

C-22633 A+B

NORTHEAST REGIONAL REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN X

UNITED STATES POSTAL SERVICE

Employer

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Union

GRIEVANT:
M. SFORZA

POST OFFICE:
WATERBURY, CT

CASE NOS.:
B98N-4B-D 01120532 30218
B98N-4B-D 01128577 30250

BEFORE: ROGER E. MAHER, Arbitrator X

APPEARANCES:

For The USPS: Bruce Harvey.....Labor Relations Specialist
Cathy Genua..... Manager
Bryan Mulville.....Supervisor Customer Service
Majorie Wright.....Postal Inspector

For the NALC: Glen Aeschliman.....Business Agent
Paul Daniels.....Technical Advisor
Richard Pescatore.....Chief Shop Steward
Geraldine Works.....Carrier
Allan Lacombe.....Carrier
Mark Sforza.....Grievant

Place of Hearing: 135 Grand Street, Waterbury, Connecticut

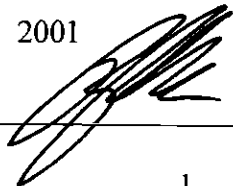
Date of Hearing: August 16, 2001

AWARDS:

On the substantial and credible evidence of the cases as a whole, the Arbitrator finds the USPS had just cause for the Emergency Placement in Off-duty status and subsequent removal of Mark Sforza.

Date of Award: October 6, 2001

Arbitrator: _____



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JOHN J. CASCIANO, NBA
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Pursuant to the arbitration procedures set forth under the National Agreement between the United States Postal Service and the National Association of Letter Carriers, (hereinafter referred to as the "USPS" and the "NALC" respectively) the undersigned was appointed arbitrator to hear and decide the issues herein and to render a final and binding award.

A hearing was held before the undersigned Arbitrator at the office of the Postal Service at 135 Grand Street, Waterbury, Connecticut, on August 16, 2001.

The evidence adduced and the position and arguments set forth at the hearing have been fully considered in preparation and issuance of this opinion and its accompanying award. The parties were afforded ample opportunity to present evidence and testimony germane to their positions.

ISSUES:

"Whether the USPS had just cause for placing Mark Sforza (Grievant) on 2/16/01 in an emergency placement in off-duty status? And if not, what shall the remedy be?"

"Whether the USPS had just cause for the removal of Mark Sforza? And if not, what shall the remedy be?"

BACKGROUND

The USPS argues it had just cause for the 2/16/01 emergency placement in off-duty status as well as the subsequent removal dated 3/10/01 of Mark Sforza (the Grievant) for improperly disposing of mail.

The USPS notice of emergency placement in off-duty status of the Grievant in part is as follows:

"In accordance with the emergency procedure contained in Article 16.7 of the National Agreement, you are hereby notified that you were placed in an off-duty status without pay, on

Friday, February 16, 2001 at 4:00 p.m. This action was taken because your retention on duty could result in loss of mail or funds.

A further decision shall be made as to whether or not discipline shall be issued to you. That decision shall be forthcoming in the near future.

The USPS's Notice of proposed removal dated 3/10/01 is as follows:

"You are hereby notified you will be removed from the Postal Service no sooner than 30 days from the date of this notice. The reason for this action is:

Charge #1 Improperly disposing of mail

Specifically, on 2/16/01, postal inspectors recovered 325 pieces of standard A mail for route 1, which was your job assignment, from the recycling container at the Plaza Station Post Office. The pieces which were mailed by the Waterbury Republic-American contained sales, flyers for local grocery stores. The pieces were addressed to 'current resident' and appeared to be in walk sequence order.

You were interviewed by the postal inspectors when you returned from your route that day. The Inspectors showed you the recovered mail. You did not deny that you threw out the mail. You stated that you do not deliver 'weekenders' to the projects because people don't want them. You stated that when the router sorts items into your case you deliver them, but when you do the sorting that you don't have time. You told the Inspectors that you deliver everything else but the 'weekenders'.

Your actions are very serious in nature and are in violation of Section 131.14 of M-41, City Delivery Carriers Duties and Responsibilities which states in pertinent part, 'Do not remove stamps from mail or throw away or improperly dispose of mail'.

Your failure to return this mail to the office and properly dispose of it demonstrates you did not perform your duties conscientiously and effectively. Your actions violate the following sections of the ELM:

Section 666. discharge of duties

Section 666.85 incomplete mail distribution

Section 668.27 obstructing the mail

Your actions strike to the core of the mission of the Postal Service to assure that all mail is delivered in the most expeditious and efficient manner. I find your removal would promote the efficiency of the Service. Your removal will be effective at close of business on 4/20/01."

POSITION OF THE USPS

The USPS states the observations and report of the Postal Inspection Service (PIS) led to the Grievant's placement in emergency off-duty status and his subsequent removal.

The Grievant freely admitted to discarding deliverable mail, and stated the reason this

happens is for time purposes. He also said some people don't want them, and some people who aren't on the list get them if they ask. The USPS states this information from the Grievant was freely provided to its postal inspectors after 325 pieces of Standard A mail for the Grievant's route were recovered from the recycling container at the Plaza Station Post office in Waterbury, Connecticut. The pieces in question were addressed "current resident" and appeared to be still in walk sequence order.

The USPS states in a separate statement the Grievant admitted to discarding deliverable mail, but attempted to justify this behavior by stating "...I told them (PIS) that after five years on the route I knew who wanted them and who didn't want them, and which were vacant, snowbirds, vacationers, etc."

The USPS states the mailer paid for this mail to be delivered and expects it to be delivered to each and every deliverable address.

It further asserts the Grievant knew the mail was deliverable but provided no evidence that management knew he was discarding deliverable mail and as such it can not and should not tolerate such a serious violation of postal regulations.

Additionally the USPS contends, without concurring there was a practice or not, that contrary to the NALC's solicited statements from employees indicating it was an accepted practice to discard UBBM into the recycle bin, none of them spoke of deliverable mail.

The USPS states it was clearly its right in accordance with Article 16.7 of the National Agreement to have placed the Grievant on an off-duty status especially given the fact he freely admitted to throwing out deliverable mail, specifically "weekenders" he has to sort himself.

The Grievant's subsequent removal for improperly disposing of mail was conditioned on the facts as of the Investigative Memorandum (IM) [IM Case #0746-1332224-1CL(1) in file]

dated 2/23/01 from postal inspector M.A. Wright which clearly articulates the circumstances, events and findings leading to the Grievant being put on emergency placement and management's reasoning for this action. that caused his emergency placement in off-duty status and subsequent removal.

The USPS adds it finds it even more disturbing that the Grievant contends when his router sorts the "weekenders" into his case he delivers them, but when he himself sorts he doesn't have time, so he delivers everything but the "weekenders".

The USPS states it can not and should not tolerate the Grievant's misconduct.

Based on the forging it respectfully requests that the Arbitrator deny these grievances.

POSITION OF THE NALC

The NALC contends that the USPS's did not have just cause for the emergency placement and subsequent removal of the Grievant and further management's action was punitive rather than corrective, and failed to take into account the Grievant's seven year service and excellent work record..

The NALC states that Article 16 requires that management give the Grievant a written notice of charges when imposing a suspension. Implicit in this requirement is that the notice of charges describe and explain the basis for the discipline with sufficient specificity that the grievant may make a defense. Albeit the Notice of Emergency Placement dated 2/16/01 falls far short of this requirement. The NALC further claims when it requested the reason for the Grievant's emergency placement it was told by supervisor C. Genua and manager Fred Dotson, "We don't know, we didn't get a report back from the postal inspectors yet."

The NALC also maintains management blatantly refused its requests for materials used in

this case, e.g., the mail allegedly thrown away etc. and remarks it has filed a separate grievance regarding same.

In support of this position the NALC cites the decision of arbitrator Mittenthal in H4N-3U-C 586 which in pertinent part states"...He (referring to the grievant) can not effectively grieve unless he is formally made aware of the charge against him, the reason why management has invoked Section 7. He is surely entitled to such notice... To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against management's action."

The Joint Contract Administration Manual (JCAM) provides for what is known as the Weingarten rule which gives each employee the right to representation during any investigatory interview which he or she reasonably believed may lead to discipline. However, the Grievant's Weingarten rights were violated when on 2/16/01, postal inspector M.A. Wright conducted an investigatory interview with the Grievant that was absent any union representative.

The NALC contends that management failed to give the Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of his alleged misconduct.

Additionally the Grievant's handling of the "weekender" mail in question was handled in the same manner by all employees of the Plaza Station, Waterbury Post Office for many years. Statements from other employees attest to the fact of management's lax handling of "weekenders" by allowing carriers to dump them into the recycling bin without review. The NALC contends that management in the Plaza station encouraged and allowed this practice over an extended period of time albeit it was contrary to postal regulations. The Grievant's statement was "I have been on Route 402 for about five years, from the day I got this route things have been done the same way. I was under the impression management that management knew what was going on."

Therefore the Grievant's alleged misconduct was not intentional as he and other employees openly place the discarded mail into the station's recycle bin with absolutely no attempt to conceal this fact, given this practice has been for many years. Further the Grievant discarded what were in his opinion "bad weekenders" i.e., ones believed to be doubles, vacant and for projects with CMBU boxes with a high level of patron turnover.

The NALC contends that the USPS has an obligation to inform employees clearly, without equivocation and without the possibility of misunderstanding, when rules which have been ignored are to be enforced and when wrongful practices which have been condoned are to cease. In support of this position it cites the decision of arbitrator Carl Warns, Jr. in RA-72-131, 7/24/72 (C-02029) which states in relevant part, "But management cannot 'tighten up' by imposing discipline on one offending individual where there has been no rule in the past and no punishment in the past." Other topically relevant arbitration awards were also cited to support this NALC contention..

The NALC asserts its interview of supervisor Mulville was that carriers threw away undeliverable "weekenders" without review by management. Yet while this supervisor clearly did not believe the Grievant improperly disposed of mail, he signed the Notice of Removal.

Further the NALC in its written closing statement cited additional arbitration awards that identify what characterizes a grievant's "willful and intentional action in direct defiance of the known and high responsibility placed on the Service and its employees," to demonstrate this Grievant's action was not a willful intent to thwart postal rules and regulations, but rather conformed with a long standing past practice at the Brass City station.

As the emergency placement in an off-duty status was not for just cause and it served as the basis for the Grievant's removal, the NALC seeks as remedy that the notice of emergency

placement be rescinded and removed from all files, and the Grievant be returned to duty and be made whole for all pay and benefits, including overtime, lost from the time of his suspension to reinstatement.

OPINION

The Arbitrator upon a review of the testimony and evidence adduced at the hearing finds the USPS had just cause for both the emergency placement suspension and the subsequent removal of the Grievant for improper disposal of mail in violation of postal regulations and even at variance with an informal practice of disposal of undeliverable "weekenders" at the Brass City post office, Waterbury, Connecticut that may well have not been in conformity with postal regulations.

In addition to what it believes to be the substantive merits of these grievances, the NALC raised procedural Weingarten rights violations and a claim of disparate treatment. The Arbitrator will preliminarily respond to each before responding to the central issue which forms the basis of the Grievant's suspension and removal.

First with respect to the NALC's claim that the Grievant's Weingarten rights were violated, the Arbitrator holds the record before him is devoid of any testimony or evidence that asserts or confirms the Grievant requested union representation and was denied such a request and or either the Grievant refused to cooperate with the investigation because union representation was not present during the inspectorial service interview and therefore was disciplined as a result of not cooperating during the investigation. The Arbitrator understands there is no requirement by the USPS to inform an employee of their Weingarten rights to representation.

Accordingly the Arbitrator finds there was no violation of the Grievant's Weingarten

rights in connection with this matter.

The NALC had contended the Grievant was a victim of disparate treatment as it claimed another carrier, C. Bergen assigned to the Brass City station was initially issued on 9/18/99 a seven day suspension for discarding deliverable mail ("weekenders"), however, during the dispute resolution team's subsequent review of the matter the seven day suspension was reduced to a letter of warning unlike this Grievant who was suspended and removed for identical conduct.

While this Arbitrator was not involved with the Bergen case it would appear from a review of the Bergen case file that it is distinguishable from the present charges alleged against the Grievant. Namely Bergen was charged with putting eleven "weekenders" in her UBBM tub by her case wherein the supervisor for customer service discovered these eleven "weekenders" of which ten were deliverable before they were discarded. Conversely the Grievant is charged with wholesale dumping of 325 sequential deliverable "weekenders" on 2/16/01.

The Arbitrator holds in comparing the Bergen case relied upon by the NALC to establish disparate treatment of the Grievant there are significant differences between the Bergen case and this case which do not cause this Arbitrator to conclude that management issued discipline to the Grievant in a disparate way compared to the cited Bergen case.

Concerning the NALC's claim that the Grievant's emergency suspension was without just cause and lacking specificity of the charges, the Arbitrator finds the Grievant's notice of emergency suspension provide sufficient specificity of the cause for such a suspension, namely "because your retention on duty could result in loss of mails or funds". The Arbitrator adds that the Grievant was furnished with the written notice of emergency suspension on 2/16/01, his last day of work.

Moreover as the Grievant was charged with improperly disposing of mail, his emergency

suspension was in conformity with Article 16.7 of the National Agreement and explicitly contemplated for.

With regard to the merits of the Grievant's removal the NALC's defense was the removal was not for just cause based on the following.

There existed for a long duration at the Brass City station, Waterbury, Connecticut a practice, albeit not in conformity with postal regulations, that was known to management, condoned and abetted by management to allow all carriers to dump their own deliverable weekenders (local newspaper advertisements and coupons for local stores and supermarkets) either in a hamper that on occasion was rolled out to the floor and per management's instruction to discard undeliverable weekenders without a carriers endorsement or supervisor's review. Or in the alternative to place undelivered weekenders in a tub next to the recycle dumpster.

The NALC had asserted both its and management's witnesses essentially supported each other on this point as well as a plethora of carrier statements, that were stipulated to by both advocates, that had these carriers been called to testified they would have testified consistent with their written statements.

Hence the NALC argued the Grievant did not do anything more than any other carrier would, i.e., to dump weekenders in conformity with the practice and with management's implicit consent except that this Grievant was removed for the very same conduct that many other carriers performed without penalty.

Further evidence of the existence of this practice is borne out by the fact that the day after the Grievant was removed, management had a stand-up with all carriers at the Brass City station to correct and reiterate postal policy regarding disposing undeliverable UBBM.

Based upon the foregoing, the Arbitrator does discern the existence of an aberrant

practice concerning the disposal of undeliverable weekenders known to and condoned by management. However, there is a critical distinction between this practice of many carriers at the Brass City station and that what the Grievant is charged with i.e. the wholesale dumping of sequenced deliverable mail directly into the recycle dumpster.

The Arbitrator believes the NALC met its burden to establish a practice existed by which carriers, based on their determination, were able to dispose of weekenders into the dumpster without a carrier's endorsement or supervision giving much oversight to the disposal of undelivered weekenders.

The Arbitrator understands and the witnesses testified to what undeliverable mail means which is no such address, forwarding order expired, vacant address, no label, bad address or resident deceased. However, the mail retrieved from the dumpster was deliverable mail. Specifically the Grievant was charged with 325 sequenced pieces of "weekenders" of which 98 percent were deliverable.

The Arbitrator finds neither the NALC or USPS witnesses or carrier statements contends that UBBM "weekender" mail can be disposed of for any reason or no reason. All witnesses testified consistent that the only mail to be discarded by practice or regulation was mail that was undeliverable.

Hence the fact the Grievant discarded wholesale deliverable "weekenders" and regular mail directly into the recycle dumpster does not cloak him with the protection of an established practice even if that practice is contrary to USPS regulations.

The Arbitrator finds the Grievant's wholesale dumping of mail is undisputed by him except to say he believed he was in conformity with the aforementioned practice.

The Arbitrator holds the wholesale dumping of deliverable mail can not be excused by

ignorance or claim of inadvertence or the Grievant's posited excuse he did not have time to deliver the "weekenders".

Had the Grievant been in conformity with the purported practice, which he was not, the Arbitrator would have seriously considered sustaining the NALC's grievance.

The Arbitrator does not find it a prerequisite to apply progressive discipline to employees who either engage in provable acts of serious misconduct or deliberately fail to perform the core function of the postal service to deliver the mail. Employees can not take it upon themselves to determine on a wholesale level that deliverable mail should not be delivered.