C#18017

SOUTHERN REGULAR DISCIPLINE ARBITRATION PANEL

In the matter of
an arbitration between:

United States Postal Service Employer	)	
	)	Grievant: Donald Marshall
and	)	Case No. G94N-4G-D 97087319
	)	Tulsa, Oklahoma
National Association of Letter Carriers, AFL-CIO Union	)	

Before: Leonard C. Bajork, Arbitrator

Appearances:

For the Employer: O. D. Curry, Advocate

For the Union: John W. Hogue, Advocate

Place of hearing: Tulsa, Oklahoma

Date of hearing: January 22, 1998

Award: The Union's grievance is sustained.

As remedy, the Employer will immediately offer reinstatement to the Grievant. Assuming that TE carriers continue to be employed and assigned work at the Tulsa, Oklahoma postal facility, this award will stay the expiration of the remaining period of the Grievant's 359 day TE tour. On the other hand, should the Employer no longer employ and assign work to TE carriers, this award will likewise stay such remaining period for backpay purposes. Therefore and in either event, the backpay period will begin on the date immediately following the 30-day advance notice period and end upon the date of the Grievant's expired TE tour, less

interim earnings. The Employer will purge from the Grievant's file all records of this case.

Date of award: February 20, 1998

Statement of the Case:

The Union's grievance 1358-97-90 arose on February 26, 1997 at the Employer's Tulsa, Oklahoma, Southeast Station, postal facility where Mr. Donald Marshall, the Grievant had been a transitional employee (TE) Letter Carrier since 1993.

On January 24, 1997, the Grievant received a telephone call from Ms. Terry Johnson, TE Letter Carrier, asking him to bring her to work that morning at 9:00 a.m. The Grievant intended to resolve a pay issue with the Employer at this time but, instead, was assigned to finish Route 4509 in assistance to an unassigned regular carrier. He asked that the meeting on the pay issue be postponed as a result of the assignment. Subsequently, the Grievant cased and pulled down the mail. Before going to the street, the Grievant marked his departure time as 1:40 p.m. and wrote out a buck slip to such effect. He placed the buckslip on a clip board, walked to the supervisor's desk and put the board down in front of Mr. Bobby Holland, Station Manager, who was standing at the desk.

Thereafter, the Grievant delivered the route. Upon his return to the station at 7:40 p.m., the Grievant observed that no one was in the building. He then called the downtown station, as he was earlier instructed to do in such situation, in order to be cleared. As he was leaving the station parking lot, Mr. Holland drove up in his car. The Grievant asked to be checked in. Upon check-in, Mr. Holland told the Grievant that, "This was unacceptable" and added, not to come in the following day.

On January 31, the Employer issued a Notice of Removal to the Grievant, effective March 8, 1997. The grounds for removal were, "Failure to perform your duties".

Positions of the Parties:

The Employer:

The Grievant was removed for just cause. The Grievant failed to timely call the station in order to advise that he would be unable to complete his assignment before the 6:00 p.m. window. The Grievant knew of the rule to call-in but did not.

The Grievant is a TE carrier and is not, therefore, entitled to progressive discipline.

Accordingly, the Employer urges the Arbitrator to sustain its decision to remove the Grievant by denying the Union's grievance in its entirety.

The Union:

The Grievant was removed without just cause.

As procedural matters, the Employer:

1. Refused to furnish the Union with certain information upon its request.

2. In conjunction with 1. above, failed to allow the Union's Step 1 Steward sufficient time to conduct his investigation of the incident.

The Union maintains that the Employer accordingly committed harmful error and urges the Arbitrator to set the Removal aside.

Alternatively and on the case's merits, the Union contends that the Grievant was treated disparately. Finally, it maintains that the removal penalty was punitive.

The parties agreed that the issues properly before arbitration for final and binding determination are:

Was the Grievant removed for just cause?

If not, what is the proper remedy?

The parties each submitted several case authorities as support for their respective positions. Each were considered for their relevance and materiality to the issue of just cause.

Discussion and Findings:

A Question of Harmful Error

The Union included an information request within its contentions of the Step 2 appeal:

> THE UNION REQUESTS AT STEP 2 OF THE GRIEVANCE
>
> PROCEDURE TO BE PROVIDED ALL EVIDENCE THAT
>
> MANAGEMENT WILL BE USING OR RELYING ON TO PROVE
>
> THE CHARGES AGAINST THE GRIEVANT, TO INCLUDE BUT
>
> NOT LIMITED TO:
>
> -copies of carrier reports for 1/24/97
> -any documentation to prove that the grievant was made aware of the requirement to call station management by 3:30 pm, when you cannot make deliveries prior dark.

Regarding the latter, the Union stipulated at hearing that the Grievant knew of the Employer's rule to call from the route if the carrier believes that deliveries cannot be completed before the 6:00 p.m. window.

The Employer's Step 2 denial stated:

> Additionally, you have requested, on your Step 2 appeal, copies of all information/evidence that will be relied upon to prove the charges. That information, should have been requested at step 1 of the Grievance procedure. Additionally, your request is non-specific and a "catch all" and a request to be used "just in case". If you desire specific information concerning the grievance, you should make a specific request to the issuing

> supervisor letting him/her know exactly what information you desire. I am confident the information will be provided. I am willing to cooperate fully in the exchange of copies of all relevant papers or documents. A grievance is filed by the Union and not management. This is your case. If you desire information which you do not have, make the specific request and we will comply within the guidelines of the Collective Bargaining Agreement.

The Union repeated the request within its letter of additions and corrections. However, apparently to no avail.

The Employer's Step 3 denial said:

> Grievant was properly terminated in accordance with Appendix C of the NALC TE Arbitration Award.

I find that the denial is remarkable because of its brevity. It is a stark example of what happens at the top level of Article 15's grievance-arbitration procedure when a case is not first developed at the lower levels. Nothing developed, little basis for response. The Employer's Step 3 brief answer appears to be in reply to the Union's merits position on the absence of progressive discipline. It however makes no reference to the Union's repeated request for information - a request which was last included with its letter of additions and corrections.

The Employer claims that the Union's information request was too broad, without particularity, as basis for its non-disclosure. I respectfully disagree.

The Union's primary request was for the "carrier reports of 1/24/97". Presumably, these reports would have shown which carriers may have called for assistance and the Employer's response as well as who may have missed the 6:00 p.m. window. I find that its request is in fact specific and deserved. I also find that the Employer's reply to the Union's Step 2 appeal's request for information affecting its removal decision, "That information should have been requested at step 1 of the Grievance procedure", is without contractual basis and a denial of the Union's right to fairly represent and defend the Grievant. The parties'

National Agreement and applicable national awards make no distinction between transitional employees' and regular full time employees' due process protections. Here, the Employer denied the Union requested information by which to make proper appeal.

The basis of the Employer's case theory on TE removal appears to be narrowly focused on proving that the TE is guilty of the charged offense consistent with paragraph 11 of Appendix C. Yet Arbitrator Louis V. Baldovin in Case No. G90N-4G-D- 94018185 (1994) stated that such reliance "is only partially correct". Arbitrator Baldovin then went on to analyze a wholly different set of circumstances to which he applied his conclusion. No matter, that case and others like it, make the relevant point that the Employer's total just cause burden involves more than proving a TE grievant's guilt of a matter. Surely, if it means anything, it must mean that TE grievants have a right to representation and the Union a right to represent and defend them. These rights are both contractual and statutory.

It would be a mistake for the Employer to regard generally the Union's information requests as noisome, that is, an arrogant intrusion into its private decision-making province. Nor may it necessarily be true that information disclosure is tantamount to losing a case if winning and not voluntary settlement is the goal. Within the grievance side of dispute resolution, information sharing is the bedrock of voluntary settlement. With it, the parties are enabled to evaluate the potential outcome of an arbitration of a matter. Within and as a result of this fluid process of information exchange and consequent evaluation and reevaluation, grievances may be voluntarily settled. Opportunity for voluntary settlement here was lacking.

One of the Union's positions on the case's merits was the charge that the Grievant was disparately treated. I find that the Employer's denial of its information requests, in particular, the carrier reports for January 24, improperly diminished the Union's employee representative role. Without the requested information, the Union was unable to develop and advance its disparate treatment position. In this regard, the Employer's error I find was harmful insofar as it most certainly affected the case's outcome.

While I make no findings on the case's merits, the Employer's decision to remove the Grievant is set aside and the Union's make whole remedy is granted.

Leonard C. Bajork, Arbitrator