

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	
Between)	GRIEVANT: Kyle Comstock
UNITED STATES POSTAL SERVICE)	POST OFFICE: Wheeling, WV
And)	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO)	CASE Numbers:
)	USPS: C16N-4C-D 18359939
)	NALC: WHG0627182
)	DRT: 13-439738
)	

BEFORE: Sherrie Rose Talmadge, Esq., ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:	Dean Petros, Labor Relations Specialist
For the Union:	Adam Cline, Arbitration Advocate

Place of Hearing:	2501 Chapline Street, Wheeling, WV
Date(s) of Hearing:	April 2, 2019
Date of Award:	May 14, 2019
Relevant Contract Provisions:	Article 16
Date of Contract:	2016 - 2019
Type of Grievance:	Discharge

AWARD SUMMARY

The Notice of Removal dated July 18, 2018 issued to CCA Comstock charging him with Unsatisfactory Performance was not issued for just cause in accordance with Articles 15, 16 and 19 of the National Agreement, Section 115 of the M-39 Handbook, M-00326 and M-01664. Management's inferential conclusion that the use of excessive time demonstrated the Grievant's poor performance was not sufficient to establish just cause for discipline without evidence that during the four days in question the Grievant was guilty of any improper work or time-wasting habits. Accordingly, the grievance is sustained.

For the remedy, the removal is to be rescinded and expunged from the Grievant's record. The Grievant is to be reinstated and made whole for lost wages and benefits. The Union's request for lost overtime is too speculative and not warranted.



Sherrie Rose Talmadge, Esq., Arbitrator

STIPULATED ISSUES

1. Was the Notice of Removal dated July 18, 2018 issued to CCA Comstock charging him with Unsatisfactory Performance for just cause in accordance with Articles 15, 16 and 19 of the National Agreement, Section 115 of the M-39 Handbook, M-00326 and M-01664?
2. If not, what should the remedy be?

FINDINGS OF FACT¹

Kyle Comstock, the Grievant, worked as a City Carrier Assistant (CCA) for approximately two years at the postal facility in Wheeling, WV. During June 2018, the Grievant had a hold down on a different route than the one in question in the instant case. After one week, Management determined that the Grievant was not fast enough and removed him from the hold down. On June 31, 2018, Management issued the Grievant a 14-day suspension for unsatisfactory performance for expanding his time while performing the hold-down. Management cited the 14-day suspension in the Grievant's July 18 removal notice at issue.

On July 9, 2018, Management assigned the Grievant to Route 3101. On four days, July 9, 10, 11 and 12, the Grievant worked longer than the DOIS/PET workload projections for the route that he was on. The Grievant had carried on Route 3101 a few times prior to July 9 and before it had undergone a route adjustment. On each of the four days, Management also assigned the Grievant approximately a one-hour bump on another route. On each of those four days, the Grievant provided a 3996, request for overtime or auxiliary assistance. The Grievant testified that he requested auxiliary assistance on July 9 because he was unfamiliar with Route 3101 and had been assigned a one-hour bump on Route C043. Moreover, the Grievant was 1:29 minutes late leaving the office. Management approved one hour of overtime on 043. Management sent over one hour of street assistance. In addition, the Grievant used 1 hour of overtime and 43 minutes penalty overtime (POT) over the 1 hour he had been approved.

On July 10 the Grievant was assigned to carry Route 3101 and a one-hour bump on Route C043. The Grievant submitted a 3996 requesting 20 minutes overtime because of his unfamiliarity with the recent changes on Route 3101, which was denied. The Grievant

¹ The parties had an opportunity to question sworn witnesses on direct and cross-examination, and to submit relevant and material documentary evidence. At the end of the hearing the parties presented oral closing arguments.

Arbitration decision continued.

also did collections. The Grievant returned to the facility 26 minutes late, which was not authorized.

On July 11 Management assigned Route 3101 to the Grievant and a one-hour bump on Route C049. The Grievant submitted a 3996 for 15 minutes overtime because he was late leaving the office. Management denied the Grievant's request. The Grievant used 39 minutes of overtime without authorization.

On July 12 Management assigned Route 3101 to the Grievant with a 50-minute bump on C010. The Grievant submitted a 3996 for one-hour overtime explaining to management that he was unfamiliar with the bump on C010, there was door to door on the bump and he was late leaving. Moreover, there were 150 more flats to case than on Monday, July 9. Management denied the Grievant's request. The Grievant used 1 hour and 39 minutes of overtime. The 39 minutes of overtime were not authorized. At the PDI the Grievant explained that he was unfamiliar with the bump on C010, it had door to doors, there was travel time to the bump, and the DPS and flats were upside down.

The Grievant also contacted Management via cell phone and/or text message through the MDD scanner provided by the Postal Service.

On July 13, 2018, Supervisor Kristina Barr held a pre-disciplinary interview with the Grievant and his Union steward, David Hagiloizou about failing to complete assigned duties within the scheduled times. At the PDI the Grievant explained that on July 9 he had been assigned to carry Route 3101 and given a 1-hour bump on C043. He had submitted a 3996 stating that he was unfamiliar with Route 3101, had an extra on C043 and was 1:29 minutes leaving. The Grievant requested 1 hour and 30 minutes overtime. Management approved 1 hour of overtime for the bump on 43. The Grievant explained that he used 1 hour of overtime and 43 minutes penalty overtime (POT) because he was unfamiliar with the casing and left for the street 1 hour and 29 minutes late, had three hods of spurs in his parcel hamper to take to the street, and later was instructed to bring mail back by the Postmaster and took a little extra time to re-route as a result of a traffic accident. On July 10 the Grievant was assigned to Route 3101 and a one-hour bump on C043. He submitted a 3996 for 20 minutes of overtime because he was unfamiliar with the recent changes on the street and was denied the overtime request. However, the Grievant used 39 minutes of unauthorized overtime. He explained that he had curtailed mail from Monday and performed collections. On July 11 the Grievant was assigned Route 3101 and a 1-hour bump on C049. He submitted a 3996 for 15 minutes of overtime because he was late leaving. Management denied his request. When asked about the 39 minutes of

Arbitration decision continued.

unauthorized overtime, the Grievant replied that he was still new on the route. On July 12 he was assigned Route 3101 and a 50-minute bump on C010. He submitted a 3996 for 1 hour of overtime stating that he was unfamiliar with the bump on C010 which included a door to door and that he was leaving late to the street. His request for assistance was denied. The Grievant explained that he used 39 minutes of unauthorized overtime because he was unfamiliar with C010 which had door to door, there was travel time to C010, and the DPS and flats were upside down and there were missorted DPS. The Grievant concluded by stating, "I feel like I have not failed to meet the responsibilities or duties of my position. I am trying my best every day and will continue to do so."

Supervisor Kristina Barr testified that she believed that the Grievant was intentionally expanding his street time and requested issuance of discipline. Postmaster Ron Burns, the concurring official, testified that the Grievant repeated expanded his delivery time without authorization despite being counseled and given progressive discipline. The Postmaster also testified that he questioned the Grievant's attitude. The Postmaster explained that on June 19, 2018, Supervisor Andrea Cooper walked the Grievant's then assigned route with him. Although the Grievant had submitted a 3996 for one-hour overtime, they returned in under eight hours. The Postmaster testified that when he talked with the Grievant upon his return, the Grievant stated, "I'll get it back tomorrow".

On July 18, 2018, Supervisor Barr², with concurrence from Postmaster Burns, issued the Grievant a Notice of Removal, which stated in material part:

You are hereby notified that you will be removed from the Postal Service effective August 20, 2018, or, if a timely grievance is filed, the effective date of this removal action will be the date of the Step B decision; which date is the later.

Charge - Unsatisfactory Performance

You are being charged with unsatisfactory performance. On July 9, 2018, you were assigned to carry Route 3101 and given a one hour bump on C043. Sixty minutes of overtime was approved for the one hour on 043. The mail volume on Route 3101 required 8 hours so you were approved for 9 hours. You were sent over one hour of street assistance and you still used 1 hour of overtime and 43 minutes POT without authorization over the 1 hour of overtime you were approved. Your unsatisfactory performance cost the Service 2 hours of overtime and 43 minutes of POT. You expanded your deliver time without authorization.

² Supervisor Barr testified that because she was out of the office on the day the NOR was issued to the Grievant, Supervisor Brandon Sheehan signed the removal notice on her behalf.

Arbitration decision continued.

On July 10, 2018, you were assigned to carry Route 3101 and given a one hour bump on C043. You submitted a request for 20 minutes overtime which was denied. You used 26 minutes of overtime without authorization. You expanded your delivery time with authorization.

On July 11, 2018, you were assigned to carry Route 3101 and given a one hour bump on C049. You used 39 minutes of overtime without authorization. You expanded your delivery time without authorization.

On July 12, 2018, you were assigned to carry Route 3101 and given a 50 bump on C010. You used 1 hour and 39 minutes of overtime. You expanded your time and used 39 minutes of overtime without authorization. Your unsatisfactory performance cost the Service 39 minutes of overtime. You expanded your delivery time without authorization.

At the interview on 07/13/18, you verified you are required to complete your duties as scheduled. You verified you were aware of a fair day's work for a fair day's pay. You said "I feel like I have not failed to meet the responsibilities or duties of my position. I try my best every day and continue to do so."

It is not enough that we do our best, sometimes we have to do what is required. One of the requirements of a city carrier becoming proficient when assigned to a route. You continue to demonstrate a lack of ability to complete your duties as required and you are expanding your time without authorization resulting in an unjust enrichment.

By your actions you are in violation of, but not limiting to the following:
Employee and Labor Relations Manual:

Section 665.13 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

Section 665.15 Obedience to Orders

Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual must nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels.

By your actions you are in violation of, but not limited to the following: City Delivery Carriers Duties and Responsibilities

Section 112.1 Efficient Service Provide reliable and efficient service.

Section 112.21 Obey the instructions of your manager.

Section 112.24 Display a willing attitude and put forth a conscientious effort in developing skills to perform duties assigned.

Arbitration decision continued.

Your discipline history includes:

14 Day no time-off suspension dated 06/31/18 for unsatisfactory performance

Letter of Warning dated 05/01/18 for unsatisfactory performance

Letter of Warning dated 03/01/18 for unsatisfactory performance

On February 15, 2019, Arbitrator Braverman rescinded and expunged the 14 Day suspension, dated June 31, 2018, concluding that Management did not establish just cause for the discipline because they failed to provide documentary evidence of any misconduct on the Grievant's behalf during the one week he worked on a hold down they had asserted he was not fast enough and had removed him from the hold down.

POSITIONS OF THE PARTIES

POSTAL SERVICE POSITION

Management met its burden to establish that there was just cause to issue the Grievant the Notice of Removal for unsatisfactory performance. The Grievant knew the rules of a fair day's work for a fair day's pay and "Provide reliable and efficient service" (Handbook M-39, Section 112.1). The Grievant, a three-year employee, was disciplined many times for over running his time. Management had taken him off a hold-down because he was not improving. On the dates in questions, July 9 -12, 2018, the Grievant expanded his street time without authorization. Even though the Grievant submitted a 3996 each day requesting assistance, the Grievant was not absolved from coming back on time. To determine that the Grievant had expanded his time, Management used many tools, including DOIS, PET, DMS, RIIMS, observations and counting the mail. When the Grievant was known on these routes there was a learning curve, however, the street time is the easy part. The Grievant expanded his street time over and over. Either he was not capable of completing the route in a timely manner or it was intentional.

Although the Grievant was a CCA, Management went through extra steps to be corrective to correct the Grievant's behavior. The Postmaster had given the Grievant a discussion. At the time of issuance of the removal notice, Management considered the Grievant's prior discipline which included two LOWs and a 14 Day Suspension. Management provided the Grievant with prior progressive and corrective discipline. They wanted a good employee, but the Grievant kept running over his time during the summer, the period with the lightest volume during the year. The Grievant tried to get unjust enrichment by extending his street time into overtime. The Grievant had an outstanding

Arbitration decision continued.

record in the military. But he was not able to do the carrier job in a timely manner. The Grievant unreasonably ran over the time approved by Management on an ongoing basis.

Management had reason to question the Grievant's attitude. On June 19, 2018, the Grievant had submitted a 3996 for an hour of overtime and the Postmaster had Supervisor Andrea Cooper walk the route with him. When they returned, the Grievant's time came out to under eight hours. The Postmaster testified that when he talked with the Grievant upon his return, the Grievant stated, "I'll get it back tomorrow".

Based on the above, Management established that there was just cause for the issuance of the removal notice and urged a denial of the grievance.

UNION'S POSITION

Management did not meet its burden of proving by clear and convincing evidence that there was just cause to issue the Notice of Removal to the Grievant. The basic principle established by the provisions of the National Agreement is that each employee is to be individually judged by the fair day's work for a fair day's pay and that any work standards must be fair, reasonable and equitable. The Service's witnesses testified that the discipline was for unsatisfactory performance. However, they also testified that at no time on the dates in question did they go out and observe the carrier or document any negligent or time-wasting practices. The Service bears the burden of proving that the Grievant intentionally expanded his time.

Management failed to satisfy the just cause test. The only rule Management cited was that the Grievant failed to meet the projected office and street times. The Union has presented multiple National Arbitration decisions that state, "no carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet the standards." (M-01769, M-00326, M-00829, LM-01664, LM-00304, and M-01444). The Union has provided documentary evidence that the rule to which Management held the Grievant is in direct violation of the national level settlements and, therefore, the rule is not reasonable.

Management failed to conduct a thorough investigation. Management had an obligation to go out and observe the Grievant if the charge was going to be unsatisfactory performance. M-39 Handbook states that an employee may not be disciplined absent documented evidence of misconduct. Management must establish that the Grievant was negligent or intentionally expanded his street time. Management has to show that the Grievant was engaging in time wasting practices. Management did not observe the

Arbitration decision continued.

Grievant and cannot allege the Grievant failed to make a projected time that was not evaluated to his own performance. Management acknowledged that they did not observe the Grievant on his route, therefore they do not have documented evidence of misconduct.

The Grievant testified that he was conscientious and put forth his best effort on the days in question. Management failed to take into consideration his request for additional time due to late leaving, unfamiliarity with the case and the street geography of the route, and the amount of time it took to travel to the additional routes that he was assigned. At the PDI the Grievant provided credible answers to the supervisor's questions. The Grievant explained that on July 9 there were many mitigating circumstances. He was unfamiliar with the case, he had three hods SPURS that were found in his hamper that he had to take to the street, and he had to re-route his return trip as a result of an accident. Management provided no evidence to contradict these explanations. On one day the Grievant had nearly triple the mail that he had on the other three days. However, Management had no interest in listening to the Grievant and giving his answers fair consideration. Management capriciously and arbitrarily dismissed the Grievant's responses at the PDI in violation of his due process rights.

Furthermore, Article 41.3.F requires Management to give a carrier unfamiliar with the route a reasonable amount of time to become familiar and efficient on the route. The Grievant had a hold down on Route 21, but within a week Management revoked that hold down and placed the Grievant on another route that he was not familiar with. Management set the Grievant up to fail. As with the 14-day suspension that was subsequently rescinded, Management has presented no more proof of any misconduct. The Grievant made Management aware that he was unfamiliar with the route and required more time. To punish the Grievant for failing to meet a projected time, without documented evidence of misconduct, is contrary to the principles of Article 16 and does not meet just cause. There are no time standards for the office or the street. The Grievant cannot be punished for failure to make projected times in the absence of documentary proof of misconduct. Management did not meet its burden and, therefore, does not have just cause to discipline.

For the remedy, the Union requested that the removal be rescinded and expunged, the Grievant be made whole for all lost wages and benefits, to include the average overtime hours worked at the Wheeling, WV installation with interest at the federal judgement rate in accordance with the Memo on page 172 of the National Agreement. The Union also requested that the Grievant be converted to a career full-time city letter carrier effective August 4, 2018 and made whole for all lost wages and benefits to include the average

Arbitration decision continued.

overtime hours worked at the Wheeling, WV installation and all benefits associated with being a full-time career city letter carrier. As of August 3, 2018, there were two residual vacancies and the Grievant had the most relative standing at the Wheeling Post Office.

DISCUSSION

At issue is whether Management had just cause to issue the Grievant a Notice of Removal dated July 18, 2018 charging him with Unsatisfactory Performance for just cause in accordance with Articles 15, 16 and 19 of the National Agreement, Section 115 of the M-39 Handbook, M-00326 and M-01664. Management has not met its burden of proof in this matter.

The just cause standard requires the Postal Service to prove that the disciplinary action was issued after an objective pre-disciplinary investigation resulting in proof of an employee's infraction of a clearly communicated, consistently applied work rule. The Postal Service must communicate the disciplinary consequences of the employee's infraction. The administered discipline must be consistent with the charged offense and the employee's past record. Furthermore, the Postal Service must establish that its discipline was imposed in accordance with the procedural requirements of the National Agreement.

The basic principle articulated in National Agreement, Article 34, Section A is "The principle of a fair day's work for a fair day's pay is recognized by all parties to this Agreement". Furthermore, in accordance with Sections B and C, any work standards must be fair, reasonable and equitable. In the present case there were no specific street time standards. Therefore, street time standards must be established in accordance with M-39.

Numerous arbitrators have held that a Letter Carrier must be judged upon his/her own personal abilities and work performance. As noted by Arbitrator Levak, [USPS and NALC, W4N-5B-D 3530, 05952 (1985)],

An overall reading of M-39, Chapter 2, leads the Arbitrator to the inescapable conclusion that route street standards can only be developed with reference to a specific individual Carrier. That is, an evaluation must be based upon the performance of an individual Carrier while giving a "fair day's work". That is, if a Carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for the route must be adjusted and set according to his individual abilities."

The gravamen of the Service's case is that during the four days in question, the Grievant, a CCA who had just be assigned to an updated Route 3101 and had been assigned a one hour bump on various routes each day, had used more street time to

Arbitration decision continued.

deliver the route than management expected the route to take based on the DOIS/PET workload projections for that route.

The Union provided three National Level Settlements that address whether carriers can be disciplined for failure to meet standards. National level settlement M-00304 (1985) provides that "there is no set pace at which a carrier must walk and no street standard for walking." The M-01444 (2001) National level settlement states, "Daily piece counts (PCRS) recorded in accordance with the above-referenced systems (POST or DOIS) will not constitute the sole basis for discipline. However, daily counts recorded in accordance with these procedures may be used by the parties in conjunction with other management records and procedures to support or refute any performance-related discipline. This does not change the principle that, pursuant to Section 242.332 of the M-39, "No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards." See also M-01769 (2011) for similar language.

The City Delivery Carriers Duties and Responsibilities Handbook, Sections 112.1, 112.21 and 112.24 require reliable and efficient service, obeying the instructions of your manager and displaying a willing attitude and a conscientious effort. There was no direct evidence that any supervisor had observed a lack of such behavior by the Grievant, and Management cited no specific instance of improper performance. The Grievant had been reassigned from his hold down to Route 3101 that had been reconfigured after a route inspection since the last time he had walked the route. He had been on the route only four days and each day he also had been given an hour bump on various other routes. Article 41.3.F requires Management to give a carrier newly appointed on a route a reasonable amount of time to become efficient on that route. Management failed to afford the Grievant a reasonable amount of time to become efficient on Route 3101.

The M-41 Handbook requires a carrier to notify Management when they are of the opinion that they will not be done within their scheduled time. Each day in question the Grievant submitted a Form 3996 requesting auxiliary assistance explaining his unfamiliarity with the route and the various bumps, that he was leaving the office late because of a large number of parcels and to cover the travel distance to the bump. On each occasion management authorized less than what was requested. I find that it was improper for management to discipline the Grievant solely because he exceeded the street time on a route to which he had just been assigned. The Grievant explained to Management at the pre-disciplinary interview that he had made every effort to service his delivery route

Arbitration decision continued.

efficiently and expeditiously and explained the issues that arose on each of the four dates that resulted in the use of excessive time. Management's inferential conclusion that the mere use of excessive time demonstrated the Grievant's poor performance was not sufficient to establish just cause for discipline.

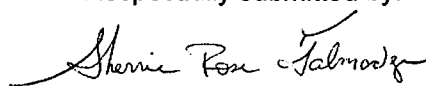
The Service presented no direct evidence that during the four days in question the Grievant was guilty of any improper work habits or of any time-wasting habits. The supervisor may believe that the Grievant was not being productive on his route, therefore, needing overtime to complete the route. If so, the supervisor should have provided a street observation of the Grievant and not merely allege that the Grievant failed to accurately estimate his need for auxiliary assistance making more overtime necessary.

Based on the above, I find that Management did not meet the burden of proving just cause to issue the Grievant a Notice of Removal. Therefore, the grievance is sustained. For the remedy, the removal is to be rescinded and expunged from the Grievant's record. The Grievant is to be reinstated and made whole for lost wages and benefits. I do not find that the Union's request for lost overtime, which is too speculative, is warranted. The Union also argued that the Grievant should be converted to a career carrier because he had the most relative standing among the CCAs as of August 3, 2018, and there were two residual vacancies at that Wheeling Post Office at that time. I do not have sufficient evidence to substantiate the Grievant's relative standing as a CCA and whether there is a current open position for a regular carrier at the Wheeling facility to grant the Union's requested remedy.

AWARD

The Notice of Removal dated July 18, 2018 issued to CCA Comstock charging him with Unsatisfactory Performance was not issued for just cause in accordance with Articles 15, 16 and 19 of the National Agreement, Section 115 of the M-39 Handbook, M-00326 and M-01664. Management's inferential conclusion that the use of excessive time demonstrated the Grievant's poor performance was not sufficient to establish just cause for discipline without evidence that during the four days in question the Grievant was guilty of any improper work or time-wasting habits. The grievance is sustained. As the remedy, the removal is to be rescinded and expunged from the Grievant's record. The Grievant is to be reinstated and made whole for lost wages and benefits.

Respectfully submitted by:



Sherrie Rose Talmadge, Arbitrator