

REC-2 1980

Calvin Burchfiel's
OFFICE

IN THE MATTER OF AN ARBITRATION)	Julian F. Maldonado Discharge
Between)	Case No. W8N-5F-D-8240
NATIONAL ASSOCIATION OF LETTER)	
CARRIERS)	AWARD OF THE ARBITRATOR
And)	
UNITED STATES POSTAL SERVICE)	June 25, 1980

C# 01760

This matter came on for hearing at the Denver, Colorado, Post Office on April 25, 1980, before Arbitrator William E. Rentfro, selected by the parties to hear and render a final decision on the issue in dispute.

The Union was represented by Calvin Burchfiel, National Business Agent, NALC. The Postal Service was represented by Don R. Freebairn, Employee and Labor Relations Executive.

Timely briefs were filed by both parties on or about May 8, 1980, and this following is the final award and opinion of the Arbitrator in this matter.

ISSUE

Whether Julian F. Maldonado was discharged for just cause? If not, what is the appropriate remedy?

STATEMENT OF THE CASE

This arbitration arises out of the Postal Service action of discharging the Grievant from employment effective January 8, 1980. The Grievant was a full-time regular letter carrier prior to the events which gave rise to management's action.

The specific events which occasioned the discharge occurred on November 30, 1979. But, to fully understand the context in which those specific events took place, it is necessary to start with events which occurred on November 29, 1979. On that date, Mr. James Price, a Postal Service acting supervisor at the Santa Fe Station of the Denver Post Office where the Grievant worked, accompanied the Grievant on his route for a period of time in order to evaluate the Grievant's performance. At this time Supervisor Price made certain suggestions aimed at improving the Grievant's efficiency in delivering the mail.

The following morning, November 30, 1979, the Grievant requested that Price provide him with auxiliary assistance on his route, number 401. Price surveyed the mail the Grievant had to deliver and determined that because the Grievant had more first class mail than normal, he should be granted one-half hour street assistance time to offset an estimated one-half hour it would take the Grievant to case the additional mail for delivery. In addition to the first class mail the Grievant had to deliver, Price indicated he wanted the Grievant to deliver some circular mail and some La Belle's catalogs. To accomplish this additional work he granted the Grievant one hour auxiliary assistance on the street and instructed the Grievant to

finish casing the first class mail and then case the third class circulars and the La Belle's catalogs.

At approximately 9:05 a.m., Price noticed the Grievant was proceeding to sequence his flat mail, having cased all of his first class mail, but having neglected to case the circulars and the catalogs. At this time Price reminded the Grievant of this requirement. At approximately 9:20 a.m., Price returned to check on the Grievant's progress and found the circulars and catalogs untouched. Price now ordered the Grievant to case the mail before leaving for the street. The Grievant objected and asked that the circular mail be counted as he believed Price's request unreasonable. Price responded to the Grievant's request and counted 251 pieces of circular mail, which would equate to approximately fourteen minutes' casing time.

Price again directed the Grievant to case the circulars. The Grievant replied, "What if I don't want to take it?" Price repeated the instruction. The Grievant then responded, "Why don't we go outside and settle this like men." Price declined, indicating nothing would be solved by adopting that approach. It is Price's testimony, denied by the Grievant, that following the refusal to step outside, the Grievant continued the threat by stating then, "Why don't I bust you in the mouth right here?" Price's testimony continued, that despite the fact he felt threatened by the Grievant's comment, he told the Grievant that such action

would be the worst possible thing he could do. Next, Price testified that he directed the Grievant to accompany him to the office, but the Grievant refused.

It appears undisputed that following this confrontation Mr. Clark Fassett, the Manager of the Santa Fe Station, called the Grievant to his office. In Fassett's office the Grievant admitted he challenged Price to go outside, but had done so because Price was harassing him about his performance. The Grievant denied that he ever refused to case the additional mail. Fassett placed the Grievant on administrative leave. On December 7, 1979, the Grievant received a Notice of Emergency Suspension and one of Proposed Discharge. However, the proposed emergency suspension was not placed into effect because of procedural problems involving management's notice. The Grievant was left on administrative leave until the effective date of the discharge, January 8, 1980. The Notice listed three charges in support of the proposed discharge. They were: threatening a supervisor; violation of Postal rules relative to threats and fighting; and failure to follow instructions--insubordination.

Prior to the incident that gave rise to the Grievant's discharge he had no disciplinary record in more than fourteen years of employment. Indeed, while serving as a Mail Handler in the Denver, Colorado, Post Office in 1978, the Grievant received a Performance Award Recommendation which resulted in a Quality Step Increase. (Union exhibit 6)

POSITION OF THE PARTIES

Postal Service

It is the position of the Postal Service that the Grievant's discharge should be upheld. It cites several factors:

1. The Grievant admits suggesting to Price that the two of them go outside and "settle the matter like men."

Although the Grievant denies the threat to hit Price, Price's testimony is more credible, in part because Price reduced his recollection of the incident to writing immediately after the events transpired.

2. Price indicated he felt threatened by the threat.

3. Employees were advised of the serious disciplinary action they could expect for fighting and threats to fight in notices dated November 28, 1978--warning against bad conduct including fighting, threats and insubordination (Joint Exhibit 5), September 25, 1979--warning against fighting (Postal Service Exhibit 1) and notices warning against fighting and threats to fight made after this case arose on February 4, 1980 (Postal Service Exhibit 3) and April 4, 1980 (Postal Service Exhibit 2).

4. Case law supports the Postal Service position that discharge is generally upheld in the cases of threatening a supervisor.

Union

It is the Union's position that discharge is too severe a penalty in the present case. In support of this position the Union argues:

1. The Grievant is a 14-year employee with no prior disciplinary record.

2. Ms. Judy Ford, a Postal Service Labor Relations Representative, in the Denver office, admitted disparate treatment was evident when the discipline imposed in this case is compared to past disciplinary actions in similar circumstances. The Union noted that Postal Service employees Ray D. Holman and Henry Culbreth, Jr., were given only Letters of Warning for their actions in threatening to fight a supervisor and security guard respectively (see Union Exhibits 1 and 2).

3. Supervisor Price was dissatisfied with the performance of five or six mail carriers at the Santa Fe Station, one of these carriers being the Grievant. Price, through his efforts to improve efficiency, irritated the Grievant and the Grievant only made his remarks to "get Price off his back." The Grievant at no time had any intention to proceed outside and fight even if Price would have accepted the invitation.

4. The Grievant denied making the statement, "Why don't I bust you in the mouth right here."

DISCUSSION AND CONCLUSIONS

It is the opinion of the Arbitrator after a review of all the testimony, exhibits, and the briefs of counsel that discharge is too severe a penalty in this case. As the Postal Service admits, the discipline imposed in each case must be "based on its individual merits." (Postal Service Brief at p. 6) While any threat made to a supervisor is serious misconduct and usually deserving of severe discipline, several factors when viewed together mitigate against discharge in the present situation.

A convenient starting point is an examination of the several Postal Service notices with respect to fighting and threats to fight. At the outset the February 4, 1980, and the April 10, 1980, notices can be dismissed since they were issued after the occurrence of the conduct which is the subject of this arbitration. While they may well be valid notices that impact on future cases, they don't strengthen the Postal Service's case in this arbitration. Indeed, it can be argued that the fact that these notices were issued after this case arose showed that the Postal Service recognized not only that it had a recurring problem but that it hadn't imposed the strict discipline in past cases that it now desires to impose on the Grievant. The September 25, 1979 notice can also be duly dismissed since it speaks only to fighting and fails to mention threats.

The November 28, 1978 notice presents a harder problem. It clearly warns that fighting, threats to fight and insubordination are serious misconduct. However, these offenses are only three of many offenses listed in the notice. More importantly, in light of the disparate enforcement (discussed more fully below) that the Postal Service engaged in after this warning, discharge in the instant case is too severe.

The Union cites two similar situations in which the employees involved were issued only letters of warning (Letter of Warning to Ray D. Holman, dated December 4, 1979 [Union Exhibit 1]; and Letter of Warning to Henry Culbreth, Jr., dated December 19, 1979 [Union Exhibit 2]). Both of these cases occurred within a few days of the Grievant's confrontation with Price. It appears to the Arbitrator that in these similar situations the conduct of the employees involved was as serious as the Grievant's conduct in this case. In the Holman situation the employee used profanity and his physical actions of slamming down the chair and jerking the door open with such force that the door handle was driven into the wall evidenced more serious misconduct. The mere fact that the supervisor in the Holman and Culbreth situations did not feel as threatened as Supervisor Price, doesn't justify the difference in discipline in the two situations.

The Postal Service itself cites the opinion of Arbitrator Eaton in Association of Letter Carriers, Local 204 and United States Postal Service, Colorado Springs, Colorado (Gammon discharge, March 24, 1980) (unpublished). The Postal Service cites this case for the proposition that the threatening of supervisors is intolerable conduct even in light of disparity in discipline of offenders. But as the Postal Service notes, the discharge was not upheld in that case, although Gammon was denied back pay for the period of suspension. In that case, however, Gammon had a poor past disciplinary record that included a previous suspension for threatening a supervisor and his threat was a more serious one than the Grievant's in the present situation.

The Union also cites situations dating back to December of 1977 in which employees were not discharged for conduct ranging from fights with fellow employees to threats against supervisors. (Union Exhibit 3). The Postal Service on the other hand fails to cite a single case in which the discharge of an employee in Denver for fighting or threatening to fight has been directed or sustained in the grievance procedure. Further, no disparate treatment is indicated in the other cases cited in the Postal Service Brief as support for the Grievant's discharge.

As noted in How Arbitration Works by Elkouri and Elkouri at pages 643-44:

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variation in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees).

The parties herein are well aware of the general rule that disparate treatment--unequal discipline for similar misconduct--is not looked upon with favor by any arbitrator. Unequal discipline imposed, even by a well meaning but somewhat disorganized employer, will consistently be overturned as discriminatory when appealed to arbitration. Further, there is evidence in this case that management picked this case to draw the line and change a former policy of leniency to one of discharge for such threats to supervisors. The policy can and has been changed by a clearly announced intent, but not before the incident giving rise to this arbitration.

Another factor in the Arbitrator's decision in this case is the totality of circumstances surrounding the Grievant's conduct. While his actions are in no way condoned, the Arbitrator is inclined to credit the Grievant's testimony that he only acted to get Supervisor Price "off of his back." Price, in his efforts to promote efficiency, gives the distinct impression of having been a little overzealous, and his actions, although taken in the interest of better postal service, had become extremely irritating to the Grievant. The Grievant's remarks appear to be attributable

to the heat of the moment and they carried no expressed or implied threat of future harm to Price. Also they contained no profanity or general disrespect for authority that would show the Grievant incapable of being a valuable postal employee in the future. Nothing in the evidence indicates that Postal Service's managerial authority, needed to insure its smooth and efficient function, would suffer with the Grievant's reinstatement.

AWARD

The Grievant, Julian F. Maldonado, was not discharged for just cause. For the reasons expressed above, the penalty of discharge was too severe under all the circumstances involved. The discharge is reduced to a letter of warning. The Grievant is ordered reinstated without loss of seniority and with back pay, less any unemployment compensation and interim earnings.



William E. Rentfro
Arbitrator