C #03607

IN THE MATTER OF AN ARBITRATION

BETWEEN

United States Postal Service
Bossier City, Louisiana

AND

National Association of Letter Carriers
Branch 4617

S1N-3Q-D 15761
Grievant: R. LaBonte

Hearing date: May 17, 1983
Arbitrator: Elvis C. Stephens

APPEARANCES

For the Employer:

1. Bill Roberts, Supervisor, Employee Services, Shreveport
2. John Ostrout, Supervisor Postal Operations, Bossier City

For the Union:

1. Ben Johnson, National Business Agent
2. Richard Van Tiem, Local Business Agent

ISSUE

Was the removal of the grievant for just cause? If not, what shall be the remedy?

INTRODUCTION AND BACKGROUND

On May 17, 1983 there was an arbitration hearing on the above referenced case at the Post Office, Bossier City, Louisiana. The arbitrator was assigned to hear the case by the Southern Regional Headquarters in accordance with the agreement between the parties. Both parties had opportunities to introduce exhibits and present and cross examine witnesses. The union made a closing arguement. A post hearing brief was filed by the employer and received by the arbitrator on June 16, 1983.

On October 27, 1982 the Postal Service issued a notice of proposed removal to Rene LaBonte, a carrier technician at the Bossier City Post

Office. The first charge was failure to follow instructions. Specifically, the grievant was charged with deviation from his route on August 5, 1982. He was charged with deviating some four tenths of a mile at the end of his route by going to the Sheraton Inn instead of directly to the Post Office, which was closer. His excuse was that he intended to get a Coke and use the restroom.

Charge No. 2 was the improper disposal of mail. He was accused of throwing into a Dumpster some 163 pieces of third class mail on July 3, 1982. This bundle of mail was found in the Dumpster by a former employee of the Postal Service who told the sender of the mail (Shooter's World) that he found them on July 3. One of the co-owners of the business gave them to a Postal Inspector on July 12. The mail had been retrieved by the owner on July 9 from the person who had found them. The mail was for route 1109, which was carried by the grievant on July 3.

The grievant's record reveals a Letter of Warning, dated Sept. 9, 1978, for loitering on his route; a Letter of Warning on May 29, 1979 for failure to follow instructions; a ten day suspension (reduced to two days in arbitration) issued April 29, 1980; and a 14 day suspension on Dec. 7, 1981 for failure to follow instructions. The latter suspension was pending arbitration at the time of the instant case.

POSITION OF THE EMPLOYER

The employer contends that the discarding of mail is one of the most serious of offenses with which an employee can be charged. In addition, it is a violation of Federal Statutes. Although the grievant was not prosecuted on criminal charges, the Postal Service had no responsibility for this decision. The matter is entirely in the hands of the U.S. Attorney's Office.

In addition to the charge of disposing of mail, the grievant was also charged with the failure to follow instructions. He had previously been disciplined for this same type offense.

The employer presented evidence to show that the grievant had the means, motive, and opportunity to discard the mail in question. He was on the route for which it was destined. He was knowlegeable of the area where the mail was discarded, and he was the only person who would have benefited from the discarding of the mail.

The grievant had a 7.9 mile deviation from his route on the day in question. Although he tried to explain this devation by saying that he carried a part of another route, this defense was not satisfactory. At the earlier steps the grievant could not recall which route he supposedly assisted. When Mr. Powell was testifying about this explanation, he admitted that he could not recall the grievant making a statement about a specific route during the grievance meetings. Mr. Jackson, the supervisor on the day in question, testified that he had not given any auxilliary assistance and that the grievant had not been instructed to help on any other route.

Mr. Ostrout's testimony showed that the mail was received on the prior afternoon, and would have been ready for delivery on July 3, the day the grievant carried the route for which the mail was destined. Also, the mail was discovered by a postal patron on that day. The delay in contacting the sender of the mail was easily explained because of the weekend and the unusual hours of operations of the sender.

Arbitrator Scearce in a similar case (S8N-3A-3D-10829 and 10830) held that the Service met its burden of proof. He ruled that the grievant was the only one who had the means, opportunity, or motive to stow the mail in question. He also held: "Notwithstanding the circumstantial nature of the proof offered in this case, I am compelled to the conclusion that the Service has established a sufficient showing that only the grievant was reasonably in a position to have committed this improper act."

Supporting the greivant's removal are a number of past elements for relatively the same type of offense--failure to follow instructions. His record indicates that he has difficulty in following orders and in accepting regulations. In addition, while he was testifying at the hearing he was evasive and refused to answer questions directly. This action raises doubt about his credibility.

POSITION OF THE UNION

The union contends that the first charge should be dismissed on the grounds that its use constitutes double jeopardy. The employer discussed this event with the grievant the day after it occured. The grievant assumed that the discussion ended the matter. He admits that he deviated from his route, but at most it wasted only 30 to 40 seconds of time. The grievant did not hear anything about the matter until some 10 weeks later. The Postal Service should not be allowed to wait such a long time to again use this event against the grievant.

The union further contends that the Postal Service has failed to meet its burden of proof that the employee actually was the one who threw away the circulars in question.

The union asserts that if the citizen who had served with the Post Office 30 years had actually found the circulars on July 3, he would have called the Post Office then, not wait some six days later and then call the sender. The ex-employee certainly would have known that the Postal Inspector would have been the proper person to contact.

The Post Office can only assume that the circulars were delivered on July 3. There is no one who can say when they were actually delivered. Ostrout admitted that it normally takes two days to process third class mail for delivery, not the one day it would have taken for the circulars to have been delivered on July 3.

The main evidence the Postal Service uses to prove a July 3 delivery is the word of an ex-employee who said he found the mail on July 3. It is

more likely that the person found the mail on July 9, the day he called the owner of Shooter's World. If he kept the mail for six days, he would have violated the law--and he certainly would have known this.

The Service claims the fact that the grievant's vehicle was driven eight additional miles on July 3 proves that he could have driven from his route to the shopping center and disposed of the mail. However, the grievant claims that he drove one mile to the mounted part of route 1116, drove six miles on this part of the route, and one mile back to his route. The Postal Service's form 3997 does not reveal who carried parts of route 1116 on July 3. Although the Postal Service claims that the grievant could not have worked that route because there was no 3996 filled out, the grievant had come in on a non-scheduled day. As such he is guaranteed eight hours of overtime and does not need to fill out a 3996 if he carried a part of another route within his eight hour day.

The postal inspector tried to coerce LaBonte into signing a confession by claiming that she had an eyewitness who saw the grievant throw away the circulars. Upon advice of his steward, the grievant refused to sign a statement of any kind.

The union contends that since the last suspension is under appeal to arbitration, it cannot be used as an element of past record. If it is not used, then the other elements cited cannot be used since they happened too long ago.

Many arbitrators have held that the Postal Service must prove its case either beyond a reasonable doubt, or with clear and convincing evidence. Regardless of which standard of proof is used, the Service has not meet its burden in this case. Cases introduced by the union (exhibits 3 to 8) support this position.

DISCUSSION AND OPINION

The deviation from the route which resulted in charge No. 1 occurred on August 5, 1982. The union contends that the discussion the next day ended this event; therefore, it could not be used ten weeks later. Mr. Ostrout testified that he did not write up any disciplinary action regarding this deviation because he knew an investigation into the discarded circulars was being made.

The arbitrator believes that action should have been taken on the August 5 matter before the October 27 notice of proposed action. To wait so long causes the discipline to be punitive, rather than corrective as required by Article 16. The discipline could have been cited later if the investigation resulted in the need for charges. In any event, the act of discarding mail, if proven, is sufficient by itself to justify removal.

The basic elements of the Postal Service's case are as follows:

1. The grievant was assigned to carry Route 1109 on July 3, 1982.

2. The circulars were delivered to the Post Office at Bossier City on July 2, 1982. Since the mail to be processed was light that day, there was plenty of time for the circulars to have been worked by the Shreveport office and returned to the Bossier City office in time to go out the morning of July 3.

3. Circulars for patrons on Route 1109 were found in a Dumpster by an ex-employee of the Postal Service around 3:00 or 4:oo p.m. on July 3, 1982.

4. The grievant's vehicle traveled eight miles further on July 3, 1983 than the normal distance for Route 1109. This extra mileage is the round trip distance from the most distant part of Route 1109 to where the circulars were found.

5. The grievant was familiar with the location of the Dumpster since he had carried the route which services the shopping center where the Dumpster was located.

As can be seen, these elements are all circumstantial. There is no direct evidence to prove that the grievant threw away the circulars. The question for the arbitrator to answer is whether or not this circumstantial evidence is sufficient to meet the employer's burden of proof.

Before answering that question, there are some other factors of the case which must be examined. The grievant claims the extra mileage on his vehicle was due to the fact that he carried the mounted part of Route 1116. There was evidence that this part of the Route was six miles in length, and its distance from Route 1109 was two miles round trip. This assertion could account for the extra mileage. The extra mileage is easily seen on the vehicle trip record. There was no evidence that any supervisor questioned the grievant about this extra mileage. The union contends that this indicates that the supervisor knew the grievant worked Route 1116 that day and had a good reason for the extra mileage.

To accept the employer's contention with respect to this extra mileage we would have to conclude that the grievant waited until he got to the furthest part of his route, went to the Dumpster and threw away the circulars, and then went back to resume his route. The more reasonable explanation for the extra miles on the vehicle is that the grievant carried part of Route 1116 as claimed.

The form 3997 for July 3, 1982 which reveals who carried what route that day is blank where it should specify who carried Route 1116. Thus, the Postal Service cannot prove with its records that the grievant did not carry the mounted part of Route 1116 as he contends. It should be noted that the Form 3997 for the previous Saturday (June 26) does indicate that LaBonte and Cook assisted on this route.

Another factor is whether or not the circulars were actually sent out on the routes on July 3. The normal time to work such material in Shreveport and return it to Bossier City is at least two days. Mr.

Newberry, who carried Route 1111 on July 3, testified that he does not recall carrying the circulars on July 3 or any day.

The employer contends that the mail was light on Saturday, July 3; therefore, there was time for the circulars to go to Shreveport to be worked and sent back for delivery on the 3rd. An examination of the 3997 for July 3, 1982 reveals that 14 of the 34 routes listed required overtime on that day. Union exhibit No. 1 was the 3997 for Saturday, June 26, 1982. A check of this form reveals only three carriers used overtime. The inference is that the mail on July 3 was heavier than the previous Saturday.

There are several questions which concern the statement of Stanley Kolniak, who found the circulars in the Dumpster. His deposition indicates that he found the circulars on July 3; however, it also states that he then called the Shooter's World. The document then states "In as much as they stated that they were mailed the previous week for delivery. . . ." This appears that the discovery was later than the 3rd of July. Inspector Triggs testified that Kolniak told her that he called several times before he was able to contact the owner of Shooter's World. She stated that he said there was a delay of some six days before he reached the owner.

As the union contends, it is odd that the ex-employee did not contact a Postal Inspector when he found the circulars.

The union introduced six arbitration awards for cases similar to this one. In each of these, the arbitrator held that the Postal Service had a burden of proving beyond a reasonable doubt or with clear and convincing evidence that the grievant was actually guilty of the alleged offenses.

Based on all of the above factors, the arbitrator does not believe that he can say with a reasonable amount of confidence that the grievant actually threw away the circulars. Since the penalty imposed in this case was removal, the grievant's guilt should be established at least by clear and convincing evidence, and it would be better if the evidence met the reasonable doubt test. In this case, the employer's case fails to meet even the lessor of the two standards.

AWARD

With respect to charge 1, the delay of ten weeks appears to violate the requirements of Article 16. With respect to charge 2, the employer does not meet the burden of proof required to show that the grievant was guilty of disposing of the circulars. Grievance upheld. The employee shall be reinstated and made whole for monetary losses.

Date: June 20, 1983
Denton, Texas

Elvis C. Stephens

Elvis C. Stephens, Arbitrator