C#11112

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	GRIEVANT: M KURAKUSU POST OFFICE: BURBANK, CALIFORNIA CASE NO: W7N-5T-D 28832

BEFORE: Gary L. Axon, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service:
Teresa Fleming
Labor Relations Assistant
United States Postal Service
Van Nuys Field Division
16150 Sherman Way Room 208
Van Nuys, CA 91409-9401

For the Union:
Joan Hurst
Vice President
California State Association of Letter Carriers
PO Box 3434
Torrance, CA 90510

Place of Hearing: Burbank, California

Date of Hearing: July 25, 1991

AWARD:

Just cause did not exist to remove Grievant from the Postal Service. Grievant is ordered to be reinstated without back pay and benefits.

Date of Award: August 9, 1991

Gary L. Axon
Arbitrator

I. STATEMENT OF ISSUE

The parties were unable to agree on a statement of the issue. The Union believed the issue to be properly framed in terms of whether or not there was a violation of the last chance agreement. It was the position of the Postal Service the issue should be stated in terms of whether or not just cause existed to remove Grievant from employment.

Based on the submissions of the parties the Arbitrator formulates the issue to read:

> Did the Postal Service have just cause to remove Grievant from employment? If not, what is the appropriate remedy?

II. RELEVANT CONTRACT 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.

. . .

LAST CHANCE AGREEMENT

(For the sake of brevity not reproduced in its entirety)

. . .

> 3). Mr. Kurakusu must ensure that on any day that he cannot complete his street duties and return to the office by 17:00 (5:00 p.m.) or within ten hours of his reporting time (including lunch), he must call his supervisor or any supervisor by 3:00 p.m.;
>
> 4). Mr. Kurakusu recognizes that the Last Chance Agreement is just that, a "last chance" to maintain employment with the U.S. Postal Service. Any violation of this agreement will be grounds for removal. Mr. Kurakusu waives all appeal rights to any subsequent removal action due to violation of this Agreement.

III. STATEMENT OF FACTS

Grievant Kurakusu was first employed by Postal Service in July, 1988, as a letter carrier at Burbank, California. During his short career with the Postal Service Grievant has been the subject of several discussions and disciplinary actions for failure to follow instructions. Each of the disciplines were for failure to notify his supervisor if unable to complete street delivery in nine and one-half hours or by 5:00 p.m. The first discipline was a letter of warning dated October 19, 1988. A seven-day suspension was levied October 19, 1988, later reduced to a one-day suspension. A fourteen-day suspension for the same offense was issued on March 9, 1989, subsequently reduced to four days.

On August 21, 1989, Postal Service served a proposed notice of removal on Grievant. The removal action was rescinded based on a last chance agreement dated September 19, 1989. (Jt.

Ex. 2(H)). As part of the last chance agreement, Grievant was to serve a fourteen-day suspension. From the date Grievant returned to work in September, 1989, until October 21, 1990, his career was uneventful. On October 31, 1990, his supervisor Nina Metichecchia observed Grievant away from his vehicle while the engine was still running. Metichecchia reminded Grievant of his responsibility to turn off the vehicle every time he was outside of the vehicle.

On November 7, 1990, Grievant notified his supervisor at 4:15 p.m. of his inability to complete the route by 5:00 p.m. The final incident relevant to this case occurred on November 14, 1990, when Grievant brought back approximately forty flats and the flat portion of forty deliveries instead of delivering them to the customers. Grievant placed the undelivered mail in a bin and did not notify any supervisor of the undelivered mail.

In a letter dated November 29, 1990, the Postal Service proposed to remove Grievant from employment. (Jt. Ex 2(F)). The letter set forth three charges which read in relevant part as follows:

> Charge No. 1: Failure to Follow Instructions/Failure to Notify a Supervisor if Unable to Complete Street Delivery By 5:00 p.m. - Notification of a Supervisor by 3:00 p.m.
>
> On November 7, 1990, at 4:15 p.m., you notified your supervisor of your inability to complete delivery by 5:00 p.m. During a factfinding you stated you knew that you must notify your supervisor by 2:30 - 3:00 p.m.
>
> Charge No. 2: Failure to Follow Instructions/Mishandling of Mail.

> On November 14, 1990, you brought back flats undelivered for the 500-600 block of Lincoln, approximately 40 deliveries. In addition, you failed to deliver the flat portion of the Pennysaver coverage for the same 40 deliveries mentioned above.
>
> During a factfinding, you admitted you were aware of your responsibilities to deliver all the mail entrusted to you and that you did not notify any one in management of your failure to deliver this mail.
>
> Charge No. 3: Failure to Follow Instructions/Failure to Follow Safety Rules and Regulations.
>
> On October 31, 1990, you were out of your vehicle with the engine left running. During a factfinding, the question was asked "are you aware of your responsibility to turn off the engine every time you are outside of your vehicle." You responded, "yes, it is against Postal regulations."
>
> . . .

The prior disciplines, including the last chance agreement, were cited as elements of past record.

The Union grieved the removal as being without just cause. (Jt. Ex. 2(D)). In the written grievance Union alleged with respect to Charge 1 Grievant did not violate the spirit of the last chance agreement as he attempted to call in before 3:00 p.m. but got a busy signal. Grievant complied with the last chance agreement for fourteen months. Regarding Charge 2, Grievant felt he was required to deliver mail at night under conditions which were unsafe so he returned to the Post Office. Charge 3 was a minor infraction which management was piling on in order to discharge Grievant.

Postal Service denied the grievance on the ground Grievant had been given every opportunity to improve his performance but was unable to do so. David English, Labor Relations Representative, replied at Step 3 "the record indicates that the occupation of letter carrier is not suitable to the Grievant." (Jt. EX 2(A)). Union elevated the case to arbitration. A hearing was held at which time both parties were given the full opportunity to offer evidence and argument in support of their respective positions. The issue is now properly before the Arbitrator for decision.

IV. POSITION OF PARTIES

A. U. S. Postal Service

Postal Service takes the position Grievant is a short time employee who is unable to follow instructions in spite of repeated efforts to secure a change in his behavior. Prior attempts to utilize progressive discipline in the form of discussions, letter of warning, two suspensions and a removal, later reduced to a last chance agreement did not accomplish the desired change. Moreover, Grievant admitted he was fully aware of all of the rules to which he was charged with violating. Grievant's performance under the last chance agreement showed he knew, and could call in before 3:00 p.m. when he believed he would be unable to finish the route by 5:00 p.m.

Regarding Grievant's claim he attempted to call in at 3:00 p.m., Postal Service argues this was an afterthought to save

his job. Grievant did not mention any attempt to call in at 3:00 p.m. at the initial factfinding held to discuss the charges. It was not until the grievance procedure did this purported attempt to call in surface.

Turning to Charge 2, Postal Service notes that just one week prior to the November 14, 1990, incident Grievant had been instructed by the postmaster on the subject of non-delivery of mail. In spite of this instruction Grievant turned right around and brought back mail to the post office undelivered. Further, he placed the mail in a bin and told no supervisor what he had done. It was not until the next day that Grievant admitted to returning the mail after a supervisor questioned him about the undelivered mail.

As to Charge 3, Postal Service asserts leaving a Postal Service vehicle with the motor running is contrary to the rules. It is a serious safety infraction for which discipline is warranted.

Postal Service makes the special point that it did not move to discharge Grievant based on the last chance agreement. Instead, Postal Service made its case for just cause on the three specific charges stated in the notice of removal. The last chance agreement was cited merely as an element of past record to support the discharge.

In sum, the charges against Grievant were proven. In light of his prior record of discipline for the same offense, Postal Service concludes just cause exists for removal.

Postal Service submitted Case Numbers S4N-3S-D 31072 and E7N-2K-D 13654 in support of its position.

B. The Union

The Union argues Grievant complied with the terms of the last chance agreement. He attempted to call in at 3:00 p.m. and got a busy signal. At this point he made a decision to continue on his route in the belief he could complete his route. When he realized he could not complete his route by 5:00 p.m., he called the supervisor at 4:15 p.m. and informed him he would not be able to complete the route as scheduled. Grievant had no reason not to follow the rules.

The Union next argued Grievant was held to a higher standard than other carriers. Union evidence revealed other carriers had returned with undelivered mail or failed to call in by three and were not disciplined. Thus, Union submits Grievant was a victim of disparate treatment.

It is also the position of Union Grievant had a "penchant" to please his supervisors. As such, he was reluctant to ask for additional time or help when the mail volume was heavy. He should not be punished for failure to call in on this one occasion.

Additionally, the Arbitrator should not lose sight of the fact Grievant did call in for approximately fourteen months as required by the last chance agreement. On November 7, 1990, he did in fact attempt to call in at 3:00 p.m. as required. Further, there is no dispute Grievant did in fact call in at 4:15 p.m. to report he would be unable to conclude his route by 5:00 p.m. His

actions on November 7, 1990, show he is committed to the job and should not be discharged.

Regarding Charges 2 and 3, Union admits Grievant committed the acts as charged. However, Union argues these were minor isolated incidents for which summary removal is not warranted. Union notes Grievant has never had an accident so it cannot be found Grievant performs his work in an unsafe manner.

The Arbitrator should also take into account Grievant used no sick leave during the past two years.

In sum, Postal Service failed to establish Grievant was in violation of the last chance agreement or that just cause existed to remove him for the offenses cited in the letter of removal.

Union submitted Cases C1N-4J-D 22433; N4N-1N-D 34056 and W7N-5F-D 6022 to support its arguments.

V. DISCUSSION AND FINDINGS

The first point which must be addressed is Union's attempt to frame this case in terms of a violation of the last chance agreement. The boundaries in this case are set by the reasons for the removal set forth in the notice of removal. Three charges constitute the basis on which Grievant was removed from his employment. Violation of the last chance agreement was not among the stated reasons cited for moving against this employee. Further, Postal Service at the arbitration hearing, specifically disclaimed any intent of seeking the removal of Grievant based on

a purported violation of the last chance agreement. Therefore, the Arbitrator concludes Postal Service's case for removal must stand or fall on the three charges described in the letter of removal.

Moreover, the Arbitrator will review the last chance agreement as an element of past record. This would be consistent with the function the last chance agreement played in Postal Service's decision to remove. The cases cited by Union involved the implementation of the last chance agreement as the cause to remove the employee. As such, the Union's authority was of limited relevance in the present case.

Turning to Charge 1, the Arbitrator finds Postal Service proved Grievant failed to call in by 3:00 p.m., as alleged. Grievant's testimony that he attempted to call in at 3:00 p.m. and got a busy signal strikes this Arbitrator as an afterthought in an attempt to save his job. He never reported this attempted call in at the initial factfinding hearing. At the arbitration hearing Grievant revealed for the first time he made two additional calls shortly after he got a busy signal, but nobody answered the telephone on the second and third calls.

There is no dispute that Grievant did in fact call in at 4:15 p.m. to notify his supervisor of the inability to deliver mail by 5:00 p.m. This would have been grounds to invoke the last chance agreement. However, Postal Service elected not to use the November 7, incident as the trigger for a violation of the last chance agreement. The Arbitrator must take this to mean management did not consider the November 7, incident standing alone as a

removable offense. This is reasonable because Grievant had gone fourteen months without violation of the last chance agreement which mandated he call in if he anticipated not being able to finish his route by 5:00 p.m.

While this case is not framed in terms of a removal for violation of the last chance agreement, the Arbitrator notes the last chance agreement Grievant signed has no firm date by which it would terminate. Last chance agreements without a termination date are not favored. Arbitrators generally hold that a last chance agreement must be limited to a reasonable period of time.

Charge 2 concerns mishandling of mail. Union admits Grievant did bring back mail from the route undelivered and failed to notify management of the non-delivery of his mail. This is a serious charge for which discipline is warranted. However, three mitigating factors are present which argue against summary discharge. First, Grievant made no attempt to secret the mail he brought back undelivered. Second, Grievant has no history of returning mail to the post office undelivered. Third, Union evidence established other carriers had returned mail to the post office undelivered and were not discharged.

Turning to Charge 3, the Arbitrator concurs with Union this allegation was thrown in to bolster Charges 1 and 2. The incident involving leaving the engine running occurred on October 31, 1990, almost thirty days before the removal. At the time the supervisor discovered the engine running Grievant was given what could be termed an oral warning. No other action was taken for

leaving the engine running until the proposed notice of removal was issued on November 29, 1990. The Arbitrator agrees that leaving the engine running while outside of the vehicle is a disciplinary offense. However, it does not rise to the level of a dischargeable act for the first offense. The record in this case reveals Grievant has received no discipline for unsafe work practices. Thus, the Arbitrator is unable to find Grievant's work habits create a safety hazard to himself or the public.

In sum, the three charges on which Postal Service relied to remove this Grievant do not rise to the level for which summary discharge is justified. Further, Grievant's record of no sick leave use for the last two years is a factor which mitigates against immediate discharge. Except for the problem on call ins, Grievant's record indicates he was a satisfactory employee. Grievant was able to work for fourteen months under the terms of the last chance agreement which required him to call in by 3:00 p.m. One violation in fourteen months does not equal just cause for dismissal.

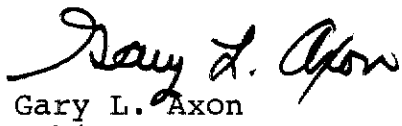
While the Arbitrator has found just cause does not exist for removal, Grievant's past record of discipline for failure to notify his supervisor if unable to complete delivery by 5:00 p.m. warrants severe discipline. When the last chance agreement which allowed Grievant to return to work with a fourteen-day suspension is coupled with the mishandling of mail charge, the Arbitrator is compelled to conclude Grievant should be reinstated <u>without</u> back pay. This Arbitrator does not often order reinstatement without

some back pay. In the judgment of the Arbitrator Grievant's lack of candor at the arbitration hearing and his repeated violations of the call in rule make reinstatement without back pay appropriate in this case. The reinstatement without back pay should serve to impress on Grievant his duty to call in a timely manner to notify of his inability to complete the route by 5:00 p.m.

AWARD

Just cause did not exist to remove Grievant from the Postal Service. Grievant is ordered to be reinstated without back pay and benefits.

Respectfully submitted,



Gary L. Axon
Arbitrator
Dated: August 9, 1991