

C#17398

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GREAT LAKES AREA
REGULAR ARBITRATION PANEL

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|---|---|----------------------------|
| In the Matter of the Arbitration |) | GRIEVANT: F. Martin |
| |) | |
| Between |) | POST OFFICE: Detroit, Mi. |
| |) | |
| UNITED STATES POSTAL SERVICE |) | CASE NO. J94N-4J-D96084703 |
| |) | |
| And |) | GTS-17709 |
| |) | |
| NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO |) | CASE NO. J94N-4J-D96084702 |
| |) | |
| |) | GTS-17708 |

BEFORE: Thomas J. Erbs, Arbitrator

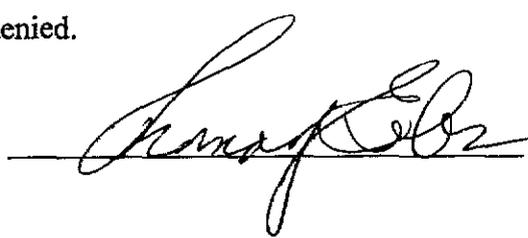
APPEARANCES:

- U.S. Postal Service - Jack Liech - Labor Relations Specialist
- Union - Steve Burt - Advocate
- Place of Hearing - Detroit, Michigan
- Date of Hearing: - September 10, 1997

AWARD: The grievance as to the Emergency Suspension is sustained. The Grievant shall be made whole for the period up to the effective date of his removal.

The grievance as to the Removal is denied.

Date of Award: September 30, 1997



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OUTLINE OF CASE

The Grievant, Fred Martin, was employed by the Postal Service on June 20, 1987. Testimony indicated that until the introduction of the DPS the Grievant was a very good carrier. He had no discipline on his record prior to DPS.

In March of 1995 the Grievant had an official route inspection for his route number 3841. His street time was determined to be five (5) hours and forty six (46) minutes and those records indicated that the Grievant demonstrated a pace of 108 steps per minute.

DPS was introduced in the Fenkell station in October of 1995. Until each carrier qualified the DPS was cased. However, by the end of 1995 all carriers had qualified and the DPS was to be taken directly to the street. On January 4, 1996 a DPS training team came to the station to observe. During that observation the Grievant demonstrated a pace of 70 while delivering his route with the DPS.

Shortly thereafter some complaints and calls of concern were received by the Supervisor and the Manager concerning the Grievant. Some of the calls complained about the lateness of the mail delivery but many of them referenced some concern that the Grievant, because of his slow pace and how he was delivering mail, was sick. As a result of those calls, and after a review of the Grievant's street times, the Manager went out onto the street on several occasions to observe the Grievant. The Grievant was observed with a very slow pace even as low as 60.

The workload analysis sheets for the Grievant's route for pay period AP7 1995 through AP10 1996 were introduced. The workload analysis indicates that all through 1995, up to the introduction of the DPS, the Grievant's street time consistently was either at or below the time indicated in his March 1995 route inspection. (5.46). Commencing in the last week of AP4 1996, when the DPS

was no longer cased, the Grievant's street time jumped dramatically.

The Manager testified that his review of those sheets, coupled with his observations of the Grievant's pace on the street, caused him to send the Grievant for a Fitness For Duty examination to make sure that there was nothing physically wrong with the Grievant. On March 22, 1996 the Manager was advised that the Grievant was fit for duty. The Manager also sent the Grievant to the EAP but no evidence of what occurred in the EAP counseling, which the Grievant admit he attended, was introduced. The Grievant's street time continued to be almost 7 or more hours per day.

The Grievant received a NTOL-2 based upon an April 6 observation where he was observed at a pace of 64. The Supervisor stopped the Grievant on the street and asked what his problem was and why he was not walking at his demonstrated pace of 108. The Grievant allegedly replied: "No can do. No, I'm going to walk like I did since DPS." On April 4, 1996 he was again observed by the Supervisor at a pace of 90. When approached by the Supervisor and instructed to increase his pace he then continued his route but decreased his pace to 76. That April 4, 1996 NTOL-3 contained the following admonitions:

THIS IS YOUR FINAL WARNING PRIOR TO DISCHARGE. You must correct the deficiencies of the type cited above and you must comply with Postal Regulations. Failure to do so result in your discharge from Postal Service.

The Postal Service evidence in regard to the Grievant's actions leading up to the Emergency Suspension and the removal were set forth in the Notice of Removal and were confirmed by testimony of the witnesses. That Notice of Removal, portions of which are set forth herein, was dated April 26, 1996.

You are hereby notified that you will be removed from the Postal Service on May 31, 1996, or no earlier than thirty (30) days from the date you received this notice. The reason(s) for this action are:

**CHARGE I - FAILURE TO FOLLOW INSTRUCTIONS/
DISCHARGE OF DUTIES**

During an Official Route Count and Inspection conducted in March of 1995, your Route 3841 was determined to be five (5) hours and forty-six (46) minutes in the field. Those records also indicated that you demonstrated a pace of 108 steps per minute during this Inspection.

On April 19, 1996, you were assigned to City Route 3841 at the Fenkell Station in the Detroit District. At approximately 2:45 p.m., you were observed by Supervisor Wanda Woolfolk delivering mail on the 1400 block of Northlawn. You were delivering mail at a pace of 76 steps per minute, 32 steps per minute slower than your demonstrated pace during route inspection. You were instructed by her to complete the rest of your assignment, and to discharge your duties in a professional manner.

You were also instructed to walk at the pace that you had demonstrated during your last route inspection, 108 paces per minute. You did not respond to Supervisor Woolfolk, and turned around and began walking. Instead of following the instructions of your supervisor, you decreased your delivery pace even further, walking at a pace of 60 steps per minute.

On April 25, 1996, you were assigned to City Route 3841 at the Fenkell Station in the Detroit District. At approximately 2:55 p.m., you were observed by Supervisor Wanda Woolfolk delivering mail on the 1400 block of Northlawn. You were delivering mail at a pace of 90 steps per minute, 18 steps per minute slower than your demonstrated pace during route inspection. After you were made aware that you were being timed, you slowed your pace to 84 steps per minute. You were instructed by Supervisor Woolfolk to discharge your duties in a professional manner, and to walk at the pace that you had demonstrated during your last route inspection, 108 paces per minute. You did not respond to Supervisor Woolfolk, and turned around and began walking. Instead of following the instructions of your supervisor, your delivery pace was timed at 96 steps per minute. When Supervisor Woolfolk asked you if you had any problems following her instructions, you gave a negative response by shaking your head. You were then instructed to follow her previous directions, and notified you that failure to follow those instructions would result in further corrective action. When she asked you if you understood, you gave a positive response by nodding your head. You then turned around, and continued delivery of your mail. You were again timed, and you again slowed your pace to 90 steps per minute.

You offered no administratively acceptable reason to explain why you have deliberately slowed your pace far below your demonstrated ability. In fact, a Fitness For Duty Exam was conducted on March 21, 1996 in the Medical Unit in the George W. Young Post Office, where it was determined that you were Fit for Full Duty.

Available records indicate that during the same period last year (AP 7, FY 95), you demonstrated an average of 5 hours and 48 minutes delivering your route in the field, at a rate of 87.01 deliveries per hour. During AP 7, FY 96, your field time has increased to 7 hours and 32 minutes at a rate of 64.49 deliveries per hour.

Your refusal to follow the instructions of your supervisor to discharge you duties at the established pace that you demonstrated during route inspections in 1995, affects the ability of the Postal Service to provide quality service to our customers in a efficient and effective manner. Your deliberate actions in obstruction and retarding delivery of the mail has also unnecessarily caused an increased financial burden upon the Postal Service, including the payment of overtime for hours over and above your demonstrated field time.

By Declaration dated June 8, 1987, you were put on notice that to obstruct or retard the mail was a crime, punishable by fine or imprisonment, and could result in your *termination of employment*.

Your deliberate slow down in the delivery of your mail caused an increase in time delivering your route, and demonstrates your refusal to give a "fair day's work for a fair day's pay" as specified in Article 34 of the National Agreement. your failure to follow instructions and discharge your assigned duties efficiently and effectively is a serious breach of the employer/employee relationship, and fails to meet the Postal Service's Standard of Conduct as stated in the Employee and Labor Relations Manual, specifically;....

In addition, the following elements of your past record have been considered in taking this action:

1. NTOL 3 dated April 4, 1996 for Discharge of Duties/Failure to Follow Instructions/Failure to Give a Fair Day's Work for a Fair Day's Pay.
2. NTOL 2 dated April 2, 1996 for Discharge of Duties/Failure to Follow Instructions/Failure to Give a Fair Day's Work for a Fair Day's Pay.
3. NTOL 1 dated March 25, 1996 for Discharge of Duties/Failure to Follow Instructions.

Additionally, your past disciplinary record reflects that you have been forewarned that such conduct would result in disciplinary action being taken up to and including discharge...

The documentation presented by the Postal Service indicates that prior to the introduction of the DPS the Grievant was performing at a rate of 87.01 deliveries per hour and after the DPS introduction, when his field time had increased dramatically, his delivery rate had fallen to 64.49 per hour. Those same records all indicate that the carriers who carried the same route in the Grievant's absence delivered within the original allotted delivery time. The carriers who delivered subsequent to the Grievant's emergency suspension and removal also delivered the route within the demonstrated average time that was established in the March 1995 inspection of the route.

The Manager testified that after the observances on April 19 and 25 it was obvious to him that the Grievant was deliberately slowing down the mail despite the previous warnings in this regard. He felt he had no choice but to issue the Grievant an emergency placement and subsequent removal. He could not afford to keep the Grievant on the clock when he was deliberately delaying the mail. As a result an emergency placement dated April 26, 1996 and a removal dated the same date were issued to the Grievant.

The Manager testified, as did the Supervisor, that they had numerous discussions with the Grievant concerning his performance. The Manager testified that whenever he tried to talk to the Grievant about his performance he was told to talk with a Steward. He did talk to the Steward and gave the Stewards instructions in regard to what was expected of the Grievant. A Supervisor also testified that the morale in the station was severely affected because of employees having to complete assignments for the Grievant. This morale problem, plus the complaints from the customers, had a very serious affect on the efficiency of the office.

The Manager and the Supervisor also indicated that while they were observing the Grievant he would not finger the mail as he was walking nor was he taking any obvious short cuts across

lawns. They both agree that neither of those deficiencies was cited in the removal but acknowledged that failure to finger mail and to take the obvious shortcuts would affect delivery time.

The Postal Service witnesses testified that the DPS, when first introduced, added approximately 15 to 20 minutes of street time to each route. However, after a few months, the street time was almost the same as before the introduction of the DPS. The Manager testified that in all his years in the Postal Service he has never seen a carrier walk as slow as the Grievant. Supervisor Woolfolk testified that when she observed the Grievant he was walking so slow, and looking straight ahead, that he looked almost like a "zombie".

The Grievant testified to his discipline free years of service since 1987. He testified that he had a hard time adjusting to the DPS. He did not specifically deny the pace that was attributed to him by Management. He said he had no idea what his pace was as he was only trying to deliver the mail in a safe manner. He denies that Management advised him that he was not fingering the mail. Contrary to Management's witnesses the Grievant said that he always fingered mail even the DPS. He acknowledges that he does not walk across lawns but stated that no one ever told him that he should do this.

The Grievant acknowledges that in February 1996 he was advised by Manager Sims that he was expected to maintain the 108 pace. He testified he has no knowledge of what his pace is and does not know how it is computed. He also acknowledged the NTOL-3 with the final warning.

Various methods of computing pace were described by Management witnesses all of which center around counting the paces of the carrier for either 5, 10 or 15 seconds and then multiplying that count by the appropriate number in order to get an average for a minute. The Grievant has no explanation as to why his street time increased so dramatically after the DPS except that he was not

familiar with the DPS process.

CONTRACT AND HANDBOOK AND MANUAL CITATIONS

The letter of removal cites the following provisions of the ELM, Sections 666.1, 666.2 and 666.5. In addition Detroit District General Order Number One, listing dischargeable infractions, is as follows:

Item 3 - Unauthorized Destruction or Discarding of Mail or Postal Property, and any unauthorized intentional act that retards, delays, or diverts mail from proper processing or delivery."

In addition the parties have cited various provisions of the National Agreement including Articles 3, 16.7, 19 and 34 and ELM Sections 661.2, 661.3 and the M39 Section 115.

POSTAL SERVICE CONTENTIONS

The facts in this case are not in dispute because they are so well documented. The Grievant, despite his 10 years employment, "did knowingly and blatantly commit the infraction as stated in the Removal Notice dated April 26, 1996." This deliberate action was not only unjustified but resulted in the delay of mail and substantial cost increases to the Postal Service. Retaining the Grievant in the Service would have been a detriment to the Services' mission. The case does not concern new standards of delivery but instead only required that the Grievant perform within his demonstrated performance ability of 108 steps per minute. The record clearly shows that he maintained this pace for a year until the introduction of the DPS. "At that time, he arbitrarily increased his field time by almost two (2) hours per day." Management's investigation indicated that the Grievant deliberately slowed down his speed increasing his street time despite the issuance of several disciplines and numerous discussions concerning his pace. Article 16.7 clearly authorized the Postal Service to take immediate action when the allegation of misconduct would result in loss

of Postal funds. The Grievant's actions certainly were costing the Postal Service funds.

Other arbitrators who have viewed similar situations have upheld removal based upon the slowness of a Carrier's pace. The Grievant continually refused to work at his demonstrated pace. The Grievant has given no explanation as to why he had such a dramatic slow down. He has never explained why the DPS would have affected his street time. There was no change to his route. All other carriers who carried on this route performed within the allotted street time. The conclusion is that the Grievant, for whatever reason, refused or was unable to meet this standard. Management must be in a position to hold its employees responsible for their performance especially when they have documented proof of their ability. The Grievant's age certainly is not a factor. He is only 32. He has demonstrated what he could do when he wanted. Despite the discipline which has been issued to the Grievant it is obvious the Grievant is not going to change. There is no reason why he should be given another chance. The Grievant's blatant refusal to correct his deficiencies cannot be tolerated. Even customers were involved. The morale was low at the station. The evidence is clear that the Grievant's actions were deliberate and the Postal Service requests that both grievances be denied. To support its positions the Postal Service cites the following arbitration decisions:

NC-S-11, 463-D - Larson - 1978
S4N-3W-D18689 - Nolan - 1986
W7N-5T-D20906 - Barker - 1981
RA-72-488 - Willingham - 1973
NC-W-907-D - Eaton - 1979
H4N-3U-C59518/58637 - Mittenthal - 1990

UNION CONTENTIONS

The discipline in the instant case is without just cause. Any discipline must be corrective in nature and this discipline is not. The Postal Service claims that the Grievant was walking too slow

however the observation was for as little as 5 seconds. There is no official method of how the pace is computed. The Postal Service has a tool for the evaluation of street time. That tool was used when the inspection was made in 1995 but it was not used for the implementation of this discipline. There is also a question as to whether the DPS came in prior to 1996 or started in January of 1996 as some documentation indicates. This raises a credibility problem as far as the Supervisor's testimony.

Management also indicated that the Grievant was not fingering mail and was not crossing lawns, however, this was never addressed in the discipline nor mentioned in the removal notice. That alone would cause the increase in street time. Since the Postal Service did not address that issue the discipline for the delay in the mail must not stand. While there might have been past discipline issued to the Grievant that discipline only assessed blame and it did not help him correct any perceived deficiencies.

The Grievant answered honestly. He did not know his pace. He only knew that he was doing the best he could. This is an outstanding Carrier with a great record for 10 years. The Grievant could be retrained if that was required. It would not be in the Post Office's best interest to remove a carrier with this good record over such a substantial period of time. The fact that the Grievant was not able to adapt to a dramatic change should not mean that he has to be removed. He could possibly even be assigned to a different office after he is retrained. The Postal Service used a form which is not even a National form in order to assess the pace of the Grievant. This is totally improper. Management should have used the appropriate tool to assess his pace. Since they didn't it is only proper that the Grievant be reinstated after both grievances are sustained and that he be made whole.

DISCUSSION

The Notice of Charges sets forth very clearly the complaints that Management has had with the Grievant's performance on the two (2) dates in question. The past discipline sets forth similar allegations on prior occasions. Significantly the Grievant does not dispute the allegations contained in the Notice of Removal nor in the testimony of Management's witnesses at the arbitration hearing. He does not deny that at times his pace was only 60, other times in the 70s, and other times in the 90s. Nor does he deny that after being confronted by Supervision on several occasions out on the street, prior to being issued discipline, that he then reduced his pace. His only explanation is that he was going at a pace that he felt enabled him to deliver the mail in a safe and responsible manner. He did not mention any particular safety problems. He admittedly is a young man with no physical reason which would prevent his performing up to standards which he set in 1995.

The Grievant's testimony in regard to his performance might be much more persuasive if the Grievant had not demonstrated his ability to deliver the route in the time established in the 1995 inspection. Significantly the records show the Grievant hardly ever had a problem maintaining that allotted street time from the route inspection all of the way up to introduction of the DPS to his route. While the Union has argued that Carriers deliver in different manner and paces and that some had more trouble than others with the DPS, it is noted that the Grievant's performance was so far outside of the norm for himself, and even for the substitute Carriers on this route, that the conclusion can only be reached that the Grievant, for some reason, was engaging in a deliberate slowdown.

The Grievant does not deny that he was approached on many occasions by Management concerning his pace, the complaints of customers, and his increased street time. The Grievant does not deny that he had four months to deliver DPS before the final discipline was issued to him. The

Grievant never asked for additional DPS training. The Grievant does not deny that Management, even with the intervention of his Steward, counseled him about the street time on his route and the discipline that might follow if performance did not improve. He has no explanation as to why Carriers on his off days were able to complete the route in the allotted time and yet he was consistently almost two (2) hours over on his street time.

While the Grievant denies that he failed to finger the mail, but admits that he failed to cross the lawns in order to take advantage of obvious short cuts, the Arbitrator is hardpressed to believe that failure to take such action would add two (2) hours to his street time.

Despite the arguments of the Union and the claims of the Grievant it is clear that the Grievant has consistently, since the introduction of the DPS, extended his street time for an inordinate amount of time. Certainly he performed his duties more slowly than required without any plausible explanation.

This is not a case where Management jumped in and immediately started discipline procedures against the Grievant when his street time increased. Instead the Grievant was given a substantial amount of time to adapt to the DPS delivery system. Even the Grievant admits that he started the full DPS delivery as early as January 4, 1996. No discipline was issued to the Grievant for almost three (3) months. Admittedly Management talked to him on several occasions during this period of time in order to increase his performance. They even advised the Grievant of the calls from customers complaining about the lateness of delivery and the expressions of concern about his health. Prior to issuing discipline Management sent the Grievant both for a Fitness For Duty Examination and then, when he was deemed to be fit, to the EAP in order to attempt to find out what problem, if any, was causing the drastic change in the Grievant's performance.

When no obvious reason could be discerned for his totally unacceptable performance the conclusion was reached that the Grievant was deliberately slowing down on his route. The documentary evidence clearly shows that is exactly what the Grievant was doing.

The Union has argued extensively that there is no appropriate measure of the pace and that it is improper, based upon these short observations without using the form from a street inspection, to discipline the Grievant for lack of pace. However, even accepting the Union arguments in full, the documentation is clear that for some reason, the Grievant's street time increased dramatically. The Supervisor and the Manager testified to how they computed his pace. They measured his pace on several days and at different times. The pace was averaged. Even if there was a slight error that error, even though possibly exaggerated by the shortness of the count, does not excuse the Grievant's two (2) hours extension on his street time. Instead it tends to corroborate the testimony of the Managers as to the Grievant's pace on the street. The Arbitrator is convinced from the record that the Grievant demonstrated such a slow pace that it was obvious not only to a trained Manager and Supervisors but also to customers. Arbitrator Eaton in NC-W-11907:D stated:

While it is agreed that a certain number of paces per minute cannot be required of a carrier, it is equally apparent that there is no foundation in the National Agreement for the contention that a carrier may therefore go at any pace whatsoever, so long as he maintains that pace as "his" pace. It is obvious that there must be some point at which such a proposition falls of its own weight. Curiously, the union, having vehemently rejected efforts to establish a particular pace as being required, then resists the necessary alternative that the pace or rate at which a carrier performs work be judged subjectively.

Clearly it is possible, for whatever reason, for a carrier to adopt a slow and unnatural pace, one which would prevent him from performing adequately. Of necessity, whether this has occurred must be determined in large part by reference to the judgment of experienced carrier supervisors and route inspectors.

There is no doubt in the Arbitrator's mind that the Grievant, for whatever reason, made a

conscious decision to extend his street time. This is entirely improper and subjects him to discipline. Management attempted NTOL discipline on three (3) occasions. On the April 4, 1996 discipline he was specifically warned that if such conduct continued he would be subject to removal. The Grievant knew this. The un rebutted evidence indicates that this identical conduct continued on two (2) more occasions. Hence, in the Arbitrator's opinion, knowing full well that he was performing below standards and knowing full well that he was subject to further discipline, which was discharge, the Grievant continued his conduct.

The Grievant is a long term Carrier who had demonstrated his ability to carry the route in a timely manner. When he consistently failed to perform as expected Management took the time to find out that he had no physical disability which would affect his pace. They also sent him to EAP to see if there were any psychological or personal problems which might affect his pace. Only thereafter did progressive discipline start.

Management is entitled to expect its employees to perform up to standards. When an employee consistently, for whatever reason, fails to meet that performance standard, Management is entitled to begin progressive discipline in order to correct the deficiencies. That is exactly what occurred in this case. Progressive discipline had absolutely no effect. At some point Management must be entitled to take steps in order to remove an employee who consistently fails to conform to the appropriate standards. That is what occurred in this case. The Grievant's continuous failure to perform up to his demonstrated ability, after progressive discipline, left Management no choice but to issue the removal. The removal was proper.

The Grievant was also issued an Emergency Placement on the basis of possible loss of Postal Service funds. In this regard, the Arbitrator has compared both the provisions of Section 16.7 and

the facts of this case. After due consideration the Arbitrator is unpersuaded that the Grievant's inefficient delivery (extended street time) constitutes the same type of emergency situation which is contemplated by 16.7. As stated by Arbitrator Mittenthal in H4N-3U-C58637/59518 at pages 7 and 8:

"The "emergency procedure" is, as those words indicate, a recognition that situations do arise where supervision must act "immediately" in suspending an employee because of immediate risks are dangers which do not allow the more time-consuming procedures of Sections 4 and 5. Thus, Section 7 is a permissible variation from the conventional suspensions contemplated by the parties. But it is a suspension nonetheless, one which must be considered an integral part of the Article 16 "discipline procedure."

Under the provisions of Article 16.7 decisive, "on the spot", action is required. As was stated by Arbitrator Mittenthal "Nothing intervenes between the decision to act and the act itself." In this situation the Grievant had been demonstrating this type of conduct (work performance) for some period of time. On other occasions, when he inefficiently delivered mail, he was given NTOL suspensions. Yet, in Management's opinion, the same type of conduct, when engaged in on April 25, 1996, now justifies an Emergency Suspension. If so, then why not the same "immediate" threat to funds and the same "emergency" situation on April 2, 4 or 19. Suffice it to say that Management has failed to sustain its burden of proof to justify the Grievant's April 26, 1996 placement off the clock. Hence, the Arbitrator concludes that the Grievant's Emergency Placement in off-duty status issued April 26, 1996 was not issued for just cause. The Grievant shall be made whole for the notice period up to the effective date of his removal.

Ruling

1. The grievance as to the Emergency Placement is sustained and the Grievant shall be made whole for the notice period.

2. The Postal Service had just cause to remove the Grievant based upon the evidence that has been presented. The grievance as to the removal is denied.

Signed in the County of St. Louis, State of Missouri, this 30th day of September, 1997.


Thomas J. Erbs, Arbitrator