again led to disagreement, arising this time from his estimated two hours overtime need. Acting supervisor Lewis first had estimated one hour. Then an erroneous estimate of Manager Moody was corrected by Lewis to fifty minutes. The final allowed time approximated the two hours first asked for as overtime. Included was casing of some curtailed mail, several phone calls, also the conversing with Inspector Willis on the route.

Mr. Fountain explained his unusual behavior was caused by fear of being persecuted as a consequence of the recent discipline that was then being appealed by Steward Curtis; also by arbitrary and confusing instructions of two supervisors who differed as to overtime needs. Also a failure to use request forms that are required by the Manual; and the alleged refusal of any opportunity to discuss the situation with a Union steward are argued. On that he was supported by testimony of a Union witness, Wimberly, referring to other situations when he had an overload; but this is refuted by both Supervisor Lewis and Manager Moody.

According to Steward Curtis he heard Moody say in a loud voice to grievant Fountain that he took too much time but to call in if he could not make it as instructed. Union witnesses Brooks and others also complain of confusing instructions from supervisors and trainee acting supervisors.

Last is the question of union representation in a situation regarding work loads, overtime and work assignments. Management contends the right to grieve precludes the questioned need for any union representation.

The Agreement recognizes in Article 3 management exclusively is to direct the employees on performance of duties for maintaining efficiency of operations, subject to all other provisions. Article 17 allows for a steward representative in the investigation, the presenting and adjusting of a grievance. In Section 2 it says the steward may request permission from the immediate supervisor "which request shall not be unreasonably denied."

Nothing then involved a grievance or the denial of a steward's request for the discussion of overtime needs.

National Labor Relations Board decisions indicate that employees have a right to union representation when being interviewed by a management representative who is investigating what an employee may reasonably believe could involve a disciplinary action. The Supreme Court ratified this point on February 19, 1975. (NLRB versus J. Weingarten, Inc.) However

that would not apply under the law or the contract to work floor instructions, to training or to needed corrections of work techniques if not indicating a resultant disciplinary action. (Mobil Oil Corporation 196 NLRB 1052)

Here there was hardly a cause for Fountain to fear that the situation on May 13 was a setup or a trap. However his explanation of his behavior as due to fear because he had recently been suspended is his subjective response that cannot be refuted as impossible.

Steward Kyser later questioned carrier Lewis, Acting Supervisor, who had on May 13 first instructed carrier Fountain to use one hour overtime; and was present when Moody instructed the grievant to curtail 50 of the circulars and bills. He stated Moody was "not loud or demanding", but that at first Moody told Fountain to use only 30 minutes overtime until Lewis said a computer printout showed 50 minutes was needed for that volume of mail.

Moody denied refusing any steward the right of assisting in the discussion. Fountain moreover wrote the Postmaster on May 13, and testified under oath that he had "requested permission to talk to the shop steward; it was refused." (Un. 10)

Although this remains in dispute in my opinion it is not material. Charging union activity or discrimination or interference with collective bargaining rights has no basis.

For supervisory work instructions as then, where the discussion was initiated by the employee concerning the work assigned and allowed time for its completion, the grievance procedure as to overtime pay is available. There was no question of risk to health, safety or morality. The employee performs as instructed subject to noting his protest and subsequently grieving it formally, with union assistance if necessary.

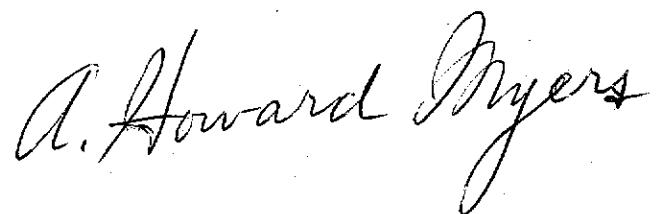
While the evidence establishes that management had just cause for imposing discipline in the interest of its responsibility, i.e. operating efficiently, a question remains of the need or justification for removal. As arbitrator I should not lightly replace management's decision as to penalty by overruling its judgment. Here, however, the background of over twenty years continuing services, with grievant's irrefutable explanation that his behavior resulted from fright because his recent suspension was still being protested, cause me to conclude that removal was not justifiable.

Under the principle of corrective rather than punitive discipline stated in Article 16, I conclude the grievant ought to have a further chance to demonstrate a willingness and ability to follow supervisory instructions. I am therefore ruling that this removal action be changed to suspension without backpay but with a restoration of seniority.

(11)

Award

There was cause for disciplinary action under Article 16 but not removal; the notice sent to Carver C. Fountain shall be changed to a disciplinary suspension without compensation with immediate restoration to his position with full seniority rights.

A handwritten signature in cursive ink, appearing to read "A. Howard Myers".

A. Howard Myers

December 6, 1982
Boca Raton, Florida