

REGULAR ARBITRATION PANEL

C-20121
A+B

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

GRIEVANT: R USHIYAMA
POST OFFICE: LOS ANGELES
CALIFORNIA
CASE NO: F94N-4F-D 99151613
F94N-4F-D 99204169
GTS# 52992
GTS# 53684

BEFORE: Gary L. Axon, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Wayne Marshall
For the Union: Harold Powdrill
Place of Hearing: Los Angeles, California
Date of Hearing: October 12, 1999

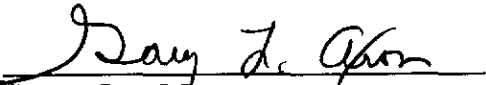
AWARD:

The Arbitrator awards as follows:

- 1) The Postal Service acted in conformance with Article 16, Section 7 when it issued the notice of Emergency Placement Non-Duty Status on February 24, 1999.
- 2) The Postal Service did not have just cause to summarily remove Grievant Ushiyama from his position as a letter carrier. The Postal Service did have just cause to suspend Grievant.

The Arbitrator orders that Grievant Ushiyama be reinstated but without back pay and benefits. There shall be no loss of seniority during the period Grievant was off work.

Date of Award: November 8, 1999


Gary L. Axon
Arbitrator

I. INTRODUCTION

Ronnie Ushiyama (Grievant) was employed as a letter carrier at the Foy Station in Los Angeles, California. On February 24, 1999, he was issued an Emergency Placement Non-Duty Status. Jt. Ex. 2, p. 8. Subsequently, the Postal Service notified Grievant Ushiyama that he was being removed from the Postal Service. Jt. Ex. 3, pp. 10-12. The Union grieved both actions as without just cause. The parties were unable to resolve either grievance at the lower levels of the grievance procedure.

The Union advanced the two cases to arbitration. The two grievances were consolidated for hearing before this Arbitrator. A hearing was held at which time both parties were accorded the full opportunity to present witnesses for direct and cross-examination, offer documentary evidence, and to argue the two grievances. The two cases are now properly before the Arbitrator for decision.

II. STATEMENT OF ISSUES

The parties were unable to agree on the exact same wording for the questions to be decided by the Arbitrator. The Arbitrator formulates the issues as follows:

- 1) Was the notice of Emergency Placement Non-Duty Status issued to Ronnie Ushiyama in accordance with Article 16, Section 7, of the National Agreement?
- 2) Did the Postal Service have just cause to remove Ronnie Ushiyama from his position as a letter carrier?
- 3) If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

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.

[see Memo, page xxx]

. . .

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.

IV. STATEMENT OF FACTS

The basic facts in this case are undisputed. Grievant Ushiyama has been employed as a letter carrier by the Postal Service for nineteen years. At the time of his termination, his record was free of discipline. Grievant's immediate supervisor at Foy Station was Cosmore Troy, Supervisor, Customer Service. Charles Williams is the Manager of Customer Service at Foy Station.

On Friday, February 19, 1999, a Price Waterhouse test bundle was placed in a collection box located on Grievant's route. The mail should have been collected and canceled on the same day. However, the mail was not collected and canceled until the following day, February 20, 1999. This caused the Postal Service to initiate an investigation as to why the mail had not been collected and canceled as per the schedule.

The Postal Service conducted an investigatory interview with Grievant on February 24, 1999. Grievant was represented by a Union steward. Grievant told the investigators he had sold Registered Article #R741260955 at 2007 Wilshire Blvd., Suite 720. The business located at this address was known as Jenny's Professional Service, the owner being Jenny Casco. According to Grievant, a secretary signed for the registered letter on Postal Service Form 3849. Grievant told the managers this delivery was accomplished on February 19, 1999. Grievant then explained that when he returned to the station, he realized he had lost the signed Form 3849. Grievant clocked off, then clocked in, and went back over the route in an attempt to find the Form 3849 but was unable to do so.

Grievant signed a written statement on February 24, 1999, providing his account of his actions on February 19, 1999. Jt. Ex. 3, pp. 17, 18. In his statement, Grievant referred to using his personal vehicle to transport his cart and satchel to an area on his route. Grievant has a walking route and is not authorized by the Postal Service to use his personal vehicle to transport mail.

On Saturday, February 20, 1999, Grievant prepared a second Form 3849 to cover for the form he allegedly lost on February 19, 1999. The office of Jenny's Professional Service is closed on Saturday and Sunday. Grievant then wrote in the name "Avita," a name on the letter he had held for delivery, as the person signing for the registered item at Jenny's Professional

Service. The Form 3849 was then turned in showing delivery of the accountable mail.

On September 24, 1999, Supervisor Troy advised Grievant he was being placed on Emergency Placement Non-Duty Status. The Notice of Emergency Suspension read as follows:

In accordance with Article 16, Section 7, of the National Agreement, you are being placed in an off duty status for the following reasons:

On Friday, February, 19, 1999, you failed to account for Registered Article #R741260955. On that date, a Price Waterhouse test bundle was deposited in a collection box on your route. This mail should have been collected and canceled on Friday, February 19, 1999. This mail was not canceled until Saturday, February 20, 1999, indicating that this mail was not collected or deposited on Friday, February 19, 1999. On that date, you also used your private vehicle to transport mail without authorization.

Therefore, it is determined that retaining you on duty may result in damage to the the [sic] U.S. Postal Service property, loss of mail or funds. You are hereby notified that you are on a non-duty status, effective, immediately. You will remain in this status until notified otherwise by postal management.

Jt. Ex. 2, p. 8; emphasis added.

The Union grieved the emergency suspension on the grounds management failed to prove any infraction which rose to the level of an Article 16, Section 7, case. Jt. Ex. 2, p. 7. At Step 3, the Postal Service denied the grievance, stating:

. . .

The facts of this case show that the grievant was interviewed by Postal Managers regarding the delay of collection mail. During this interview it was determined that the grievant had failed to account for a registered item and that the grievant submitted [sic] a falsified PS Form 3849.

Based on the above it has been determined that retaining the grievant on duty may result in additional loss of mail or funds.

Under the circumstances of this case the grievant was properly issued the 16.7 Notice.

. . .
Jt. Ex. 2, p. 2.

The Union moved the emergency suspension grievance to arbitration.

The Postal Service continued to investigate the case. Jenny Casco, the owner of Jenny's Professional Service, was interviewed before the February 24, 1999, investigatory meeting. She later wrote a letter dated February 25, 1999, to Manager Williams stating her office was closed on Saturdays and Sundays. PS Ex. 1. Casco also wrote in her letter that no one in my office signed for Registered Article #R741260955, and that no one named "Avita" works in this office.

A second interview was held with Grievant on March 16, 1999. Grievant was again asked about Registered Article #R741260955. After being shown the letter written from Casco, Grievant admitted he completed the second Form 3849 and signed the name "Avita" as the person receiving the letter. Grievant continued to maintain he had delivered the registered item to the office of Jenny's Professional Service on February 19, 1999.

In a letter dated April 23, 1999, Grievant was notified by Supervisor Troy that he was being removed from the Postal Service. The two charges were stated in the Notice of Removal:

. . .

CHARGE 1: Failure to Account for Registered Article # R741260955 and Falsifying PS Form 3849 (Delivery Notice/Reminder/Receipt).

. . .

CHARGE 2: Transporting Mail in a Private Vehicle without Authorization.

. . .

Jt. Ex. 3, pp. 10, 11.

The Union filed a grievance challenging the removal which alleged there was no just cause for the disciplinary action. Jt. Ex. 2, p. 5. In the grievance, the Union alleged:

. . .

UNION CONTENTIONS: REASONS FOR GRIEVANCE
The crucial aspect, the First Charge has not been sufficiently documented that the registered article was not delivered. As of this date, the Service has not produced any documentation of loss Claim Filed. the [sic] Article conceivably was delivered. The Grievant is a discipline free employee and the imposition of Removal is too severe.

CORRECTIVE ACTION REQUESTED:
Rescind the Removal. Reinststate the Grievant.
Make the Grievant whole.

Jt. Ex. 3, p. 5.

At Step 3, the Postal Service denied the grievance on the grounds:

. . .

On February 19, 1999 the grievant was assigned a registered item which he failed to clear for at the end of the day. He then filled out a PS 3849 and signed the name Avita as receiving the notice. He indicates he got the name (Avita) from a letter he had delivered to the address, and that he forged the signature on the PS Form 3849.

Evidence of record shows the owner of the business where the registered item was to be delivered provided documentation indicating that her business never received the item. Nor does she have someone working for her by the name of Avita.

In addition, the grievant admitted to transporting Mail in his private vehicle without authorization.

Based on the investigation it was clear the grievant had failed to deliver the registered item as reported. The whereabouts of the item are unknown. Under the circumstances of this case the grievant was properly issued a notice of emergency suspension and removal and the action was for just cause.

. . .
Jt. Ex. 3, pp. 2, 3.

The parties presented their evidence at arbitration on both cases simultaneously. The Arbitrator advised the advocates he would decide the two cases separately. Verbal closing arguments were presented in lieu of written briefs.

V. POSITIONS OF THE PARTIES

A. United States Postal Service

With respect to the emergency suspension, the Postal Service argues Grievant's failure to account for the registered article and using his private vehicle to transport mail without authorization demonstrated the potential for loss of mail or funds. Pursuant to Article 16, Section 7, Postal Service is authorized to place an employee on emergency suspension in order to protect the mail. In light of Grievant's admissions of misconduct at the investigatory meeting on February 24, 1999, Postal Service acted in conformance with Article 16, Section 7 when management placed Grievant off duty.

The evidence shows while Grievant was on emergency suspension the Postal Service continued its investigation. The investigation confirmed Grievant did not deliver the registered article and that he falsified a Form 3849. A second investigatory meeting was held on March 16, 1999, where Grievant admitted he filled out another Form 3849 and signed the name "Avita."

Postal Service managers testified credibly that Grievant's actions compromised the integrity of the mail service. Further, the managers' statements that they can no longer trust Grievant were valid reasons to discharge this employee from the Postal Service.

The Postal Service points out that postal employees must be honest and trustworthy because of the work they perform. Grievant has still failed to account for Registered Article

#R741260955, and has admitted to falsification of Postal Service Form 3849. Based on the proven allegations, the Postal Service had no alternative but to remove Grievant from his job as a letter carrier.

Turning to Charge 2, Postal Service concedes the unauthorized use of Grievant's personal vehicle to transport mail is not a dischargeable offense for a first violation. However, the use of a personal vehicle to transfer mail without authorization is a serious offense which warrants discipline. Even without Charge 2, the gravity of the offense cited in Charge 1 is sufficient to establish a just cause discharge.

B. National Association of Letter Carriers

Addressing the emergency suspension grievance first, the Union asserts that, as of February 24, 1999, Postal Service did not have sufficient information to justify the emergency suspension. Absent from this record is any credible evidence Grievant constituted a threat to the security of the mails at the time the emergency suspension was issued. As a nineteen-year employee, with no discipline, there was simply a lack of justification to place Grievant in emergency off-duty status while the case was being investigated.

Turning to Charge 2, the Union concedes transporting mail in a private vehicle without authorization is unacceptable conduct. However, it is a well-established practice that letter carriers do provide their own transportation to and from their respective walking routes. Management witnesses testified this offense would

normally result in a letter of warning. Thus the Arbitrator should reject the Postal Service's attempt to remove Grievant based on Charge 2.

Responding to Charge 1, the Union asserts Grievant "panicked" when he lost the Form 3849 on February 19, 1999. The evidence before this Arbitrator is that Grievant did deliver the registered article on February 19, 1999. No claim was made against the Postal Service by the customer for the item, and no money was paid out as a result of Registered Article #R741260955. The Postal Service produced no witnesses to counter Grievant's testimony that he did in fact deliver the registered article on February 19, 1999.

The Union argued in its hearing brief in relevant part as follows:

. . .

The Union's affirmed beliefs as to why there is absolutely no just cause for the imposition of removal are: The Grievant has no cited elements of prior disciplinary action. He is a 19 year "+" Employee. The Discipline was not "progressively issued". And it's the AGREEMENT that discipline shall be corrective in nature, rather than punitive.

. . .

The Accountable Registered Article

Mr. Arbitrator; We of the Union cannot undo, what was, and has been done, (02-19-99). The Union does not support, condone, nor endorse the submitting of an alleged "falsified" document, not even a "receipt". Again this unto, and of itself does not rise to a Removable Infraction. For what was the final disposition of the Registered Letter? The Grievant, Mr. Ushiyama contends, and maintain

[sic] that he delivered the item to it's [sic] intended addressed destination.

The Postal Service' [sic] charge is recorded. But to this day, the Postal Service has failed to provide conclusive proof that the registered mail article was not delivered! And that Sir; Is the yet troubling aspect of this case. As late as the Union's filing it's [sic] appeal to arbitration, the Postal Service still failed to provide such proof.

Mr. Arbitrator; We never got, nor saw the statement referred to on page 2, paragraph 3, of the Charge Letter, from "Jenny Casco". In fact as of April 12, 1999, the Union was told in writing that the status of the registered item was: "investigation pending by inspection service", And of our inquiry of a claim, (for loss) filed: "investigation pending" Mr. Arbitrator; As The Union has contended, The Postal Service has failed to Prove / Document that the Registered Mail Item was in fact not delivered.

. . .

Un. Brief.

The Union next concedes that Grievant made a mistake. He was candid in admitting that he had falsified the Form 3849. According to the Union, Grievant is a salvageable employee who has learned from his mistake. As a nineteen-year employee with a good record, free of discipline, the Union reasons removal is punitive, rather than corrective. The Arbitrator should recognize Grievant has built up a "bank of goodwill" during his nineteen years of service which mitigates against summary discharge.

The totality of the evidence shows Grievant can return to work as a trustworthy and good letter carrier. Although he made a serious error, Grievant should be provided the opportunity to earn back the trust he once had from his supervisors. Hence, the

Arbitrator should sustain the grievance and return Ushiyama to work as a letter carrier. The Union relied on Case No. C1N-4G-D 30766 and Case No. C1N-4G-D 31307 to support its position.

VI. DISCUSSION AND FINDINGS

Two distinct issues are raised by the instant grievances. While the two cases arise out of the same fact situation, each grievance is controlled by different sections of the National Agreement. The Arbitrator will address the issues raised in the two grievances separately.

With one exception, the essential facts in both of the cases are not in dispute. A major conflict exists over whether Grievant did in fact deliver the registered item on February 19, 1999, to the office of Jenny's Professional Service. As to the remainder of the charges, Grievant admitted to Postal Service managers and at the arbitration hearing he engaged in the conduct alleged in the Notice of Emergency Suspension and Notice of Removal.

Emergency Placement on Off-Duty Status

The first grievance challenges the placement of Grievant Ushiyama in non-paid status through the emergency procedure as not for just cause. Article 16, Section 7 grants the Postal Service broad power to place an employee on off-duty status when "allegations" involve certain types of misconduct. Section 7 creates an emergency suspension procedure that is distinct from the typical suspension requirements of Sections 4 and 5. Section 7

does not contain a just cause test. The emergency procedure is a recognition that in certain situations the Postal Service must act "immediately" to remove an employee from the workplace because of certain risks and dangers. Section 7 allows Postal Service to bypass the time-consuming process demanded in a Section 4 or Section 5 suspension, when specified conditions exist.

The Grievant in the instant case was placed off duty because the Postal Service determined that "retaining you on duty may result in damage to the U.S. Postal Service property, loss of mail or funds." Prior to placing Grievant in an off-duty status, the Postal Service conducted a preliminary investigation which provided reliable indicators Grievant failed to account for Registered Article #R741260955, and had admitted to transporting mail in his personal vehicle without authorization. The Arbitrator finds it quite understandable that the Postal Service suffered a loss of faith in Grievant's judgment when management learned what he was alleged to have done. By virtue of the preliminary investigation, Postal Service was able to demonstrate it had a reasonable basis to implement the emergency procedure set forth in Section 7. As such, this Arbitrator is unwilling to set aside management's use of the emergency procedure sanctioned in Section 7.

The Removal

Charge 1 combines two separate allegations of misconduct. The first involves the failure of Grievant to account for Registered Article #R741260955. To the date of the arbitration, the item is still unaccounted for by the Postal Service. As a registered item, the mail is insured by the Postal Service. However, approximately eight months have passed and no monetary claim has been made against the Postal Service or money paid out, because the registered item has not been accounted for. There is no dispute Grievant failed to properly account for Registered Article #R741260955 pursuant to Postal Service procedures.

There is one area of significant conflict in the evidence. Grievant testified at the arbitration that he delivered Registered Article #R741260955 to a secretary at Jenny's Professional Service who signed for the item on Friday, February 19, 1999. There is no evidence in the record which directly contradicts this testimony. The letter from business owner Casco states that her office is closed on Saturday and Sunday. Grievant makes no claim he attempted to deliver the disputed item on Saturday, February 20, 1999. The Casco letter is hearsay. She was not called as a witness and subject to cross-examination, so the Arbitrator is compelled to credit the testimony of Grievant Ushiyama that he did make the delivery on February 19, 1999.

The most serious of the charges against Grievant is the falsification of Form 3849. Grievant explained that he lost the

signed Form 3849 and panicked. To correct the problem with the lost Form 3849, Grievant created another Form 3849 showing delivery on February 20, 1999, and signed the name "Avita" as the person receiving the registered item. Grievant freely admits to engaging in this conduct.

The Arbitrator finds the Postal Service has proved the allegations set forth in Charge 1. There is no question Grievant engaged in conduct which gives just cause for discipline. The precise issue here is whether the proven conduct provides just cause for summary removal. The Postal Service is committed to use progressive discipline, rather than punitive actions. The reasonableness of the penalty of removal under the just cause test depends on evaluation of several factors. Applying those principles to the present case, the Arbitrator holds there are five major reasons that warrant setting aside the penalty of removal.

First, the misconduct must be reviewed in light of all of the circumstances surrounding the offense. There is no credible evidence in the record which contradicts Grievant's testimony that he did in fact deliver Registered Article #R741260955 on February 19, 1999, to Jenny's Professional Service. The fact no monetary claim has been made against the Postal Service bolsters Grievant's position on this point. On the basis of the record before this Arbitrator, the conclusion must be Grievant did make the delivery on February 19, 1999. However, the finding on the matter of making the delivery of the registered article does not excuse Grievant's conduct to remedy what he did next.

Second, Grievant's lack of past discipline and work history contains no elements which suggest Grievant was untrustworthy or a threat to the security of the mail. Before the incident, Grievant's integrity and honesty had never been questioned.

Third, there is no claim by the Postal Service Grievant secured any personal gain or profit from his wrongful conduct. While not excusing his actions, Grievant's testimony that he panicked when he could not find the Form 3849 is believable. The falsification of the Form 3849 was atypical behavior on the part of Grievant. In the judgment of this Arbitrator, his momentary lapse in good sense led Grievant to incorrectly complete a Form 3849.

Fourth, the Arbitrator was impressed by Grievant's candor at the arbitration hearing. Ushiyama readily admitted to the conduct charged and indicated he was willing to accept responsibility for his behavior. There are few cases where this Arbitrator had heard a grievant testify without qualification, "I did it," and then not follow up with excuses or attempts to deflect the behavior on another person. The forthright testimony of this Grievant at arbitration argues in favor of a lesser penalty.

Fifth, the final factor which demonstrates Grievant is a good candidate for progressive discipline is his nineteen years of duty with the Postal Service. The record before this Arbitrator shows Grievant to be a good employee, free of discipline. As a nineteen-year employee, Grievant has built up substantial equity in the job which works in favor of reinstating this employee.

Ushiyama's testimony at arbitration convinced this Arbitrator he fully understands that as a letter carrier his duty is to be honest and trustworthy.

Falsifying a Postal Service document constitutes a serious offense because it calls into question the employee's integrity and trustworthiness. The Grievant's conduct, which served as the basis of the removal, was unacceptable and justified discipline. Under the circumstances of this case, removal for a first offense by a nineteen-year employee is excessive and not related to the gravity of the charge. The Postal Service's legitimate interest in discouraging this type of behavior and placing other employees on notice that conduct such as engaged in by Grievant will not be tolerated, can be established by a lesser penalty. In the judgment of this Arbitrator, progressive discipline is appropriate under the facts of this case in order for Grievant to earn back the trust he lost by his conduct on February 20, 1999.

Based on the foregoing, the Arbitrator holds Postal Service's claim that Grievant could not return to work as an effective and trustworthy employee is unsupported by the evidence. Ushiyama's prior record firmly establishes he is the type of person who will benefit from corrective discipline and will not repeat his mistake of February 1999. In other words, Grievant is a good candidate for rehabilitation. Accordingly, the Arbitrator concludes the removal of Grievant was excessive and therefore not for just cause.

The proven misconduct of Grievant is serious and warrants a substantial penalty. Under the facts of this case, the Arbitrator holds that Grievant should be reinstated without back pay, but with full seniority. The Arbitrator further directs that the action in this case should be recorded in Grievant's personnel record as a warning to him that, if similar conduct is repeated in the future, he would be subject to immediate dismissal from the Postal Service.

Regarding Charge 2, the Postal Service manager testified the penalty for a first time violation for use of a personal vehicle to transport mail would probably be a letter of warning. Grievant admits to using his personal vehicle to transport mail to and from his delivery site without authorization. Charge 2 adds nothing to the Postal Service's case for removal of this Grievant. The Arbitrator's findings and Award on Charge 1 controls the result in this case, not Charge 2.

AWARD

The Arbitrator awards as follows:

- 1) The Postal Service acted in conformance with Article 16, Section 7 when it issued the notice of Emergency Placement Non-Duty Status on February 24, 1999.
- 2) The Postal Service did not have just cause to summarily remove Grievant Ushiyama from his position as a letter carrier. The Postal Service did have just cause to suspend Grievant.

The Arbitrator orders that Grievant Ushiyama be reinstated but without back pay and benefits. There shall be no loss of seniority during the period Grievant was off work.

Respectfully submitted,



Gary L. Axon
Arbitrator

Dated: November 8, 1999