

REGULAR ARBITRATION PANEL

C#14117
A-C

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

GRIEVANT:
K. Mendes

POST OFFICE:
Boston, MA

CASE NUMBERS:
USPS: B90N-4B-D 94026415
USPS: B90N-4B-D 94053240
USPS: B90N-4B-C 94056389

BEFORE: ARBITRATOR

GEORGE R. SHEA, Jr.

APPEARANCES:

National Association of Letter Carriers, AFL-CIO (Union):
E. Ahlstedt

United States Postal Service (Service):
L. McDonough

Place of Hearing: Boston, MA
Date of Hearing: October 13, 1994

AWARD:

For the reasons more fully set forth in the attached Opinion, the Arbitrator determines that:

- (a) The Service did violate the Agreement, when the Postal Inspectors interviewed the grievant at the Boston GMF on January 12, 1994. Consequently, evidence initially obtained during that interview is excluded from the evidentiary record considered by the Arbitrator in these matters.
- (b) The Service did not have just cause to issue the grievant the Emergency Placement, dated January 14, 1994. Accordingly, the grievant is awarded restitution of the pay and benefits lost by him as a result of that Emergency Placement.
- (c) The Service did have just cause to issue the grievant the Notice Of Removal, dated March 21, 1994, and, consequently, the related grievance is denied.

Date of Award: November 30, 1994


George R. Shea, Jr.

OPINION

STATEMENT OF PROCEEDINGS:

The parties' representatives specifically agreed to place the matter designated as B90N-4B-C 94056389 / 948210 / GTS 16668 before the Arbitrator and to consolidate that matter with the matters designated as B90N-4B-D 94026415 (Emergency Placement) and B90N-4B-D 94053240 (Notice of Removal) for the purposes of hearing and disposition.

The Union appealed the above captioned matters to arbitration. In accordance with the provisions of the parties' National Agreement [Agreement], the undersigned was designated as the Arbitrator to hear and decide the matters. The Arbitrator held a hearing on and at the previously referred to date and location. The parties' representatives appeared. The Arbitrator provided the parties with a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses.

ISSUE:

The parties agreed to the following statement of the issues before the Arbitrator:

Did the Service violated the National Agreement [Agreement], specifically Articles 17 and 3, as interpreted by the Step 4 decision in the matter designated as H7N-5N-C 31554 (J-2A), when the Postal Inspectors interviewed the grievant on January 12, 1994? If so, what shall be the appropriate remedy?

Did the Service have just cause to issue the Emergency Placement, dated January 14, 1994, or the Notice of Removal, dated March 21, 1994, to the grievant, K. Mendes? If not, what shall be the appropriate remedy?

FACTS:

The parties' representatives stipulated to the following statements of fact.

1. The grievant did not sign the "Miranda Statement" on January 12, 1994, the day he was interviewed by the Postal Inspectors. The form was filled out by one of the Postal Inspectors.

The Miranda Rule provides the following. Prior to any custodial interrogation (that is, questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom in any significant way) the person must be warned: 1. That he

2. The Service has records which show that Lottery Coupons from Val Paks addressed to locations on routes in Brookline MA were cashed at the convenience store in question on the dates listed in the Notice of Removal.

The events involved in this matter were described in the submitted documentary evidence and the varying testimony of the parties' witnesses. Upon his review of all the evidence, including his personal observation of the witnesses during their testimony, the Arbitrator concludes that the preponderance of the credible evidence supports the following version of those events.

1. At times relevant to these matters, the grievant, K. Mendes, had been employed by the Service as a Letter Carrier for approximately six years. He had been assigned to the Brookline postal facility for the four years immediately preceding the incidents precipitating these matters. On January 12, 1994, the grievant, while in his postal uniform and "on the clock", was in a convenience store in Boston, MA [Convenience Store], which was not on his assigned mail delivery route.
2. The Postal Inspectors [Inspectors] commenced their investigation of the grievant as a result of reported disappearances of bulk business mail known as "Val Paks". Val Paks contain retail coupons and Massachusetts Lottery Ticket Coupons [Lottery Coupons]. Val Paks are identifiable as being addressed to specific locations. The Lottery Coupons can be identified as being sent to a specific area. As part of their investigation, the Postal Inspectors "staked out" the Convenience Store, which had been identified as a location at which a large number of Lottery Coupons from the Brookline area were being redeemed. The Inspectors' investigation [Investigation] included the Postal Inspectors' personal observation and electronic surveillance of the Convenience Store, an examination of Lottery records and a comparison of the Lottery Coupons redeemed at the Convenience Store with accompanying material addressed to locations on the grievant's assigned mail delivery route in Brookline MA.
3. On the September 15, 1993, and January 11, 1994, the Investigation resulted in a determination that Lottery Coupons from the Brookline area were redeemed at the Convenience Store; and a video tape showing the grievant conducting transactions at the Convenience Store's counter at the precise

has a right to remain silent; 2. That any statement he does make may be used as evidence against him; 3. That he has a right to the presence of an attorney; 4. That if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires. Black, Henry Campbell, Black's Law Dictionary 5th ed, West Publications, St Paul MN (1979)

times the Lottery Coupons were redeemed. On January 12, 1994, the Investigation resulted in the same information resulting on the earlier dates in September and January and an eye witness observation by Inspector Kenney of the grievant redeeming Lottery Coupons at the Convenience Store.(J-#3, pg 18-21)

4. Subsequent to the Inspector's observation of the grievant inside the Convenience Store, the Inspectors confronted the grievant, while he was seated on the passenger side of a private vehicle of a second postal employee. The Inspectors' uncontradicted testimony confirms Inspector Bellucci's description of this confrontation in his Investigative Memorandum [IM] dated February 15, 1994. The IM describes the encounter in the following manner.(J-#3, pg 18-21)

"On January 12, 1994, at approximately 3:40 PM Mr. Kevin Mendes and Mr. SDJ, full time regular carriers were observed by Postal Inspectors and video recorded redeeming stolen Massachusetts State Lottery coupons at the ... [Convenience Store]. They were observed in postal uniform, leaving the store and sitting in Mr. SDJ's privately owned ... [vehicle] Mr. Mendes and Mr. SDJ were confronted by Postal Inspectors while in the front seat of the vehicle. After identifying ourselves as Postal Inspectors, they were asked to exit the vehicle. Mendes and SDJ were asked if they were on the clock, and both replied "Yes".... In the vehicle in plain view was mail, and on the floor between Mr. Mendes' legs was a brown paper bag containing 37 rifled Val Pak envelopes. Mr. Mendes also had 14 Massachusetts Lottery scratch tickets valued at \$34.00. Also recovered was a pair of scissors and SDJ and Mendes' satchel containing mail."

5. Subsequent to the encounter at the Convenience Store the grievant was escorted in an Inspector's vehicle to the Boston GMF and detained in that facility. During this approximate ninety minute detention, the Inspectors interviewed the grievant. During this interview, the grievant declined to sign the so called "Miranda Statement" and requested union representation. The requested union representation was not provided. The grievant, at the Inspectors' request, initialled² the brown bag found in the vehicle and its contents.
6. Some of the opened and unopened mail found in the vehicle and

² There is insufficient evidence in the record for the Arbitrator to make a determination whether, or not, the grievant requested legal representation during the Interview.

in the grievant's presence was deliverable mail entrusted to the grievant as part of his employment duties.

POSITION OF PARTIES:

National Association of Letter Carriers, AFL-CIO [Union]:

The Union maintained that the Service violated the Agreement, specifically section 17.3, when the Postal Inspectors failed to honor his request for union representation during their interview of the grievant on January 12, 1994 [Interview]. The Union further argued that the evidence, if any, collected during the Interview was obtained in violation of the grievant's contractual and statutory "Weingarten" rights. Accordingly, the Union requested that the Arbitrator exclude such evidence from the evidentiary record and deny the Service the ability of relying on such evidence to establish the factual basis of the charges upon which the contested Emergency Placement [EP], and Notice of Removal [NOR] were based.

The Union further maintained that the Service did not have just cause to place the grievant in an Emergency Placement status [EP], or to issue him the contested Notice of Removal [NOR]. Firstly, the Union argued that the Service failed to establish that: (a) it had a rule regarding the handling of undeliverable bulk business mail; or (b) if it had such a rule, that it clearly communicated that rule to the grievant. Secondly, the Union argued that the evidence relied upon by the Service to establish the charges against the grievant is the result of a contractually improper interview and is circumstantial, of limited probative value and unpersuasive. Accordingly, the Union concluded the Service failed to establish the factual basis of its charges against the grievant. Based on these factual assertions and contractual contentions, the Union requested the Arbitrator sustain the related grievances, vacate the EP and NOR, reinstate the grievant to his postal employment and award him restitution of any pay or benefits lost by him as a result of the contested NOR and EP.

United States Postal Service [Service]:

Initially, the Service argued that the Union did not establish that the Postal Inspectors violated the grievant's Article 17 rights, or his "Weingarten" rights, in that, the Union failed to establish that the grievant: (a) requested union representation during the Interview; (b) answered any questions during the Interview subsequent to his alleged request; or (c) provided the Service, or the Inspectors, during the Interview with any evidence relied upon by the Service, when it issued the contested NOR. Additionally, the Service maintained that the Postal Inspector's Investigative Memorandum [IM] is not based on the Interview and, consequently,

should not be excluded from the record of this matter, as requested by the Union.

Regarding the EP and the NOR, the Service maintained that it had just cause to issue both the EP and the NOR to the grievant, in that, both actions were imposed pursuant to procedures sanctioned, or required, by the Agreement and the just cause standard. The Service specifically argued that the NOR was imposed after a proper pre-discipline investigation by the disciplining supervisor, including his interview of the grievant. The Service further argued that this investigation resulted in sufficient admissible evidence to establish the factual basis of the charges upon which the EP and the NOR were based. Finally, the Service maintained that the NOR was consistent with the proven offense, which interfered with the Service's primary mission of protecting and delivering the mail entrusted to it by the public. Based on these factual assertions and contractual contentions, the Service requested the Arbitrator deny the related grievances and sustain the contested EP and NOR.

DISCUSSION:

THE PARTIES' CONTENTIONS REGARDING THE CONTRACTUAL APPROPRIATENESS OF THE POSTAL INSPECTORS' INTERVIEW OF THE GRIEVANT

Section 17.3 of the Agreement, in parts relevant to this issue, provides the following.

"If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted."

The parties, in a Fourth Step settlement of a relevant matter designated as H7N-5N-C 31554, have stated the following regarding this issue.

"The parties at this level agree that under the "Weingarten" rule, the Employer must provide a union representative to the employee during the course of its investigatory meeting where the employee requests such representation and the employee has a reasonable belief that discussions during the meeting might lead to discipline (against the employee himself). (J-2A)

The National Labor Relations Board [NLRB] has held that its policies on remedies for violations of the "Weingarten" rule are as follows.

"Initially, we determine whether the General Counsel has made a *prima facie* showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent

conducted an interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for conduct which was the subject of the unlawful interview.

In the face of such a showing, the burden shifts to the respondent. Thus, in order to negate the *prima facie* showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remedy will not be ordered. Instead, we will provide our traditional cease and desist order ...".

The Arbitrator determines that the NLRB's determinations regarding the parties' burdens of going forward, proof and persuasion, as set forth in the quoted Kraft Foods decision, are appropriate for his use, when making his determinations concerning the contractual arguments made by the parties on this issue.

The Weingarten Doctrine provides, in general terms, that an employee has a right to union representation during an interview by the employer, or its representative, when: (a) the employee has a reasonable belief that the interview could result in discipline; (b) the purpose of the interview is to obtain facts that the employer might consider in deciding whether some penalty will be imposed; and (c) the employee requests that the union be present.

The Miranda and the Weingarten rules involve an individual's right to be represented during an interview, which may lead to a criminal penalty, in the case of the Miranda rule, or work place discipline, in the case of the Weingarten rule. In the instant matter, the Postal Inspector's Interview of the grievant was subject to both rules. However, the issue before the Arbitrator in this matter is not the correctness of the Postal Inspector's conduct of the Interview under the criminal law, as stated in the Miranda Rule, but rather, the contractual correctness of the Interview under the provisions of the parties' Agreement, as set forth in Article 17, and the Weingarten Rule.

The record in the instant case, establishes that: (a) the Postal Inspector's Interview constituted an investigatory meeting; (b) the grievant was reasonable in his belief that the Interview could lead to him being disciplined by the Service; (c) the grievant did request the presence of union representation during the Interview; and (d) the Postal Inspectors did not provide the requested representation. The record further establishes that, subsequent to

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Kraft Foods, Inc. 251 NLRB 598, 105 LRRM 1233 (1980) See also Morris, Charles J., editor The Developing Labor Law 2nd ed, Vol 1, BNA, Washington, DC (1983) pages 149-156.

the grievant's request for union representation, he declined to respond to any further questions asked by the Postal Inspectors. However, the record also establishes that the grievant, at the Inspector's request, initialed certain evidence already in the Inspector's possession.

The Arbitrator must concur with the Union's contention that the Postal Inspector's request of the grievant, that he initial evidence, constituted an improper continuation of the investigatory Interview in contravention of the Weingarten Rule. Accordingly, the Arbitrator determines that the Service did violated the Agreement, when the Inspectors continued their Interview of the grievant without providing him with the union representation he requested. Consequently, the Arbitrator determines that the Service, if it is to prevail in its contention that it had just cause for the EP and the NOR, must establish the factual basis of the charges upon which the EP and NOR were based exclusive of any evidence obtained by Postal Inspectors during the Interview, subsequent to the grievant's request for union representation.

THE PARTIES' ARGUMENTS REGARDING THE UNION'S CONTENTION THAT THE SERVICE DID NOT HAVE JUST CAUSE TO ISSUE THE EMERGENCY PLACEMENT TO THE GRIEVANT

In parts relevant to this matter, Section 16.7 of the Agreement provides that the Service may immediately place an employee in an "off duty status (without pay) ..." "where retaining the employee on duty may result in ..." the "loss of mail or funds ..."

Substantial arbitrable authority exists in the decisions of arbitrators on the parties' regional and national arbitration panels to support the determination that the Service must generally adhere to the just cause standard, when it places an employee in an Emergency Placement status on the basis of activity which would otherwise subject the employee to discipline. However, the just cause standard's requirements may be altered in such circumstances to accommodate the immediate action authorized by section 16.7 of the Agreement. In such circumstances, the Service may impose the Emergency Placement in the absence of written notice and after a shorter notice period than is usually required by the Agreement. Similarly, the Service may impose an Emergency Placement after a pre-disciplinary investigation which is less complete than the one required by the just cause standard for a non-emergency discipline. Finally, the Service may impose an Emergency Placement, when its investigation establishes reasonable cause to believe that an employee's retention on duty would result in the loss of mail.

The contested Emergency Placement was imposed on the charge that "There was reasonable cause to believe you are guilty of stealing mail". The Notice of Emergency Placement sets forth the following

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as the factual basis of that charge.

"On January 12, 1994, you were interviewed by the Postal Inspection Service regards to this matter. To prevent further possible theft and protection of the mails you are to remain out of work until further notice with the ongoing investigation of theft of mail".

The just cause standard requires the Service to establish that, at the time it imposed the Emergency Placement, it had sufficient evidence to support a reasonable belief that the grievant was guilty of the charged offense and that the retention of the grievant would result in the loss of mail and that the imposition of the Emergency Placement was required to prevent such a loss.

The record does not contain sufficient evidence to support a finding that the issuing supervisor, when issuing the Emergency Placement, relied upon anything other than the fact that the grievant was interviewed by the Postal Inspection Service regarding his theft of mail. The Arbitrator observes that the record does not establish that the disciplining supervisor interviewed the grievant, or the Postal Inspectors, prior to his issuance of the Emergency Placement. The Arbitrator further observes that the Postal Inspector did not transmit his Investigative Memorandum [IM] to the Postal Service until February 15, 1994, considerably subsequent to the imposition of the Emergency Placement on the grievant.

Based on this review of the record, the Arbitrator must determine that the Service failed to establish that the disciplining supervisor possessed sufficient evidence, at the time he imposed the contested Emergency Placement, to support a reasonable belief that the grievant had committed the charged offense, or that the retention of the grievant would result in the loss of mail. Accordingly, the Arbitrator determines that the contested Emergency Placement was not issued for just cause, as that concept is applied to disciplinary actions imposed pursuant to section 16.7 of the Agreement.

THE PARTIES' ARGUMENTS REGARDING THE UNION'S CONTENTION THAT THE SERVICE DID NOT HAVE JUST CAUSE TO ISSUE THE NOTICE OF REMOVAL TO THE GRIEVANT

Briefly stated, the just cause standard requires the Service to demonstrate that its disciplinary action was imposed after an objective, pre-discipline investigation resulting in proof of an employee's infraction of a clearly communicated and reasonable rule. The standard further requires the Service to demonstrate that the disciplinary consequences of the rule's infraction were communicated to the employee and that the administered discipline was consistent with the charged offense and the employee's past

employment record. Finally, the Service must establish that its discipline was imposed in accordance with the procedural requirements of the parties' Agreement.

The contested NOR in the instant matter was based on the charge that the grievant engaged in activity which constituted a "Failure to perform your duties in a satisfactory manner, in that you mishandled the mails/unauthorized removal of mail."(J-#3, pg 9)

Arbitrators have consistently held that a party may rely on circumstantial evidence to factually support its position in arbitration. However, the relied upon circumstantial evidence must establish, with a fair degree of probability, the facts for which it is offered as proof. The Arbitrator determines that the circumstantial evidence relied upon by the Service in this matter, when review in conjunction with the eye witness testimony of Postal Inspector Kenney, is of probative value regarding the factual basis of the Service's charge against the grievant.

Based on his review of the evidentiary record in this matter, the Arbitrator determines that the Service established the factual basis of the charge upon which the NOR was based with credible and admissible direct and circumstantial evidence, other than the evidence obtained by the Postal Inspection Service during its January 12, 1994 Interview of the grievant at the Boston GMF.⁴

Arbitrators on the parties' arbitration panels have found that offenses, similar to the proven offense upon which the contested NOR was based, are sufficient to support a just cause Removal of an offending employee, even if, the precipitating offense was that employee's first offense. The grievant's proven acts of opening deliverable and undeliverable mail and removing and using the contents of that mail are inconsistent with the generally known and accepted standards of postal employee performance. Such actions seriously erode the public's confidence in the Postal Service, its services and its employees and diminish the Service's efficiency and effectiveness. The grievant was aware, or should have been aware of these performance standards prohibiting such acts and the disciplinary consequences of his failure to adhere to these standards.(Sr.-#3 & 6)

Accordingly, the Arbitrator must concur with the Service's position that the NOR was consistent with the charged and proven offense in this matter. Based on the findings, reasoning and determinations set forth in this Opinion, the Arbitrator makes the attached Award.

⁴ See findings of fact numbers three, four and six and the parties' stipulation number two, previously set forth in this Opinion.