

C#14907

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	GRIEVANT: Oscar Camberos
	)	
between	)	POST OFFICE: El Monte, CA
	)	
UNITED STATES POSTAL SERVICE	)	CASE NO. F90N-4F-D95031737
	)	
and	)	GTS 29418
	)	
NATIONAL ASSOCIATION OF LETTER	)	
CARRIERS, AFL-CIO	)	
	)	
	)	

BEFORE: JAMES T. BARKER, ARBITRATOR

APPEARANCES:


For the U. S. Postal Service: N. Sue Kinmon

For the Union : Charles Miller

Place of Hearing: 11151 Valley Blvd., El Monte, CA 91731

Date of Hearing : September 14, September 29, and October 26, 1995

AWARD: The grievance is sustained. The grievant was denied due process by the failure of the Postal Service to comply with requirements specified in Article 15, Section 1, Step 1 and Step 2 of the National Agreement. The Postal Service is directed to reinstate the grievance with full backpay and without loss of benefits.



James T. Barker  
Arbitrator

Date of Award: November 10, 1995

Case No. F90N-4F-D95031737  
GTS - 29418  
(Oscar Camberos)

The Issues

The issues to be decided in this case are:

Was the Notice of Removal, dated December 09, 1994, issued to the Grievant for just cause?

If not, what is the appropriate remedy?

Pertinent Fact

The grievant commenced his employment as a City Letter Carrier on April 23, 1990, and at all relevant times has been employed at the El Monte, California Main Office with duty hours from 0730 to 1600. His immediate supervisor at all times pertinent was Scarlett Wickersham. Between April 1994 and August 1994, Supervisor, Customer Service Anna Marie Culter has served as the grievant's immediate supervisor. Kurt Holbrook became Postmaster at the El Monte, California facility in February 1993, and has served in that capacity at all subsequent times relevant to this arbitration.

On December 12, 1994, the grievant received a Notice of Removal, dated December 9, 1994, charging: Unacceptable Conduct/Use of Profanity Failure to Follow Instructions and Orders. The removal notice was signed by Postmaster Kurt Holbrook and by Kim Fernandez, Manager, Postal Operations, Santa Ana District.

Within the Notice of Removal it is recounted that on December 1, 1994, the grievant was assigned to route 31-08, and at approximately 9:00 a.m. requested 1 1/2 hours of street assistance. It is further

recounted that Supervisor Wickersom disapproved the request but authorized curtailment of full coverage, leaving a remaining volume equating to eight (8) hours of office and street time.

The notice of removal further set forth that the grievant commenced pulling down his mail at approximately 9:20 a.m. and that Supervisor Wickersham called this to the Postmaster's attention, informing him that the grievant had requested 1 1/2 hours of street assistance. Supervisor Wickersham requested Postmaster Holbrook to observe the grievant on the street in that she, Supervisor Wickersham was observing a new employee all day on the street.

The evidence establishes that Postmaster Holbrook spoke to the grievant in the parking lot before the grievant departed the facility for the street. In pertinent part the Notice of Removal signed by Postmaster Holbrook recounts the following:

Upon review of your previous day's performance, I noted you were leaving the office approximately the same time and had the same amount of mail. At approximately 10:00 am, I approached you in the parking lot and initially commended you for the great job of delivering your route on November 30, 1994. However, based on your performance on November 30, 1994, your requests for 1-1/2 hour of assistance would mean an increase in street time for that amount. I then questioned why you would need the extra 1-1-2 hour of assistance for basically the same amount of mail and leaving at the same time. You responded, "It just takes me that long, you can walk with me to see.

I agreed to observe you and at approximately 10:30 am arrived at the corner of Cypress and Lambert Streets. I walked the 4200 block of Cypress with you and upon completion, we returned to your vehicle. I instructed you to combine your next two swings (4300 Cypress and 11200 Lambert) and explained that I wanted you to combine the next two swings in order to avoid returning to the vehicle, which would save loading time. You replied, "Fuck

you! I'm not going to put these swings together!" I stated, "I am instructing you to combine 4300 Cypress and 11200 Lambert. Failure to follow this instruction may lead to corrective action, do you understand the instruction? You responded, "Fuck you! I don't have to carry two swings. No one else does. You're not my supervisor anyway. You're the Postmaster, you shouldn't even be out here." At this point, I informed you, "You have failed to follow my instruction, I am now giving you a direct order to combine the next two swings and deliver [it]. Failure to follow a direct order may result in removal from the Postal Service. Do you understand the direct order?" You replied, "Fuck you! I'm not going to carry two swings. Why don't you get the fuck out of here. You're going to get yours!"

I gave you a second direct order instructing you to put away your mail and follow me back to the Post Office in your vehicle. You responded, "Fuck you! I'm carrying my route. Why don't you get the fuck out of here." You closed the rear door to your vehicle and proceeded to deliver the 4300 block of Cypress.

In further descriptive detail, the Notice of Removal depicts Postmaster Holbrook contacting Supervisor Rosina Gomez with instructions to assist him in returning the grievant to the office; the arrival of Supervisor Gomez at the appointed location; the order given the grievant to hand over the keys to his vehicle and accompany Supervisor Gomez to the office; and the grievant's obedience to those directives.

In further pertinent part, the Notice of Removal sets forth:

Supervisor Gomez reported that during the trip to the office, you began asking her how they (Supervisors) put up with him (Postmaster Holbrook). Ms. Gomez stated you said, "This has got to stop, you guys gotta stop him Rosina!" Further, you stated, "This is straight up harassment and it's personal!" Ms. Gomez reports you continued with statements of, "How many times does this guy [Postmaster] have to follow me? No, this is personal and I told him so." You informed Supervisor Gomez that you put in for the time you felt you needed and that sometimes you barely make it as it is. You subsequently arrived back at the office and completed some additional duties.

Later in the afternoon of December 1, 1994, you were interviewed by Sue Kinmon, Labor Relations Specialist, in the presence of your Union representative, Richard Felde and myself.

You admitted to submitting a form 3996 requesting 1-1/2 hour of street assistance and that the supervisor instructed you to curtail the full coverage. Further, you agree I had approached you in the parking lot and commended you on the great job the day before. However, you stated you couldn't recall me questioning you about your need for the additional 1-1/2 hour of assistance, yet you admitted I did say I would walk with you.

When asked why you failed to follow several of my instructions and orders to combine the next two swings of 4300 block of Cypress and 11200 Lambert Streets, you denied ever getting those instructions or direct orders. In fact, you denied that a conversation ever took place. You stated in the interview that after you delivered the 4200 block of Cypress, you returned to your vehicle and I "took off". Additionally, you stated your only conversation with me on the route was when Supervisor Gomez and I approached you and I directed you to turn over your vehicle keys. When I asked why I would suddenly show up with another supervisor and ask that you turn over your vehicle keys as you described, you responded, "I don't know, you have to ask him".

When questioned regarding your conversation with Supervisor Gomez on the trip to the office, you denied making any comments to her other than you only asked for the time you needed.

You not only failed to follow my instructions and orders but you directed profane and disrespectful language at me. Your blatant disregard for instructions, orders and disrespectful conduct simply cannot and will not be tolerated. Your comment of "You will get yours" was threatening and must be taken seriously.

You have been previously instructed in the presence of your union representative of the need to follow the instructions of your supervisors. Further, all employees have a responsibility to discharge their duties conscientiously and effectively.

ELM Section 666.51 and Section 112.25 of the M-41 were cited in support of the removal action, and five separate elements of past record were set forth, as follows:

- 06/16/94 14 Day Suspension/ Failure To Follow Instructions
- 06/09/94 14 Day Suspension/ Failure To Follow Instructions
- 03/22/94 2 Day Suspension/Failure To Follow Instructions & Unacceptable Conduct (3/31/94 action combined with the 3/22/94 action)
- 11/26/93 Letter of Warning/Deviating From Route Without Supervisor's Instruction.
- 05/18/93 Letter of Warning/Failure to Follow Instructions.

The removal action was timely grieved and Supervisor Wickersham met with Union Representative James Henry at Step 1. The grievance was denied and appealed to Step 2.

In its statement of facts in the Step 2 Appeal, the Union stated:

On December 12, 1994, the grievant received a Notice of Removal charging him with "Unacceptable Conduct/use of Profanity Failure to Follow Instructions and Orders.

The grievant denies ever using "profanity" towards the postmaster on the day in question. Furthermore, he states that he followed all orders and instruction given on the day in question. The grievant states that the postmaster Mr. Holbrook followed him on his first relay and departed as he began the second. As he returned from the second relay and the postmaster had returned with Ms. Gomez, a supervisor, and asked for his vehicle keys. After relinquishing the keys he was driven back to the Post Office by the supervisor. There was no incident with the postmaster.

On the day in question the employer conducted a investigative interview with the grievant. During this interview the postmaster admitted he follows the grievant three (3) to four (4) times per month. When asked if it was personal, the postmaster stated it was.

PROCEDURAL NOTE #1: Management has cited two (2) fourteen (14) day suspensions as past elements used in the consideration to discharge the grievant. Both of these issues are currently at Step 3 of the grievance process and have not been fully determined.

PROCEDURAL NOTE #2: In this instant case the discipline was issued by the postmaster and not the grievant's immediate supervisor. Further, the Step 1 grievance was heard by a subordinate level superviosr who did not conduct an independent investigation of the facts and relied on a higher level influence to deny the grievance.

In sum, the Union contended at Step 2 that the discharge was not for just cause and was punitive rather than corrective. In this regard the Union reiterated that the grievant was not culpable of the charge; that the employer improperly cited past elements and that the discipline was ordered by higher management, rather than the grievant's immediate supervisor. On this latter point the Union contended:

The decision whether to impose discipline, and the decision as to the degree of discipline to be imposed, should be made by the grievant's immediate

supervisor. While higher authority may advise, if asked, it is improper for officials above the immediate supervisor to initiate discipline. In this instant case, there is a great doubt whether the lower level supervisor who handled the grievance at Step 1 could have had the authority to over rule a decision made by her immediate supervisor.

These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprive the grievant of his right to due process. In absence of due process the grievance must be sustained without any consideration of its alleged merits.

Postmaster Holbrook and Union Vice President Charlie Miller met at Step 2 on January 20, 1995. The grievance was denied in a Step 2 Decision issued on January 27, 1995. In part, the Step 2 Decision states:

The Union questions Managements ability to discipline the grievant based an alleged incident between the Postmaster and the grievant and has cited "Alleged Personal Differences."

However, during the investigative interview and later in the grievant's statement, there were contradictory and/or ambiguous statements made by the grievant which would lead a reasonable person to believe that the grievant as been less than forthcoming and truthful as to the chronology of events leading up to the Postmaster giving him instructions and direct orders. During the interview and in the presence of his representative, the grievant acknowledged the Postmaster did approach him in the parking lot and complimented him on his performance the day before. That there was a conversation regarding his request for additional time on his 3996. However, based on his statement to the Union and dated 12/15/94, he describes how he requests time and is then authorized by his supervisor to leave an hours work at the office and the next thing he knows, he's out on the route and the Postmaster is there waiting for him. He would also have us believe the next minute the Postmaster is gone, and returns with another supervisor requiring him to turn over his vehicle keys. All this without any conversation being exchanged. The grievant has conveniently opted for selective memory in now recounting his version of what did or did not transpire including his unacceptable conduct.

Additionally, at no time during the interview with the grievant did I as Postmaster admit that I followed the grievant 4-5 times a month and that it was personal. Rather, it was the grievant who asserted this to explain away his conduct.

In addressing the two past elements cited by the Union as remaining unresolved in grievance process, the Step 2 Decision stated:

At the time the Notice was issued, those actions were accurate, even considering the reduced status of the two 14 Day Suspensions, progressive discipline would

have still resulted in a Notice of Removal for the grievant's conduct.

Moreover, the Step 2 Decision further stated:

Further, the Union has failed to support its contention with cited provisions of any handbook, manual or the N/A/ which precluded the Postmaster from issuing discipline.

The removal action was appealed to Step 3 at which point the Union raised the contention that "...the Step 2 Appeal designee was in fact the same person who initiated the charge against the grievant".

### The Contract/Due Process Issues

Pertinent to issues raised by the Union at Step 2, Procedural Note # 2 and at Step 3 are the following provisions of the National Agreement:

#### Article 15 Grievance - Arbitration Procedure

##### Section 2. Grievance Procedure - Steps

Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or Union first learned or may reasonably have been expected to have learned of its cause. \* \* \*

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

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 as expeditiously as possible...[and] The Installation Head or designee at Step 2 also shall have authority to grant or settle the grievance in whole or in part.

#### Article 16 Discipline Procedure

##### Section 8. Review of Discipline

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.

\* \* \* \* \*



### Analysis

The grievance must be sustained on the basis of procedural grounds reflecting a failure on the part of the Postal Service to comply with mandates of Article 15, Section 2, Step 1 and Step 2 of the National Agreement, thereby depriving the grievant of the due process to which he was entitled.

In circumstances wherein failure to follow the mandates of the National Agreement have proven prejudicial to an aggrieved employee, and/or wherein application of Article 15 and/or Article 16.8 provisions have been rendered a "sham", arbitrators have interpreted those provisions strictly and have overturned disciplinary decisions imposed. See e.g. Case No. S4N-3A-D 37169, decided by Arbitrator Dennis R. Nolan, March 6, 1987; Case No. E1R-2F-D 8832, decided by Arbitrator Nicholas H. Zumas, February 10, 1984; Case Nos. S8N-3D-D 30492 & 30493, issued by Arbitrator J. Fred Holly, January 15, 1982; CI\$-4H-D 31648 & 31707, issued by Arbitrator Jonathan Dworkin, January 12, 1984. Cf United States Postal Service v National Association of Letter Carriers, AFL-CIO, (CA 11, 1988).

In contending the grievant was denied due process because, (1) the Postmaster issued the Notice of Removal; (2) a subordinate supervisor without authority to settle served as the Step 1 representative; and (3) the issuing official served as the Step 2 representative for the Postal Service, the Union seeks a literal application of contract terms to the unusual factual circumstances of record. Notwithstanding, taking fully into account the unusual factual circumstances present in the case at bar, the arbitrator finds a denial of due process arising from the procedures

followed by the Service in processing the grievance through the first two steps of the grievance process.

An overview of background considerations confronting the Postal Service is deemed essential to a proper understanding and correct disposition of this controversy on procedural grounds.

The undisputed evidence establishes that at the request of the grievant's assigned immediate supervisor, Scarlett Wickersham, Postmaster Holbrook went to the street on December 1, 1994, to observe the grievant. Supervisor Wickersham was otherwise engaged in a supervisory capacity with another letter carrier. In going to the street in Ms. Wickersham's stead the Postmaster became pro tanto the grievant's immediate supervisor for all practical purposes having to do with the interlude of street observation.

Moreover, and significantly, the entire basis of the removal action at issue in this arbitration arose from an incident involving only the grievant and the Postmaster, to which no other individual, including Supervisor Wickersham, had direct insight or participation. In the circumstances defined, it was entirely appropriate under applicable contractual provisions that Postmaster Holbrook, in his capacity as the sole management official percipient to the grievant's alleged misconduct, serve as the issuing official in the Notice of Removal arising out of the incident. Delegation of the discipline formulation and issuance function to a subordinate supervisor was clearly not required in the circumstances pertaining, even on the basis of an over-literal application of the reference "supervisor" as it appears in Article 16.8. Further, such delegation of discretion, function and responsibility, in and of itself, may

in this case have raised questions of fairness and due process deprivation.

Nor on the facts of record is there support for the notion that the determination reached by Postmaster Holbrook to remove the grievant was dictated by higher management. The record indicates that Mr. Holbrook contacted Labor Relations by telephone seeking advice as to procedure and the limits of premissible immediate response, unrelated to any future disciplinary response he would ultimately impose in light of what had transpired on the street involving the grievant.

Against this background, and in the particular factual context of this record, it was not per se inappropriate for Supervisor Wickersham to have served as the Step 1 representative. She was the grievant's immediate supervisor in the broad range of the grievant's duties. In meeting with Ms. Wickersham at Step 1 the grievant was complying with the literal requirement of Article 15. Section 2, Step 1 of the National Agreement. Whether on the basis of a comity arrangement between the grievant/Union and the Employer it would have been more prudent for Postmaster Holbrook to have handled the Step 1 need not be determined. Parenthetically, and of relevant note is the fact that at arbitration Postmaster Holbrook testified that he was the supervisor who was on the street and that it was not unusual he issue the discipline.

Returning to the matter at hand, the challenge raised by the Union is to the effect that Supervisor Wickersham lacked the "authority" to settle the grievance; that she had conducted no independent investigation and relied on higher level influence to deny the grievance. The testimony and documentary evidence of record establishes that, in point of fact, Ms. Wickersham did not participate in the investigatory interview and by her

own testimony she had no clear recollection of the Step 1 meeting. On the other hand, the Step 1 Grievance Summary issued by Ms. Wickersham in denying the grievance demonstrates that she was conversant with the important operative facts and acted with reasonable knowledge of matters at issue. However, the issue raised by the Union addresses the extent of her authority to settle given the fact that the Postmaster, her immediate superior authority in the facility had initiated and issued the removal.

The Union is on solid grounds in contending that Supervisor Wickersham lacked genuine authority to settle the grievance without consent of Postmaster Holbrook. In the technical sense of the mandate of Article 15, Step 1 (a), Supervisor Wickersham was the "proper" supervisor with whom the grievant was required to meet at Step 1, but the facts of record cast grave doubt upon her freedom to settle as required by Article 15, Step 1 (b)

The contractual requirement that the supervisor "shall have authority to settle the grievance" infers the existence of an obligation on the part of the Postal Service in factual circumstances wherein the existence of such authority is not prima facie demonstrated nor susceptible of a presumption, to undertake an evidentiary showing of the existence and retention by the subordinate supervisor of a bone fide authority to settle at Step 1. Reliance upon an assumption that authority exists is not sufficient where, as here, the Postmaster represented the dominant, deciding authority and the subordinate supervisor remained out of the initial decisional loop and subsequently detached from the investigatory as well the later removal implementation process. Moreover, on the basis of the extensive record in this arbitration, it is amply

demonstrated that Postmaster Holbrook possesses a strong personality and strong conviction and dedication to the concepts of efficient management and the methods and means by and through which efficiency and achievement of the mission of the Postal Service should and shall be achieved. In short, the facts of record lend no support to the notion that Supervisor Wickersham entered the Step 1 process with freedom and authority to settle the grievance.

It is concluded that, in point of fact, Supervisor Wickersham lacked authority to settle the grievance at Step 1. Consequently, the grievant was denied genuine opportunity to have the merits of his removal fully and fairly considered at that step of the grievance process as was his right under under the National Agreement. This deprivation of a contractual right is serious but does not stand alone as necessitating invalidation of the removal action. This is so because the record evidence establishes further deprivation of contractual rights requiring a finding that the grievant's due process rights were violated.

As was observed by Arbitrator J. Fred Holly in Case No. S8N-3F-D 9885, supra:

The contractual provisions regarding Step 2 provide that on an appealed grievance, "the installation head or designee will meet with the steward..." The clear intent of this provision is to assure that an authority higher than the Employer representative who initiated the action which gave rise to the grievance will be the Employer's hearing representative. This condition was not met since the Employer representative at Step 2 was the same official who initiated the removal action; that is the Sectional Center Director of Employee and Labor Relations. Hence, Step 2, like Step 1, was ineffective and meaningless and as a consequence the Grievant was deprived of procedural due process.

In the present arbitration, not only was the line of authority extending from the issuance of the removal action through to the Step 2 more direct,

but the Step 2 representative (Postmaster Holbrook) had been a major participant in the very one-on-one/Postmaster-Grievant incident at the heart of the grievance. Thus, the spirit and the intent of Article 15, Section 1, Step 2 was breached by and through the Postmaster's involvement at Step 2.

The contract provides for participation of a "designee" at Step 2. Both the spirit of the contract and the realities of fairness and due process required in this particular case that a designee with capacity for detachment and reasonable neutrality be designated by the Service to review the salient facts and circumstances pertaining to the removal.

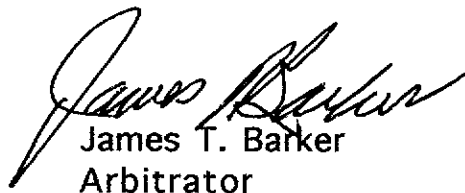
This combination of procedural defects combine to create a denial of fundamental due process rights to which the grievant was entitled under the National Agreement. See e.g. Case No. S4N-3A-D 37169, supra. Accordingly, the breach nullified the removal which must be set aside without any consideration of the substantive merits. It is unnecessary to decide whether, on the facts of record, the citation by the Postal Service of past elements remaining unresolved in the grievance process adversely impacted the grievant's due process rights.

The arbitrator fully comprehends the various strands and facets attending the case at bar, and, of course, is aware that the grievant is charged with a serious form of misconduct including use of profanity towards the Postmaster and failure to follow a direct order of the Postmaster. Notwithstanding, this arbitrator is required to enforce the terms of the National Agreement, and is not free to deviate therefrom in order to dispense his notion of industrial justice. He concludes in conformity with established arbitral principals recognized as valid by

regional arbitrators over a span of one and one-half decades, that the deprivation of due process rights were serious and requires the remedial action here taken.

AWARD

The grievance is sustained. The removal was not for just cause. The Postal Service shall reinstate the grievant with full back pay to which he is entitled, and without loss of benefits.



James T. Barker  
Arbitrator

November 10, 1995