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ARBITRATION OPINION AND DECISION PURSUANT TO ARTICLE XV OF

THE NATIONAL AGREEMENT BETWEEN THE PARTIES

CASE NO. W8C-5K-D-2752

Date of Hearing - October 5 1979

AMERICAN POSTAL WORKERS UNION,)	
)	WILLIAM EATON
and)	Arbitrator
UNITED STATES POSTAL SERVICE,)	
PHOENIX, ARIZONA,)	
Robert Garcia)	
)	
)	
)	

APPEARANCES:

FOR THE UNION:

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INDUSTRIAL
RELATIONS

ISSUE AND EVIDENCE

This is an arbitration to determine whether Grievant Robert Garcia was discharged for just cause under the National Agreement, and if not what the remedy shall be. Hearing was held in Phoenix on October 5 1979, at which time the parties were afforded full opportunity for the examination and cross-examination of witnesses, and for the presentation of other evidence. The issue was submitted to the Arbitrator for final and binding determination upon the filing of posthearing briefs, submission being completed on December 15 1979.

The Grievant was first hired by the postal service in May of 1962, serving for two years at San Manuel, at which time he went into the United States Army. There he served in Vietnam, earning two silver stars, two bronze stars, three purple hearts, and 30 air medals. He is a 10 point disabled veteran. He was rehired by the postal service in 1967, and was working as a special postal clerk in the downtown station of the Phoenix Post Office at the time of the emergency suspension and discharge at issue in the present dispute.

He had been promoted to the special postal clerk position, postal service grade 6, in 1978, apparently late in the year. In that capacity he acted as group leader on the 10:45 p.m. to 7:15 a.m. shift, and was the highest authority at the downtown station from the beginning of his shift until 5:30 a.m., when a supervisor was assigned to appear for duty. The Grievant processed mail with the other employees during the shift.

Promotion to the special clerk position is done by way of bidding, the position going to the senior qualified person.

On February 7 1979 the Grievant was served with a notice of charges - removal, stating the reasons for the proposed action as follows:

1. Your unreliable conduct and your failure to report to work as scheduled in that on Friday, January 26, 1979, you were scheduled to report to work at 10:45 p.m., in order for you to open the Downtown Station. However, you did not report to work until 1:00 a.m. the following morning and three waiting employees were locked out from the Downtown Station from 10:45 p.m. until 1:00 a.m., thus resulting in a loss of six hours of production from these employees. When you did report to work at 1:00 a.m., you did not clock into work, but merely opened the doors to the waiting employees and then you left the building. Eight hours were charged as absent without official leave (AWOL), which in turn, caused eight hours of otherwise unnecessary overtime.
2. Your unreliable conduct and your failure to report to work as scheduled in that on Monday, February 5, 1979, you were scheduled to report to work at 10:45 p.m., in order for you to open the Downtown Station. However, you did not report to work until 12:25 a.m. the following morning and three waiting employees were locked out from the Downtown Station from 10:45 p.m. until 12:25 a.m. and one employee was locked out from 12:00 midnight until 12:25 a.m., thus resulting in a loss of approximately six hours of production from these employees. Thus, 1:45 minutes were charged as absent without official leave (AWOL).
3. Making a threatening remark towards an acting supervisor in that on February 6, 1979, at approximately 11:00 a.m., you called, by telephone, Acting Supervisor Adolfo Trujillo and made threatening remarks that "this was the last time he was going to put the finger on you, and that you were going to fix it so he would never rat on you again."

The following elements of your past record will be considered:

July 18, 1978	-	7 calendar day suspension for irregular attendance.
May 16, 1978	-	Letter of warning for irregular attendance.
April 14, 1978	-	1 day suspension for time card irregularities and absent without official leave.

On February 8 1979 the Grievant was issued a notice of proposed emergency suspension based upon the charges in

paragraph 3 of the removal notice. He was placed on administrative leave on February 8 1979 which extended to the date of the proposed emergency suspension, effective February 16 1979.

The January 26 Incident

On this date the Grievant failed to report to work at 10:45 p.m., and did not arrive until 1:00 a.m. on January 27. He had the only key to the downtown station, as a result of which three other employees were locked out for approximately two hours and 15 minutes. As a result, these employees were required to be paid for the time not worked, processing of the mail was delayed, and overtime was subsequently required in order to complete the mail processing.

The Grievant testified that he was sick, but he could not recall what his illness was. He went home directly after he appeared to unlock the door, advising the next senior employee, Bruce Irwin, to take over. He stated that he had called the main office to report his illness and prospective absence, but that no one had answered. Asked why he had not come at 10:45 instead of 1:00 a.m., he replied that he was "probably asleep."

February 5 Incident

On February 5 the Grievant failed to appear until 12:25 a.m., again causing the other employees on the shift to be locked out. On this occasion another of the employees on the shift appeared at the Grievant's apartment to ask for a key, the Grievant at the time having resided only some half dozen or so blocks from the downtown station. The Grievant stated that he had given a key to Irwin to open up on Saturday and Sunday, the Grievant's

scheduled days off, and that he believed that Irwin still had the key. It appears, however, that he had turned the key over to a supervisor, Marshall Ray.

Rather confusing testimony was presented by the Grievant, and by Charles Koss, the station manager of the downtown station, as to what the key policy, if any, had been for the shift in question. While the Grievant appeared to say that a second employee was always supposed to have a second key, Koss testified that there was no such formal policy. Koss agreed, however, that he believed that the Grievant had thought someone else had a key on February 5.

Koss testified that there had been no second key policy for the reason that other employees did not want the responsibility of having the key. When asked whether he could not have required such a policy, he replied that he had "entreated" a second employee to take the key after the incident of February 5, and that the employee had reluctantly agreed to do so.

Alleged Threat Against Trujillo

It is agreed that at approximately 11:00 a.m. on the morning of February 6 the Grievant called acting supervisor Adolfo Trujillo from King's Cocktail Lounge, an establishment in the area of the downtown station which appears to be frequented by employees of the station, both for light lunches and for drinks, presumably after working hours. The Grievant agrees that he was emotionally upset, and that he asked Trujillo, who had been a social friend at one time, why Trujillo had "screwed" him. The Grievant stated that he felt Trujillo had "betrayed my friendship", that he had "put the finger on me", and that he "ran

to Charlie Koss" to report the February 5-6 incident.

The crucial portion of the telephone call concerns an alleged threat against Trujillo, which is disputed. Trujillo testified that he had known the Grievant for some 10 to 11 years, and for much of that time they had been friends away from work. He stated that the telephone call on February 6 lasted only 40 to 45 seconds, that the Grievant cursed at him in Spanish, that he used a Spanish word which indicated a threat of physical harm, and that as a result he felt threatened. Trujillo stated that he and the Grievant always spoke in English, and that he found it "peculiar" for the Grievant to address him in Spanish. According to Trujillo, the tone of the Grievant's voice was "very upset" during the call.

Trujillo went immediately to report the call to Koss. He stated that at first Koss "just smiled", but that when Trujillo said that the Grievant might have a gun, and might shoot him, Koss then suggested that Trujillo make a written report of the conversation, which he did.

Koss testified that Trujillo told him that the Grievant was calling from a bar, and that he "could do almost anything" when drinking. Trujillo testified that he did not know that the Grievant was in a bar when he called, the witnesses having been sequestered at the arbitration hearing.

The statement written by Trujillo on February 6 indicated that the Grievant had told him he was going "to put the finger on him", and that he was "going to fix it so I would never rat on him again." Trujillo testified that he took these words to constitute a physical threat, and that he intended to convey that

meaning in writing the statement.

Later the same day the Grievant returned to the downtown station, apparently to speak with Trujillo, but was intercepted by Koss, who asked him to come into his office to discuss the telephone call. Koss testified that the Grievant had stated to him at that time that he had been in bed sleeping, that he denied any drinking that morning, but that his eyes were bloodshot, that he was not "coherent", that he appeared to be drunk, that he did not smell of alcohol. Although the Grievant denied having threatened Trujillo, and also denied having slashed the tires of another employee when Koss asked if he had done that, the Grievant states that Koss advised him at that time that he was to be terminated.

Trujillo testified that by early 1979 his friendship with the Grievant had cooled. Apparently the principal reason was that Trujillo discovered that a woman he had been going with was also going out with the Grievant. Trujillo also stated that he did not like the way the Grievant was behaving at work during 1978, in showing up late, and in being absent without leave.

Trujillo testified that some time between the Grievant's termination and the arbitration hearing he overheard the Grievant at the American Legion Hall saying that he, Trujillo, had "better leave." When asked whether he believed the Grievant to be an honest person, Trujillo replied that "basically" he did.

At the arbitration hearing Gerald Marlatt, a postal employee of some 12 years service, who was assigned to the downtown station on February 6 1979, testified that he had been in the bar from which the Grievant made the telephone call to Trujillo

on that day, and that he had overheard most of the conversation from a distance of approximately five feet away.

Marlatt, a general delivery clerk, was at the time assigned to tour 2, working from 6:00 a.m. to 2:30 p.m. He testified that his lunch began at 11:00 a.m., and that he was on his lunch break, and eating lunch in company of the Grievant, at the time the telephone call was made.

Although Marlatt stated that he did not know to whom the call was placed at the time, the Grievant did not appear "particularly upset", did not speak in a loud or angry voice, that he did speak in a normal tone, and that there was "no raising of the voice." Marlatt testified that the Grievant used "about four words" of Spanish during the conversation, and that these words were delivered in the same normal tone.

Marlatt testified that February 6 happened to have been his last day of work at the downtown station, he having bid into another position. He stated that he returned two days later, on February 8, to pick up some things he had left, and at that time heard the first report that the Grievant was in some kind of trouble because of the telephone call. Later he heard that the alleged threat had been one of the reasons for the Grievant's discharge. However, Marlatt did not come forward with his version of the conversation until asked by a union representative some time in September about it. He stated as his reason the fact that nobody had asked him, and stated that it "never occurred to me" to speak up earlier. He explained that there are many confusing rumors in the postal service, and that "everyone said something different" about the threat and, evidently, about the

Grievant's discharge.

The Grievant testified that he did not mention Marlatt's having overheard the conversation for the reason that he did not want to involve anyone else, that he had never asked Marlatt to testify, and that when Marlatt did come forward it was of his own volition.

As a consequence, Marlatt's report of the telephone conversation was not available at any prior step of the grievance procedure.

Grievant's Work Record

The Grievant had received three prior warnings or suspensions in 1978, as summarized in the notice of removal set forth above. The suspension of March 22 1978 had originally been for seven days, but was reduced to one day.

The Grievant had never been placed on restricted sick leave, nor was he after the incident of January 29. While it appears that supervisor Les Vanderhaar might have spoken to him about sick leave use in the fall of 1978, this evidently was during the course of the conversation which led to the Grievant's promotion to the PS 7 position which he occupied at the time of his termination. The Grievant agrees that, as a result of the three disciplinary actions earlier in 1978, he had agreed to solve his attendance problems.

Charles Davis, director of customer services, who signed the Grievant's letter of decision concerning both the removal and the 30 day emergency suspension, testified that he suspected the Grievant had a drinking problem. The Grievant testified that on two prior occasions he had voluntarily

participated in the PAR program of the postal service for alcoholic rehabilitation, on one instance for one year, and another time for two years. He agreed that he had discussed entering the program with Davis, and that he had told Davis that he did not have a problem at the time of his discharge, and therefore did not enter the program.

Termination and Grievance Processing

The Grievant's notice of charges for removal was dated February 7 1979, and was delivered to him on February 9. The notice informed him that he would be allowed seven calendar days from the date of receipt of the notice to submit an answer, and that if he did not answer he would be given a written decision after the expiration of the seven days. The Grievant was to have answered to Davis, but testified that when he telephoned he was advised that Davis was on vacation. He stated that he therefore expected a call from Davis when he returned, and in the meantime turned the grievance over to the union. Davis testified that he was not on vacation between February 9 and February 15, although he did leave on February 22 for a training program in Washington.

In his discussion with Koss on January 29 or January 30, it is agreed that the Grievant mentioned sickness and family problems. Koss testified that discharge was decided upon after the January incident rather than demotion or reassignment of the Grievant. He stated that this was because of prior offenses as well as the January absence, and the decision of the postal service that he could not perform at either level PS 5 or PS 6. Koss denied having stated during the grievance proceedings that the Grievant needed time off, but that he did not want to fire him.

Koss stated that the Grievant agreed that the January incident was his fault, but denied any culpability in the February incident.

Shortly after Davis issued his letters of decision on the removal and the emergency suspension, both dated February 17 1979, the Grievant came in to speak with him for the first time. While Davis had been the step 2 hearing officer, the Grievant was not personally present at that hearing, although it was alleged on his behalf that his remarks to Trujillo on the telephone had been misinterpreted, that no threat had been intended, and that the union suggested that Trujillo was acting out of prejudice against the Grievant because of their involvement with the same woman in the past.

Davis stated that when he spoke to the Grievant he mentioned emotional, marital, and personal problems he was having at the time. He asked that a reduced assignment be considered, even at another work location. After considering this request, and reevaluating the Grievant's record, Davis declined to change his decision, except to offer the Grievant the opportunity to resign rather than being discharged.

Davis testified that he originally determined upon discharge for the reason that the charges in the letter were all that he had, that he had nothing from the Grievant himself, and that the charges were substantiated. These factors, taken together with the past record of the Grievant, led Davis to conclude that further progressive discipline would not help.

It was pointed out to Davis that a letter sustaining the discharge and removal, dated June 5 1979, from the regional labor relations representative had noted that item number 3 of

the charges "was in itself a serious and singular reason for Management's action in this instance." When asked if this reason alone, or the two AWOL charges alone, would have been enough to sustain the discharge, Davis repeated that his decision had been based upon the entire record of the Grievant as set forth in the notice of removal.

DISCUSSION

Postal Service Argument

The record is clear that on January 26 1979 the Grievant was two hours and fifteen minutes late and that the result was delay and additional expenditure in order to perform the necessary work. At that time, he knew that he had received two suspensions and a letter of warning in 1978 for poor attendance.

In spite of this background, and the threatened discipline in late January of 1979, the Grievant was late again on Feburary 5, with the same results.

The Grievant's excuses of sickness are not persuasive. Although he was not on restricted sick leave, had he been truly ill, he could have provided medical certification in an attempt to save his job. When he was allegedly ill on Feburary 5, he worked the remainder of his tour after his late arrival, leaving work at about 7:00 a.m. after which he went to a nearby cocktail lounge, where he remained at least until 11:00 a.m. when he telephoned Trujillo.

Although the Grievant thought another employee had a second key to the building on each occasion, on each occasion the Grievant was mistaken. After he found out his error of January 26 he should not be excused for making the same error on February 5.

The credible evidence establishes that the Grievant threatened Trujillo by telephone. Trujillo had no proven motive to make up a story about the threats, while the Grievant did have a motive to threaten because he had advised Koss of the Grievant's misconduct. Even Marlatt testified that during the call the Grievant said "you screwed me", pursuant to his evident motive.

This record establishes that the Service has used progressive discipline in an attempt to Grievant's attendance and tardiness problems, and that his repeated misconduct justifies a belief that further progressive discipline would be useless, justifying discharge on the basis of his attendance record alone.

The Grievant's threat to his supervisor is added reason for removal. At best it can be assumed that he expected Trujillo to risk his own job by attempting to cover up the Grievant's misconduct.

Nor should the Grievant be demoted back to his former job. The new job was not too difficult. Coming to work on time was his problem.

It is respectfully submitted that the Service has established that it had just cause to discharge the Grievant, and that the

Grievance should be denied.

Union Argument

The Postal Service Policy of requesting medical documentation for illness is clear. The employer's failure to follow such a policy in this case by requesting a medical excuse makes such a policy senseless.

Due process was denied the Grievant in that Koss clearly condemned him before fully investigating and utilizing all the rights and responsibilities entrusted to him. Nor did Davis conduct a proper review and investigation. He failed to discuss the matter with any of the key witnesses.

Although the downtown station went unmanned for a period of time, there was no policy that would alleviate such an occurrence. After the incident of January 26 the Grievant made every effort to prevent a reoccurrence by establishing a back-up key system, similar to that already in effect for his scheduled days off. Management, aware of this effort, acted only on the appeal of another employee not to institute such a policy. This fact can only be considered a form of entrapment. The Employer subsequently did enact the identical back-up key system the Grievant had suggested, thereby admitting failure to act in a responsible manner prior to the discharge of the Grievant.

The Employer has a right to demote an employee occupying a higher level assignment who is not performing his duties.

If the Grievant in this case was failing to live up to his responsibilities that would have been the proper action to take.

A threat to a supervisor is a serious offense, but the Grievant did not threaten physical harm to Trujillo. Abusive words alone do not constitute a physical assault. Koss gave the conversation between Trujillo and the Grievant little weight when he failed to act immediately to investigate such an alleged threat. Marlatt's testimony supports the Grievant in that the Grievant's demeanor was far from violent during the telephone conversation. There is no evidence of any prior job related problems between the Grievant and Trujillo.

If the Employer felt that there was reason to believe an alcohol related problem existed, it should have investigated the employee's past participation in the program to discover the circumstances. Perhaps other action or recommendations could then have been made.

The Grievant is ready, willing and able to go to work for the Postal Service. Management's burden of proof has not been met in complying with just cause principles. The Union therefore respectfully requests that the Grievant be placed back to work and made whole in all respects.

Conclusions

There are a number of consideration which, taken together, make it clear that the Postal Service has not met the burden of establishing just cause for discharge in this dispute, even though the record of the Grievant is hardly exemplary. In nearly every element of the charges against the Grievant there is some extenuating circumstance or some indication that responsibility should be shared by Management.

It is evident that a policy involving a back-up key which has since been instituted should have been instituted before. While lack of such policy does not, in itself, excuse the Grievant's tardiness, it does lessen his responsibility for the resulting delays in service and increases in cost. This is particularly true when it is conceded that he believed another employee had a back-up key.

It is true that the Grievant's excuses of illness are not entirely persuasive, particularly in relation to the Feburary incident when he worked the remainder of his tour after arriving late and then proceeded to a nearby cocktail lounge for a number of hours thereafter. Regarding the January incident, however, there is a good deal to be said for the Union's argument that, if Management wishes to discredit a proper excuse of illness, an opportunity should be presented to the absent employee to obtain a doctor's certificate.

Evidence regarding the alleged threat against Trujillo is equivocal and indecisive. There are, to begin with, certain

problems with the Grievant's version of the telephone conversation. He says he spoke no Spanish during that conversation, while the chief witness in his behalf, Marlatt, says that he spoke at least a few words of Spanish. If Marlatt's version of the entire conversation is correct, the Grievant spoke quietly throughout, which would seem to contradict the Grievant's own admitted "emotional" agitation at the time.

On the other hand, it is interesting that Koss's first reaction to being told of the threat was simply to smile. Trujillo's testimony must be evaluated in light of the apparent rivalry between him and the Grievant over a mutual lady friend which appears to have soured their friendship. This could well have led Trujillo to interpret any equivocal statement in the Grievant's call in the worst light.

The testimony of Marlatt, who seemed a rather straightforward witness, nevertheless presents certain difficulties. Although he explained not coming forward with his information concerning the telephone call as related to rumor and uncertainty, such testimony at an earlier date would have added to its validity. Perhaps the most difficult aspect of his testimony is in comparing his description of the Grievant during the telephone call with the Grievant's apparent characteristics. He appears to be a rather volatile individual, and it is difficult to imagine him an admittedly upset state asking his friend and supervisor why he had been "screwed"

and all the while speaking in a "normal" voice, as described by Marlatt.

In all of these circumstances, the most appropriate solution is that of demoting the Grievant back to his former job and transferring him to another facility. This decision does not expunge the Grievant's unacceptable attendance record and he should fully understand that continued instances of AWOL or tardiness may well lead to his discharge.

Had this dispute been resolved without undue delay, reinstatement without back pay would be appropriate. However, since it was delayed by a backup of arbitration cases through no fault of the Grievant, he should not be made to bear the entire economic loss.

The Award is rendered accordingly.

DECISION

For the reasons set forth above, the Arbitrator finds and awards as follows:

1. The Grievant was not discharged for just cause.
2. He shall be demoted back to his former job and, if possible, transferred to another Postal Service facility.
3. Back pay is awarded commencing September 1, 1979 and running to the date of reinstatement, less any earnings by the Grievant during that period.
4. The Arbitrator retains jurisdiction of the dispute until the terms of this award shall have been effected and in

the event that any interpretation or correction should be required.



WILLIAM EATON,
Arbitrator

December 27 1979