

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE
(Pittsburgh, Pennsylvania)

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS

OPINION
and
DECISION

ARBITRATOR
G. ALLAN DASH, JR.

Case No. E8N-2F-D 10690
Removal--Kevin R. Sherry

NATURE OF ISSUE

Whether the May 7, 1981 Notice of Removal was issued to Grievant Kevin R. Sherry for "just cause" within the terms of Article XVI of the July 21, 1978 Agreement? If not, what shall the remedy be?

Introduction

The issue in this case was considered in an arbitration hearing pursuant to Article XV, Section 4 of the July 21, 1978 Agreement between the above-named parties. The hearing was held at the Pittsburgh, Pennsylvania Post Office on February 12, 1982, at which witnesses were present, were sworn and gave testimony concerning the facts of the removal issue, and through whom a considerable number of exhibits were placed in the hearing record. The Postal Service's case was presented through Regional Labor Relations Executive Joseph A. DeMarco, and the Union's through Charles E. Weston, Esq. and Dennis Paul Zawacki, Weston and Zawacki, P.C., Pittsburgh, Pennsylvania. After the testimony was presented and the exhibits were made part of the Arbitrator's hearing record, the parties' representatives agreed that post-hearing briefs would be filed. The Arbitrator received the Postal Service's brief on

March 26, 1982 and the National Association of Letter Carriers' brief on April 5, 1982. Receipt of the briefs closed the hearing record and permitted the Arbitrator to place the case in his writing schedule.

The present issue arose shortly after Full-Time City Carrier Kevin R. Sherry received a May 7, 1981 "Notice of Removal." Under the same mailing date, May 7, 1981, he received a "NOTICE OF EMERGENCY SUSPENSION OF 30 DAYS OR LESS" which suspended him "immediately" for the reason expressed as:

"It appears that your retention in an active duty status may result in damages to government property or may be detrimental to the interests of the government or injurious to you, your fellow workers, or the general public..."

It is unclear as to whether both of the "Notices" issued to the grievant were grieved, but it appears from the record that during the Grievance Procedure discussion of this issue the parties recognized that they were dealing with both the suspension and the discharge. The May 7, 1981 "NOTICE OF REMOVAL" read as follows:

"May 7, 1981

"Notice of Removal

"Kevin R. Sherry
Pittsburgh, PA 15226

SS#170-56-8353
FT City Carrier
Certified No. 3444758

"You are hereby notified that you will be removed from the Postal Service on June 12, 1981. The reasons for this removal action are:

Charge No. 1: Unauthorized Disposal of Mail

As a result of an investigation conducted by the Postal Inspection Service, the following information was obtained:

On April 25, 1981, a postal customer found a large quantity of mail adjacent to Moore Field in the Brookline Section of Pittsburgh. This customer reported the find to P. Redlinger,

Superintendent of Postal Operations at the Brookline Station, who made arrangements to recover the mail.

The recovered mail was examined on April 28, 1981 by the Postal Inspectors at the Main Post Office in Pittsburgh. They determined that all the mail should have been delivered on Carrier Route 28024 originating at the Mt. Lebanon Branch. An examination of local originating postmarks indicated that the mail should have been delivered on March 13, 1981. A piece count of the mail determined that it consisted of 430 pieces of first class, 47 pieces of second class, and 347 pieces of third class for a total of 824 pieces of mail. The count and verification of this mail was made by D. A. Synborski, General Supervisor, Delivery and Collections and W. F. Greb, Manager, Stations & Branches.

On April 29, 1981, the Postal Inspectors visited the site where the mail was found. An additional three pieces of second class mail and 53 pieces of third class mail were found. This brought the total of recovered mail for Route 28024 to 430 first class, 50 second class, and 400 third class pieces for a total of 880 pieces of mail.

A further search of the general area located 69 pieces of third class mail originally intended for delivery in the South Hills Branch delivery area. An examination of the mail determined that it should have been delivered on Carrier Route 16022 during the period October 25 to 28, 1980.

An examination of official Postal records bearing on the Mt. Lebanon Branch and the South Hills Branch was made. PS Form 3997 for March 13, 1981 at the Mt. Lebanon Branch indicated that you were assigned to Route 28024 on that date. PS Form 3997 for October 28, 1980 indicated that you were assigned to cover Route 16022 on that date.

You have the right to file a grievance under the Grievance-Arbitration procedure set forth in Article XV, Section 2 of the National Agreement within 14 days of your receipt of this notice.

"s/ R. Burke
R. Burke
Manager, Delivery & Collections"

The May 12, 1981 grievance, apparently protesting the "Suspension and Removal," read:

"Facts of Grievance - 5/7/81 Letters Dated, 5/9/81 Letters Received (Suspension & Removal)

"Exactly What Happened - Grievant is charged with unauthorized disposal of mail. Mail found 4/25/81 adjacent to Moore Field in Brookline. Customer reported find to P. Redlinger (Supt. 026). Postal Inspectors and management personnel involved have assumed that the mail in question should have been delivered 3/13/81 on Rte 28024--a day on which grievant was assigned to said route. To date, no hard evidence or witness(es) have been produced, and the charges against the grievant are purely circumstantial and largely presumptuous.

"Corrective Action Requested - Reinstate grievant to active duty with back pay & all benefits lost during suspension."

Supervisor James E. Gallagher gave a written answer to the grievance after the May 12, 1981 first-step meeting which, under the heading "If Denied, Reason Given," read: "Case Pend. Further Investigation." At the two subsequent steps of the Grievance Procedure management denied the grievance, and the Union appealed the issue to arbitration on September 14, 1981.

USPS Position

1. Postal employees are the trustees of the customers' mail, and interfering with the flow of mail by them is a very serious offense. The Postal Service employees are not only required to be able to perform their jobs but they must possess honesty, loyalty and integrity. An employee who throws mail away is sabotaging the Service's business and is subject to the most severe form of discipline, discharge, regardless of past conduct, i.e., "full removal for the first offense."
2. The standard of proof the Arbitrator should apply in evaluating the testimony in this case is "proof beyond a reasonable doubt," the degree of proof the Arbitrator said in the Flynn case (Pittsburgh, Pa., NC-E-5841-D) should be applied when the charges leading to removal do not constitute alleged theft. Since the charges in the instant case "unauthorized disposal of mail," are similar to charges in the Flynn case, it is axiomatic that the same standard should be applied.
3. It was established during the hearing that the discarded mail, discovered by a postal customer on April 25, 1981 and recovered by the Postal Inspector on April 29, 1981, should have been delivered by Carrier Route #28024 on March 13, 1981, originating at the Mt. Lebanon Branch. The Union agreed that the four (4) letters introduced

into evidence (Employer Exhibits 4(a), (b), (c) (d)) were illustrative of the sample of the 22 letters the Postal Inspectors drew from the large volume of recovered mail, so no argument need be made concerning such a sample. Therefore, the existence of 880 pieces of recovered mail scheduled for delivery by Route #28024 on March 13, 1981, the verification of them made by management, the manner in which the recovered mail was retained, sampled and authenticated with each customer, is not considered to be at issue and is submitted as an uncontested fact.

4. As to the critical question whether or not Grievant Sherry was scheduled and did, in fact, work Route #28024 on March 13, 1981, the evidence submitted by management clearly locks the grievant into that route on that date. While Supervisor Gallagher admittedly erred in filling out the PS Form 3997 that recorded the route assignment of the Carriers at the Mt. Lebanon Branch on March 13, 1981, the error which recorded Grievant Sherry assigned to both Routes 28024 and 28058--on the left side and center of that form--probably made during the transition of the assignments from a workbook to the PS Form 3997, was corrected in the summary on the right side of the form, and showed Carrier Sherry on Route 28024 and Carrier Weber on Route 28058. If this admitted error causes any doubt of the assignment of Grievant Sherry to Route 28024 on March 13, 1981, such doubt should be overcome by the Route 28024 "Accountables" record for March 1981 (Employer Exhibit 11) which shows that Grievant Sherry signed for two "accountables" on that date and route.
5. Management's Exhibit 10 (the Form 3997 for March 13, 1981), Exhibit 11 (the March, 1981 "Accountables" on Route 28024) and Exhibit 12 (the March, 1981 "Accountables" on Route 28058) demonstrated by the preponderance of the evidence, although not necessarily beyond a reasonable doubt, that Grievant Sherry was assigned to, and worked, Route 28024 on March 13, 1981. Since he had custody of the mail for that route on that day there can be no doubt but that he in fact disposed of the mail that was discovered on April 25, 1981. Therefore, Grievant Sherry was guilty of an offense that warranted discharge.
6. A single copy of the 69 additional pieces of 3rd class mail (Gimbels circulars) found near the Moore Field by the Postal Inspector on April 29, 1981, intended for delivery out of the South Hills Office, was made and the rest was discarded because of its extremely poor condition. An examination of this mail by Postal Inspectors indicated that it was assigned for delivery to Route 16022 out of the South Hills Office, and their check with the main Pittsburgh Post Office divulged the fact that the circulars were to be delivered on Saturday, October 25, Monday, October 27, or no later than Tuesday, October 28, 1980. The October 24, 1980 mailing of the circulars at the Pittsburgh Post Office made it unlikely that they would have been cased and taken out for delivery at the South Hills Branch before Monday, October 27 (Carrier Weber served Route

16022 on that date). However, the volume figures ("DELIVERY UNIT VOLUME RECAP"--EMPLOYER EXHIBIT #15) for the South Hills Branch suggest that the circulars may have been delivered on Tuesday, October 28, 1980. The PS Form 3997 (Employer Exhibit #13) established that Grievant Sherry worked Route 16022 on October 28, 1980.

7. While the date on which the Gimbels circulars were taken out for delivery cannot be established with certainty, and it cannot be established that Grievant Sherry disposed of them, the 69 pieces of Gimbels circular mail discovered by the Postal Inspector were included in his Notice of Removal because it would have been improper, in this type of case, to exclude them because they did not tie in directly to Grievant Sherry as did the Mt. Lebanon mail. But when assessing all of the evidence uncovered in the Mt. Lebanon incident, and the possibility of employee impropriety in the South Hills discarded mail incident, management's actions were appropriate.
8. Although it cannot be proven that Grievant Sherry disposed of every piece of mail cited in his "Notice of Removal," it is clear that he did discard a large portion thereof. Grievant Sherry, or any other employee, would be removed if it could be shown that he disposed of just one (1) piece of mail.
9. Although the Postal Service's evidence in this case is, admittedly, circumstantial, the proof suggests beyond any reasonable doubt that Grievant Sherry is guilty. Arbitrators generally hold that circumstantial evidence is often far more persuasive than direct evidence, and has more probative value, if the inferences drawn therefrom can lead to but one reasonable conclusion.
10. The circumstantial evidence includes a map of the Mt. Lebanon and South Hills areas (Employer Exhibit 2), which show that the delivery routes served out of both Branches are in the general vicinity of Moore Field, and that Grievant Sherry lives within two blocks of the Field. Because of the relatively isolated surroundings of the Field, the implication is clear that it was easily accessible to Grievant Sherry at various times of the day or night and that the grievant took full advantage of this opportunity. While the close proximity of the grievant's home to the spot where the discarded mail was discovered, taken alone, would certainly not have resulted in Grievant Sherry's removal, such evidence was part of a web of circumstances that leads to no other conclusion than the fact that he disposed of the mail.
11. In light of Grievant Sherry's action on the dates in question, it is requested that the Arbitrator deny the Union's grievance in full.

NALC Position

1. Discharge is the extreme industrial penalty because the employee's job, seniority, other contractual benefits, and his reputation are

at stake. In resolving discharge cases Arbitrators (including the present Arbitrator) generally require more than a preponderance of the evidence where a crime has been carried out or where the misconduct carries the stigma of general disapproval. In the instant case a crime has been alleged and charged against the grievant. Therefore, without considering the social stigma that could be attached upon the character of Grievant Sherry in this case, the fact that the charges against him include alleged criminal action should cause the Arbitrator to require the Service to present "proof beyond a reasonable doubt" before he considers sustaining the Service's disciplinary action.

2. The Service's case in this instance is exclusively circumstantial. Suspicion, however strongly held, that an employee is guilty of any offense, however serious, does not constitute just cause for his suspension. Wherever the Employer suspends an employee on suspicion that he has committed an offense, the Employer necessarily suspends him at its own risk. If the evidence producing the chain of circumstances pointing to guilt is weak and inconclusive, no probability of fact may be inferred from the combined circumstances. Further, all reasonable doubts should be resolved in favor of the accused.
3. Since no one visually observed the grievant discard any mail on March 13, 1981, the Postal Service relied on numerous documents to weave its web of circumstantial evidence, and did so by presenting quantity not quality of proof. But it is the quality of proofs, not quantity, which determine the outcome of any case.
4. The Postal Inspectors began their investigation concerning the discarded mail on Tuesday, April 28, 1981 and confronted the grievant on April 30, 1981, two (2) days of investigation that will affect the grievant's entire life. The Union seriously doubts that two days of investigation were sufficient, and it appears that many significant issues of an evidentiary nature were not resolved to support the Postal Service's conclusions.
5. Supervisor Gallagher's Carrier Report for March 13, 1981 (Employer Exhibit #10) is erroneous on its face. He testified that he knew, on April 28, 1981, that it contained an error of transposition from a log book on March 13, 1981, i.e., he made no attempt to correct it for a period of 45 days. In the absence of a correction, and in view of the fact that no log book was produced at the arbitration hearing, the evidence in Employer Exhibit #10 must be taken at face value. He also testified that the apparent error was brought to the attention of the Postal Inspector who investigated the case, yet there is no such fact revealed in the Postal Inspector's Investigative Memorandum. Was this a thorough examination?
6. Service reliance on the March, 1981 Route 28024 Accountable Mail Form to show that the grievant was on Route 28024 on March 13, 1981

should be evaluated in light of the fact that testimony showed that such form could be signed at any time in the morning and that two Carriers were off that day. Therefore, it is reasonable to assume that the records as a whole do not reflect who in fact carried the route on March 13, 1981.

7. The investigatory methods used in this case were hastily done and overlooked many potentials for human error. For instance, why was the Mt. Lebanon mail so neatly bundled in sequence, in such good shape, and dry, when testimony showed that it had rained just prior to the discovery? Why did not the Inspector interview Carrier Weber whose name was intertwined with Grievant Sherry's on the March 13, 1981 Mt. Lebanon PS Form 3997, and who carried South Hills Route 16022 on Monday, October 27, 1980 when the circular delivery attributed to Grievant Sherry could have been done, instead of on October 28, 1980? Here were two Carriers carrying the exact same routes at two different locations, and each date on which the mail was improperly disposed of the same Carriers could have been involved. This fact did not even draw the Postal Inspector's attention.
8. Using established principles, conclusions incorrectly drawn from evidence of a circumstantial nature must be resolved in favor of the grievant. The Arbitrator cannot find beyond a reasonable doubt that the grievant was discharged for just cause. Therefore, Grievant Sherry must be reinstated with full back pay and all Agreement benefits. The grievance must be allowed.

Opinion

First, the Arbitrator must note that if he were satisfied on the record that Grievant Sherry discarded any of the mail found on either April 25, 1981 or April 29, 1981, he would have no hesitancy whatsoever in sustaining his suspension and removal. A Carrier who takes mail out on his route and disposes of it without delivering it to the addressees violates the Code of Conduct applicable to his position (Employee and Labor Relations Manual, Section 661), and exposes him to federal criminal charges, particularly under 18 U.S.C. 1700 and 1703. There would be no reason, then, to sustain the grievance in this case if the Postal Service had proven the charges against the grievant as set forth in the May 7, 1981 Notice of Suspension and Removal issued to him.

The major portion of the arguments presented by the parties to the Arbitrator in this case had to do with the standard of proof he should require in determining whether or not to sustain Grievant Sherry's suspension and discharge. The Postal Service is correct in noting that the present Arbitrator did say in the "Flynn" case (Pittsburgh, Pa., No. NC-E-5841-D), that he would require that the Employer demonstrate "beyond a reasonable doubt" the grievant's guilt (i.e., in a case involving alleged discarding of deliverable third-class mail in a trash container and in the "waste" bin of a throwback case within the Post Office) if he had been charged with theft thereof, because a decision sustaining a discharge for theft would categorize a grievant as a thief. But the Arbitrator notes that he did not say there that he would require the "beyond-a-reasonable-standard" of proof only in cases involving alleged theft from the mails. In fact it is to be noted that in his March 6, 1979 "DEE" decision (Buffalo, NY, No. AC-E-23,661-D) he stated:

"The Arbitrator agrees with the Union that, to sustain a discharge involving moral turpitude or an allegation of criminal intent, he should be presented with proof beyond a reasonable doubt that the discharged employee was guilty as charged."

While the parties did not indicate the nature or status of the criminal charges that were filed against Employee Sherry by the United States Attorney in this case, it has been stated that he has been charged with a Federal offense as the consequence of his alleged unlawful disposition of mail, at least on March 13, 1981. Since his alleged actions could lead to his conviction of a felony, the Arbitrator is persuaded that he must require that the Postal Service be held to a "beyond-a-reasonable-doubt" standard of proof in supporting his

discharge as being for "just cause" within the meaning of Article XVI of the Agreement.

The Postal Service has agreed that it has not been able to sustain "just cause" for the grievant's discharge if the Arbitrator requires that it satisfy a "beyond-a-reasonable-doubt" standard of proof. But in order that the Postal Service will not conclude that the Arbitrator has used this admission as the basis for concluding that the Service fails to meet the "beyond-a-reasonable-doubt" standard of proof in this case, he feels that he should mention here a number of the parts of the Service's presentation that have caused doubts in the Arbitrator's mind as to Grievant Sherry's guilt of the charges listed against him. These include the following:

1. Though neither party has noted the fact, the first Postal Service witness (Ms. Patricia Redlinger, the Superintendent of Station Branch Operations, Brookline, Pa.) testified at the arbitration hearing that when she checked the discarded mail that was brought to her office on Friday, April 25, 1981, to be held in safekeeping there until it could be taken to the Pittsburgh Postal Inspector's Office on Monday, April 28, 1981, and found it in surprisingly dry and in good condition in view of the rain that had fallen that week, the "dates on the mail I saw were in the area of March 5 and March 6." Perhaps Ms. Redlinger misspoke herself, but the dates she cited were quite at variance to the March 12, 1981 dates on Employer Exhibits No. 4(a) (b) (c) and (d).
2. The May 6, 1981 Investigative Memorandum makes no mention of the good condition of the "March 13, 1981" mail (though it was recovered 43 days later on April 25, 1981), nor of the extremely poor condition of the "October 25-28, 1980 mail." In his arbitration hearing testimony the Postal Inspector cited the very poor condition of the "October 25-28 mail," but he did not mention the good condition of the "March 13, 1981 mail." Nor is there any indication in the record that the Postal Inspector tried to find reasons to account for the fact that the "March 13, 1981 mail" could possibly have been exposed to the March-April elements for 43 days on the South Hills "unauthorized dump" and still be in the excellent condition indicated in the picture he

took of it (Employer Exhibit No. 3) lying on his office floor.

3. The PS Form 3997 recording the March 13, 1981 Carrier assignments at the Mt. Lebanon Branch Office contains an admitted error that its author explained, but the log book from which he transposed the Carriers' names was not made available (apparently it had been destroyed after several months in the Superintendent's usual fashion) to prove that his explanation was correct, and that Grievant Sherry, rather than Carrier Weber, was assigned to Route 28024 on March 13, 1981. The Accountables Form for Route 28024 (Employer Exhibit No. 11) appears to sustain the Superintendent's explanation of his error but it, too, could have been in error if it was, in fact, prepared by the Accountables Clerk early on the shift before the Carriers were ready to accept, and sign for, their Accountables. Additionally, there is no indication in the arbitration hearing record that the Postal Inspector was furnished with this "Accountables" form before filing his Investigative Memorandum, to serve as a possible confirmation for his conclusion that Grievant Sherry had, in fact, delivered Route 28024 on March 13, 1981.
4. The Postal Inspector's Investigative Memorandum noted that the 69 pieces of third-class circular mail he recovered on April 29, 1981 were to be delivered in the South Hills area in the period of October 25 to 28, 1981. He did not indicate any reason for concluding that the mail he found for delivery on Route 16022 was taken out of the Branch Office to be delivered on October 28, 1980, but only that his examination of the South Hills PS Form 3997 for October 25, 27 and 28, 1980 indicated that Carrier Sherry was assigned to Route 16022 on October 28, 1980. Though he checked the Carriers assigned to the route on October 25 and 27, 1980, he apparently decided that since Carrier Sherry had been assigned to that route on October 28, 1980, and that date was one of the three on which the circulars were to be delivered, he had a second reason to conclude that Carrier Sherry was guilty of disposing of deliverable mail. (In this connection it is to be noted that the Postal Service has agreed that the date on which the 69 circulars were taken out for delivery on Route 16022 cannot be established with certainty.)
5. The Postal Inspector's Investigative Memorandum reflects nothing in the way of an investigation of any possible role that Carrier Weber might have played in the discard of the mail here in question. Testimony shows that the Investigator was apprised of the "error" in the PS Form 3997 for the Mt. Lebanon Carrier assignments on March 13, 1981, and that Carrier Weber was noted as having been part of the "error." The Postal Inspector's Memorandum states that he examined the PS Forms 3997 at the South Hills Branch for the

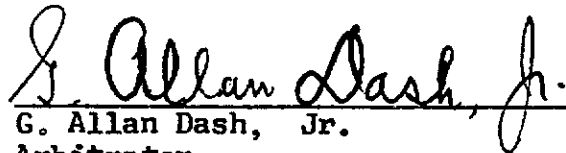
dates between October 25 and 31, 1981, and that he found that Carrier Sherry was assigned to Route 16022 on October 28, 1980. But he must have noted that Carrier Weber was assigned to Route 16022 on October 27, 1980, a date which, on the basis of the information then known to him, could have been even a more likely date than October 28, 1980 for the delivery of the recovered circulars. It is mere conjecture to consider now what he might have found had he investigated the appearance of Carrier Weber's name in these two instances.

The Arbitrator feels that the above observations concerning parts of the Postal Service's presentation, should be sufficient to explain, entirely outside of the Postal Service's admission, that the Arbitrator entertained too many doubts about significant parts of that presentation to enable him to conclude that it had "proof beyond a reasonable doubt" to impose the suspension and discharge penalties against Grievant Sherry on May 7, 1981.

The Arbitrator agrees with the Union's position that his doubts of the grievant's guilt of the charges made against him should be resolved in his favor. But in some discharge cases when the Arbitrator entertains doubts about a grievant's guilt of the charges which caused his discharge, he resolves such doubts in the grievant's favor to the extent of returning him to his job, but not to the extent of awarding him back pay for time "lost." In the Arbitrator's opinion the Sherry case is one in which he should apply this kind of finding and ruling.

DECISION

1. The May 7, 1981 Notice of Removal issued to Grievant Kevin R. Sherry was not for "just cause" within the meaning of Article XVI of the July 21, 1978 Agreement.
2. The suspension and removal of Grievant Sherry are rescinded and reference thereto shall be removed from his record. He shall be returned to his prior Carrier position within one (1) week of the date of this Decision with all Agreement rights intact but without back pay for wages and fringe benefits not received between May 7, 1981 and the date he is returned to work under this Decision.



G. Allan Dash, Jr.
Arbitrator

April 29, 1982