

C# 18933

REGULAR ARBITRATION PANEL

In The Matter of Arbitration)	GRIEVANT: Russell Salvatore
(
between)	POST OFFICE: Fullerton, CA
(
UNITED STATES POSTAL SERVICE)	CASE NO.:
(
and)	USPS : F94N-4F-D 98048111
(
NATIONAL ASSOCIATION OF LETTER)	UNION : GTS # 47716
CARRIERS, AFL-CIO)	

BEFORE: GUY M. PARENT, ARBITRATOR

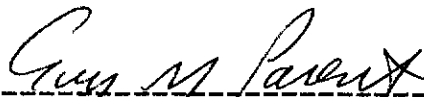
APPEARANCES:

For the U.S. Postal Service:	Nick Barson Labor Relations Specialist
For the Union:	John Jackson Vice-President, Branch 1100
Place of Hearing:	Main Post Office Fullerton, CA
Date of Hearing :	October 22, 1998

AWARD: The grievance of Russel Salvatore is upheld to the following extent:

The Grievant is to be reinstated to his former position with seniority but without back pay. Further, the Grievant is to immediately and diligently apply for his full and normal retirement benefits as have been accumulated and to exercise, as soon as permitted under the provisions of the Pension Plan, his rights to his normal pension.

Date of Award: November 22, 1998



 Guy M. Parent
 Arbitrator

This arbitration arises pursuant to the 1994-1998 National Agreement (the "Agreement") (JX-1), between the United States Postal Service (the "Employer"), and the National Association of Letter Carriers (the "Union"). At the hearing, no witnesses were called to testify. Both parties were afforded full opportunity for the introduction of relevant exhibits¹ and for argument. The Grievant did not testify on his own behalf but was ably represented by the Union. The parties stipulated that the case is properly in arbitration. The record was closed following oral closing arguments by both parties.

ISSUE

The parties stipulated that the issue before the arbitrator is the following:

Was the removal of the Grievant on January 30, 1998 for just cause and, if not, what shall be the remedy?

RELEVANT PROVISIONS OF THE 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

¹ References to exhibits will be EX, UX or JX signifying Employer, Union or Joint Exhibits.

positions within the Postal Service and to suspend, demote, discharge, or take disciplinary action against such employees;

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

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

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.

(The preceding Article, Article 3, shall apply to Transitional Employees.)

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.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed change that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours, or working conditions, as they apply to employees covered by this Agreement, shall be furnished by the Union upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly related to wages, hours, or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make

changes to handbooks, manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.

Relevant Sections Of the ELM:

665 Statutory Provisions

665.2 Application to Postal Employees

The following statutes and regulations are applicable to all employees in the Postal Service. In addition to these statutes, Executive Order No. 11222 of May 8, 1965, as made applicable to the Postal Service by Executive Order No. 15590 of April 23, 1971, prescribes standards of ethical conduct for officers and employees of the government.

...

r. Prohibition against delay or destruction of mail or newspapers (18 U.S.C. 1703)

666.1 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

666.85 Incomplete Mail disposition

It is a criminal act for anyone who has taken charge of mail to quit voluntarily or desert the mail before making proper disposition.

FACTUAL SUMMARY:

At the time of his removal, the Grievant was a Level 5 Letter

Carrier assigned to the Sunny Hills Post Office in Fullerton, California. He had 29 years of service.

None of the facts of this case are in contention except for the severity of the penalty imposed on the Grievant. The following is the summary of the events which took place on November 5, 1997, and which gave rise to this arbitration. This summary is that which is stated in the first paragraph of Joint Exhibit 15. The record of the investigative interview of the grievant conducted on November 6, 1997 is reflected in Joint Exhibits 15 and 61, and is quoted below verbatim:

"On Wednesday, November 5, 1997, Russell Salvatore was scheduled to case and carry Route 3511. This was R. Salvatore's regular day on his assigned route. On this day, R. Salvatore was given two hours of auxiliary assistance on the street and he was approved to carry an hour of his own route on overtime. Upon his arrival back to the Sunny Hills station, Supervisor Norma Mason and Station Manager Michael Reading were discussing the following days(sic) delivery plan while looking out the back dock doors into the postal parking lot when Supervisor Mason noticed carrier Salvatore leaving something in the back of his LLV. M. Reading and N. Mason decided that while making the afternoon vehicle inspections they would find whatever R. Salvatore left in the back of his LLV. Upon inspection of the vehicles, R. Salvatore had left one tray of DPS letter mail (408) pieces, twenty-five parcels (Priority, First-Class, and Third-Class), and two accountable pieces (two certified letters). All the mail had been concealed in the back of the LLV and it was all Route 3511's mail. The DPS letter mail was not delivered to 2831 Anacapa through 800 Madeira Pl., the parcels were for addresses that R. Salvatore had carried that day, and the two certified letters were also on the part of the route that he carried that day. After the discovery was made and accounted for, management sent two other carriers out to deliver the mishandled

mail. On this day R. Salvatore had been notified prior to leaving the office that he was going to be counted in the office the following day. On 11/5/97, the day the mail was mishandled/delayed, R. Salvatore had received 21.5 ft. of caseable mail, 9 ft. over his reference volume of 12.5 ft. He requested and was authorized two hours of street auxiliary assistance on 11/5/97. He ended up leaving the office almost three hours later than his scheduled leave time, so he was authorized another hour upon leaving the office that he was told to do on his own.

On Thursday, November 6, 1997, R. Salvatore was taken in for investigative interview with Supervisor Mason and Station Manager Reading. He did not make a request for any Union representation. During the investigative interview, the following questions were asked and responded to accordingly:

1. On November 5, 1997, were you scheduled for route 3511? Yes.
2. On this day did you case and carry route 3511? Yes.
3. On this day did you request and was any auxiliary assistance given? Yes, yes.
4. Did the auxiliary assistance consist of three hours of street time? Yes.
5. Did the assistance include B. Abitan carrying .50 hr (Catalina-2411 Domingo), J. Lee carrying 1.50 hr (2725 Terraza-2210 Domingo), and you carrying an hour on your own assignment? Yes.
6. Is 2831 Anacapa through 800 Madeira Pl. on route 3511? Yes.
7. On 11/5/97 did you carry 2831 Anacapa through 800 Madera Pl.? Yes.
8. Did you have DPS letter mail for this section of the route? Yes.
9. Did you deliver the DPS letter mail for this section of the route? No.
10. Did you have parcels/chunks for route 3511 on 11/5/97? Yes.
11. Did you deliver these parcels/chunks on this day? Some, but

not all.

12. Did you have accountable mail for route 3511 on 11/5/97? Yes, 2 certified letters found in the DPS while delivering.
13. Did you deliver the accountable mail? No.
14. After finishing your deliveries on route 3511 did you return to Sunny Hills Post Office around 4:30 p.m.? Yes.
15. Did you unload your own vehicle? Yes.
16. Did you clean out the LLV of all mail, parcels, and equipment? No.
17. Did you leave 408 pieces (one tray) of DPS letter mail in the back of your LLV? Yes.
18. Did you leave 25 parcels. Yes.
19. Did you leave 25 certified letters? Yes.
20. Did you see the supervisor or station manager prior to clocking out after returning to the office? Yes.
21. Did you report the undelivered mail to the supervisor or the station manager before leaving to go home that afternoon? No.
22. Are you aware that it is your responsibility to efficiently and securely deliver the mail? Yes.
23. Are you aware that it is your responsibility to notify management when you cannot complete your assigned duties according to the scheduled time? Yes.
24. Why did you conceal the mail in the back of the LLV on 11/5/97? I was trying to get back on time so I would not receive any more discipline. I thought I could catch up the delayed mail on the following day (Thursday).
25. Have you ever done this in the past? No, I have brought back third-class parcels before but not any letter or flat mail.

The Grievant was placed on administrative leave effective November 6, 1997. On December 1, 1997, he was issued a Notice of Proposed Removal. The reason given was "Mishandling of the Mail." The Grievant was charged with violations of the ELM, specifically, Sections 665.2 (r), 666.1 and 666.85. In addition, the notice

states that the following elements of the Grievant's disciplinary record were considered:

- September 19, 1997 - 7-day suspension. Failure to follow Instruction/Unauthorized Overtime.
- July 15, 1997 - 7-day suspension. Failure to follow Instructions/Unauthorized Overtime.
- January 23, 1997 - Letter of Warning. Failure to follow Instructions/Extension of Break.

On January 13, 1998 the Grievant was issued a notice of removal with an effective date of January 30, 1998. The Union grieved the removal. The parties were unable to settle the grievance and it is now properly in arbitration.

Position of the parties

The Employer:

The Employer contends that the act of the Grievant is one of the most serious offenses that can be committed by a postal employee. The Grievant has admitted his guilt. The reason he gave at his investigative interview for not having delivered the mail and parcels found in his LLV on 11/5/97 was that he wanted to avoid receiving further discipline for unauthorized overtime.

The Employer anticipates that the Union will bring forth arguments such as the DPS system was new, the Grievant was having a hard time adjusting to it, his route was overburdened etc...The Union will also attempt to use the Grievant's length of service as factor to mitigate his offense. There are established methods in the National Agreement by which an employee can request a route

examination if he/she is experiencing difficulty adjusting to DPS mail. This avenue was not pursued by the Grievant. His length of service should not serve to mitigate the penalty of discharge for this sort of offense. With his experience, the Grievant knew his actions were wrong and he knew the seriousness of such actions.

The Grievant was not delaying mail for legitimate business reasons or for reasons beyond his control, but for a self-serving reason: to avoid discipline.

In support of its position, the Employer cites two prior arbitral decisions: Arbitrator Fogel, in case No. W7N-5D-21814 states:

"Without question, the delay of mail is a very serious offense, directly affecting not only the performance of the Postal Service's function, but also public confidence in the Service. The grievant had been a carrier for two years; he must have known the seriousness of delaying mail...Furthermore, requiring progressive discipline in all instances of mail delay would be inimical to the functioning of the Postal Service, because it would mean that each employee could on one occasion delay the mail without fear of losing his/her job. This could have dire implications for the functioning of the Service, it would reduce the integrity of the mail in the eyes of the employees."

In case No. E7N-2A-D 2645, Arbitrator Duda found:

"It is well established that a Carrier who intentionally discards or delays mail is subject to discharge. This is true even for a 20-year carrier. Long service is not a license to attack the very purpose of the Postal Service. Thus, the Postal Service had reason to believe, on August 6, 1991 that retaining Grievant on duty may have resulted in loss of

mail."

Although the Union argues that the Postal Service routinely delays mail, the Employer argues that it has the exclusive right under Article 3 of the National Agreement to direct the employees in the performance of official duties and to determine the methods, means and personnel by which such operations are to be conducted. Management does on occasion curtail mail to meet the operational needs of the Postal Service. The mail curtailed is never First Class or Priority as was in the instant case. It is "NEVER" (emphasis by Employer) up to the letter carrier to determine what mail is to be curtailed. That responsibility lies with management. Based on the evidence presented, the Employer requests that the grievance be denied.

The Union:

The Union's position is that the penalty imposed is punitive in nature and not corrective, and to have been corrective it would have had to follow the progressive discipline provisions of Article 16 of the Agreement. In addition, it draws the arbitrator's attention to the fact that the grievant was candid; he admitted his transgression; he showed remorse; he had never engaged in such behavior in the past; he did not intend to steal the mail or to discard it; he merely attempted to avoid discipline which he knew was possible if he attempted to deliver all his mail on November 5, 1997 and he knew he would have had to use overtime to do it.

Although the elements of the Grievant's prior discipline establish that he had cause to worry about receiving more serious discipline for unauthorized use of overtime, they are nevertheless unrelated to the offense he is charged with in this case and therefore do not established a line of progressive discipline. On this point,

the Union cites the findings and conclusions of Arbitrator Thomas Levak in case No. W4N-5L-d 12735 wherein the arbitrator states:

" ...an additional principle applicable to this case is that where progressive discipline is to be applied in an increasingly severe manner to the point of discharge, there should be some reasonable relationship between the chain of offenses. That is, there should be more than a remote connection between the types of offenses in the chain."

The Grievant's 29 years of service cannot be overlooked. In two cases cited by Elkouri And Elkouri, the arbitrators emphasize the importance and relevancy of an employee's length of service to a determination of the propriety of a penalty.² In a case heard by Arbitrator Graff (Brown & Bigelow, 44 LA 237.241), the grievant was reinstated because consideration was given to his 19.5 years of service. In the other case (American Welding & Mfg., 47 LA 457,463), Arbitrator Dworkin also was mindful of the grievant's length of service, which was 14 years, when he ordered that he be put back to work. Also in case No. EIN-2D-D4628 (Union Att. "B"), Arbitrator Le Winter refers to an employee's long, good service record as a "bank of goodwill" which should be addressed and which could serve to mitigate an assessed penalty.

The Union also cites Regional Arbitration case No. F94N-4F-D97034212 in which Arbitrator Louis M. Zigman based his decision to reinstate the grievant on the grievant's length of service, her candor in admitting her infraction and the fact that there was no evidence of intent of theft or discarding of mail on the part of the grievant. Based on these findings, the Union submits that the Grievant was a victim of difficulties encountered with the DPS mail system, the discipline imposed was punitive, not progressive

² Elkouri And Elkouri, "How Arbitration Works" (4th Ed.) p. 682.

and therefore unwarranted. The grievance should be upheld.

Discussion and Conclusions:

There is no doubt, in my opinion, that the grievant's infraction was of a most serious nature. Theft of mail, unauthorized destruction or intentional curtailment of mail are types of infractions, among others, which are so egregious as to warrant severe discipline up to and including removal.

Record evidence persuades me to find that the Grievant had no intention of stealing or destroying the mail at issue. But he did confess to a deliberate attempt to curtail a least a tray of mail because, as he stated, he was afraid of incurring discipline if he engaged in unauthorized overtime which, in his estimation, would have been necessary had he attempted to deliver the remaining tray of mail.

I must agree with the Employer's suggestion that this motivation is somewhat suspect. First, he had been granted three hours of overtime to deliver his route because the mail assigned thereto was excessive; he relinquished two of those hours to others. Second, the most severe discipline he could have expected, following his previous 7-day suspension for a similar infraction, would have been another, but probably longer, suspension in accordance with the progressive/corrective discipline provisions of Article 16 of the Agreement. Third, his route was scheduled for a street inspection the day following his curtailment of that one tray of mail, estimated to contain approximately 400 pieces, plus some parcels. Had the curtailed mail not been discovered at the end of the day on November 5, 1997, it could have been added to the following day's volume thereby enhancing the adjustment.

Absent anything in the record of probative value on this point, it must remain conjecture, but the arbitrator also has kept in mind the Union's contention that the Grievant did not intend to destroy the mail and he was going to deliver it the next day. If that was the plan, then the curtailed mail would (emphasis added) have been added to the next day's volume, thereby affecting the route adjustment.

The Union also contends that the Grievant's difficulty in delivering his route within he allotted time is based on his claimed inability to adjust to DPS. JX-17 and 18, the 2-page statement signed by the Grievant on December 10, 1997 provides some merit to this contention, and to some extent, possibly serves to explain the two instances in 1997 when the Grievant used unauthorized overtime to finish his route and for which he received a 7-day suspension on both occasions. The Grievant's written statement, which went unchallenged, also establishes that although he complained about the difficulty he was having with DPS mail and was told by Supervisor Mike Redding that Redding would go out with him one day to do an inspection, Redding never did go out with him. In spite of this evidence showing the grievant may have had a serious problem with DPS mail, a reasonable person would wonder why the Grievant did not make a more formal request for additional training since his perceived problem was causing him such serious discipline.

The Union also argues that the charges against the Grievant in the instant case are unrelated to the prior elements of discipline in the Grievant's record, i.e., the Letter of Warning and the two 7-day suspensions in 1997, and therefore his last offense must be evaluated as a "stand-alone" infraction which does not warrant the penalty imposed and does not reflect progressive discipline. The Union adds that if a nexus is found between the charges leading to the removal and the prior elements, then the removal of the

Grievant should be found to not be for just cause because the Employer would not have followed the progressive/corrective steps of discipline called for under Article 16 of the Agreement; according to the Union, the normal, proper discipline following the Grievant's last 7-day suspension should have been, at worst, a 14-day suspension.

I am in agreement with the Union's position that the charge of "Mishandling Of The Mail", which is the Employer's stated basis for the removal, is unrelated to prior elements, as evidenced by the record. Whether or not the charge against the Grievant of mishandling the mail, standing alone, is serious enough to preclude the application of the concept of progressive discipline and to warrant summary dismissal is another matter and one which must now be addressed.

In the course of my assessment of the severity of the penalty imposed on the Grievant, I have reviewed all of the prior arbitral decisions cited by both parties. The results of this study and a fair and objective evaluation of the facts of this case compel a conclusion that the removal of the Grievant was not for just cause. This conclusion is based on the following:

There should be no doubt that the timely delivery of the mail entrusted to it is crucial to the continued existence of the Postal Service as a viable means of manually delivering communications, especially in an age when competition is increasing because of innovations which are taking place at a near-frantic pace in the field of electronically-transferred communications.

Therefore, any failure by the Postal Service to deliver mail when normally expected by customers, at this place in time, would reasonably tend to have a more negative impact on the Postal

Service's perceived image as an effective mail carrier, than, for instance, it would have had fifteen or twenty years ago, before the now-widespread use, and increased acceptance, of e-mail and other forms of electronic communication.

The Union argues, in this case, that the Employer itself has engaged in the curtailment of mail and therefore the Grievant's similar action should not be viewed as serious an infraction as the Employer would like the arbitrator to find. I cannot accept as valid the Union's argument on this point. Article 3 of the Agreement grants the Employer the right to manage its operations and to do so in an efficient manner. It is reasonable to assume that in its day-to-day operations the Employer might be forced, because of time, manpower constraints or other operational needs, to curtail, for example, the delivery of third-class mail for the purpose of ensuring the timely delivery of first-class mail. That sort of managerial decision is the right and responsibility of the Employer, not, as the Employer rightfully argues, of the employee.

The Union also argues that the removal of the Grievant constitutes a penalty which violates the progressive/corrective nature that discipline should have under the provisions of Article 16. I would accept that argument as valid if it were not for the nature of the offense at issue.

Arbitrator Walter Fogel, cited by the Employer, aptly describes the seriousness of this sort of infraction in case No. W7N-5D-D21814 and also gives therein his views on the appropriateness of progressive discipline in certain cases:

"Without question, the delay of mail is a very serious offense, directly affecting not only the performance of the Postal Service's function, but also public confidence in the Service. The Grievant had been a carrier for two years; he

must have known of the seriousness of delaying mail. When employees have been told of the seriousness of an offense, the necessity of progressive discipline is weakened, if not eliminated, because one of the purposes of progressive discipline -- notice (sic) the gravity of certain behavior-- has already been accomplished. Furthermore, requiring progressive discipline in all instances of mail delay (it may be appropriate for some such cases) would be inimical to the functioning of the Postal Service, because it would mean that each employee could on one occasion delay mail without fear of losing his/her job (although, there would still be the risk of disciplinary suspension). This could have dire implications for the functioning of the Service; it would reduce the integrity of the mails in the eyes of the employees. It would be difficult to entrust the Grievant with mail delivery in light of his delay and false denial of delay. I find that the Grievant's behavior provided just cause for removal even though no prior discipline had been assessed against him."

In the instant case, I find that the intentional curtailment of mail by the Grievant to be an offense serious enough to warrant severe discipline and not commanding the application of the progressive discipline provisions of Article 16 of the Agreement.

But is removal the appropriate discipline? The facts of this case cause the arbitrator to think not. The Grievant is an individual who, as the record clearly shows, has given his employer at least 28 years of faithful service. The record also indicates that he is scheduled to retire in May, 1999. His candor in admitting his infraction during his Investigative Interview of November 6, 1997 (JX-15,16) and the contents of his written statement of December 10, 1997 (JX-17,18) serve to convince this arbitrator that, for some reason or another, possibly the advent of DPS as the Grievant

has claimed, he may have reached, by 1997, a burn-out point in his career which led him to engage in an act the gravity of which he certainly should have been aware, after 28 years as a Postal Service employee. It is his almost-perfect employment record for such a long period of time that causes his unacceptable behavior during 1997, and which led to two suspensions, to be out of character.

Regional arbitrators have reached varying conclusions as to the weight that an employee's length of service and good record should be given in cases of proven offenses meriting removal. For instance, Arbitrator LeWinter in case No. E1N-2D-D4628, cited by the Union, took the position that an employee's long (8 years) and discipline-free service established a "bank of goodwill" which can serve to mitigate a penalty. The grievant in that case had admitted throwing some mail in a dumpster. Taking into consideration her length of service, her good record and her convincing repentance for her action, the arbitrator ordered that the grievant be reinstated but without back pay.

In case No. NC-N-19 091-D, also cited by the Union, an employee with 13 years of service was removed after admitted stealing a test envelope containing \$1.50. The grievant defended his action by stating that the purpose of taking the money was to buy food for a stray cat who had adopted the grievant. He was reinstated without back pay by arbitrator Peter Seitz who accepted the grievant's altruistic motive as a mitigating factor and found the penalty to be excessive.

In case No. W4N-5L-D 12735, the grievant was removed after being charged with deliberately dropping a package on the floor at a business customer's location and of throwing a bundle of mail some 25 feet towards an employee of the customer. The grievant had 24 years of service. The facts of that case caused Arbitrator Thomas

Levak to conclude that the grievant's action was a minor offense, that the charge made to support to removal was only remotely connected to prior elements and that the degree of discipline was not reasonable. The arbitrator therefore reduced the penalty to a 30-day suspension and a possible transfer to another route.

In case F94N-4F-D 97034212, also cited by the Union, Arbitrator Louis Zigman reinstated a grievant who had been removed after admitting that she had forged a customer's signature on a Form 3849 indicating that a registered item had been delivered and received by the customer when, in fact, it had not been. The arbitrator based his decision on a finding that mitigating factors such as an employee's long and blemish-free service should be considered, along with the relevant facts of a case, in the evaluation of a penalty. Among the many arbitration decisions which had been cited in the case before him, Arbitrator Zigman was particularly impressed with the rationale expressed by Arbitrator Gentile in case No. W1N-5F-D 14091.

The Gentile decision was also referenced by Arbitrator Carlton Snow in case No.E90N-4E-D94046953, cited by the Union in the instant case. Citing the Gentile case, arbitrator Snow aptly described six mitigating factors presented by Arbitrator Gentile as "an insightful discussion of mitigating considerations". Those factors are:

1. Long service without discipline.
2. No issue of theft.
3. A distinguished work record.
4. No pattern of misbehavior.

5. Discipline of a non-corrective nature.

6. The Grievant's attitude during the investigation.

Using the Gentile factors, Arbitrator Snow concluded that it would be proper to reinstate the grievant who had 14 years of service and who had been charged with discarding deliverable mail. Finding lack of intent on the part of the grievant, the arbitrator judged the infraction to be a matter of simple negligence instead of willful destruction of mail. In addition, he found that the Employer had not adhered to the concept of just cause by failing to evaluate mitigating factors in selecting an appropriate sanction.

In contrast to the findings and conclusions I have just discussed, are those of Arbitrator Nicholas Duda in case No. E7N-2A-D 2645, cited by the Employer in the statement of its position, supra.

I have also studied and evaluated Attachments "F", "G" and "H" to the Union's closing arguments. The facts in those three instances of discipline to other Letter Carriers are not found to be relevant to the facts in the case before us because they involve less serious charges of "Failure to Follow Instructions" and "Improper Work Methods"

In the instant case, I must accept as valid the Union's contention that the evaluation by an arbitrator of the appropriateness of a penalty must include consideration of any and all factors which may serve to mitigate the penalty imposed. I have included such consideration in arriving at my conclusions in this case. Specifically, I have used the factors suggested by Arbitrator Gentile but I address them here in the order which I find more consonant with the relevancy they are judged to have to the facts of the case at hand:

1. There is no allegation of theft or of intended destruction of mail.
2. The Grievant's record consists of one unspecified element which occurred some 20 years prior to the incident giving rise to his removal. The Grievant's most recent elements involve a Letter Of Warning for an extended break and two 7-days suspensions for unauthorized use of overtime, all of which are the result of infractions which took place within 12 months of the incident leading to the removal. The charge against the Grievant is unrelated to these prior elements, but the two 7-day suspensions for the same offense evidence a sudden change in the Grievant's otherwise almost perfect work record for almost 28 years and support the Union's contention that the advent of DPS mail may, indeed, have had some impact on the Grievant's ability to deliver his route in an efficient and timely manner.
3. Other than the suspensions imposed for unauthorized overtime during 1997, there is no evidence of a pattern of misbehavior at any other time in the Grievant's long career.
4. The Grievant does have a near-perfect work record for 28 of his 29 years of service. The arbitrator notes also that he accumulated 2,600 hours of sick leave and 440 hours of annual leave.
5. The Grievant's was open and candid during his Investigative Interview and readily admitted his offense.
6. Standing alone, the Grievant's infraction is found egregious to the point of meriting a severe penalty without prior progressive discipline.

In sum, the Grievant committed a very grave error in judgement and one which, in my opinion, could, under different circumstances, cause the Employer to have extreme difficulty with showing faith, reliance and trust in the grievant's ability to fulfill his duties as a Letter Carrier. But the arbitrator finds there are enough mitigating factors in this case for him to find the penalty imposed to be excessive and therefore not for just cause. My efforts to fashion what I believe to be an appropriate remedy were guided by the judgement, opinion and rationale of Arbitrator Harry J. Dworkin in American Welding And Manufacturing Co., 47 LA 457,463 (1966) wherein he held that "...the grievant's proximity to retirement...is not germane to the issue presented, nor does it constitute a mitigating circumstance. An employee cannot claim immunity from the consequences of his misconduct, nor can he claim that a proper form of penalty is unwarranted, due to the fact that he may be close to retirement. The fact that an employee may be eligible in the future to claim benefits under an existing pension system, would not constitute a mitigating circumstance, nor would it preclude disciplinary action which is otherwise proper and reasonable."

From my study and evaluation of the record and of the evidence presented, I conclude that the removal of the Grievant is excessive and therefore not for just cause. The Grievant's offense nevertheless merits severe discipline and therefore my award is as follows:

The Grievant is to be reinstated to his former position with seniority but without back pay. Further, the Grievant is to immediately and diligently apply for his full and normal retirement benefits as have been accumulated and to exercise, as soon as permitted under the provisions of the Pension Plan, his rights to his normal pension.