

BEFORE THOMAS F. LEVAK, ARBITRATOR

C#04941

In the Matter of the Grievance
Arbitration between the U. S.
POSTAL SERVICE
The "SERVICE"

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS
The "UNION"

DISPUTE AND GRIEVANCE
CONCERNING REMOVAL FOR
AWOL--TIMELINESS DEFENSE

WLN-5B-D 31519
R. HENDERSON

ARBITRATOR'S OPINION
AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., May 14, 1985 at the offices of the Service, Laguna Niguel, California. The Service was represented by Paul La Rocco. The Union was represented by Basilio Fontana. The Grievant, Randall Henderson, appeared and gave testimony on his own behalf. Testimony and evidence were received, and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGE AND THE ISSUES.

The Notice of Proposed Removal issued May 22, 1984 provides as follows:

Charge - You are charged with being Absent Without Official Leave (AWOL). You were scheduled to report for duty on May 17, May 18 and May 19, 1984 and you failed to report as scheduled. You did not notify your supervisor of your intended absence and have not done so as of this date. Attempts to contact you have been fruitless. The Employee and Labor Relations Manual, Part 666.81 states; "Employees are required to be regular in attendance". Part 511.43 of the Employee and Labor Relations Manual requires that, "Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences."

* * *

You have the right to file a grievance under the Grievance/Arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice. (J2)

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The final Letter of Decision affirming the Grievant's removal was issued August 28, 1984 and was made effective September 28, 1984. A grievance was filed to protest the removal on December 17, 1984.

The stipulated issues are as follows: First, was the grievance filed in a timely manner in accordance with the National Agreement? Second, if the grievance was filed in a timely manner, was the removal for just cause in accordance with Article 16 of the National Agreement; and if not, what is the appropriate remedy?

II. FINDINGS OF FACT.

The Grievant was first employed by the Service in August 1978 at the Laguna Niguel, California station. After his first three months of employment, he served as an Acting Supervisor (204-B), a position he held until his resignation from the Service in March 1981. He was re-employed by the Service sometime in 1982 and again served as a 204-B at Laguna Niguel until on or about May 12, 1984.

On or about Monday, May 14, 1984, the Grievant was assigned to work at the Laguna Hills, California station as a PTF Carrier. He was assigned to work the entire week of May 14-18, 1984, with his shift commencing at 11:00 a.m.

The Grievant worked his May 14, 15 and 16 shifts without incident. At the conclusion of his May 16 shift, the Grievant was instructed by Supervisor of Delivery and Collections Margaret Buller to work one additional hour (a one-hour swing). The Grievant responded that his feet were tired and that he did not want to work anymore that day. Buller responded that he would have to work one hour to take care of the swing, and the Grievant again responded that he did not want to work an additional hour because his feet were tired. He explained that because he had not yet received his uniform allowance, he had to carry the mail for three days in his own street clothes and shoes, and that his feet were therefore tired.

Buller responded that the Grievant would have to carry the swing, and gave him a direct order to do so. The Grievant responded to her that he would not carry the swing. Buller told the Grievant that if he did not carry the swing, she would have to issue a warning letter, and asked him whether he was aware of the consequences of his refusal. The Grievant said that he understood the consequences, but that he was tired and would not carry the swing.

Buller immediately went to the office of Station Manager Monroe Sandberg and told him that the Grievant had refused to take a swing and had refused a direct order to do so. Sandberg went back to the floor and talked to the Grievant. He asked the

Grievant whether the Grievant understood the seriousness of disobeying a direct order, and mentioned to the Grievant that as a former 204-B, he should understand the consequences. The Grievant stated that he understood but that he was not going to perform the work.

Sandberg and Buller both testified that the Grievant thereupon simply punched out and left work. The Grievant testified that Sandberg first took him into his office and told the Grievant to clock out, and that he (Sandberg) would be contacting the Grievant. The Arbitrator makes a special finding of fact that the Grievant's testimony lacked credibility and was totally unbelievable. On the other hand, both Buller and Sandberg testified in a credible and forthright manner, and the Arbitrator therefore makes a special finding of fact that their testimony constitutes fact.

It should be noted that the Grievant contended that Buller and Sandberg were both jealous of him for having received a number of commendations as a 204-B (the commendations were received into evidence by the Arbitrator). The Grievant's contention in that regard was totally unsupported by any factual evidence, and the Arbitrator concludes that the Grievant's contention is ludicrous. There is no reason to believe that either Buller or Sandberg maintained any professional jealousy against the Grievant or that they acted out of any improper motive. Similarly, there is no reason to believe that either Buller or Sandberg had any motivation to falsify their testimony regarding their last encounter with the Grievant.

On May 16, 1984, Buller took steps to prepare a warning letter for insubordination, which letter was finally prepared and ready for issuance on May 18, 1984. It should be noted by the Arbitrator that the propriety of the warning letter is not at issue in this case.

The Grievant testified that on May 17 he was confused about his actual employment status, but that at about 10:00 a.m., one hour before his regular reporting time, he called the Laguna Niguel office, spoke to a Clerk, and asked to speak to either Buller or Sandberg. He testified he was told by the Clerk that they were unable to come to the phone and that the Clerk would take a message. The Grievant testified that he gave the Clerk a message to call him at his home. The Grievant testified that he never received a call back from either Buller or Sandberg.

The Grievant testified that he repeated that same procedure on May 18, with the same results.

Buller testified that on May 17, 1984, when the Grievant did not call in, she called his home phone number several times and received no answer. She testified she reported the matter to Sandberg, and also asked other supervisors whether the Grievant had called in. Sandberg also testified that he also personally attempted to contact the Grievant by telephone but received no

answer. Buller and Sandberg both testified that they repeated the same process on May 18 without result.

The Arbitrator makes a special finding of fact that the Grievant's claim that he called in on May 17 and May 18, 1984 lacks credibility and is false. On the other hand, the Arbitrator further finds that the testimony of Buller and Sandberg was entirely credible. Again, there is absolutely no reason to believe that they did not attempt to contact the Grievant repeatedly by telephone. Such would have been the obvious and normal thing to do when the Grievant failed to report or call in.

The Grievant made no attempt to contact the Laguna Niguel station, and on May 22, 1984, the Service issued the above-quoted Notice of Proposed Removal. The Grievant's employment records listed his post office box at the Laguna Niguel station as his official mailing address. On May 22, 1984, a Return Request Receipt Certificate for the Notice of Proposed Removal was placed in the Grievant's box, with the actual letter and envelope maintained in the possession of Laguna Niguel Box Clerk Ian Graves.

The Notice of Proposed Removal was not picked up by the Grievant, and on June 8, 1984, a Decision letter of that date was issued which stated in relevant part:

On May 22, 1983, you were issued a notice proposing to remove you from the Postal Service, based upon the charge set forth in the notice.

You failed to answer the charge, and after full and careful consideration of all evidence of record, I find that the charge stated in the notice of May 22, 1984, is fully supported by the evidence and warrants your removal. You were charged with being Absent Without Official Leave (AWOL). You were scheduled to report for duty on May 17, May 18, and May 19, 1984 and you failed to report as scheduled. You did not notify your supervisor of your intended absence and have not done so as of this date. Attempts to contact you have been fruitless.

Considered collectively, this deficiency indicates a wilfull disregard for instructions and an undesirable attitude, on your part, to conform to the standards of conduct expected of Postal Employees. The removal will be effective June 28, 1984.

You have the right to appeal to the Merit Systems Protection Board immediately, but no

later than 20 days after June 28, 1984. If you desire to appeal to the Merit Systems Protection Board, your appeal should be sent to Chief Appeals Officer, MSPB, San Francisco Field Office, 525 Market Street, 25th Floor, San Francisco, Ca. 94105. Your appeal must be in writing, and give reasons for contesting the action, with any offer of proof and pertinent documents you are able to submit.

If you appeal, you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance Arbitration Procedure.

* * * (J3)

Again, a Certified Letter was prepared, and the Certificate of Return Receipt Requested was placed in the Grievant's post office box, with Greaves maintaining possession of the letter itself.

By June 29, 1984, neither of the two letters had been picked up by the Grievant, and he still had not contacted the Laguna Niguel station. On June 29, 1984, the Laguna Niguel Postmaster issued a Form 13 routing slip to the MSC Postmaster/Manager in Santa Ana, California as follows:

Enclosed is the OPF for Randall E. Henderson. Please note letters dated May 18, May 22, and June 8, 1984. All were mailed to the employee Certified RRR. All were returned unclaimed.

Please effect a Form 50 terminating this employee, effective 6/28/84. (U7)

Sandberg was directed to place the Warning Letter, the Notice of Proposed Removal and the Letter of Decision in a penalty envelope in the Grievant's post office box. On July 15, 1984, Sandberg, in the presence of Greaves, placed the Warning Letter, the Notice of Proposed Removal and the Letter of Decision in a penalty envelope addressed to the Grievant, and placed the penalty envelope in the Grievant's post office box. On July 31, 1984, the penalty envelope was picked up, together with other mail addressed to the Grievant.

The Grievant admitted at the arbitration hearing that during the months of May, June and July he regularly picked up mail at his post office box, but denied that he ever saw the two certificates for the Proposed Removal and Letter of Decision, and also denied that he picked up the penalty envelope. The Grievant testified that he had authorized another Letter Carrier, Pam Canard, to use his post office box, but that Canard never picked up mail addressed to him. Ms. Canard was not called as a witness by the Union.

The Arbitrator finds that the Grievant's testimony lacks

credibility, and that he in fact saw the two certificates in his post office box and also picked up the penalty envelope. Neither the Union nor the Grievant offered any explanation as to why the Grievant would not have seen the two certificates, nor did the Union or Grievant offer any plausible explanation as to what could possibly have happened to the penalty envelope. The Arbitrator will not simply presume that some unknown person, for some unknown motive, removed the certificates and penalty envelope from the back of the box. Neither will the Arbitrator assume that Canard took the certificates into her own possession and for some unknown motive kept them from the Grievant. The Arbitrator can only logically assume that at that point in time, the Grievant intended to abandon his job and not answer any correspondence from the Service.

On August 28, 1984, a second Letter of Decision was issued stating that the Grievant's final removal was to be effective September 28, 1984. That Letter noted the Grievant's right to appeal as a preference eligible employee to the Merit Systems Protections Board (MSPB), but did not mention the Grievant's right to file a grievance under the National Agreement. At that point in time, management representatives believed that the Grievant had preference rights because of prior service with the Armed Forces.

On August 30, 1984, the Grievant personally removed the August 28, 1984 Letter of Decision from his post office box. On or about the same date, he spoke with Union representatives, who advised him that the time had expired for filing a grievance. Those Union representatives also arranged for an appointment between the Grievant and Laguna Niguel Postmaster David Rios so that the Grievant could make a personal appeal for reinstatement. The Grievant met twice with Rios in September 1984, but Rios refused to reinstate him.

On or about October 1, 1984, the Grievant filed an appeal with the MSPB. His appeal noted in part, under the heading, "How do you think the Agency was wrong in taking this action?":

Procedures for grievances not complied with.
Was not AWOL; notified supervisor was sick and
unable to report to work the following day.
(M4)

The Grievant testified at the arbitration hearing that his brother had completed the MSPB appeal form, and that his brother must have misinterpreted his statements regarding his reason for not being AWOL. Again, the Arbitrator finds that the Grievant's testimony is not credible. It is clear from the MSPB form that the Grievant was therein claiming that he was not AWOL for the reason that he had notified his supervisor on the day prior to his absence that he was sick and would be unable to report to work the following day. That explanation is patently false and totally conflicts with the Grievant's arbitration hearing testimony regarding the May 16 refusal to work incident.

On or about December 1, 1984, the MSPB dismissed the Grievant's appeal for the reason that he was not a veterans preference eligible employee. (Note: the date is indefinite because no documentation was offered into evidence regarding the dismissal of the appeal.)

On December 6, 1984, the Grievant again contacted the Union, and was this time advised to file a grievance. On December 17, 1984, the Grievant filed a Step 1 grievance to protest his removal.

At Step 1, and again at Steps 2 and 3, the Service asserted the untimeliness defense, while also denying the case on the merits.

III. Service Contentions on the Issue of Timeliness. All notices were properly issued to the Grievant. For whatever reason, the Grievant simply failed to pick up the certified notices, but the Service did everything within its power to serve the Grievant. Further, the evidence establishes that the Grievant picked up the penalty envelope containing all three documents. The Grievant testified he picked up his mail regularly, and that the other individual authorized to utilize his box never touched his mail. The Arbitrator must therefore assume that the Grievant received notice.

Secondly, no grievance was filed within fourteen days of the date the Grievant picked up the final Decision Letter on August 30, 1984. Nothing within Article 16 requires the Service to notify an employee of his right to grieve, and it is clear that the Grievant never filed a grievance until December 17, 1984.

IV. Union Contentions on the Issue of Timeliness. First, the Grievant never saw the two certificates of mailing in his box, and never received the July 31, 1984 penalty envelope. The Union does not know why the Grievant never received any of those documents. The Grievant was letting someone else use the box, and it is possible that that person took them. It is also possible that someone else took the certificates or the penalty envelope from the back of the box.

It is the Service's burden to establish that the Notices were in fact delivered. The Service has failed to do that.

Further, the Grievant was misled by the August 28, 1984 letter to appealing to the MSPB. The Service breached its responsibility under the National Agreement to advise the Grievant of his right to appeal his removal through the grievance procedure.

The failure of the Service to effectively serve the Notice of Proposed Removal on the Grievant constitutes a major procedural defect which entitles the Union to a directed verdict

in his favor.

V. Arbitrator's Conclusion on the Issue of Timeliness. The Arbitrator concludes that the Service has established by a preponderance of the evidence that the grievance was not filed in a timely manner in accordance with Article 15, Section 2 of the grievance procedure, and that the grievance must therefore be dismissed and denied. Indeed, the Service has established by clear and convincing evidence that the grievance was untimely. Accordingly, on that basis alone, the grievance must be denied. The following is the reasoning of the Arbitrator.

The starting point on the issue of timeliness is Article 15, Section 2, Step 1(a) which provides that an employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. Article 15, Section 3(b) provides that the failure of an employee or the Union to meet the Step 1 time limit shall be considered as a waiver of the grievance. The well-established definition of "waiver" is "an intentional relinquishment of a known right." Section 3(b) further provides that the Service itself waives any objection to a failure to meet time limits by failing to raise the issue of timeliness in a timely manner. Accordingly, an employee who fails to file a grievance within the contractual time lines must be deemed to have intentionally relinquished his right to grieve.

The next point concerns the alleged failure of the Service to properly provide the Grievant with advance notice of discharge, a requirement of Article 16, Section 5.

The Arbitrator concludes that under normal circumstances, the Service effects advance written notice to an apparently AWOL employee, and thereby fulfills its Article 16, Section 5 requirement by effecting delivery of the Notice to the employee's official mailing address, and that such an employee shall be deemed to reasonably have been expected to learn of the Notice upon the date of such delivery.

Of course, because the penalty of discharge is so severe, arbitrators will reasonably and liberally apply the rule, and sometime invoke equitable exceptions, to serve the interests of equity and justice. One example readily comes to mind: an employee who suffers a serious accident requiring his hospitalization. However, an employee who claims such an excuse must quickly come forward with the excuse and with evidence to substantiate it. Also, an arbitrator will normally require management to have made a reasonable number of telephone attempts to reach the absent employee before imposing the removal penalty.

In the instant case, it is clear (1) that management made several pre-removal attempts to contact the Grievant, (2) that delivery was properly effected, (3) that the Grievant never came forward promptly with any excuse for his absence, and (4) that no

excuse existed whatsoever that would justify a finding that the Grievant would not reasonably have been expected to learn of the Notice.

It is clear to the Arbitrator that the Grievant's testimony was simply false, and that he saw the Return Receipt Requested Certificates in his post office box, but simply refused to pick up the Notice of Proposed Removal and Letter of Decision, knowing that adverse action had been taken against him. The Grievant's testimony that he never saw the July 15, 1984 penalty envelope is another patent falsehood. It is apparent to the Arbitrator that from February 16 through sometime in August 1984, the Grievant (1) had no intention of returning to his position or contacting the Service, (2) intended to abandon and relinquish his job rights, and (3) had no intention of appealing any adverse action.

Further, even assuming, for the sake of argument, that the Grievant never saw the two certificates, never picked up the penalty envelope, and had some reasonable excuse for failing to do so, his grievance is still untimely for the reason that he did not file a grievance within fourteen days after receiving the August 28, 1984 Letter of Decision on August 30, 1984.

The Union argues that the Service's action is fatally defective because (1) the Grievant did not receive advance notice and (2) the Grievant did not receive proper notice of his right to file a grievance.

Regarding the first defense, the Grievant's and the Union's claim in that regard cannot now be considered by the Arbitrator because it was not timely raised as a grievance within fourteen days of the Grievant's receipt of the Letter of Decision on August 30, 1984.

Let us assume for a moment, for illustrative purposes only, that the Service had failed to comply with all notice requirements of Article 16 and had simply terminated the Grievant on August 28, 1984. In order for the Grievant and the Union to challenge the Service's failure to meet those notice requirements, they would have to have done so through a timely grievance filed within fourteen days of the termination. Any alleged breach of the Agreement, including an alleged breach of the notice provisions, must be challenged through the filing of a timely grievance. Thus a failure to provide timely notice cannot be held by an arbitrator to be fatally defective to a removal action unless the failure is brought to arbitration as part of a timely grievance.

With regard to the Union's second defense, nothing within Article 16 of the National Agreement requires the Service to notify an employee of the employee's right to file a grievance to protest a removal. While such notice may be traditional, the Service's failure to notify the Grievant of grievance procedure appeal rights in the August 28, 1984 Letter of Decision does not constitute a breach of the National Agreement. Employees are

charged with the responsibility of knowing their own rights under the National Agreement, including grievance rights. In legal jargon, employees are "third-party beneficiaries" of labor contracts and are charged with the responsibility of knowing contractual terms which have been negotiated on their behalf by their labor organization. In any event, the Grievant spoke with the Union immediately after receiving the Letter of Decision on August 30, and had every opportunity to be independently informed of his grievance rights.

For all the above reasons, the Arbitrator concludes that the grievance is untimely and must be denied and dismissed.

Normally, the Arbitrator will not consider a case on the merits once it has been denied on a procedural basis. However, because there may be some inference in this case that the Union may be responsible for failure of this case to have been grieved in a timely manner, the Arbitrator has chosen to treat the merits in a summary manner.

VI. Arbitrator's Conclusion on the Merits. The Arbitrator concludes that the Service has established by clear and convincing evidence that the removal of the Grievant was for just cause. Accordingly, the grievance must be denied on the merits. The following is the reasoning of the Arbitrator.

As has already been discussed in some detail, the Arbitrator is convinced beyond any reasonable doubt that the Grievant falsified his testimony throughout the arbitration hearing, and also falsified his reason for appeal to the MSPB. It is clear to the Arbitrator that the Grievant walked off the job without sufficient reason on May 16, 1984, and violated the lawful and proper order of his supervisors to remain at work and perform an additional hour of work.

The evidence further clearly establishes that from May 16 until sometime in September 1984, the Grievant made absolutely no attempt to contact any of his supervisors, and that he voluntarily became and remained AWOL.

The Grievant was aware, at all times, that the Service had initiated adverse action against him, but he failed and refused to pick up the first two letters issued against him, and after picking up the penalty envelope on July 1, 1984, simply chose to not respond.

The Arbitrator is not a clairvoyant and cannot determine from the evidence the reason for the Grievant's failure to take any effort to protect his job. It does appear that the Grievant was suffering from some personal problem or condition which he failed to reveal at the arbitration hearing.

In any event, it is abundantly clear that the Grievant intentionally relinquished any claim to his job for a period of over three months before deciding to first effect an appeal to

the MSPB and later through the grievance procedure. During that entire period of time, the Service acted in an entirely proper manner, and there is absolutely no convincing evidence whatsoever that the Service's supervisors were motivated by jealousy, bias or other improper motive.

The Grievant's failure to report for work and his failure to call in for a substantial period of time constitutes a "major" infraction as generally understood by arbitrators. An employee who absences himself from work without excuse and without calling in for a substantial period of time commits an offense that is just as serious as gross insubordination, theft of company property or on-the-job intoxication. Accordingly, removal for a first offense is entirely justified.

The Arbitrator has considered the prior good work record of the Grievant, including his numerous commendations as an acting supervisor. However, under the facts of this case, the Grievant's relatively short work record, even though exceptional, cannot mitigate against the severity of the offense. Just cause for his removal existed within the meaning of Article 16.

The grievance is denied on the merits.

AWARD

The grievance was not filed in a timely manner in accordance with Article 15, Section 2, Step 1(a), and was therefore waived within the meaning of Article 15, Section 3(b). Further, the removal of the Grievant was for just cause in accordance with Article 16 of the National Agreement, and the grievance is also therefore denied on the merits.

DATED this 26th day of May, 1985.



Thomas F. Levak, Arbitrator