REGULAR ARBITRATION

In the Matter of the
Arbitration Between

UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF
LETTER CARRIERS


Appearances:
For the Employer: Orvil R. Smith, Sectional Center Director, Employee and Labor Relations.

For the Union: Robert L. York, Regional Administrative Assistant.

OPINION

I. Statement of the Case.

James Monroe filed this grievance on November 24, 1986 to challenge a seven day suspension given him for "failure to meet minimum acceptable performance standards" during a special count on his route the week of November 3. The parties were unable to resolve the dispute in the grievance procedure and the Union demanded arbitration. The arbitration hearing took place in Rossville, Georgia on August 12, 1987. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all relevant evidence. Each party submitted a post-hearing brief, the last of which arrived on September 1, 1987.

II. Statement of the Facts.

The facts of this case are deceptively simple. By late 1986, the Rossville post office had exceeded its budgeted overtime, due in part to the Grievant's frequent inability to complete his route in the normal work day. From time to time he was counselled and instructed in proper procedures, but the problem
persisted. On October 20, 1986 the Postmaster, W. L. Tolbert, issued the Grievant an official letter of warning for failure to meet minimum acceptable performance standards due to "unsatisfactory effort" during a special count of his route on October 10. The warning letter cited certain flaws, although only in general terms. The Grievant and his Union successfully took the matter to arbitration and management removed the letter from the Grievant's file.

While the grievance on the letter of warning was pending, the Postal Service conducted another special count on the Grievant's route from November 3-7, 1986. According to the Postal Service's calculations, which the Union disputes, he averaged about 27 minutes over standard each day. Accordingly, on November 17, Postmaster Tolbert issued the Grievant a seven-day suspension. The complete text of the charge against him was this:

You are charged with failure to meet minimum, acceptable performance standards as stated in Handbook M-41, Section 121.12 during a special count on your route during the week of November 3, 1986 thru November 7, 1986.

Unlike the previous letter of warning, the suspension letter neither charged him with unsatisfactory effort nor listed any specific deficiencies. It rested solely on a comparison of his recorded actual time with the standard time the Postal Service believed he should have met.

The Union charged that the forms used to calculate his time were riddled with inaccuracies, but it concentrated on only two items. One was a mathematical error of 40 minutes which would, if corrected, bring his average over standard down to about 19 minutes. The other was the Postal Service's failure to credit him with any time for casing or collating sequenced mail on three successive days of the count. The forms clearly record that he had 369, 739, and 217 pieces of sequenced mail, respectively, on those three days. The Grievant testified that he cased or collated much of that mail. Postmaster Tolbert testified that he did not know if the Grievant cased the mail, but admitted that normally a carrier on a walking route like the Grievant's would do so. I must therefore accept the Grievant's version as correct. The exact amount of time due him is not determinable from the record, but the appropriate credit would substantially reduce if not eliminate his overage.

Although the Postmaster issued the discipline, the Grievant's immediate supervisor represented the Postal Service in the Step 1 meeting. Postmaster Tolbert represented the employer at Step 2.
III. The Issue.

Did the Postal Service have just cause to suspend the Grievant? If not, what shall the remedy be?

IV. Relevant Contractual Provisions.

Article 15.2, Step 1. (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days.

(b) In any such discussion the supervisor shall have authority to settle the grievance.

Article 15.2, Step 2. (a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee.

(c) The installation head or designee will meet with the steward or a Union representative. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

Article 16.1. In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause.

Article 16.8. In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

Handbook M-39, Section 242.332. No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards.

Handbook M-41, Section 121.12. Time standards for carrier office work (see exhibit 1-1) represent the minimum acceptable performance standards. [The referenced exhibit states that carriers should case, on average, at least 18 pieces or letter-size mail or 8 flats per minute.]

Step 4 Settlement in Case NC-NAT-6811 (July 11, 1977). Management may not charge or impose discipline upon a carrier merely for failing to meet the 18 and 8 casing standards. Any such charge is insufficient. Under the Memorandum of
Understanding of September 3, 1976, the only proper charge for disciplining a carrier is "unsatisfactory effort." Such a charge must be based on documented, unacceptable conduct which led to the carrier's failure to meet the 18 and 8 criteria. In such circumstances, management has the burden of proving that the carrier was making an "unsatisfactory effort" to establish just cause for any discipline imposed.

V. The Employer's Position.

On the questions of due process raised by the Union, the Postal Service claims that the contractual requirements were satisfied because its representatives in the grievance process had authority to resolve the matter. In support of its position, it notes that a court recently overturned one arbitration award which sustained a grievance because a second-level supervisor had initiated the discipline. USPS v. NALC, Civil Action No. 86-G-1647-E (N.D. Ala., April 17, 1987), vacating the awards of Arbitrator James B. Giles in cases S4N-3D-D 7726 and 7727 (Anniston, Alabama, November 21, 1985 and January 15, 1986). It also cites an award by Arbitrator Edmund W. Schedler, Jr., in case S1N-3F-D 44384 (Lewisburg, Tennessee, May 18, 1985). Arbitrator Schedler dismissed a Union objection to discipline imposed by a Postmaster rather than an immediate supervisor by saying that, given the evidence in the case, "it would have made no difference if the Notice of Removal letter was signed by a bottom level supervisor or a top level supervisor."

On the merits of the case the Employer argues simply that the Grievant continually took more time than was necessary to case his route during the week of the special count, and that this amounts to unsatisfactory effort.

VI. The Union's Position.

The Union strenuously objects to the discipline in this case on procedural and substantive grounds. Its procedural objections stem from the fact that Postmaster Tolbert issued the suspension himself, rather than letting a first-level supervisor do it. This violates the Agreement in itself, and it also made a charade of the first two steps of the grievance procedure because no subordinate supervisor at Step 1 would change the Postmaster's decision and the Postmaster himself would not do so at Step 2. According to the Union, the Agreement requires that discipline be initiated at the lowest level and that each step after the first be conducted by someone higher in rank than the deciding official.

The Union makes three points going to the merits of the dispute. First, it claims that management's errors in recording
the Grievant's time eliminate any overage. Second, it complains that management improperly relied on a letter of warning that was pending arbitration at the time the suspension was issued and was subsequently overturned. Third, going to the heart of the matter, the Union argues that the Postal Service may not rely solely on failure to meet standards in order to discipline an employee; it must instead charge him with unsatisfactory effort and then prove that charge by citing specific incidents of unacceptable conduct.

VII. Discussion.

Seldom have I seen a disciplinary action which is subject to attack on so many plausible grounds. The action is so flawed, in both procedure and substance, that the grievance must be sustained in full.

A. Procedural Matters.

1. The Union suggests that any discipline initiated by a second-level or higher supervisor is invalid. As I had occasion to point out in a recent decision, S4N-3W-D 28808 (St. Petersburg, Florida, August 31, 1987), nothing in the Agreement so limits management's choice of agents, so long as a front-line supervisor with power to settle the grievance complies with Article 15.2 by meeting with the Grievant at Step 1:

   It is easy to imagine many situations in which the immediate supervisor is not the appropriate person to initiate discipline. That supervisor might be too inexperienced for such an important and difficult task, for example, or might not be the person with the most knowledge of the facts, or might for some reason be prejudiced in favor of or against the employee. In these cases, and no doubt in others as well, some other supervisor should take the first step. That was precisely the situation in this case, since the immediate supervisor was an inexperienced 204B who knew nothing about the incident.

In the instant case, however, management gave no reason for avoiding the immediate supervisor. The Union's full argument thus need not be accepted in order to nullify the discipline on procedural grounds. It is enough that without any reason management departed from the normal and preferred method of imposing discipline.

2. Similarly, the Union goes too far, I think, by suggesting that no Step 1 or 2 representative lower in rank than the deciding official could possibly have authority to sustain a
disciplinary grievance. Arbitrator Holly seemed to agree with the Union in case S8N-3F-D 9885 (Little Rock, Arkansas, May 20, 1980), when he asked rhetorically, "Can one realistically assume that the Supervisor had authority to settle the grievance in this situation where the removal action had been initiated by the Sectional Center Director of Employee and Labor Relations? Obviously not, and the Step 1 procedure was no more than a charade." With due respect to Arbitrator Holly's opinion, I find nothing in the Agreement which requires each step in the grievance procedure to be conducted by someone higher in rank than his or her predecessor in the process. To the contrary, the Agreement leaves it to each side to choose its own representatives, except for certain functions not involved in this case.

The flaw in the Union's position is the same one I found in the St. Petersburg case cited above:

It would invalidate every discipline because all disciplinary decisions require concurrence and yet the employee must meet at Step 1 with the immediate supervisor. An elementary rule of contractual interpretation is that every part of an agreement must be given effect if at all possible; in this case the Union's position would require reading several sections out of the national Agreement. A far more reasonable reading is that management must not tie the immediate supervisor's hands at Step 1. In other words, so long as that supervisor has authority to settle the dispute, his or her lack of rank is no barrier. When higher management interferes with the grievance process by denying that supervisor the necessary authority, an arbitrator will sustain the grievance, as Arbitrator Williams did in the decision mentioned above [S8N-3W-D 28220, Largo, Florida, December 9, 1981]. There the higher authorities called all the shots and deprived the immediate supervisor of all authority at Step 1. By way of contrast, there is no reason to believe that Supervisor Jones lacked authority in this case. . . .

As a practical matter, of course, some lower-level supervisors will hesitate to reverse their superiors. The parties presumably were aware of this risk when they drafted the Agreement, yet they still required that Step 1 be conducted by the lowest-level supervisor. That decision reflects a belief that such supervisors can responsibly exercise their formal authority
in the grievance process. If they so believed, I am in no position to disagree with them.

In this case, as well, the Union presented no evidence to show that higher level supervision interfered with the authority of the Step 1 representative. I therefore find that Postmaster Tolbert did not violate the Agreement by initiating discipline himself or by allowing a subordinate to conduct the Step 1.

Step 2 is another matter altogether. If the grievance procedure is to have any success at all, participants must approach it with open minds as well as with formal authority. To be sure, the initiating supervisor will usually serve as management's Step 1 representative, but that is almost unavoidable if the first step is to be informal and local. Beyond the first step, however, the grievance process fulfills a review function. A lower level supervisor may be able to review a superior's decision, despite the risks involved, because he or she comes to the process with a fresh and presumably unbiased view. But is it at all reasonable to expect the deciding supervisor to be so unprejudiced as to be able to conduct a fair review of his or her own decision? That is asking too much of human nature. I therefore must hold that Postmaster Tolbert's wearing of his Step 2 representative's hat denied the Grievant his right to a fair hearing at that stage of the grievance process.

Again, the full Union argument need not be accepted; it is enough to hold that one who initiates discipline cannot fairly serve as the one who reviews it. To allow him to do so would, in Arbitrator Holly's term, make a "charade" of the grievance procedure.

B. Substantive Matters.

1. Each of the Union's arguments about the substantive merits of the discipline is valid. As indicated in Part II, the special count prompting this discipline was severely flawed by computational errors. There is not sufficient evidence to conclude that, once those errors were corrected, the Grievant would have met standards. The burden of proof in disciplinary cases rests with management, however. The Union has no obligation to show that the Grievant was perfect; it need only demonstrate that management failed to prove that he was unsatisfactory. Since the sole documentary evidence of his performance is unreliable, it follows that the Postal Service has failed to meet its burden of proof.

2. The suspension cited as an element a letter of warning that was later removed in arbitration. Without that prior discipline, a suspension appears punitive. Even though the Agreement avoids imposing a rigid system of progressive
discipline, the requirement of Article 16.1 that discipline be "corrective" means that lesser penalties must be used before greater ones unless there is some special reason not to do so. Here there was no such reason: the offense was not especially serious, there was no emergency, and there was no reason to believe that the Grievant would fail to respond to gentler correction. I conclude that the suspension was punitive and thus violated Article 16.1.

3. Finally, and perhaps most importantly, Postmaster Tolbert impermissibly based the suspension solely upon the Grievant's failure to meet numerical standards. This is but the latest skirmish in the long-running war over standards. No doubt it would be convenient for management to have a simple test to apply to employees suspected of loafing, and perhaps the 18 and 8 standard is a fair test. Whatever that standard's merits, the parties have agreed not to use it as the basis for discipline.

In 1975, in case NB-NAT-3233, national level arbitrator Sylvester Garrett ruled that, because management had unilaterally changed the meaning of the 18 and 8 standard by adjusting the size and configuration of carriers' cases, it could no longer use the standard for discipline. The parties implemented his award with a Step 4 settlement on July 11, 1977. That settlement prohibited discipline "merely for failing to meet" the 18 and 8 standard; instead, a supervisor had to charge an employee with "unsatisfactory effort" and to document that charge with specific incidents of unacceptable conduct. The Postal Service later embodied the same requirement in its Handbook M-39, Section 242.332. It is far too late now to ignore those agreements and rules, yet Postmaster Tolbert cited not a single specific flaw in the suspension letter he sent the Grievant. If for no other reason, the discipline would have to be overturned because the Postmaster did not even comply with the Postal Service's own requirements for evaluating an employee's work.

I hasten to add that nothing in this Opinion should be read as condoning substandard performance or as limiting management's ability to evaluate an employee and discipline him or her for unsatisfactory effort, incompetence, or for specific acts of inefficiency. I hold only that the Postal Service failed to prove any such offense in this case.
AWARD

The grievance is sustained. Management is directed to remove the suspension from the Grievant's file and to reimburse him for lost earnings and benefits for the period during which he was improperly suspended.

Dennis R. Nolan, Arbitrator

September 3, 1987
Date