

REGULAR ARBITRATION PANEL

C# 16511

A+B

In the Matter of the Arbitration
between
United States Postal Service
and
National Association of Letter Carriers, AFL-CIO

GRIEVANT: Mark Woodson
 POST OFFICE: Encino, CA.
 CASE NO. F94N-4F-D96044421
 F94N-4F-D96044427
 NALC Case NO. VN/E-026-96
 VN/E-027-96

BEFORE: DONALD E. OLSON, JR.

APPEARANCES:

For the U.S. Postal Service: Tom Thomas, Labor Relations Specialist
 For the National Association of Letter Carriers, AFL-CIO: Manuel L. Peralta, Jr. Regional Administrative Assistant

Place of Hearing: Encino, California

Date of Hearing: January 23, 1997 and February 7, 1997

AWARD: The grievances are sustained. The Grievant shall be reinstated to his former position at the Encino, California postal facility, no later than March 31, 1997. The Grievant shall receive back pay, benefits and seniority restitution from the date of removal until date of reinstatement. The Employer shall pay interest on such back pay award at the Federal Judgment rate. The Employer may deduct monies earned by the Grievant, if he worked during this period of absence from employment with the Employer. Furthermore, the Employer shall remove the Notice of Emergency Placement on Off-Duty Status, and the Notice of Removal from the Grievant's personnel file.

Date of Award: March 2, 1997



 Donald E. Olson, Jr., Arbitrator

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

This proceeding was conducted in accordance with the provisions set forth in ARTICLE 15, GRIEVANCE-ARBITRATION PROCEDURE of the parties 1994-1998 collective bargaining agreement. A hearing was held before the undersigned at the postal facility located at 5805 WhiteOak Avenue in Encino, California on January 23, 1997 and February 7, 1997. The parties stipulated to consolidate cases F94N-4F-D96044421 and F94N-4F-D96044427. On January 23, 1997, the hearing commenced at 9:00 a.m. and concluded at 5:00 p.m. On February 7, 1997, the hearing convened at 9:00 a.m. and concluded at 3:32 p.m., at which time the hearing record was closed. Mr. Tom Thomas, Labor Relations Specialist, represented the United States Postal Service, hereinafter referred to as the "Employer". Mr. Manuel L. Peralta, Jr., Regional Administrative Assistant, San Francisco Region, represented the National Association of Letter Carriers, AFL-CIO, hereinafter referred to as the "Union", and Mr. Mark Woodson, hereinafter referred to as the "Grievant". The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to make closing arguments in support of their respective positions. The Arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties. There were no challenges to the substantive or procedural arbitrability of the dispute(s). The parties stipulated the issue(s) to be determined by this Arbitrator. All witnesses testified under oath as administered by the Arbitrator. The parties submitted the matter on the basis of

evidence and testimony presented at the hearing and oral arguments. The parties submitted four (4) Joint Exhibits, all of which were received and made a part of the record. The Employer introduced twenty-seven (27) Exhibits, all of which were received and made part of the record. The Union objected to the introduction of several of the Employer's exhibits. The Arbitrator noted the Union's objections. The Union introduced ten (10) Exhibits, all of which were received and made a part of the record. The Arbitrator promised to render a written opinion and award within thirty (30) days after the hearing record was declared closed. This opinion and award will serve as the complete final and binding decision in this matter.

ISSUE

The stipulated issue(s) to be determined are:

"Was the Notice of Emergency Suspension for just cause? If not, what is the appropriate remedy?"

"Was the Notice of Removal for just cause? If not, what is the appropriate remedy?"

RELEVANT PROVISIONS OF THE 1994-1998 NATIONAL AGREEMENT

* * * *

ARTICLE 3

MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operation entrusted to it;

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

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ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

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 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.

Section 7. Emergency Procedure

An Employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The Employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

BACKGROUND

The Grievant was hired on January 30, 1984, as a Letter Carrier. The Grievant had recently been assigned from Annex 3 to the Encino-WhiteOak postal facility. On Thursday, December 21, 1995, the Grievant was observed returning to the postal facility

at 2:17 p.m. by Manager of Customer Services, V. Noblitt. It was alleged the Grievant did not clock in from the street. At approximately 2:24 p.m., Ms. Noblitt observed the Grievant leaving the building. Both Ms. Noblitt and Supervisor Chesnut attempted to locate the Grievant during the next hour without success. Thereafter, Ms. Noblitt instructed Supervisor Chesnut to station himself at the timeclock until 3:30 p.m., which was the Grievant's end of tour, so he could ascertain the Grievant's whereabouts from 2:24 p.m. to 3:30 p.m. The Grievant failed to clock out at his end of tour. The following day the Grievant completed a PS Form 1260 and entered 1550 (3:30 p.m.) as his end of tour. On Saturday, December 23, 1995, the Grievant was once again observed by Supervisor Chesnut arriving at the postal facility at 2:15 p.m., which was one hour and fifteen minutes prior to the end of his shift. Supervisor Chesnut made an attempt to locate the Grievant at 3:00 p.m. Supervisor Chesnut waited by the timeclock for the Grievant to clock out at 3:30 p.m., however, the Grievant did not clock out at his scheduled end tour time. On Monday, December 26, 1995, the Grievant once again completed a PS Form 1260, indicating an end tour of 3:30 p.m. for December 23, 1995. The Employer representatives then reviewed the Time and Attendance Clock Ring Error Reports for the two days in question. On December 29, 1995, the Employer confronted the Grievant for an explanation why he completed the 1260 forms with incorrect end tour times. The Employer found the Grievant's response to be unacceptable and lacking in credibility. The Grievant was issued a Notice of Emergency Placement in an Off-Duty Status dated December 29, 1995, on January 3, 1996 by Supervisor Konopka for allegedly falsifying

time records. A grievance regarding the issuance of this notice was filed. Meanwhile, the Employer continued to investigate this matter, and eventually concluded the Grievant had falsified both PS Form 1260s for time not worked on December 21, 1995, and December 23, 1995. Subsequently, on January 22, 1996, the Employer issued a Notice of Removal to the Grievant. Again, a grievance was filed. Both grievances were appealed through the grievance process set forth in the National Agreement. Eventually, both grievances were denied at Step 3. Thereafter, the Union appealed both matters to arbitration.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

The Employer maintains it had just cause to issue a Notice of Emergency Placement in an Off-Duty Status, and subsequently to issue a Notice of Removal to the Grievant for willfully and knowingly falsifying time records at the Encino-WhiteOak post office. Moreover, the Employer contends the Grievant was aware of the timekeeping procedures involving Forms 3971 and 1260, and received pay for time not worked on those two days in question. Furthermore, the Employer asserts the Grievant's actions were not mere errors, but falsification of time records. In addition, the Employer argues there is no need for progressive discipline when an employee such as the Grievant falsifies time records. Further, the Employer avows the Grievant's due process rights were not violated. The Grievant was given an opportunity to tell his side of the story. Also, the Employer avers that it conducted a fair investigation prior to placing the Grievant on Emergency Off-Duty status, and subsequently discharging him. In conclusion, the Employer requests that the grievances be denied.

POSITION OF THE UNION

The Union maintains the Employer did not have just cause to issue a Notice of Placement in an Off-Duty Status, or to remove the Grievant. The Union contends the Employer never charged the Grievant with falsification of time records. Moreover, the Union maintains the Employer's fact-finding investigation was not conducted properly, nor was the Grievant given an opportunity on December 29, 1995, to review the documentation in the Employer's possession at that time, which they eventually used to make their decision to remove the Grievant. The Union asserts this action by the Employer violated the Grievant's due process rights. In addition, the Union contends the Employer incorrectly charged the Grievant with receiving pay on December 21, 1995, when in fact he had not. Further, the Union argues the Employer failed to listen to the Grievant's version of the facts impartially. Moreover, the Union asserts the Grievant was never given any training on how to fill out Forms 1260 and 3971. Also, the Union claims the Grievant was entrapped by the Employer. In summary, the Union maintains the Employer failed to carry its burden of proof to establish the Grievant had falsified time records. In summary, the Union requests that the Grievant be reinstated and made whole, with no loss in seniority.

DISCUSSION

This Arbitrator has reviewed and given consideration to pertinent testimony, all exhibits and evidence, the parties closing arguments, as well as cited arbitration cases.

In this case, this Arbitrator is confronted with two issues that both deal with the just cause standard. Viewed

broadly, this Arbitrator is of the opinion that the term "just cause" implies some investigation, fact-finding and weighing of the circumstances by the Employer, which dictates a full, fair and objective investigation in order to be satisfied that the charged employee is in fact guilty of a particular offense. Clearly, suspensions and removals cannot be based upon conjecture, surmise, suspicion or anything but hard material and known facts. In short, the Employer must supply convincing evidence that the Grievant committed the offense for which he was suspended and subsequently removed.

As it happened in this instant case, the Grievant received a notice dated December 29, 1995, that indicated he was being placed on Emergency Off-Duty status pursuant to the terms outlined in Article 16.7 of the National Agreement, after he had met with Employer representatives on that same date. The Employer took this action for the following reason:

"Evidence of record indicates you falsified time records, specifically you falsified PS Form 1260, Non-Transactor Card. It is believed that leaving you in a duty status could result in falsification of other documents or forms. This could lead to loss of mail or funds."

Supposedly, the meeting held on December 29, 1995, between the Grievant, his Shop Steward and Employer representatives, in part was held to ascertain the Grievant's side of the story. However, it is evident to this Arbitrator that the Employer representatives did not share any of the documentation in their possession, i.e., Form 1260s with the Grievant, so that he could properly defend himself. This action, or lack thereof, clearly violated the Grievant's due process rights.

Later, on January 22, 1996, the Employer decided to remove the Grievant, and issued a Notice of Removal. This Arbitrator

notes that this Notice of Removal charges that the reasons for the Grievant's removal were for the following reasons:

"Unacceptable Conduct/Inaccurate Recording of Time Rings on PS Form 1260 (Nontransactor Card) Resulting in Pay for Hours not Worked."

Specifically, the Employer contended the evidence indicated the Grievant had inaccurately recorded time rings on PS Form 1260 on at least two separate occasions, resulting in payment to him of money which he was not entitled to.

Without doubt, in the opinion of this Arbitrator although the Employer charged the Grievant "with inaccurate recording of time rings on PS Form 1260s, in reality the Employer was actually claiming the Grievant had "falsified" time records. In Washer v. Bank of America National Trust & Savings Association, 21 Cal. 2d. 822, 136 P.2d 297, 301, the court held the word "falsify" may be used to convey two distinct meanings - either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue.

Needless to say, in this case the Employer has not supported its claim of falsification with proof beyond a reasonable doubt, or that the Grievant acted with an intent to defraud.

As a matter of fact, this Arbitrator notes the Employer after investigating this matter claimed the Grievant on at least two occasions received payment of money for which he was not entitled to. Obviously, the Employer's investigation was fatally flawed. Contrary to the Employer's assertions, a review of the record indicates the Grievant did not receive pay for the period of time from 2:24 p.m. through 3:30 p.m. on Thursday, December 21, 1995, a total of one hour and six minutes. In fact, the Grievant received LWOP (Leave Without Pay) for that absence. As such,

this Arbitrator concludes the Employer's investigation leading up to the charges being leveled against the Grievant, which resulted in his being placed on Emergency Off-Duty status without pay, and subsequently being removed, was not conducted properly, fairly or objectively. All things considered, if the Employer had properly investigated, it would have ascertained the fact that the Grievant received LWOP for his December 21, 1995, absence, rather than receiving pay for time not worked as charged. When readily available and obvious evidence is overlooked or disregarded as in this case, this Arbitrator has to conclude the investigation was conducted by the Employer in a shabby and incomplete manner. Equally important, this Arbitrator is of the opinion that if the Employer had carefully scrutinized the evidence pertaining to the twenty (20) Form 1260s allegedly completed by the Grievant, it should have been evident that he had only filled out three (3) of these documents as claimed. Obviously, the other seventeen (17) Form 1260s had been filled out by an unknown individual(s). The printing on these Form 1260s is clearly different than the Grievant's. In fact, this evidence supports the Grievant's claim that while employed at Annex 3 the timekeeper filled out the forms, when the Grievant missed an end of tour clock ring.

Certainly, this Arbitrator is of the opinion that since the Grievant was accustomed to the practice at Annex 3, he hardly can be held accountable for a change in procedure dealing with working conditions at the Encino postal facility, without being properly informed or trained on the procedure pertaining to filling out Form 1260s, if an end tour clock ring is missed. This Arbitrator finds the Grievant's testimony regarding the reasons for the entries made on the Form 1260s for the two days in question, as

well as how Form 1260s were used at Annex 3, rings with more veracity than the Employer's version.

The Employer clearly did not prove the Grievant really "did it", which is a rock-bottom requirement for discipline to pass arbitral review.

Thus, based on the record as a whole, and for the reasons set forth above, this Arbitrator concludes the Notice of Emergency Suspension and the subsequent Notice of Removal were not for just cause.

AWARD

The grievances are sustained. The Grievant shall be reinstated to his former position at the Encino, California postal facility no later than March 31, 1997. The Grievant shall receive back pay, benefits, and seniority restitution from the date of removal until date of reinstatement. The Employer shall pay interest on such back pay award at the Federal Judgment rate. The Employer may deduct monies earned by the Grievant, if he worked during this period of absence from employment with the Employer. Furthermore, the Employer shall remove the Notice of Emergency Placement on Off-Duty Status, and the Notice of Removal from the Grievant's personnel file.

Dated this 2nd day of March, 1997

Tacoma, Washington


Donald E. Olson, Jr., Arbitrator