C-23961

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: Kenneth Clevenger

POST OFFICE: Muncie, Indiana

USPS CASE NO: J01N-4J-D 02213934
NALC CASE NO: DRT 06-040374

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Mark Moore

For the Union: Jeff Fultz

Place of Hearing: U.S. Post Office, 501 W. Memorial Dr., Muncie, Indiana

Date of Hearing: December 6, 2002
Date of Award: January 5, 2003

Relevant Contract Provision: Article 16
Contract Year: 2001
Type of Grievance: 30 day suspension

AWARD SUMMARY

The Postal Service failed to establish by a simple preponderance of the evidence that the Grievant falsified the no lunch list for May 1, 2002. The evidence does not provide clear evidence that the Grievant expanded his break at the Taco Bell. There are also numerous inconsistencies in the time line, and the Supervisor's testimony, which must be constructed against the charges. Therefore the grievance is sustained in its entirety, and the remedy requested granted.

David A. Dilts, Arbitrator

ISSUE

Was Kenneth Clevenger (herein the Grievant) issued a 30 calendar day suspension for just cause pursuant to Article 16 of the 2001 National Agreement? If not, what shall be the remedy?

BACKGROUND

The parties entered into stipulations of fact relevant to this case, these are: (1) Letter carriers may eat while on breaks, (2) at the time of this incident, the Grievant was at a designated break location by virtue of PS Form 1564A, and (3) pages 9 items 1 and 12 of the moving papers have been blacked out.

The Grievant in this matter was issued a letter of proposed removal, which was subsequently administratively (unilaterally by the Step A representative) reduced to a 30 calendar day suspension as a result of his allegedly falsifying the no lunch list. The testimony of Kelly Simmons, then the Grievant's supervisor, was that he observed the Grievant's vehicle at the Taco Bell on McGalliard Street in Muncie, Indiana at approximately 1:00 p.m. Further, the supervisor subsequently observed the Grievant's vehicle still at the Taco Bell at 1:28 p.m. on May 1, 2002. The Supervisor also testified that he observed a letter carrier in line to purchase food inside of the Taco Bell at approximately 1:00 p.m. This testimony was disputed by the Grievant, and the testimony together with a written statement from Ms. Hirst, manager of the Taco Bell (page 7 of

the DRT package). In examining the pictures of the Taco Bell entered into this record, it is clear that the entry and foyer of the Taco Bell can be observed from where the pictures were taken, it is also equally clear, that nothing inside of the store can be observed, and that reflections of vehicles and trees are clearly evident in the windows surrounding the interior store space, assuming away the advertisement that are evident in the photographs.

Upon investigation the supervisor found that the Grievant had signed the no lunch list. There was an investigative interview, and the Grievant denied having falsified the no lunch list, but admitted to having eaten while at the Taco Bell, which he claimed was his routine on his ten break. The manager at the Taco Bell confirmed the Grievant's routine. The Grievant claims that he arrived at the Taco Bell sometime after 1:10 p.m, and that he left the Taco Bell restaurant at about 1:25 p.m. The manager of the Taco Bell, Melvina Hirst, testified that the Grievant arrived at the restaurant sometime between 1:10 p.m. and 1:15 p.m. and that he left the Taco Bell restaurant at approximately 1:25 p.m. (Page 6, DRT package) which is corroborative of the Grievant's testimony.

Debbie Riddle, Supervisor of Customer Services, testified that Supervisor Simmons called the Post Office at about ten minutes after one and inquired whether the Grievant was on the no lunch list. Randy Clark testified that there was in incident which gave him cause to doubt the veracity of a statement made by the Grievant before May 1, 2002. The incident involved a controversy between the Grievant and Simmons.

The Grievant is an employee with more than 23 years of service to the United States Postal Service. The Grievant has a letter of warning in his record for having taken an unauthorized break (Management exhibit 1). The Union filed a timely step one grievance which

was denied, and the DRT Team declared impasse on this matter, and therefore the parties stipulated that this grievance is properly before this Arbitrator pursuant to Article 16 of the 2001 National Agreement.

POSTAL SERVICE'S POSITION

The Postal Service had just cause for the 30 calendar day suspension of this Grievant. The record of evidence shows that the Grievant was observed standing in line at the Taco Bell at 1:00 p.m. on May 1, 2002. The record also clearly shows that the Grievant's vehicle was still in the Taco Bell parking lot at 1:28 p.m. There is also agreement between the parties that the Grievant had signed the no lunch list.

It is Postal management's position in this matter that the Grievant took undue advantage of the trust management had in him and that he attempted to be paid for time he did not work. Letter carriers work much of their day unsupervised and must be trustworthy. The record also shows that not only was the Grievant dishonest when he wrote that he would not take a lunch, but that his only explanation was that Supervisor Simmons was lying about the incident. It is clear that at 1:00 p.m. Mr. Simmons observed the Grievant in the Taco Bell and his vehicle parked, he had to have been there for longer than the 28 minute period observed. The totality of the testimony and the documentation in this case clearly shows that the Grievant was dishonest and deserved to be disciplined for this infraction. In addition, the Grievant was previously an acting supervisor and union president, he was aware taking 28 minutes away from his duties when he essentially said he would not is a blatant attempt to paid for time not worked.

In considering the administrative modification of the removal penalty, the Grievant's "bank of goodwill" was a determining factor in giving the Grievant an opportunity to salvage his career. His service to customers during inclement weather was locally publicized and placed the Postal Service in a favorable light in the community. However, the Grievant's action still warrants severe disciplinary action. In this case, it is management's position that it warrants a 30 calendar day suspension.

Management believes that the Arbitrator will reject the self-serving testimony of the Grievant. Clearly, the Grievant has much to gain with his version of the facts, and that the managers who testified have nothing to gain by fabricating these events. The testimony of the Taco Bell manager must also be rejected, it is simply incredible that she would remember exact times over seven months after the events of May 1, 2002. The Union simply failed to provide any defense that can be given weight by the Arbitrator.

Therefore, the Postal Service respectfully requests that the Arbitrator make the Grievant accept the responsibility for his misconduct by denying this grievance and upholding the Grievant's 30 calendar day suspension.

UNION'S POSITION

It is the Union's position that there was no just cause for the suspension of this Grievant arising out of the events of May 1, 2001. Postal management bears the burden to prove, with a clear and convincing of the preponderance of evidence, that the Grievant engaged in the misconduct of which he stands accused. Management must prove the charges made against this

Grievant, which is the *Falsification of No Lunch List* (page 51 of the DRT package). Postal management has simply failed to shoulder this burden of proof in this matter, and therefore the Arbitrator must sustain this grievance.

The only evidence offered by management of any wrong doing by this Grievant, is a faulty time line offered by Supervisor Simmons. This time line is refuted by the Grievant's testimony, the testimony and written statements of the manager of the Taco Bell, and is even inconsistent with the times offered by another management witness. Further, the Supervisor claims to have observed the Grievant, in line, inside of the Taco Bell restaurant, which is a complete impossibility. The clear preponderance of evidence (photos, statements and testimony of the Taco Bell manager, and the Grievant's own observations) demonstrates that the inside of the restaurant cannot be observed from outside.

The Union also cannot understand how the facts in this case could be interpreted as they have been by management. The Grievant is authorized to eat on his break, and he has consistently done so for a considerable period of time, with management's knowledge, and without repercussion. This aggrieved discipline is simply without anything that could be mistaken for just cause.

It is the Union's position, *arguendo*, should just cause be found, that the Postal Service failed to consider the Grievant's past record and long service. There is a bank of good will that has been clearly established and recognized by management, yet not applied in determining this penalty. One of the elements of just cause is that the penalty must fit the offense, should an offense be found from this record of evidence (which the Union contends is simply not the case in this matter).

It is the Union's position that no just cause exists for this aggrieved discipline. The Union requests that the Arbitrator sustain this grievance, and expunge this aggrieved discipline from the Grievant's record, and in any all other respects make this Grievant whole for this wrongful suspension.

ARBITRATOR'S OPINION

The case before this Arbitrator is a disciplinary matter in which the Grievant is accused of falsifying the No Lunch List for May 1, 2002. In this Arbitrator's considered opinion, this case reduces to a simple matter of what the record shows, and whose version of the events finds the most support in this record of evidence. In other words, this case will turn on credibility concerning the relevant events of May 1, 2002.

Charges

Even the charges brought against this Grievant and memorialized in the Notice of Charges seemingly portend the remaining short-comings of this case against the Grievant. The Grievant is charged with the falsification of Postal documents. In this case, the Grievant is specifically charged with the falsification of the May 1, 2002 "No Lunch List." It is this charge that must be proven with a clear preponderance of the evidence. Specifically, the notice of charges states:

> On May 1, 2002 Supervisor Kelly Simons [sic] observed your vehicle (#2213352) parked at the Taco Bell on McGalliard from 1:00 p.m. to 1:28 p.m. Supervisor Simmons called back to the office at 1:10 p.m. to inquire if you had signed the "No Lunch" list for that day. It was confirmed that you were on the "No Lunch" list also it was confirmed that the vehicle sitting outside the [sic] Taco Bell was your vehicle.
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> During the investigative interview you admitted that you had signed the "No Lunch" list for that day. You also admitted that you took a comfort stop at the Taco Bell some time between 1:12 p.m. and 1:13 p.m. You stated that you did not take your morning break, and you were there for about fifteen minutes. You stated while at the Taco Bell you used the restroom and ate a bean burrito and drank a medium Diet Pepsi. You stated Kelley [sic] found you at 1:26 p.m. at 3009 N [sic] Linden. You stated that it had to be someone else's vehicle at the Taco Bell and that on a good day you could not have been there at 1:00 p.m. Taking extended breaks are not authorized.

The letter of charges is problematic, but not conclusive evidence. While not uncommon, mistakes and typo-graphical errors are normally not something rising to issues of credibility. People are human, and err. It is neither reasonable, nor rational to expect perfection in the recounting of events in a letter of charges. However, this letter of charges has four errors in just the above cited portions. When the exactness of the times relied upon are of such importance it is a more serious matter than normal when there are clear typographical errors in excess of the what is common in this Arbitrator's experience, leading one to question how much more is in error. However, this Arbitrator would be willing to dismiss these errors and not consider them save for the last quoted sentence in the charges, to wit: "Taking extended breaks are not authorized."

The Postal Service has charged this Grievant with "Falsification of No Lunch List" and then alternatively characterized his offense as "Taking extended breaks . . . " Is this carelessness,

or is this what was intended, and the charge was an aggravation of this characterization? It is clear a connection must be established between the alleged conduct, and "falsification" of a Postal document, not just simply an extension of a break. The nexus required, is to demonstrate falsification, and do so such that this Arbitrator is convinced that the alleged offense is not simply expansion of a break.

Observation of the Grievant in the Restaurant

There are also significant problems with Supervisor Simmons' testimony. Supervisor Simmons claims to have seen the Grievant in line in the Taco Bell restaurant on May 1, 2002. From the photographs entered into this record, even in the absence of the advertisements, the windows (except in the entry way and foyer) are of some reflective material that clearly would make the observation of the persons in that restaurant unlikely in this Arbitrator's considered opinion. If it was otherwise, then there should have been conclusive proof offered such as a visit to the site. Worse still, there was testimony from the Taco Bell manager, Ms. Hirst, who said, unequivocally, that the windows were made especially to reflect light and heat, and it was impossible to see who was in the store during the daytime. In addition to the written statement, Ms. Hirst was called to testify over the telephone by the Union. Her testimony corroborates her written statement found at page 8 of the DRT package, to wit:

July 18, 2002

Windows

> The windows at Taco Bell on McGalliard Road are virtually impossible to see through from the outside of the building during the daytime. They are made with Low E - Argon Gas matter. They are made with this to reflect heat and light. From the outside of the building they almost totally have a mirror image reflection. There is no possible way that you can even drive by and see whom [sic] is in the store in the daytime.
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> .
> .
> .
>
> S/Melvina Hirst

This statement is consistent with the testimony of Ms. Hirst, the Grievant, and with the photographs entered into this record, and is inconsistent with the testimony offered by Supervisor Simmons, and the surmise offered by the former Post Master. It is therefore this Arbitrator's considered opinion that the preponderance of the evidence refutes Mr. Simmons' testimony that he observed the Grievant in line in the Taco Bell restaurant on May 1, 2002 at 1:00 p.m. as he claims.

While this evidence does little to convince the Arbitrator of the Grievant's culpability in this matter, there is more in this record. The essence of the Postal Service's case are the circumstances of the matter surrounding the Grievant's signing of the no lunch list. Perhaps most important among these circumstances is the time line.

Time Line

The time line offered by Postal management is also suspect in this case. The Union steward in this matter, had conducted an investigation several weeks after the incident and

requested a statement from Ms. Hirst, the Taco Bell manager concerning the time frame issues and she provided a written statement (DRT package, page 7), to wit:

> July 18, 2002
>
> Melvina Hirst
> 4904 E. Centennial Ave.
> Muncie, Ind. 47303
>
> Witness Statement
>
> To whom it May Concern:
>
> My name is Melvina Hirst and I work at Taco Bell. I am an Asst. Manager and have been with this company for 5 years and 3 months. I am writing to you about the events on May 1, 2002. I was the manager in charge of the restaurant on this day in question. Mailman Kenny Clevenger came into my store at approximately 1:10 pm to 1:15 pm on this day and left around 1:25 pm. I know this because Kenny always makes a point to say hello when he comes in and he always makes sure to say good-by to us also. Kenny always waits to come into our store when we are not busy so he can be sure to get in and out without having to wait. He has always done this!! And this day was no different [sic].
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> S/Melvina Hirst

This written statement was consistent with the testimony she gave over the telephone at hearing. It is this Arbitrator's considered opinion that it essentially refutes the testimony of Mr. Simmons in this matter.[1]

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[1] The Postal Service contends that this testimony is incredible, as is the statement found on page 7 of the DRT package. The Arbitrator gave this assertion substantial consideration. In fact, this testimony and document was the product of the Union having given the manager warning that these issues may become important because of potential disciplinary action. This Arbitrator does not find this evidence suspect, and weighs it as independent and credible.

Further the testimony of Ms. Riddle was that Supervisor Simmons called the office at approximately 1:10 p.m. on May 1, 2002 to inquire whether the vehicle located at Taco Bell was assigned to the Grievant, and whether the Grievant signed the "No Lunch List." Here too is a problem in the testimony of Supervisor Simmons. He claimed, repeatedly in his cross examination, that when he called at 1:10 p.m. he had observed the Grievant at the Taco Bell for fifteen minutes. However, in direct testimony he stated that he first began his observation of the Grievant at 1:00 p.m. – a matter of ten, not fifteen minutes.[2] This difference serves as a basis to question the accuracy of the Supervisor's observations.

Without some evidence that the Grievant, with intent, falsified the "no lunch list" for May 1, 2002, the preponderance of evidence even fails to clearly establish he expanded his break. The one witness who is neither accuser or accused, puts the times that the Grievant was present in her establishment, in the best case scenario for the Grievant, at the ten minutes he is authorized for his break (1:15 p.m to 1:25 p.m DRT package, page 7). The parties stipulated that there is no bar to obtaining something to eat during break time and therefore the fact the Grievant procured a bean burrito and a Diet Pepsi is far from probative or convincing in this case. The Grievant being authorized to eat on breaks, and the fact that the Taco Bell is an authorized break stop on the route conclusively eliminates any relevance of the bean burrito and Diet Pepsi in this particular case.

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[2] The letter of charges is not as equivocating as the testimony of Mr. Simmons, the letter of charges states, in pertinent part: *On May 1, 2002 Supervisor Kelly Simons* [sic] *observed your vehicle (#2213352) parked at the Taco Bell on McGalliard from 1:00 p.m. to 1:28 p.m.* . . . The letter of charges is binding upon the Postal Service's cases, and to attempt to aggravate the alleged misconduct by expanding the time the Grievant is alleged to have been in the Taco Bell without some clear explanation for the difference in the times, serves to impeach the testimony of Mr. Simmons in this Arbitrator's considered opinion.

Conclusion

It is this Arbitrator's considered opinion that no further consideration is necessary, the circumstances relied upon by Postal management to determine that the Grievant either extended his break or falsified anything are discredited by clear and convincing evidence. Therefore, this Arbitrator has no alternative save to sustain this grievance in its entirety. There is no just cause for the aggrieved discipline, any record of the either the removal or suspension are hereby ordered expunged from the records, and the Grievant is to be made otherwise whole.