

12438 (CIC-4K-D)

C#00053

BEFORE  
ROBERT W. McALLISTER  
ARBITRATOR

In The Matter of Arbitration	)	Case No. ClC-4K-D 12438
	)	Vincent R. Siemer, Grievant
Between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Charles V. Stevens, Jr.
ST. LOUIS, MISSOURI	)	Postal Advocate
	)	
And	)	
	)	
AMERICAN POSTAL WORKERS UNION	)	Robert D. Kessler
LOCAL 314, <u>ST. LOUIS GATEWAY AREA</u>	)	APWU Advocate

Hearing: April 22, 1983

## I. FACTS & BACKGROUND

The Grievant, Vincent R. Siemers, is a full time regular clerk at the St. Louis, Missouri, Post Office with service since May of 1977. On September 3, 1982, the Grievant was notified that, effective immediately, he was removed from the Postal Service as a result of a "physical altercation with a Postal supervisor." This removal notice was rescinded the next day, and the Grievant was placed on administrative leave until further notice. On September 9, 1982, he was notified his removal would become effective October 15, 1982. The reasons stated were:

The Altercation Policy of the St. Louis, Missouri, Post Office is as follows:

The policy of the St. Louis Post Office is that any altercation with a customer, a fellow employee, or a supervisor shall be reasonable cause for termination, unless mitigating circumstances exist.

On September 2, 1982, while assigned to LSM #11, Operation 081, you were enroute to LSM #4 at approximately 10:45 PM. When passing Ms. Narisella Nesbitt, Acting General Supervisor, in the main aisle by LSM #10, you threw your shoulder into Ms. Nesbitt knocking her off balance. Clerk Taff L. Overton caught Ms. Nesbitt, preventing her from falling into the LSM machine and onto the floor.

## II. ISSUE

Was the removal from service of the Grievant, Vincent R. Siemers, for just cause?

## III. POSITION OF THE POSTAL SERVICE

The St. Louis Post Office has an office Altercation Policy of which all employees are aware. Violation of the policy is

reasonable cause for termination unless mitigating circumstances exist. The Grievant threw his shoulder into Ms. Nesbitt, a supervisor, knocking her off balance. She could have been seriously injured.

According to the Postal Service, the Grievant had earlier requested annual leave for Thursday, September 2, 1982. This request was denied by Ms. Nesbitt. Subsequently, the Grievant indicated he had to attend a funeral on September 2. He was told by Ms. Nesbitt to bring in documentation. He did so, but Ms. Nesbitt told the Grievant's supervisor, Odis Keys, that the documentation was insufficient. This caused the Grievant to become upset and is cited by the Postal Service as the motivation for hitting Ms. Nesbitt with his shoulder. The Postal Service views the testimony of the witnesses as establishing the Grievant's actions were intentional.

#### IV. POSITION OF THE UNION

The Union asserts the Postal Service has failed to show just cause for the removal of the Grievant. Two people bumped into each other. There has been no showing of deliberation, intention or malice. The Postal Service, according to the Union, failed to conduct a fair and impartial investigation before taking the action of removal. The Union also points out the prior record of the Grievant may not be used for any other purpose than to establish its authenticity. The record in this case clearly shows there is a complete lack of notice. It also shows no intention on the part of the Grievant, and the only offense

the Grievant could be found to have committed was a failure to apologize.

#### V. DISCUSSION

At the outset, the Arbitrator is of the opinion this case rests substantially on credibility. To set the scene, we are dealing with a work area for a number of LSM machines which parallel each other. At the head of the respective machines, a clearly marked walkway runs at ninety degrees. It is between four and five feet wide. The Grievant and Odis Keys, his Supervisor, were using the walkway to get from Machine 11 to Machine 4. That evening of September 2, 1982, Narisella Nesbitt was the Acting General Supervisor. She and a fellow employee, Taft Overton, were walking in the same aisle in the opposite direction of the Grievant and Keys.

According to Ms. Nesbitt, when she first noticed the Grievant, he was to the right of Mr. Keys. Then the Grievant switched positions and was somewhat behind Keys on his left. Ms. Nesbitt said he "stood there, bent down and braced himself and shouldered me. He hit my upper left shoulder." Ms. Nesbitt said that she did not cry out, did not yell, was just stunned. Taft Overton prevented her from falling by grabbing her around the waist. At the point of impact, all four individuals described above were just at Machine 10. Ms. Nesbitt testified Overton was to her right and behind her and that the Grievant stopped walking when he hit her. She said that his actions were like a football block.

The Grievant denied he threw his shoulder into Ms. Nesbitt. That evening, he was working a relief crew. He was at the front of Machine 11 and claimed he had a migraine headache. He related this to Odis Keys and asked to see the nurse. The Grievant said that Keys was busy and told him to put it off until later. The Grievant and Keys then started toward Machine 4. He was talking to Keys about the migraine, which he said affects him all over. He vaguely remembers Ms. Nesbitt being in the walkway and does remember a bump. The Grievant claimed he was preoccupied with his migraine headache and with talking to Keys. Under these circumstances, the Grievant states he had no awareness of the contact being of any consequence.

Five or ten minutes after arriving at Machine 4, Urlee Swope, Tour Administrator, told Keys to send the Grievant to the General Superintendent's office. Apparently, the Grievant was confronted in that office by Ms. Swope, Mr. Clary, Mr. McCadney, and Ms. Nesbitt. Mr. Clary charged the Grievant with pushing Ms. Nesbitt into a machine. He denied the charge. Ms. Nesbitt said, "Yes, you did." At about this juncture, Mr. Keys stuck his head in the doorway and asked the Grievant what happened. According to Keys, he responded that nothing had happened, they were trying to frame him. Keys related that someone then claimed the Grievant struck Ms. Nesbitt and that they have witnesses. The Grievant said, "I didn't strike anyone." Ms. Swope then instructed the Grievant to get his card and clock out. He was

told there would be an investigation, and he would be notified of the results by letter. Two Security Guards had, by this time, appeared, and one said, "Let's go." At the Guard Station, the Grievant called Mr. Clary and asked what was going on. Mr. Clary told the Grievant Ms. Nesbitt said he knocked her into a machine, and she would have fallen if she had not hit the machine.

Odis Keys conducted the investigation, which led to the removal letter dated September 3, 1982, and signed by Keys. Mr. Keys spoke to Mr. McCadney, Ms. Nesbitt, and Taft Overton before the end of the shift. He said their words outweighed the denial made by the Grievant shortly before he was told to leave by Ms. Swope.

Mr. McCadney is a LSM Supervisor who witnessed the contact. Mr. Keys testified that McCadney told him the Grievant "stiff shouldered" Ms. Nesbitt. He said McCadney described it like leaning in like a football block. Mr. Keys did not ask Ms. Nesbitt to demonstrate the type of impact. Overton told him he was sure it was deliberate. Mr. Keys did not speak with the Grievant again that night. The decision to remove was made about two hours after the incident.

The Union argues that a fair and impartial investigation of the incident did not take place before the decision was made to dismiss the Grievant. The Arbitrator agrees. Despite ample opportunity, the Postal Service was unable to rebut several

significant segments of testimony. First, the record supports a finding Supervisor Keys was under the hearsay impression the Grievant struck Ms. Nesbitt. Thus, when Keys stuck his head into the office and asked the Grievant what happened, this was his frame of reference. In the two hours that elapsed between the incident and the completion of Keys' investigation, he said he weighted the statements of Nesbitt, Overton, and McCadney against that of the Grievant's. The record just does not support a conclusion that the response by the Grievant could properly be considered or used as a statement in response to a specific charge. At best, it might, under other circumstances, be considered an excited utterance amounting to an admission against interest. At this point of confrontation, no investigation had taken place nor was the claimed misconduct the same as subsequently charged in the removal letter of September 9, 1982. Striking a supervisor and throwing a shoulder could possibly be found to be the same act. Without additional explanation, however, they appear on the surface to be two different physical acts.

In the excitement and concern for Ms. Nesbitt, certain essentials were overlooked. The meeting the Grievant was called to could hardly be termed orderly nor did it afford the Grievant an opportunity to fully understand the extent of what he was charged with and to defend himself. The subsequent actions taken by Mr. Keys cannot reasonably be termed a thorough and objective investigation.

Supervisor Nesbitt testified she saw the Grievant switch positions, stop and shoulder her. Mr. McCadney, a Supervisor, who witnessed the incident said the impact happened fast. He twice stated that Ms. Nesbitt was looking away with her head turned toward Machine 10 when contact was made. Ms. Nesbitt described the contact as a football block. Notwithstanding, Mr. McCadney testified that by "stiff shouldering" Ms. Nesbitt, he meant you "brace yourself for contact in order that you don't fall."

Mr. McCadney also demonstrated how the Grievant made contact with Ms. Nesbitt. My notes indicate the Grievant, at the point of contact, had his head erect looking ahead. His shoulders appeared squared. At no point did Mr. McCadney state or suggest that he saw the Grievant stop, crouch, and throw his shoulder into Ms. Nesbitt. The only facts established in the demonstration is that somehow the Grievant did make contact with Ms. Nesbitt. He did not stop nor turn around and did not seem to react.

Taft Overton said he was to the right of Ms. Nesbitt, and they were walking side by side. He did not see the contact and remembered no sudden movement. He told us he grabbed Ms. Nesbitt by the shoulders to prevent her from falling. He said Keys and the Grievant kept walking away at a fast pace.

Odis Keys said the Grievant and he were talking as they proceeded toward Machine 4 at a "rapid pace." Keys was pushing a



U-cart, and he said the Grievant was to his left. Keys did not have eye contact with the Grievant, but he said the two of them never lost voice contact. Keys also confirmed the Grievant had complained of a migraine headache, and they were talking about the Grievant going to First Aid as they were walking.

The Postal Service has established that some form of contact took place between the Grievant and Supervisor Nesbitt. Much of the evidence is contradictory and suspect. Supervisor Nesbitt's testimony is not compatible with Witnesses Key's and McCadney's testimonies. McCadney twice affirmed Ms. Nesbitt was looking away and said, in effect, the Grievant did not stop, crouch or hit Ms. Nesbitt with a football block. Mr. Keys said the Grievant was to his left and that he never lost voice contact. This differs again from what Ms. Nesbitt said happened. It is also unlikely that voice contact would have been maintained if the Grievant had stopped to deliver the blow as related by Ms. Nesbitt.

Mr. Keys also cast doubt upon Mr. McCadney's testimony when he related his remembrance of McCadney's statements about the contact made on September 2, 1982. Only a short time after the incident, Keys testified that McCadney said the Grievant hit Ms. Nesbitt with a football like block.

On the basis of this analysis, the Arbitrator cannot credit the testimonies of the Postal Service witnesses as against the Grievant's. There is no evidence which could remotely suggest

the Grievant was disposed toward violence. The attempt to establish a viable motive through the denial of annual leave and the funeral leave situation is unconvincing.

A proper investigation would most likely have allowed scrutiny and analysis of the conflicting stories. Certainly, the Grievant's migraine headache and previous medical history could have been explored and given weight. If the Grievant's self-preoccupation was sufficient for him to ignore the inadvertent contact, he was very wrong. If his migraine headache was indeed as severe as he stated, his lack of response is a factual possibility. In either event, the contact was not an altercation. An altercation is generally defined as "a heated and noisy quarrel." Nevertheless, the claimed misconduct would, if proven, properly be termed an assault. Notwithstanding, a "physical" altercation is clear enough for interested parties to be made aware of the nature of a charge.


For the reasons contained herein, the Arbitrator finds the investigatory procedure employed was neither fair nor objective. On the basis of my evaluation of the testimony and the credibility thereof, I also find the Postal Service did not meet its burden of proof and did not establish by a preponderance of evidence that the charged physical altercation took place as claimed.

#### VI. AWARD

The grievance of Vincent R. Siemers is sustained. Grievant is to be reinstated immediately to his former position with no

loss of seniority. He is to be made whole for all back pay  
and benefits less any interim earnings.

June 10, 1983  
Chicago, Illinois

  
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Robert W. McAllister  
Arbitrator