C-25035

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: Danny Walls

POST OFFICE: Gary, Indiana

USPS CASE NO: J01N-4J-D 03101234
NALC CASE NO: DRT 06-041838

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Merline Jann
For the Union:	Anthony Flora
Place of Hearing:	U.S. Post Office, 1499 Martin Luther King Drive, Gary, Indiana
Date of Hearing:	January 28, 2004
Date of Award:	February 27, 2004
Relevant Contract Provision:	Article 16
Contract Year:	2001
Type of Grievance:	Removal

AWARD SUMMARY

The matter before this Arbitrator is a removal in which the grievant is alleged to have received pay for time not worked and unauthorized curtailment of mail. The allegation of receiving pay for time not worked is left without proof. The record, however, shows that the grievant did curtail mail, but there is no evidence that he attempted to hide this fact from management as implied in the charges. The grievant returned to the station after dark on February 1, 2003 and the next tour stated on the 3996 request for assistance that he had curtailed mail due to darkness and being in an unsafe area of Gary, Indiana. This action deserves no more than a discussion concerning the proper notification of management of mail curtailment. Therefore, the grievance is sustained, and the aggrieved discipline is ordered expunged. The grievant is ordered reinstated to his former position with full back pay and benefits.

David A. Dilts, Arbitrator

ISSUE

Was there just cause for Danny Walls, herein the grievant, to be issued a notice of removal for receipt of pay for time not worked and unauthorized curtailment of mail? If not, what shall be the remedy?

BACKGROUND

There is very little dispute between the parties concerning the relevant facts in this case, however what is in dispute is the inference which may be properly drawn from the evidence in this case. At the time of the notice of removal, the grievant was a full-time letter carrier and was employed at the Gary, Indiana Post Office for approximately twenty-three (23) years. The grievant had been assigned to route 616 since the latter part of January, and was therefore new to this route. On February 3, 2003, the grievant submitted a PS Form 3996 requesting 3.75 hours of auxiliary assistance. In the remarks section he indicated "mail brought back due to darkness." Management investigated this and found that the grievant had curtailed mail on Saturday February 1, 2003.

Management alleges that on this date Supervisor Jones had done periodic street checks and at no time did the grievant request or inform Ms. Jones that he intended to curtail mail. The grievant never mentioned curtailing any mail to any member of supervision nor did he fill out and submit a PS Form 1571.

Management also alleges that the grievant had taken two hours and fourteen minutes to deliver mail from 2041 Burr Street to 5309 W. 19th Street Apartment 312 (last delivery before lunch). Manager Wooten had walked with the grievant on January 31, 2003, the day prior and for this same area had taken only one hour to deliver the mail. When management questioned the grievant regarding the amount of time he took he stated that he had a lot of parcels and had gone to lunch at 1300 after delivering 5309 West 19 Apartment 312. The Postal Service alleges that even assuming he went to lunch at 1300, he still would have had approximately 36 minutes for which the grievant cannot account.

Management determined that the grievant had not only curtailed mail without proper supervisory authorization but had also received pay for time not worked. Subsequently, the grievant was issued a notice of removal for attempt to receive pay for time not worked and for unauthorized curtailment of mail. A timely grievance was initiated protesting the actions taken by Postal Service against this grievant and the parties stipulated that the grievance is properly before this Arbitrator pursuant to Article 15 (Grievance Procedure) of the parties 2001 National Agreement.

POSTAL SERVICE'S POSITION

It is the Postal Service's position that the grievant violated the Code of Ethical Conduct and the USPS Standards of Conduct which were agreed to by the union and management at the national level and are incorporated into the National Agreement by virtue of Article 19. The provisions require an employee to be honest and trustworthy and of good character. Other

relevant contractual provisions and Postal handbooks and manuals are Article 3 Management's Rights which give management the exclusive right subject to the provisions of the National Agreement "to hire, promote, transfer, assign and retain employees within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees." Other applicable provisions are found in the Employee and Labor Relations manual and are cited in the Notice of Removal issued to the grievant.

The grievants actions of receiving pay for time not worked standing alone when proven warrants a removal. Notwithstanding the fact that the grievant had a 7 day suspension for violating postal vehicle safety, a 14 day for unacceptable conduct/violation of USPS policy on violence in the workplace and a 14 day suspension dated October 18, 2002, just four months prior for willful delay of mail and false statements.

Management has demonstrated through sworn testimony and documentary evidence that the charges against the grievant are true and therefore the grievant violated provisions of the ELM and the M-41 as stated in the Notice of Removal.

Both the union argued that the grievant has twenty-three years service, hence he has a bank of good will which should serve to mitigate the penalty. Further the Union contends that the removal was defective as a result of due process failures. However, these technicalities aside the issue before you today is whether or not management had "just cause" to remove the grievant from the Postal Service. The agency is confident that the clear preponderance of the evidence demonstrates that there was just cause for the discharge of this grievant. Accordingly, the agency respectfully requests that the Arbitrator find that "just cause" existed and deny the grievance as being without merit.

UNION'S POSITION

The grievant, is a long-term employee of the Postal Service with over twenty-three years of service at the time management initiated the removal action. He is charged in the notice of removal with receipt of pay for time not worked and, additionally, with unauthorized curtailment of mail. It is management's burden of proof, by a preponderance of the evidence, to establish, firstly, that the grievant did on Saturday February 1, 2003, without legitimate reason, curtail the delivery of mail in the area of the: 5000 block of 19th Avenue, 5000 block of 19th Place, 1900 block of Hanley Street, 5000 block of20th Avenue, and 21st Place and 2000 block of Hanley as stated in the February 18, 2003 Notice of Removal. Secondly, it is management's burden of proof to prove by a clear and convincing preponderance of the evidence, that the grievant received pay for a specified amount of time on February 1, 2003 and during said time he was not productively engaged in work. Management's allegation is that the grievant, exceed(ed) (his) authorized lunch period by thirty (30) minutes" on Saturday February 1, 2003.

The Union has shown through evidence and testimony that management has failed to shoulder its burden of proof in both these charges. Management has failed to establish just cause as required. On Monday, February 3, 2003, Brunswick Station Supervisor Jones was presented with a Form 3996 , Carrier-Auxiliary Control, completed by the grievant. On that Form 3996 the grievant listed reasons for his request for assistance or overtime for his assignment, route 616, for February 3. The reasons listed by the grievant were: "Heavy DPS, Mail Case on Rt undetermined amount, 6 change of Address cards; heavy parcels; new on

route--apartment keys not labeled; 6 ft of catalogs; mail brought back due to darkness (cannot see) ."

The Union has also shown through evidence and testimony that only upon receiving this form 3996 did management "discover" the alleged curtailment of delivery from Saturday February 1, 2003. The Union also has shown that management has never been able to identify this curtailed mail and has offered only contradictory and confusing explanations of this matter.

The Union will show that the grievant, acting in a manner both reasonable and prudent, avoided making deliveries in an unsafe area of his delivery territory. The Union demonstrated through evidence and testimony that the grievant so informed his supervisor of this fact. Further, the Union has shown that other carriers in the Brunswick Station had also avoided making deliveries when darkness made it unsafe to work and these employees were not disciplined for doing so.

The facts as established in this case file show that the grievant was only recently assigned to this route in this station. The facts in the case establish that the grievant was first assigned to Brunswick Station route 616 on Wednesday January 22, 2003. The grievant had only been assigned to route 616 for ten calendar days when he allegedly engaged in the activities charged in the Notice of Removal. The Union has also shown through evidence and testimony that in this brief time span, the grievant was subject to an inordinate amount of supervisory attention that rapidly lead to this removal action.

Management has raised the serious charge of receipt of pay for time not worked, alleging a violation of the USPS Standard of Conduct with reference to Federal law. For

such a charge, the quantum of proof is substantial. Management should have established the facts of this charge by a clear and convincing preponderance of the evidence. The Union has shown that Management has never presented any evidence of this serious violation and this charge in the Notice of Removal is self-contradictory. The facts of the case file clearly show that the grievant delivered a certain portion of route 616 in the same amount of time in the only instances in which any records have been produced, i.e., comparing Friday January 24, 2003 with the date of the alleged incident, Saturday February 1, 2003. It is clear that during the delivery of this section of route 616 that management alleges that the grievant "exceed(ed) (his) authorized lunch period by thirty (30) minutes." The Union has shown that Management's reliance on this most circumspect evidence fails to meet its burden of proof in this matter.

It is a fundamental aspect of just cause that before administering the discipline, management must make an investigation to determine whether the employee committed the offense and further that management must ensure that its investigation is thorough and objective (Joint Contract Administration Manual, page 16.2). The Union has shown through evidence and testimony that management failed to investigate the alleged offense and failed to conduct a "thorough and objective" investigation, one that would yield evidence.

Further, the alleged rule infraction by the grievant has been applied in an inconsistent and inequitable manner. The severity of the discipline is not reasonably related to the alleged infraction itself.

The Union seeks to have this February 18, 2003 Notice of Removal issued to the grievant

withdrawn in its entirety; that the grievant be restored to his former position with full back pay and benefits. Further Union requests that this aggrieved discipline be expunged from the grievant's records.

ARBITRATOR'S OPINION

The burden of proof in disciplinary matters falls to management. In this case there are two charges which have been made against this grievant, these are (1) receipt of pay for time not worked, and (2) unauthorized curtailment of mail. Both of these charges, alone, are serious matters and have often been found by Arbitrators to be just cause for discharge for the first offense. Each of these issues will be examined, in turn, in the following paragraphs of this Arbitrator's opinion, before reaching conclusions as to whether just cause exists for this aggrieved discipline.

Pay for time not worked

Pay for time not worked is a serious charge, in extreme cases clearly worthy of discharge for the first offense. What the record in this matter shows is not disputed by the parties. The claims of management, based on MSP data, and not direct observation of the grievant, was that the grievant took two hours and fourteen minutes to deliver mail from 2041 Burr Street to 5309 West 19th Street, Apartment 312 before he took lunch. Manager Wooten walked with the grievant on January 31, 2003 and alleged it took him exactly one hour to deliver this area. The

grievant claims to have taken his lunch period at 13:00 on February 1, 2003 – a claim unchallenged by the Postal Service.

By the Postal Service's calculations there was a period of 34 minutes on February 1, 2003 for which the grievant cannot account – presumably an extension of his lunch period or some other activity in which work did not occur. It is this 34 minutes that forms the basis for this charge against the grievant. There is nothing in this record save the fact that the MSP data shows a 34 minute difference in the times taken for the same delivery area on the grievant's route between January 31, 2003 and February 1, 2003. This is clearly circumstantial evidence. However, circumstantial evidence, corroborated and / or consistent with the remaining facts in the case may be sufficient to discharge the burden of proof in the case against this grievant.

In this case, however, the simple observation of a 34 minute difference between January 31, 2003 and February 1, 2003 falls far short of a basis for just cause. There is no reliable record of the differences, if any, in the mail volume, parcels, or accountables on the two days in question. Without evidence of the workload to be accomplished on the two days, time alone does not suffice that any period of time was not worked – hence receipt of pay for time not worked. There are no observations of the grievant not working, or expanding his lunch period. In fact, there is nothing in this record except that 34 minute time differential between January 31 and February 1, 2003. The record that exists is the MSP data that shows the observed time differential.

Sealing the fate of this charge, is the unrebutted statement of the parties' mutual intent in a decision in Q98N-4Q-C 01045840 (Union exhibit 1) which, in pertinent part, states:

> MSP does not set performance standards, either in the office or on the street. With current technology, MSP records of scan times are not to be used as timecard data for pay purposes. MSP data may not constitute the sole basis for disciplinary action. However, it may be used by the parties in conjunction with other records to support of refute disciplinary action issued pursuant to Article 16 of the National Agreement.

In this Arbitrator's considered opinion, there is no evidence in this record, save the MSP data, that shows the grievant took more time on February 1, 2003 than on January 31, 2003. Further, there is no credible, reliable evidence concerning the workload, or the grievant's activities on February 1, 2003. Without something more in this record it is impossible to come to the conclusion that the grievant was either working or not working during those 34 minutes on February 1, 2003 – and the Postal Service was obliged to prove he was not working for the removal to be sustained.

Clearly, there is no evidence in this record to support this charge against the grievant. For this charge to stand there must be a clear preponderance of the evidence supporting the charge of misconduct, therefore there is no cause arising from this allegation against the grievant for any discipline whatsoever.

Curtailment of mail

The Postal Service alleges the grievant curtailed mail without authorization. The grievant claims, without rebuttal, that he curtailed mail because it was dark, and that the area of delivery was a dangerous part of Gary, Indiana. Delivery of mail in the dark, in an area infamous for violent crime cannot be reasonably expected to stand the test of a reasonable and safe work expectation. In this Arbitrator's considered opinion, the grievant should have informed management of his view that delivery after dark in a street setting was not something with which he was comfortable with respect to his safety. To use this curtailment of mail as the basis of discipline, given the totality of the circumstances, must be based on a violation of instructions or standing policies; in other words, such a failure must be addressed with a discussion before resorting to discipline in this delivery area after dark.

The record also shows that the grievant wrote on the 3996 on February 3, 2003, request for auxiliary assistance that one of the causes, was that he brought mail back on the previous tour of duty. The record therefore is inconsistent with the view that the grievant attempted to hide from management that he brought mail back to the station on February 1, 2003. Curtailment of mail, which does not involve some act of deception, dishonesty, or misconduct lacks the aggravating circumstances of cases worthy of severe discipline. In cases such as this, where the grievant simply failed to use the proper form to inform management of the problem and did not attempt to deceive management, is clearly not among that class of cases worthy of discharge for the first offense. Had the grievant used a form 1571 to report the curtailment rather than mentioning the matter on a 3996, it is not clear from this record he would have faced removal or

anything more than a discussion about the proper procedures for the curtailment of mail, and informing management of that curtailment.

The record also fails to convince this Arbitrator that there was a clearly and universally understood policy in this station concerning the proper reporting of curtailed mail, particularly during after normal end tour hours for that facility. Without such a showing, there is no basis for discipline.

It is this Arbitrator's considered opinion that the grievant's performance could be corrected, and that improvement does not require discipline. Further, it is this Arbitrator's considered opinion that the circumstances in which this curtailment of mail occurred does not rise to the level of misconduct that could be reasonably characterized as just cause for discipline under Article 16 of the parties' 2001 National Agreement.

Conclusions

The Postal Service failed to establish with a simple preponderance of the evidence that just cause existed for the disciplining of this grievant. In addition to the lack of evidence of wrong doing, there is no evidence that the Service properly considered the length of service of this grievant or the fact that this carrier had been assigned to this route for a period of only ten days – significant mitigating circumstances.

Further, this Arbitrator made no inquiry into the Union's allegations that the grievant was denied due process or was subjected to disparate treatment. The threshold question was whether just cause existed, and a finding in the negative, relieves the matters of due process and disparate

treatment in this particular case.

Clearly, no just cause for these charges requires that this grievance be sustained in its entirety. Therefore, it is also required that a remedy be fashioned that will make this carrier whole. He is to be immediately reinstated to his former position, with full back pay, benefits, and all seniority he would have otherwise earned, as requested by the Union.