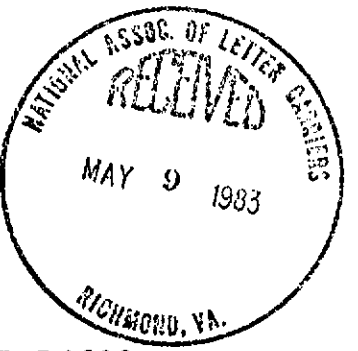
C# 03587

USPS-NALC ARBITRATION PANEL

EASTERN REGION

WILLIAM J. LeWINTER, ARBITRATOR



IN THE MATTER OF ARBITRATION	
BETWEEN	
UNITED STATES POSTAL SERVICE (Frederick, Maryland)	Case No. ElN-2D-D4628
A N D	Hoaring: January 25, 1983 Frederick, Maryland
	Sharon E. Kemp
NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 664	

OPINION AND AWARD

Representing the Employer:

Brian Houseman, Manager, Labor Relations

Representing the Union:

James Turner, Regional Administrative Assistant

Preliminary Statement

On July 19, 1982, Sharon E. Kemp, a Regular City Carrier, Frederick, Maryland, was removed and the grievance procedure instituted alleging the Employer violated the parties' collective bargaining agreement by removing grievant without just cause. The parties, being unable to resolve the matter, assigned it to arbitration. Hearing was held before William J. LeWinter, Panel Arbitrator, on January 25, 1983, at Frederick, Maryland, at which time the parties were accorded full opportunity to present witnesses for direct and cross examination and such other evidence as was determined to be pertinent to the proceedings.

From the evidence adduced at the hearing, the arbitrator makes the following:

Findings of Fact

Grievant has been employed by the Postal Service since November 10, 1972. Grievant has been under intermittent medical care since 1976 with an internist, Robert Kuafmann, M.D. He has diagnosed her ailments as follows: hiatus hernia, a distoplasmosis (mass in her chest) which exerts pressure on her esophogus and an ulcer. All three conditions create symptoms of esophogitis and gastritis. She is treated with Tagamet, Librax and antacids. The symptoms are increased with tension and stress.

Grievant became a full-time carrier in 1976. At the time of her removal she was assigned to Route 17. In addition to carrying Route 17, grievant had an additional casing assignment. The parties stipulated at the hearing that Route 17 is heavy, overburdened and requires much overtime. On May 26, grievant's off-day, a substitute carried Route 17 and misdelivered a substantial amount of mail.

On May 27, 1982, grievant, in addition to her usual duties, picked up misdelivered mail. She was seen by a patron leaving her postal jeep and throw a package into a trash dumpster. The patron retrieved the package which was delivered to the College Estates Section the following day. The package consisted of 63 pieces of letter-sized third-class mail and one piece of third class flat mail. Six pieces were undeliverable. Fifty-seven pieces were addressed to "Resident" at deliverable addresses. One piece was addressed to a patron who had moved and was marked "Address Correction Requested".

The matter was turned over to Postal Inspection. Grievant was interviewed and gave the following statement:

I Sharon Elaine Kemp, first being duly sworn, depose and state:

...All of this mail was bulk rate; only one piece was address correction requested. I was shown the bundle of mail and asked if I had seen it before. I am giving this statement in response to this question. I told the inspectors that I had seen it before, but I could not recall the exact date. I recall that I had been working on 9½ and 10 hour days, and felt I was under pressure to return and put up my mail for the next day. Due to the extra load of mail I had to carry, & to the fact that I was carrying the day after a substitute unfamiliar with my route, I had a confusion of mail that I was picking up. In order to lessen my time in the office when I got back, as I took my 2nd alloted break I leafed through the bundles of mail and sorted it as to first & second class, and as to bulk rate--no obvious value. As I started my jeep to leave the area, I discarded the bundle of no obvious value mail, which consisted of all bulk rate mail except for one address correction requested piece, which was so marked in a lower corner where my thumb had covered it as I held it. Approximately 40 of the pieces were marked "Resident" and I recognized them as the same mailing I had delivered the week before. Approximately 4 years ago, when this route had been mine (when it was an auxiliary & I was a substitute), the city had changed the addresses in the nearby development. I received dual bundles of bulk rate "door-to-door" as we call them. I asked the supervisor at that time what I should do, & was informed that I could discard those with the old address and deliver those with the new correct address. Thinking the same situation applied here, I discarded the extra letters. The new apartments across W. Key Parkway had the same mailing and those were delivered.

Until this was brought to my attention--until I was brought before the Postal Inspectors--I had not been cognizant that this was as serious as I realize it now to be. I have been diagnosed as having stomach ulcers, & being of a nervous personality, I fully believed that I was under pressure to return to the office so that I could begin on the next day's mail. I thought I was saving time by doing on the street what I would have done in the office. I now realize this was very stupid & a big mistake...I am terribly sorry for this mistake. I have never done anything of this nature before. I have never been in any trouble of ANY nature before,

and I sincerely wish I had not done it this time. I fully expected that I would never find myself confronted by postal inspectors, as I have always tried to do the right thing & hold up my end. A lasting impression had been made upon me 4 to 5 years ago when I witnessed a group of Postal Inspectors who had been observing a clerk who had been stealing change he heard as it jingled in letters & photo mailers. We were all shocked as they handcuffed him & literally dragged him away. It was chilling then & it has been reinforced in my mind now. I plan never to do anything so thoughtless again, no matter what the provacation.

On June 17, 1982, grievant was issued a Notice of Removal as of July 19, 1982:

> ...This removal action is being taken because you improperly disposed of mail matter in the performance of your duties as a letter carrier on city route, C-17.
>
> * * *
>
> Due to the serious nature of this offense, I find it necessary to have you removed from the Postal Service.

Contract

ARTICLE 16 DISCIPLINE PROCEDURE

Section 1. Principles.

> In the administration of this Article, a basic principle shall be that discipline shall be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Discussion

The function of the carrier is to take the pieces of mail designated for patrons along his route and deliver them. That is the job for which he is hired and paid. If he fails to perform that function without valid excuse, he is subject to discipline.

It is unnecessary in this case to delve deeply into the question of whether grievant is subject to discipline. From her testimony and the quoted statement she gave, grievant clearly failed in her duty. She took mail that a patron paid to have delivered; and without any authorization, made her own determination that it would not be delivered and dumped it in the trash. There is no question here of undeliverable mail. Grievant did not know whether the mail was deliverable or not. She just dumped it.

A review of the evidence shows that grievant considered this to be "door-to-door" mail or "junk mail". It is totally immaterial whether this was first class, second class, or bulk rate mail. Grievant has no right whatsoever to decide what mail will be delivered. Every piece of mail given her, regardless of its contents or what she might think of it, must be given to the patron for whom it is intended. To segregate so called "junk mail" and dump it or destroy it on her own determination is a disciplinable offense.

The grievant committed an act which gives "just cause" for discipline. The question here is whether it gives "just cause" to levy the disciplinary penalty of discharge. It is a basic rule that once an employee gives cause for discipline, the degree of discipline is to be determined by her employer. The collective bargaining agreement puts certain constraints on this right. The Employer here has agreed that "discipline should be corrective in nature, rather than punitive". Thus, just cause for discipline may not warrant discharge. If such is the case here, it is the arbitrator's function to mitigate the penalty.

Mitigation of disciplinary penalties does not come about from an arbitrator's personal approach. If a penalty is to be mitigated it must be done on the basis of estalished labor-management principles under which it may reasonably be assumed the parties have negotiated. The concepts of a mitigation case differ from those concerning the imposition of discipline. In discussing mitigation, we must already have found the employee has engaged in a wrongful act.

When the Employer agrees to use discipline in a corrective manner rather than punitive, certain ramifications must arise if the language is to have any real meaning. Such an agreement must include the concept that all wrongdoing is not subject to discharge and a recognition that there is a value to the preservation of the employment status of an employee who has done wrong, so long as it may be reasonable to assume the employee will not repeat his act and will be an asset to the Employer in the future. Some acts are so violative of the employment relationship that a single commission demonstrates that the employee is not worth retaining, and his retention is a liability which the employer must not be forced to bear. Other acts are of such a nature that the faith and trust the Employer places in the carrier, though shaken, may be possible to restore.

The seriousness of grievant's act is so great that she has placed herself perilously close to the first category of activity. Improper destruction of mail placed in the custody of the Postal Service has been made a crime by the U.S. Congress. Title 18 U.S. Code 1703. However, I find no evidence of prosecution. This indicates the Employer recognized that grievant had no

actual intent to commit a crime. This arbitrator's experience has been extensive enough with the Postal Service to know that it is not uncommon for the Employer to prosecute or at least recommend prosecution in cases it believes will result in conviction.

Grievant has served this Employer for over light years without any demonstrated disciplinary penalty. I have, in the past, referred to this as a "bank of good will". In such instances of long, good service, it must be recognized that a single violation, even a serious one may occur without an assumption that the destruction of the trust necessary to the continued employment relationship. Indeed, years of good, faithful service have many times been used and accepted as substantive evidence of lack of just cause for discharge.

Grievant had for months been working 10 to 12 hour days. The Employer argues that this day was no different than others on Route 17. That is true, but it does not recognize that overburdened route which continues in such manner, day after day, creates a cumulative effect which, at some point, explodes in some manner. It could be a not-intended loss of production, or it could result in aberrant behavior. I believe that the act of throwing away mail was aberrant behavior in this employee.

Ms. Kemp's record demonstrates she is a dutiful and faithful employee. It is not overreaching from a personal point of view to recognize that months of overtime, pressure to complete her work together with her physical condition could conspire to engender aberrant behavior on a day when she found her off-day substitute had added extensive work by misdelivering a quantity of mail.

Ms. Kemp's physical condition does not prevent her from regular work. Her medication does not render her unfit to drive or perform her duties. Everyone from time to time is under pressure and must work overtime. Therefore, all the elements of her defense, taken one by one neither excuse her act, nor show she is unfit for her job.

After much review of this case, however, the arbitrator must recongize that long periods of overtime added to a heavily overburdened route which has continued in an overburdened manner for a long period of time added to her physical condition added to medications which do induce a degree of weakness could result in an act such as that perpetrated by grievant without assuming that the act would be repeated. I believe grievant when she states that she is repentent and recognizes the foolishness of what she did. I do believe that the situation in which she has found herself has shocked her to the point where she would not repeat mail destruction.

Accordingly, I believe that reflection demonstrates that grievant is a subject for corrective discipline and that discharge in her case is punitive. Her record and the events surrounding her case warrant her reinstatement.

At the same time, I recognize the problems faced by management when an arbitrator wrests from it the decision making powers of discipline. We tell management it must be consistent and, at times, consistency is treated by reversal of its actions. The act of destroying, or attempting to destroy mail, whatever its contents or class, is most serious. Accordingly, I believe that while discharge may be too severe, reinstatement should

not be accomplished with back pay. Grievant has lost employment with the Employer since July 19, 1982. Reinstatement without back pay is no mere slap on the wrist. Under this case's fact situation I believe that is sufficient and grievant shall be reinstated without back pay with full seniority.

Award

The grievance is sustained. Grievant's discharge was not corrective when the situation required corrective discipline. The remedy shall be limited to reinstatement with seniority but without back pay.

Respectfully submitted,

William J. LeWinter

William J. LeWinter, Arbitrator
Dated: May 3, 1983