

C#03031

USPS - NALC CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

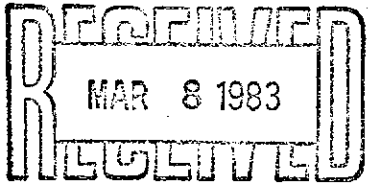
THE UNITED STATES POSTAL SERVICE
Champaign, Illinois

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS
AFL-CIO
Branch 671

*
*
*
*
* Case No. CIN-4A-D 10382
* NALC No. CHI-RA-59R
*
*
* Decision Issued
* February 24, 1983
*
*

NALC ARB.
Washington, D. C.



APPEARANCES

FOR THE EMPLOYER

Patsy J. Hackward
Clarence N. Mast
Lorenzo Cates
Mary Reeves

Labor Relations Representative
Supervisor, Collections & Delivery
Supervisor, Mail Classification
Witness

FOR THE UNION

Norbert Dombrowsky
Larry W. Long
Philip B. Vogel
Barry L. Robinson
Tracey Betterton

Local Business Agent
President, Branch 671 Assistant
Steward
Grievant
Witness

ISSUE: Article XVI -- Removal; Article 15 -- Timeliness of grievance.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
Shaker Heights, Ohio 44120

BACKGROUND OF DISPUTE

On August 13, 1982, a full-time city letter carrier was issued notice of proposed removal from the Postal Service. The Employee's seniority date was March 11, 1978. At the time of his discharge, he was assigned to Route 20 at the Champaign, Illinois Post Office. The charges against him were:

1. Deviation from route
2. Drinking beer while on duty and while in uniform
3. Carrying route out of sequence
4. Making a threat to a postal customer

The Postal Service's action was challenged by the initiation of a grievance. The grievance was denied at each of the preliminary Steps, and the matter was appealed to Regional Arbitration. A hearing was convened in Champaign, Illinois on January 24, 1983. Two issues were presented for arbitral consideration. The first is whether the discipline imposed upon Grievant was consistent with just cause. That issue calls into question the negotiated principles of discipline set forth in Article 16, Section 1 of the Agreement, which provides:

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause

The second issue is whether Grievant is entitled to have his claim heard and determined on its merits. According to the Postal Service, Grievant's right in that respect was forfeited by the Union's failure to initiate its Step 2 appeal within the contractually specified time limits. Article 15, Section 2, Step 1 (d) states that an appeal to Step 2 must be made "within ten (10) days after receipt of the supervisor's decision." In this case, the supervisor's denial of the Step 1 grievance was issued on August 19, 1982. The Standard Grievance Form which was utilized to move the grievance to the next level demonstrates on its face that it was submitted to Management on August 30, one day beyond the end of the limitation period. The Postal Service contends that the Union's failure to meet the ten-day requirement constituted a waiver of this grievance at Step 2. In support of its position, it calls attention to Article 15, Section 3 (b) of the Agreement which states in part:

The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance.

The Employer's procedural argument and the merits of the controversy were presented in the single arbitral hearing. However, it was agreed that the Arbitrator would address the question

of waiver first, and if it was found that the Union had lost its right to pursue this matter in arbitration because of untimely initiation of the Step 2 appeal, the grievance would be summarily dismissed without reference to the substantive facts or Grievant's defenses.

TIMELINESS

The claim that a grievance is barred because of alleged procedural defects always presents a difficult problem for analysis by an arbitrator. Grievance procedures are drafted into collective bargaining agreements to accord employees orderly means for redressing perceived wrongs or correcting managerial abuses. Arbitration, as the final Step of a grievance procedure, is recognized as the alternative to economic warfare such as strikes and lockouts. As such, arbitration is to be favored, and an employee's right to arbitrate a grievance ought not to be lightly disregarded or easily extinguished. On the other hand, no arbitrator is empowered to ignore contractual limitations upon his authority, or to impose upon the parties his own extra-contractual concepts of justice. Arbitration is created by collective bargaining, and the agreement that invests an arbitrator with authority to make judgments must be adhered to and carefully observed. When an agreement states unambiguously that a grievance becomes void unless certain procedural requisites are followed, no arbitrator can legitimately deviate from that contractual mandate. Article 15, Section 4A (6) of the

Agreement which governs this controversy clearly defines and circumscribes the scope of permissible arbitral authority. It states in part:

All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

As the Postal Service points out, Article 15, Section 2, Step 1(d) of the Agreement states, without qualification, that unless a grievance is processed from Step 1 to Step 2 within ten days after the supervisory Step 1 decision is made such grievance shall be judged to be waived. Simple mathematics reveals that the Step 2 appeal was initiated eleven days after the Step 1 decision. If the Arbitrator were to find that an appeal taken in eleven days constituted compliance with the ten-day requirement, that decision would bring about a tacit amendment of the Collective Bargaining Agreement. It would, in effect, alter the ten day limitation to an eleven day limitation. It would legislate a new contractual provision that was not agreed to by the parties and that was not derived from the negotiation process. Such decision would constitute an unpardonable abuse of arbitral authority. Therefore, unless the Agreement in this case contains some negotiated escape clause which would permit the grievance to remain viable even though it was appealed after the close of the contractual time limit, the griev-

ance will have to be dismissed irrespective of its substantive merits and regardless of the Union's persuasive arguments that Grievant's removal was not attended by just cause.

The Union asserts that even though the Step 2 appeal may have been untimely the grievance remained arbitrable because Supervision itself was late in raising its timeliness defense. As has been observed, Article 15, Section 3(b) begins with the statement that an untimely grievance will be considered to have been waived. However, the Subsection also imposes limitations upon Management's right to raise the procedural issue effectively. It provides:

However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or the Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

According to undisputed evidence, the Postal Service did not raise its timeliness defense in the Step 2 meeting. Management referred to the Union's delay for the first time in its written Step 2 decision which was submitted to the Union on September 3, 1982, the day after the meeting. The determinative question is, therefore, whether Management's assertion of the timeliness issue in the Step 2 decision triggered the rule that such defense is waived if it is not raised at Step 2.

The Postal Service presented two grounds for survival of the procedural defense. First, Management stated that it over-

looked the late Step 2 appeal and was not aware of it until it reviewed the case after the Step 2 meeting. In arguing that point, the Representative of the Employer stated, "The fact that they were not aware of it at the Step 2 meeting does not mean that failure to raise it was a waiver." Second, the Postal Service contends that the Step 2 decision was part of the Step 2 proceedings, and that so long as the issue was commented upon in that decision, it was effectively raised by Step 2.

The Arbitrator disagrees with both of the Postal Service's arguments. The Agreement simply does not make any allowance for a party's neglect to enforce rights. In fact, Article 15, Section 2, Step 1 (a) requires that an employee initiate the first Step of the grievance procedure 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." Although that portion of the Agreement allows some margin for an employee who cannot reasonably be expected to know of his right to initiate a grievance, the latitude does not extend to an employee who should have known of his rights but through negligence or ignorance failed to act on those rights. Not even that reason for extending time limits exists with respect to the requirement that the Postal Service raised the affirmative defense by a time certain or waive its right to rely on that defense. The contention of the Employer in this case seems to be that overlooking rights, which it should have known that it had, excuses what would otherwise be a waiver. The

Agreement does not support that view. In fact, if the argument were to be adopted, the exception would effectively do away with the requirement that the Postal Service raise the timeliness issue with certain timeliness.

The Postal Service is on somewhat firmer ground in arguing that, by addressing the issue in its Step 2 decision, it met the time limitation. However, that position does not seem to recognize the importance which the Agreement attaches to Step 2 meetings. Article 15, Section 2, Step 2(d) requires that, at the meeting, the Employer is to make "a full and detailed statement of facts and contractual provisions relied upon." Once the meeting ends without agreement, the Employer has ten days within which to summarize its position. Assertion of a new, previously overlooked defense after the conclusion of the Step 2 meeting is the kind of afterthought that severely departs from the contractually defined purpose of the meeting. Accordingly, the Arbitrator finds that in this case the Employer waived its right to demand dismissal of the grievance. The Step 2 appeal indeed was submitted in untimely fashion, but in order to assert that defense, the Postal Service was required to raise it in the Step 2 meeting. Its failure to do so constituted a waiver of the defense, and for that reason, this grievance will be decided on its merits.

FACTS AND CONTENTIONS

On August 12, 1982, Grievant held a drive-out route. That meant that he delivered mail on foot, and used a vehicle to travel between the post office and his delivery area. Normally, Grievant used his own automobile, but on occasion he was assigned a Postal vehicle. On August 12, he was given a half-ton truck.

At approximately three o'clock that afternoon, the Supervisor of Collection and Delivery received an angry telephone call from a customer. The customer stated that her address was 606 Mattis Avenue. That address was adjacent to but not on Grievant's assigned route. The customer complained that a mail truck had been blocking the access driveway to her apartment. Nearby she had seen a letter carrier and several other people standing around drinking beer. She sounded her horn. At first no one responded, then someone in the group called out derisively to her, "If you can't get in there, you shouldn't be driving."

The customer was called upon to testify in the arbitration hearing. She was unable to identify Grievant as the person who made the remark, but stated that she waited an inordinately long time for the vehicle to be moved. She characterized Grievant's response to her implicit request as slow and "in no hurry."

After receiving the call, the Supervisor of Collection and Delivery and the Supervisor of Mail Classification went to the area to investigate. They made a comprehensive search and found Grievant's truck in a place where it should not have been parked. Later

they found Grievant. The Employee was advised of the complaint. He admitted that he had taken a sip of beer from a can. According to the Supervisors, he also stated that when the incident occurred he was on a break. It was noted that 606 Mattis Avenue was not on Grievant's route; it was not an authorized breakpoint; nor was 3:00 p.m. an authorized time for Grievant to take a break.

The incident did not end at that point. After the conversation with his Supervisor, and after he had clocked out for the day, Grievant went back to the customer's home. According to the customer, the Employee practically forced his way into her apartment. He confronted her angrily, asking, "Why the hell did you call my job." According to the customer, the Employee also called her an "ugly black bitch" and threatened that if she wanted trouble she would get it. The customer said that she was frightened and that she telephoned both the Post Office and the police department to report the incident.

Supervision of the Champaign office made no further investigation. It was determined that Grievant's presence at 606 Mattis constituted a deviation from his assigned route. The sip of beer that Grievant admitted having taken was a clear violation of Postal regulations and, in Management's view, it constituted drinking while in uniform. The third charge which led to the removal, "Carrying route out of sequence", resulted from the Supervisors' investigation when they went out to find Grievant. The method of delivery that the Employee had been instructed to follow consisted

of walking his route, picking up mail from relays, delivering the letter mail first and making package deliveries last. It was discovered that on the day in question the Employee drove his route and merged the deliveries of packages and letters.

The final charge against Grievant, that he threatened a postal customer, was based upon the customer's statement. Management made no further inquiry into that allegation.

Grievant's testimony concerning the events of August 12, 1982 did not entirely refute the charges against him. To the contrary, the Employee made some significant admissions, particularly that he drank alcoholic beverage in uniform and while on duty. Nevertheless, Grievant's explanations did tend to defuse some aspects of the Postal Service's case.

The Employee conceded that the method he utilized to carry his route on the day in question did not conform to the prescribed sequence. However, he stated that he normally and customarily followed that same procedure on those days when he was assigned a postal vehicle to get to and from his route. When he uses his own car, he drives directly to his route and obtains the mail for delivery from relays which are distributed by someone else. However, when he utilizes a postal vehicle, he is often instructed to take relays and parcels with him. According to Grievant, that requires that he alter the normal delivery sequence and justifies his using the vehicle throughout the street portion of his assignment. The Employee testified that Supervision was well aware of his custom of

changing his delivery method at such times. He admitted that he had been instructed by Management to be sure to inform his Supervisor on days when he was going to carry his route out of sequence. He stated that he complied with that instruction on August 12. He testified that when he was leaving the office, the Supervisor of Collection and Delivery told him to take out the relays. Grievant said that his response was, "Okay, but I'll have to carry it different."

The Branch Steward's testimony contained some support for Grievant's assertion that the out-of-sequence delivery was authorized on the morning of August 12. He stated that during the processing of this grievance he had a conference with the Postmaster in which he specifically raised the defense that Grievant was at least implicitly, if not explicitly, authorized to carry the route out of sequence. When that issue was raised, the Postmaster allegedly called the Supervisor of Collection and Delivery into the meeting and asked him whether it was possible that the Employee had acted with at least the suggestion of permission. According to the Steward, the Supervisor responded that it was possible. The Postal Service produced no evidence or testimony rebutting the Steward's assertion.

Grievant vigorously denied that his presence at 606 Mattis constituted an actionable deviation. He testified that a church across the street from that address was on his route, and that he had attempted to make deliveries there earlier in the day, but the

church was closed. He returned to the location later that afternoon and completed the delivery. He stated that as he was leaving the church, a customer at 606 Mattis called to him to get change of address cards. The customer was in the process of moving. Grievant stated that he stopped to give the customer the cards and he waited only long enough for her to fill them out. At this juncture, it should be noted that the customer who called to Grievant was not simply an unidentified member of the public. She was an old friend whom the Employee had known for many years. While Grievant was waiting for the cards to be filled out, she offered him a can of beer. He declined the offer, but he did take a sip of the beer she was drinking.

The Union contended that Grievant's assistance to his friend who lived adjacent to his route was not an actionable deviation. To the contrary, the Union urged that it was entirely consistent with the Employee's obligation to treat the public in a courteous helpful manner. Unfortunately, while Grievant was waiting for the change of address cards to be completed, his vehicle was parked in a position that partially obstructed a driveway, to the inconvenience of another customer. That, coupled with the fact that someone in the group (not Grievant) called out to the other customer in a vaguely insulting manner, precipitated the complaint that was made to Supervision.

Grievant committed a serious error in judgment when he returned to the scene after clocking out and engaged in further

conversation with the woman who had lodged the complaint against him. He stated that his purpose in returning was to fulfill the promise he made to help his friend with her moving. When he arrived at Mattis Avenue, he found that his friend was not home. Before leaving he saw the customer who had complained about him. He went over to talk to her, but he strenuously denied that he made an attempt to force his way into her home. He stated that she was on her porch, not in her apartment. Grievant admitted that he asked her why she was trying to give him trouble, and implicit in that admission was the probability that Grievant's question may have been somewhat challenging and provocative. However, Grievant repeatedly denied that he used any kind of racial slur. He said that the customer indicated that she felt intimidated by the question, and at that point, he left without further conversation.

Grievant's testimony, standing alone, left some serious questions unanswered. It is difficult to believe that a person who did not know the Employee -- who apparently had no reason to harm him -- would falsely and maliciously accuse him of calling her an "ugly black bitch." Unquestionably, a letter carrier committing that kind of misconduct would unreasonably jeopardize his job. The Union introduced additional testimony to further explain the situation. Tracey Betterton was called as a witness in Grievant's behalf. Ms. Betterton is the friend of the Employee who lived at 606 Mattis. She confirmed that Grievant brought her change of address cards at her request and that he refused the offer of a can of beer.

She also testified that she and the customer who complained of Grievant's conduct were neighbors who had been carrying on a running feud. She stated that, at times, she had called the police because of nighttime disturbances, such as loud music and the like, emanating from her neighbor's apartment. She also said that vituperative racial slurs, insults, and threats between the two women were frequent. The implication in Ms. Betterton's testimony was that Grievant was an innocent victim who unwittingly was drawn into the continuing neighborhood battle.

In summary, the Union pointed out that Grievant's testimony was candid and believable. The Employee did not attempt to refute every charge. He admitted that his conduct on the day in question was less than perfect. However, the Union maintained that Grievant was not guilty of all of the charges that resulted in his removal and it contended that termination of employment was far too harsh a penalty, particularly since Grievant was innocent of most of those charges. The Union also noted that Grievant took only one sip of beer and, although that was technically a breach of his employment obligations, it was too trivial to warrant so severe a response.

OPINION

Before deciding upon the penalty in this case, the Postal Service carefully reviewed Grievant's employment record. That record was not admirable. As has been indicated, Grievant had accumulated only four years of seniority. The date of his career appointment was March, 1978. In that relatively short period of time, he amassed five incidents of formal discipline. On December 11, 1980, he was issued a letter of warning for deviating from his route. Less than a week later, on December 17, 1980, he received a seven-day suspension for habitually expanding street time, deviating from his route and leaving his route in an unauthorized vehicle. Another letter of warning was issued to Grievant on July 23, 1981. On that occasion, he was charged with excessive absenteeism. The discipline to that point apparently did not have the desired effect. On March 26, 1982, Grievant received a fourteen-day suspension for expansion of office and street time. The Union negotiated with Management over that discipline, and it was agreed that the penalty would remain a matter of record, but that the Employee would continue working and would not be required to serve the suspension. However, approximately two months later, on June 3, 1982, he was issued another fourteen-day suspension for expanding his lunch break, taking an unauthorized lunch stop, and ignoring a previous order that he was not to use his home for his lunch break. The later violation was deemed to constitute insubordination.

In view of the Employee's record it is clear that, if he

committed all of the acts that he was charged with on August 12, 1982, his course of continuing conduct fell squarely within the definition of "incurability." In that event, it would be obvious that previous corrective discipline did not serve its purpose and Management's exercise of additional leniency would seem futile. If the Employee intentionally delivered mail out of sequence, deviated from his route once again, consumed alcohol while on duty, and coarsely insulted a member of the public with a racial epithet, no amount of skillful advocacy could have induced an arbitral modification of the discipline. However, the Postal Service still had the burden of persuasion in this case, and it was the duty of the Arbitrator to resolve those issues on which the Employer was unable to meet its burden, in Grievant's favor.

The Arbitrator finds that the Postal Service failed to carry out its burden in two respects. The evidence confirms that Grievant delivered his route out of sequence, but not that he did so without authorization. Testimony on behalf of the Employer was extremely weak on that issue. Grievant stated that he requested the requisite permission and that his request was tacitly granted. The Branch Steward testified that, when questioned by the Postmaster, Grievant's Supervisor admitted that such permission might have been given. The Steward's testimony was not refuted and, in light of that evidence, there was no clear proof that Grievant committed the violation.

The most serious charge leveled against the Employee was that he insulted a Postal customer. That misconduct, without any-

thing else, would have constituted sufficient cause for Grievant's removal. But the evidence did not confirm the charge. It was Grievant's word against the customer's, and Grievant's word was supported by the statement of another witness. In weighing all of the evidence, the Arbitrator is unable to come to a firm conclusion of what actually happened or was said in Grievant's second conversation with the customer. Unquestionably, the Employee used very poor judgment in talking to the customer at all. It is hard to believe that he demonstrated no hostility towards her or that she was not justifiably intimidated by his approach. But the ultimate fact was not proven. Grievant said that, when he was told by the customer that she felt threatened by the conversation, he left without another word. Grievant's statement might be true, or the customer's statement might be true. Only the individuals themselves know for certain which version of the incident is more accurate. The Arbitrator can only judge probabilities from the evidence and testimony that was submitted. Since that evidence does not lend itself to a firm conclusion, it must be construed most favorably to the Employee. Therefore, the Arbitrator is compelled to find that the charge of "Making a threat to a postal customer" was not established.

The evidence does confirm that Grievant deviated from his route and that he drank an alcoholic beverage while on duty. With respect to the first of the two charges, the Arbitrator believes that Grievant was summoned by his friend to provide her with change

of address cards. But Grievant's statement that he waited no longer than was necessary for her to fill out the cards is simply not credible. The fact that the Employee was with friends, that he drank a small quantity of beer with them, that he took the time to promise to return to help with the move, and that he told the Supervisors that he was "on a break" indicates to a certainty that the Employee was in violation of the rule against loitering. Section 668.23 of the Employee & Labor Relations Manual states unqualifiedly, "Carriers will not loiter or stop for unnecessary conversation on their routes."

Postal manuals and the National Agreement itself are replete with numerous sections prohibiting drinking on duty. Actually, it seems unnecessary for all of those provisions to exist. It is axiomatic that a uniformed letter carrier violates one of his most fundamental employment obligations by drinking on duty. The fact that Grievant consumed but a small amount of beer does not excuse his violation. In fact, it would seem to make the violation less excusable. Grievant apparently knew that he was not permitted to take a whole can of beer that was offered. He knew that he was not permitted to drink on duty. His violation, therefore, appears to have been a cavalier intentional disregard for the obligations and responsibilities of his job. The Arbitrator does not find, under those, circumstances that the smallness of the amount lessened the breach.

The Employee's past record cannot be ignored. It appears

that corrective discipline has not been corrective. There is no guarantee that, if the discharge is modified, the Employee will be rehabilitated. However, in view of the fact that the Employer was unable to establish two of the four charges against Grievant, it is probable that some discipline less than discharge is warranted. The award that follows will modify the discharge to a lengthy suspension. Grievant will be restored to his employment with full seniority, but he will be held to have forfeited his wages from the time of his discharge to the time of his reinstatement. The Postal Service may enter that period of time on Grievant's record as a disciplinary suspension for deviation from his route and drinking beer while on duty and while in uniform.

AWARD

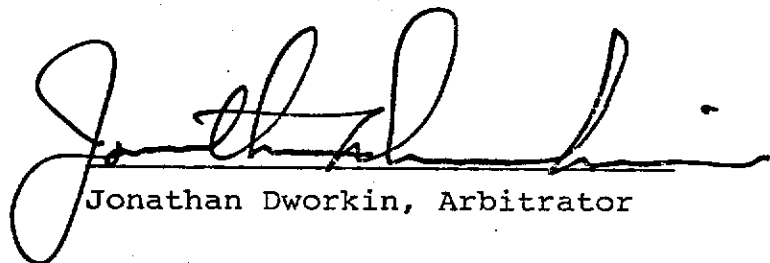
The grievance is sustained in part and denied in part.

The Postal Service is directed to reinstate Grievant to his employment with full seniority, forthwith.

Grievant shall not recover his lost wages or other lost benefits of employment. The period from his removal to his reinstatement shall stand as a disciplinary suspension. The Postal Service may note on Grievant's record that the suspension was served by the Employee for the following violations:

1. Deviation from route.
2. Drinking beer while on duty and while in uniform.

Decision Issued:
February 24, 1983


Jonathan Dworkin, Arbitrator