C-22258

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	Grievant: C. Craig
between	P.O.: Van Buren, AR
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	No.: G98N-4G-D-00097588
-and-	Union No.: VB0203001
U.S. POSTAL SERVICE	

BEFORE: Norman Bennett, Arbitrator

APPEARANCES:

For the NALC: Al Linde
For the USPS: Jill S. Hefner

PLACE OF HEARING: Van Buren PO

DATES OF HEARING: January 25, 2000
February 26-27, 2001

AWARD:

The issue is whether just cause exists for the removal of the Grievant. In that regard, the evidence convinces that the Grievant was subjected to disparate treatment. That precludes a finding that just cause exists for the removal of the Grievant. Accordingly, the grievance is sustained. The Grievant shall be reinstated. Back pay is awarded. Jurisdiction is retained in the event a dispute arises regarding the implementation of this remedy.

DATE OF AWARD: June 30, 2001

Norman Bennett

OPINION

FTR carrier C. Craig (Grievant) was issued a Notice of Proposed Removal (Notice), dated January 31, 2000, by supervisor D. McDonald. The Notice charges that the Grievant threw away 38 pieces of deliverable marriage mail, consisting of Firestone cards/pizza coupons (coupons). No prior elements of discipline are cited in the Notice. The issue in this case is whether the Notice was issued for just cause. If not, what shall be the remedy?

Factual Background

The Grievant was first employed with the Postal Service in August 1993. This case arose at the Van Buren Post Office, a small facility with about 10 city carrier routes. Prior to his removal, the Grievant had worked at the Van Buren Post Office for several years. Postmaster R. Ramsey came to the Van Buren Post Office in May 1998. The Grievant's immediate supervisor, McDonald, has been at the Van Buren Post Office since 1998. The Grievant had delivered route #5608 for about 6 years. Route #5608 is a walking route on which marriage mail is cased. Marriage mail is not cased on riding routes.

The Grievant was a Union steward in the Van Buren Post Office for about 3 years. By all accounts, he was a very aggressive Union steward. In early 1999, rumors were circulating at the Van Buren Post Office about an alleged affair between Postmaster Ramsey and a female employee. At first, Ramsey did not respond to these rumors. But after the rumors continued, Ramsey asked his supervisor for guidance as to what to do about the rumors. That supervisor instructed Ramsey to address these rumors.

On September 10, 1999, Postmaster Ramsey called two carriers into the office for separate meetings regarding the rumors. The Grievant sought to represent those carriers during the meetings. The requests to represent these carriers during the meetings were denied. The Grievant filed grievances as a result of these meetings. As a part of the grievance documentation, the Grievant wrote a letter that was highly critical of the conduct of Ramsey and the female employee. A date-stamp reflects that this letter was received in the Van Buren Post Office on December 3, 1999.

On December 7, 1999, clerk C. Cochran was going through the UBBM tubs. In doing so, she found at least 13 pieces of deliverable first class mail in carrier J. Whitlock's tub. There is a conflict in testimony as to whether McDonald was present in the delivery unit on this date. In that regard, Management witness Cochran testified that McDonald was in the unit when she found this mail. Contradicting that testimony, McDonald first testified that he was not in the unit at that time because he was in California. On cross-examination, however, McDonald testified that he had been in California in July.

Another carrier supervisor, B. Krietemeyer, discussed the discovery of the first class mail with Whitlock on December 8, 1999. Specifically, Krietemeyer asked Whitlock how the mail got in his UBBM tub. Whitlock replied, "I don't know." Krietemeyer then stated: "You need to watch it. This is serious." That ended the matter so far as Whitlock was concerned. The discovery of this mail was reflected on the UBBM log. McDonald testified that he learned of this incident about 2 or 3 weeks after it occurred. Ramsey testified that was not aware of this matter. He added, however, that it would have been a "serious matter" had he known about it.

Whitlock testified that he overheard an exchange between the Grievant and McDonald on the workroom floor during the middle of December 1999. According to Whitlock, he was on the workroom floor when he heard the Grievant say something about being lucky. He then heard McDonald tell the Grievant, "You luck is fixing to change." The Grievant responded, "I'm hoping for better luck." To which McDonald replied, "You'll find out." For his part, McDonald testified that he did not remember having engaged in this exchange with the Grievant.

Branch president B. Burlingston became concerned during this time period that there would be retaliation against the Grievant. This resulted, in large part, because of the letter highly critical of Postmaster Ramsey that the Grievant had written. Because of his concern about retaliation, Burlingston removed the Grievant as the Union steward in the Van Buren Post Office. Burlingston then replaced the Grievant in the Van Buren Post Office with a new steward, F. Harris.

On January 5, 2000, the Grievant was scheduled to deliver his regular route, route #5608. On this day, there was marriage mail (pizza coupons) scheduled for delivery. Because he was not on the ODL, the Grievant prepared and submitted a Form 3996, requesting one hour of assistance on his route. Supervisor McDonald approved forth-five minutes of assistance and reflected this approval on the Form 3996. After casing his mail, the Grievant left for the street. Management and the Grievant have differing versions of what transpired the remainder of the day on January 5, 2000.

Management's version is that the Grievant called in from the street at approximately 1:00 p.m. and spoke with McDonald. During that conversation, the Grievant said he was running late and asked what he should do. McDonald instructed the Grievant to curtail the delivery of some of the pizza coupons at the end of

the route until the next day. At approximately 1:30 p.m., clerk C. Cochran found what she believed to be an excessive amount of pizza coupons in the Grievant's UBBM tub. Cochran informed McDonald of the discovery of these coupons. McDonald asked a light-duty rural carrier D. Linton to count the coupons that had been found. Linton did so at the working desk and counted 108 coupons.

According to Management's version, Postmaster Ramsey was not in the Van Buren Post Office when the pizza coupons were discovered and counted. After the coupons were counted, McDonald notified Ramsey by telephone of the discovery of the coupons. Ramsey instructed McDonald to hold onto the coupons. McDonald then took possession of the coupons. McDonald left the Post Office at between 3:00-3:30 p.m. and went to the street in order to look for the Grievant. McDonald did not find the Grievant on route #5608. Unable to find the Grievant on the street, McDonald went to the Downtown Post Office and did not returned to the Van Buren Post Office that day.

The Grievant's account of these events is that he called from the street and spoke with McDonald about running late. During that conversation, McDonald instructed the Grievant to: "Cut what pizza coupons are needed in order to get back to work at 4:30 p.m." Pursuant to that instruction, the Grievant "pulled out some pizza coupons that he would not deliver that day." Those coupons pulled out were from "three sets of apartments and a trailer park" at the end of his route. When he returned to the Station at about 4:15 p.m., McDonald was not at the Station. The Grievant laid the mail brought back from the street on his case and left work for the day.

Rural carrier C. Carlile contradicted Management's version of what occurred on the afternoon of January 5, 2000. In that regard, Carlile testified she was in the vicinity of the

Grievant's case at around 5:00 p.m. after she returned from the street. She did not see any pizza coupons on the ledge of this case at that time. As she was walking away from this case, however, Carlile observed Linton going through the Grievant's UBBM tub. Carlile then observed Linton hold up a bundle of pizza coupons and heard Linton yell to McDonald, "Look what I found."

The evidence is also conflicting as to what occurred the next day, January 6, 2000. According to McDonald, he called the Grievant in the office on this day and questioned him about the cards. During that meeting, McDonald directed the Grievant to look at the coupons and to indicate which ones were deliverable and which ones were not deliverable. The Grievant responded by placing those coupons that were deliverable in one stack and those that were non-deliverable in another stack. There were 38 coupons in the deliverable stack. McDonald then asked the Grievant for an explanation. The Grievant responded that the coupons found in the tub were those he had been instructed not to deliver. He speculated that they "must have fallen off his case." Or that "another employee might have placed the coupons in the tub."

The Grievant's account of this meeting was that the coupons that he had left on his case when he returned from the street were on longer there when he came to work the next morning. During the morning, McDonald called the Grievant to the office. McDonald started the meeting by pulling out the coupons and asking the Grievant if he was familiar with them. The Grievant "took the cards" and "recognized the ones on the top." After viewing the coupons, the Grievant told McDonald that he recognized the coupons as the "ones that he had pulled from the apartments" at the end of his route. According to the Grievant, he "didn't actually go thorough each address to see if deliverable." The Grievant asked McDonald, "Do you want to deliver the coupons today?" McDonald responded, "No."

McDonald held two interviews with the Grievant on January 12, 2000. On January 24, 2000, McDonald held a pre-disciplinary interview with the Grievant and Union steward Harris. McDonald believed the Grievant's explanation regarding the mail found in the UBBM tub to be untruthful. Specifically, he concluded that the mail in the tub could not have been the mail brought back from the route because it was discovered when the Grievant was on the route. McDonald recommended that the Grievant be removed for discarding 38 pieces of deliverable mail. Postmaster Ramsey concurred in this recommendation. As noted above, the Grievant was issued the Notice on January 30, 2000, charging the Grievant with throwing away 38 pieces of deliverable mail.

Discussion

The Union contends that the Grievant was subjected to disparate treatment. Specifically, it offers carrier Whitlock as a similarly-situated employee who was treated differently. Disparate treatment occurs when an employee is treated more harshly than others in same or similar circumstances. In the Whitlock case, at least 13 pieces of first class mail were found in Whitlock's UBBM tub on December 7, 1999. Supervisor Krietemeyer asked Whitlock about this discovery. Whitlock denied knowing how the mail got in the tub. That ended the matter. In the present case, marriage mail was found in the Grievant's UBBM tub on January 5, 2000. Supervisor McDonald asked the Grievant about this mail. McDonald found the Grievant's response to be unacceptable. The Grievant was removed for throwing away 38 pieces of deliverable mail.

In Title VII cases, the Courts have held that in order to be similarly situated, the employee alleging discrimination and the comparison employee must have the same supervisor. Mitchell v. Toledo Hostital, 964 F.2d 577 (6th Cir. 1992). The rationale

for this requirement is explained by the Seventh Circuit in Radue v. Kimberly-Clark Corp, 219 F.3d 612 (7th Cir. 2000), as follows: "Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination for the simple reason that different supervisors may exercise their discretion differently." Utilizing a similar approach in discrimination cases, the MSPB requires that all aspects of the alleged discrimintee's employment be "nearly identical" the those of the comparison employee. Butler v. Internal Revenue Service, 86 MSBR 513 (2000).

Some labor lawyers believe that the same-supervisor requirement in Title VII cases may be subject to expansion. For example, in an article entitled, "Similarly Situated Employees - How the Courts Have Defined This Important Prima Facie Component," attorney Martin K. LaPointe writes as follows:

> "Under the comparability analysis, the 'same supervisor' requirement would appear to be a very simple and straightforward concept. However, even this component may not be so easily defined in such instances where: 1) a disciplinary decision is approved by higher levels of management, 2) a personnel representative provides an oversight function for decisions by different managers, 3) the affected employee files an internal grievance regarding the discipline thereby drawing other managers into the process of reviewing the decision. In short, when additional company officials become involved in the decision-making process, or in reviewing the appropriateness of the decision after-the-fact, the potential pool of alleged comparables may be subject to expansion, at least theoretically." CCH Journal of Employment Discrimination Law, Winter 2001 Edition.

On this general subject, the Tenth Circuit Court of Appeals has recently warned against defining "similarly situated" so strictly that there are no employees against whom a comparison can be

made. Ortiz v. Norton, 2001 U.S.App. LEXIS 13494 (10th Cir. June 18, 2001).

This case is not a discrimination case that arises under Title VII of the Civil Rights Act. Instead, it is a discipline case that arises under the concept of "just cause" set forth in the Agreement. A generally-accepted principle of "just cause" is that there must be even treatment in discipline matters. That requires equitable (fair) treatment within an appropriate unit. The scope of the appropriate unit, e.g., whether the comparables are broader than an individual supervisor, must be decided on a case-by-case basis.

The Van Buren Post Office is a small office with about 10 carrier routes. The Grievant and Whitlock regularly work side by side on the workroom floor in this office. Postmaster Ramsey concurred in the recommendation for the removal of the Grievant. He probably would have been the concurring official in any recommendation for discipline of Whitlock. Further, Ramsey either provided or should have provided an oversight function for decisions by different supervisors of this small group in matters so important as throwing away mail.

There is also reason to believe that McDonald knew of the Whitlock case when he recommended the discipline of the Grievant. That is so because McDonald testified that he learned of the Whitlock incident about two or three weeks after it occurred. That would place receiving this knowledge during the time that the Grievant's case was under consideration. It is also apparent that Ramsey either knew or should have known of the Whitlock matter because the UBBM log reflects finding the first-class mail in Whitlock's UBBM tub. Finally, Ramsey wrote the Step 2 decision in this case and probably would have been the Step 2 designee in any discipline involving Whitlock.

It is this view that the appropriate unit for applying the principle of even treatment is the small group of carriers in the Van Buren office. If Management is going to remove for throwing away mail, internal controls must be instituted so that carriers in this small group are treated evenly regarding such an important matter. If any such internal controls were in place, they apparently failed in this case. In that regard, supervisor McDonald immediately notified Ramsey of finding the marriage mail in the Grievant's tub. In fact, McDonald even called Ramsey at a different post office to inform of this discovery. If Ramsey was not informed of the Whitlock matter, that is a matter for Management to address.

The uneven treatment in this case results from there being sufficient mail found in Whitlock's and the Grievant's tubs to warrant investigations and, yet, only the Grievant was investigated.[1] On this point, asking Whitlock about the mail found in his tub and accepting his response that he didn't know how it got there does not constitute an investigation. Consequently, whether Whitlock threw away mail cannot be determined because there was no investigation of the circumstances in his case.

Management offers several reasons why Whitlock and the Grievant were treated differently. In this regard, Management cites the difference in the number of pieces of mail found in the tubs. That distinction fails. First, Ramsey concedes that finding 13 pieces of deliverable, first-class mail in a UBBM tub is a "serious matter." Second, even supervisor Krietemeyer warned Whitlock that the matter was "serious" when she asked Whitlock about this mail. It is obvious that throwing away 13

[1]When one or two pieces of first class mail are found in a UBBM tub, those pieces are usually returned to the carrier's case for delivery. Such a small number suggests inadvertence. Inadvertence may or may not be present when a larger number of mail pieces are discovered.

pieces of first class mail is just as serious as throwing away 38 pieces of UBBM mail.

Another distinction offered by Management is that Whitlock's explanation was accepted and the Grievant's was not accepted. According to Management, the Grievant's explanation was not accepted because it is a lie. With respect to this point, surely no one would argue that the matter regarding the Grievant would have been dropped if he had only told McDonald that he didn't know how the mail got in his UBBM tub. The truthfulness of Whitlock's explanation cannot be ascertained because there was no investigation. Under these circumstances, the justification for investigating the Grievant and not investigating Whitlock is not apparent.

The evidence convinces that the Grievant and Whitlock were treated differently under same or similar circumstances. This precludes a finding that just cause exists for the removal of the Grievant. Accordingly, the grievance must be sustained. The Grievant shall be reinstated and made whole. Jurisdiction will be retained in the event a dispute arises regarding the implementation of this remedy.