

REGULAR ARBITRATION

 In the Matter of the Arbitration)
)
 Between)
)
 UNITED STATES POSTAL SERVICE)
)
 And)
)
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO)
 _____)

Grievant: Michael Maroney
 Post Office: Southwest Carrier Annex
 (Chicago, IL)
 USPS Case No.: 4J 19N-4J-D 23171633
 NALC No.: 2023-0793

BEFORE: Arbitrator Rafael Gely

APPEARANCES: For the U.S. Postal Service: Francisco Marte

For the Union: John Poskin

Place of Hearing: Cardiss Collins Post Office, Chicago, IL

Date of Hearing: August 3, 2023

AWARD: The grievance is granted.

DATE OF AWARD: August 16, 2023

PANEL: Regular Regional

Award Summary

The grievance is sustained in its entirety. The Arbitrator orders the Service to rescind and expunge the February 9, 2023, Notice of Removal from the Grievant's personnel record and to reinstate the Grievant with full backpay and benefits in accordance with the terms of the National Agreement as they relate to such orders.

Rafael Gely

I. Issue

At the start of the hearing, the representative for the U.S. Postal Service raised substantive and procedural arbitrability contentions. In particular, the U.S. Postal Service's Advocate argued that the grievance was not substantively arbitrable because the grievance was filed after the grievant, Michael Maroney had ceased being an employee of the U.S. Postal Service. He also argued that the grievance was not procedurally arbitrable because the grievance was untimely filed at the Informal Step A Level and because the issue statement refers to a Notice of Removal issued on January 15, 2023, even though no Notice of Removal was issued on that date. The parties allowed the Arbitrator to craft the arbitrability issue statement, which the Arbitrator finds should be framed as: "Was the grievance filed by Local 11 of the National Association of Letter Carriers on March 16, 2023, on behalf of Michael Maroney substantively and procedurally arbitrable? The parties agreed to present the arbitrability issue to the Arbitrator and to allow him to hear the arbitrability issue and the merits at the same hearing.

As to the merits, the parties also presented different issue statements and asked the Arbitrator to craft the issue. The Service proposed that the issue be framed in accordance with the issue presented to the Dispute Resolution Team (DR Team) at the Step B Level, to wit, "Did the Postal Service violate, but not limited to Articles 16 and section 115 of the M-39 Handbook via Article 19 of the National Agreement when issuing Letter Carrier Michael Maroney a Notice of Removal dated 01/15/2023 charging him with 'Failure to Maintain Regular Attendance', and if so, what is the proper remedy?" The Union proposed to modify that statement by changing the date from January 15, 2023, to February 9, 2023.

As discussed below, the Arbitrator agrees with the Union, that the Notice of Removal in question was issued on February 9, 2023, and thus the Arbitrator agrees to frame the issue as

proposed by the Union, namely, “Did the Postal Service violate Articles 16 and 19 of the National Agreement, as well as Section 115 of the M-39 Handbook, when issuing Letter Carrier Michael Maroney a Notice of Removal dated February 9, 2023, charging him with Failure to Maintain a Regular Attendance? If so, what is the appropriate remedy?”

II. Relevant Contract and Manual Provisions

The parties referred to the following contractual provisions during the hearing and in the documentation provided as part of the record. In the interest of brevity, the Arbitrator lists the various provisions, without extensively citing their content.

National Agreement (Joint Exhibit 1)

- Article 1 (Union Recognition)
- Article 7 (Employee Classifications)
- Article 15 (Grievance-Arbitration Procedure)
- Article 16 (Discipline Procedure)
- Article 19 (Handbooks and Manuals)
- Article 31(Union-Management Cooperation)

JCAM (Joint Exhibit 2)

- Page 1-3
- Page 15-2, 15-10, 15-11
- Page 16-1, 16-2, 16-3
- Page 17-4
- Page 31-1, 35-2

Employee & Labor Relations Manual (ELM)

- Section 511.43 (Employee Responsibilities)
- Section 513.362 (Over Three Days)
- Section 665.41 (Requirement of Regular Attendance)
- Section 665.42 (Absence Without Permission)

Handbook M-39

- Section 115.1 (Management’s Responsibilities)
- Section 115.2 (Using People Effectively)
- Section 115.3 (Obligation to Employees)

EL-921 Handbook, Supervisor’s Guide to Handling Grievances

- Pages 36-37

Memorandum of Understanding

- Local Agreement USPS Chicago District & NALC Branch 11 Re: Dispute Resolution Process for the Chicago Installation, January 4, 2017

III. Background

The grievance involves the United States Postal Service, Southwest Annex Carrier, Chicago, Illinois (Service, Postal Service, Management) and Local Branch 11 of the National Association of Letter Carriers, AFL-CIO (Union). The Grievant is Michael Maroney. At the time of the incident that led to this grievance, the Grievant was a City Carrier Assistant (CCA) and had been with the Postal Service for less than two years. During his employment with the Postal Service the Grievant has experienced attendance issues as evidenced by a Letter of Warning for Failure to Maintain Regular Work Attendance that the Grievant received on or around November 4, 2021, a 7-day suspension received on or around March 1, 2022, and a 14-day suspension received on or around September 9, 2022. (Joint Exhibit 3, pp. 29-36).

At some point before January 15, 2023, Derrick Frye, who at the time was working as Supervisor of Customer Relations at the Southwest Carrier Annex Post Office, decided to issue the Grievant a Notice of Removal for absences which Supervisor Frye believed the Grievant had incurred during the previous few weeks. In preparation for issuing a Notice of Removal, Frye conducted a Pre-Disciplinary Interview (PDI) with the Grievant. Union Steward Antoine Thigpen represented the Grievant. According to the notes from the interview, Frye asked the Grievant the reasons for his absences. In response, the Grievant indicated that he had no recollection about a couple of the dates for which he was cited, that he thought that one of the days was his non-scheduled day, that two other days involved “weather issues,” and that on one day, he was sick. (Joint Exhibit 3, pp. 129-131). On January 15, Frye prepared a draft of a Notice of Removal letter

which he sent to the Labor Relations Office for review. (Joint Exhibit 3, pp. 26-28). The January 15 draft was not sent to the Grievant.

On February 9, 2023, after receiving a response from the Labor Relations Office, Supervisor Frye issued the Grievant a Notice of Removal for Failure to Maintain Regular Attendance. The February 9 letter was based on the same list of absences that Frye had shared with the Grievant during the PDI and which were included in the January 15 draft. The letter described the PDI and the sections of the Employee and Labor Relations Manual (ELM) which according to Frye, the Grievant had violated. The letter advised the Grievant of his rights, stating in particular that he “will remain on the job or on the clock at the Postal Service’s discretion, for a period of 30 days,” that at the end of the 30 days he “will be immediately removed from pay status,” and that after that, the Grievant, “will remain on the rolls in a non-pay status until the disposition of this case has been had either by settlement, through exhaustion of the grievance-arbitration procedure.” Unlike the January 15 letter, however, the February 9 letter did not include a list of the Grievant’s previous disciplinary actions. (Joint Exhibit 3, pp. 4-7, 22-26).

The Notice of Removal was delivered via Express/Priority Mail to the Grievant’s address of record at 11316 S. Bell Avenue on February 10, 2023. (Joint Exhibit 3, pp. 114-128). While the 11316 S. Bell Avenue address was the Grievant’s address of record, it was not his residence, but the residence of his parents. The Grievant became aware of the Notice of Removal on February 28, when he went to his parents’ house to collect his mail. (Joint Exhibit 3, p. 17).

At some point between March 14 and March 16, 2023, Union Steward Thigpen met with Shirlonda Williams, the Service’s Informal Step A Level representative to request information about the Grievant and to seek a time extension to initiate the grievance. In the form Thigpen and Williams signed to memorialize their meeting, Thigpen asked for “Any and all discipline issued

to grievant” and “Any and all attendance records from January 11, 2023 through March 16, 2023.”¹ Regarding the time extension, the form stated, “I am also requesting that an Informal Step-A meeting be held on this grievance no later than 3/16/2023, at which time, the grievance will be deemed timely at Step-A Informal.” The form contains a handwritten note by Williams stating, “Carrier has been separated on his 32nd day, 3-16-23.” (Joint Exhibit 3, p. 42).

The Union filed the instant grievance on March 16, 2023, with the Designee Williams and Steward Thigpen meeting at the Informal Step A Level. (Joint Exhibit 3, p. 3). Thigpen and Williams did not reach an agreement and then forwarded the grievance, with Thigpen’s position, to the Formal Step A Level. (Joint Exhibit 3, pp. 18, 40). Union Representative Charles Bundy and Manager Si Yieta Miller met on March 29, for the Formal Step A Level meeting. (Joint Exhibit 3, p. 2). Having reached no agreement, Bundy and Miller advanced the grievance and their positions to the Step B Level. (Joint Exhibit 3, pp. 9-15, 87-128).

The Dispute Resolution Team (DR Team) received the appeal on April 6, 2023, and issued a decision on April 21. The DR Team partially resolved the grievance, agreeing that the Service had violated Article 17 and 31 of the National Agreement by failing to provide the Union all the relevant information that the Union had requested. In accordance with an arbitration award applicable to the Chicago Installation, the Service agreed to paid \$2,500 to the Union. The DR Team reached an impasse on the issue pertaining to the Notice of Removal. This arbitration followed. (Joint 3, Step B Level Decision).

¹ On March 23, 2023, the Union filed a second Request for Release of Information seeking to obtain “copies of any and all documentation/information (Statements, records, audio/video, tapes, photographs) learned, obtained, developed, or relied upon by management to issue the NOR dated 1-15-23 to Michael Maroney.” (Joint Exhibit 3, p. 41).

The hearing took place on August 3, 2023, at the Cardiss Collins Post Office. As noted above, at the start of the hearing, the Service raised substantive and procedural arbitrability challenges. The parties agreed to present the arbitrability issues and the merits of the grievance to the Arbitrator. The parties then made opening statements, presented documentary evidence, and examined witnesses. With the parties' agreement, the Union presented oral closing arguments, which the Service Representative decided not to observe. The parties also agreed to allow the Service to submit a written closing argument by August 7, 2023, and to give the Union the opportunity to submit a reply brief no later than August 12, 2023. The Arbitrator received the parties' briefs as scheduled, at which time the record was closed.

IV. Position of the Parties

A. Position of the Postal Service

The Service raises several threshold matters. First, the Service disagrees with the Union's proposed issue statement. Second, the Service argues that the grievance is both substantively and procedurally non arbitrable.

As to the issue statement, the Service disagrees with the Union's request to change the issue statement by substituting the reference to the January 15, 2023, Notice of Removal with a reference to the February 9 Notice of Removal. The Service requests instead that the Arbitrator carries forward the issue statement used by the DR Team at the Step B Level. The Service notes that the issue statement was crafted by the Union at the Informal Step A Level, and that throughout the file, the Union referred to the January 15 Notice of Removal as the operative document.

Regarding the arbitrability challenge, the Service begins by noting that Article 15 requires that grievances be filed within fourteen (14) days of when the affected employee or the Union become aware or should have become aware of the alleged contractual violation, with the operative

time being the earliest of those two dates. USPS Case No. J11N-4J-D 13338674 (Simon, 2014). The Service then notes that under Article 16.5 an employee who is discharge remains “on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure.” As applied to the instant case, the Service contends that under these two provisions, neither the Grievant nor the Union had the right to file the instant grievance because by the time the grievance was filed on March 16, 2023, the Grievant was no longer in the rolls of the Postal Service. USPS Case No. G16N-4G-D 18143620 (August, 2018).

The Service notes that the Notice of Removal was delivered to the Grievant’s address of record on February 9, 2023, and that it was received the next day. The Service also notes that while the Union contends that the Grievant did not became aware of the letter until three weeks later, the evidence clearly establishes that there was constructive delivery on February 10, 2023. USPS Case No. J01N-4J-D 04135474 (Cohen, 2004). Under the terms of Article 15, for a grievance challenging the Notice of Removal to have been timely, it needed to have been filed no later than February 24, or fourteen days after the Grievant should have become aware of the Notice of Removal. Because a grievance was not timely filed by February 24, the grievance was resolved. As the result, given that the grievance was resolved and given than more than thirty days have passed after the Grievant received the Notice of Removal, the Grievant was no longer in the Postal Service rolls and thus, was no longer covered by the terms of the National Agreement, at least regarding the filing of grievances.

In response to the Union’s contention that any issues regarding arbitrability are moot given that at the Informal Step A Level the parties agreed to an extension until March 16, 2023, the Service first notes that the form documenting the extension is not dated and that its language is

ambiguous. The Service also notes that Supervisor Williams' handwritten note in the document shows that the extension was signed after the Grievant had been taken off the Postal Service rolls, and thus, that the grievance was already defunct and non-arbitrable. The Service cites to two arbitration awards holding that the parties cannot "resurrect" a grievance that is "dead" or that has ceased to be viable. USPS Case No. J06N-4J-D 12338743 (Simon, 2014); USPS Case No. J06N-4J-D 08146750 (Bierig, 2008).

Regarding the merits of the grievance, the Service acknowledges that in disciplinary actions it bears the burden of proving by clear and convincing evidence that the Grievant committed the charged infraction and that in issuing the grievance the Service satisfied the elements of the just-cause standard. The Service contends that it has satisfied that burden.

The Service initially points to evidence that demonstrates that the Grievant was absent on the six days for which he was cited. In three of those instances, notes the Service, the Grievant was absent in an Absent Without Official Leave (AWOL) status. The Service notes that the Grievant failed to provide any documentation explaining the absences, even when given an opportunity to do so.

The Service next contends that in dispensing the disciplinary action, it satisfied all the elements of the just-cause standard. The Service notes that there were reasonable and equitably enforced rules, and that the Grievant knew about those rules as demonstrated by the U.S. Postal Service Attendance Policies document signed by the Grievant during his employment. (Joint Exhibit 3, pp. 112-113). The Service next contends that local management conducted a thorough and complete investigation, that the disciplinary action was timely issued, and that the disciplinary action was corrective in nature. Finally, regarding the Union's contention that the Service did not respond timely or completely to the Union's request for information, the Service notes that the

dispute regarding the request for information was resolved at the Step B Level and thus, it is no longer actionable.

In short, the Service argues that it established that the Grievant committed the charge misconduct and that in issuing the disciplinary action, it satisfied all the elements of just cause, in a manner consistent with the Grievant's due process rights. Accordingly, the Service argues that the NOR should be upheld and that the grievance ought to be denied in its entirety.

B. Position of the Union

The Union reminds the Arbitrator that in disciplinary matters involving termination, the Postal Service bears the burden of proving by clear and convincing evidence that the charged employee engaged in the alleged misconduct, that the Service satisfied all the elements of the just-cause standard, and that the Grievant's due process rights were protected. The Union contends that the clear and convincing standard applies to all the issues raised by the Service including the challenges to the proposed issue statement and to whether the grievance is arbitrable. The Union submits that the Service failed to meet that burden and thus, the Union asks that the grievance be granted.

As to the issue statement, the Union contends that despite the date mentioned in the issue statement, there is no dispute that there was only one Notice of Removal issued, and that it was issued on February 9, 2023. The Union notes that both parties referred to the February 9 Notice of Removal several times in the casefile. At worst, avers the Union, the reference to the January 15 date in the issue statement is a technical error which should not deprive the Grievant of his right to be heard at arbitration.

Regarding the arbitrability challenge, the Union first reminds the Arbitrator that under U.S. Supreme Court precedent, there exists a presumption that disputes arising under a collective bargaining agreement are arbitrable and that an order to arbitrate a grievance should not be denied unless “it may be said with positive assurance” that the parties did not intend for the dispute to be arbitrable. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (S. Ct., 1960).

The Union next argues that the arbitrability challenge fails on two key grounds. First, the Union points to the extension signed by Supervisor Williams and Union Steward Thigpen, in which they agree to hold the Informal Step A meeting no later than March 16, 2023, “at which time, the grievance will be deemed timely at the Step-A Informal.” The Union argues that this language is clear and unambiguous, and that given that Williams did not testify at the arbitration hearing to claim otherwise, the language should be given its natural meaning which is that the Service was willing to treat the grievance as timely filed and arbitrable. The Union also points that the language in the time-extension document has been interpreted to apply to extension requests that are filed either before or after the date when a grievance might become untimely. In that sense, argues the Union, the parties can “resurrect” a “dead” grievance by mutual agreement. USPS Case No. J16N-4J-D 20157613 (Nixon, 2021); USPS Case No. J16N-4J-D 21020059 (Obee, 2021).

Second, the Union points to the fact that the DR Team resolved the grievance in part, even after considering the argument by Formal Step A Designee Miller that the grievance was not arbitrable. The Union contends that it would make no sense for the Service’s Representative at the Step B Level to agree to a partial settlement of a grievance that should not have been heard. The Union notes that these two arguments serve as a response to both the substantive and procedural arbitrability arguments raised by the Service.

In addition, and pertaining to the substantive arbitrability argument, the Union submits that even if the Arbitrator were to accept the Service's contention that an employee cannot file a grievance once the employee is removed from the rolls under Article 16.5, there is no evidence in the casefile supporting the Service's claim that the Grievant has been taken off the Postal Service rolls. The Union notes that there is nothing in Article 16.5 stating that employees who have been discharged are automatically removed from the rolls after the thirty-day notice period. The Union also notes that the Service provided no documentary evidence showing that the Grievant was removed from the rolls.

In short, the Union claims that given the time extension to which the Service agreed at the Informal Step A Level and given the DR Team's decision to partially settle the grievance, the Arbitrator should find the grievance to be both substantively and procedurally arbitrable.

Regarding the merits, the Union makes two sets of arguments. First, the Union contends that the Service failed to establish that the Grievant engaged in the alleged misconduct. Second, the Union argues that the Service failed to comply with all the requirements of just-cause and due process rights, as required by the terms of the National Agreement.

Regarding the first of these two contentions, the Union argues that given that under past practice, absences that occurred in consecutive days are considered to be just one incident, the six absences listed in Notice of Removal should be counted as just four incidents, given that two sets of the absences (December 15 and 16, and December 23 and 24), occurred in consecutive dates. USPS Case No. J06N-4J-D 11190032 (Simon, 2011).

More importantly and related to whether the Service proved by clear and convincing evidence that the Grievant engaged in the charged misconduct, the Union notes that the file contains no documentary evidence indicating that the Grievant was scheduled to work on any of

the Service failed to try to correct the Grievant's misconduct as required by Section 115.1 of the M-39 Handbook. USPS Case No. C11N-4C-D 15176406 (Brown, 2016).

Finally, the Union argues that the Service also violated the Grievant's due process rights by failing to provide the information requested by the Union and by having Manager Miller serve as both the Formal Step A Level representative and the Review and Concur Official. As to the former, the Service notes that there is no dispute that the requested information was not provided, as evidenced by the settlement reached at the Step B Level. As to the latter, the Union points to language in the EL-921 Handbook, Supervisor's Guide to Handling Grievances, which can be read only to mean that the Formal Step A Level representative and the Review and Concur Official should be two different persons. The Union points to various arbitration awards holding that due process violations are sufficient reason to overturn disciplinary actions. USPS Case No. NC-W-15 975-D (Rentfro, 1979); USPS Case No. G16N-4G-D 19411230 (August, 2020); USPS Case No. 4J-19N-4J-D 22048158 (Gallagher, 2022).

In short, the Union contends that the Service failed to establish that the Grievant committed the alleged misconduct and that in issuing the Notice of Removal it satisfied all the elements of the just-cause standard. Accordingly, the Union asks the Arbitrator to sustain the grievance. The Union requests the Arbitrator to rescind and expunge the February 9, 2023, Notice of Removal, to order the Grievant to be reinstated, and to be made whole for all lost wages and benefits, including missed overtime.

V. Discussion

Before addressing the merits of the case, the Arbitrator addresses two preliminary issues, namely, the framing of the issue statement and the arbitrability challenges raised by the Service.

A. Issue Statement

As noted above in Part I of this opinion, the Arbitrator finds it proper to amend the statement of the issue as proposed by the Union. As the parties acknowledge, the Notice of Removal dated January 15, 2023, was just a draft that Supervisor Frye sent to the Labor Relations Office for review. That letter was never sent to the Grievant. Thus, the Notice of Removal that prompted the grievance was the Notice of Removal sent on February 9. While the Union referred to the January 15 date at the Informal Step A Level and at other times during the grievance process, it is clear that both parties understood that the grievance was about the actions taken by the Service on February 9.

B. Arbitrability

The Arbitrator next addresses the arbitrability challenges raised by the Service. As noted above, the Service basic argument is that given that the grievance process was exhausted once the Union failed to file the grievance within the time limits of Article 15 and given that the Grievant was removed from the Postal Service rolls before the grievance was filed, the grievance is both substantively and procedurally non-arbitrable. The Union in turn challenges the factual accuracy of the Service's claim. First, the Union points out that the file contains no evidence that the Grievant was removed from the Postal Service rolls as claimed by the Service. Most importantly, the Union notes that regardless of the status of the Grievant and of when the fourteen-day period would have ended, Supervisor Williams agreed to a time extension, with the explicit understanding that a grievance filed during the extended period, would be considered timely.

The Arbitrator agrees with the Union that the grievance is procedurally and substantively arbitrable. As the Union contends the language of the extension signed by Steward Thigpen and Supervisor Williams is clear. In the extension document, Thigpen requested that the Informal Step

A meeting be held “no later than 3/16/2023, at which time, the grievance will be deemed timely at Step-A Informal.” This is the same language presented to Arbitrator Obee and which he found, could not be interpreted to be “anything other than an acknowledgement and an agreement on the part of the Postal Service” that the grievance was timely filed. Further, as also noted by Arbitrator Obee, that language clearly allows the parties to “resurrect” an untimely grievance, as long as the extension is by mutual agreement.

The specific language used by Supervisor Williams and Steward Thigpen, and which was also before Arbitrator Obee, distinguishes those two situations from Arbitrator Simon’s award in USPS Case No. J06N-4J-D 12338743 (2014), which the Service cites in support of its argument. In the dispute before Arbitrator Simon, the Union tried to circumvent an arbitrability challenge by relying in an agreement entered by the Chicago District Manager and the President of Local 11, in which in an effort to reduce the backlog of grievances, the parties had agreed to deem timely any grievances, which at the time of the agreement, were at the Informal and Formal Step A levels. As Arbitrator Simon noted, there was no evidence in that case, that the blanket agreement at the installation level had the intent of “resurrecting grievances that were already dead.” In the instant case, on the other hand, the language was in reference to a specific grievance and, as the handwritten note by Supervisor Williams show, with the knowledge that as far as she knew the Grievant had been separated from employment.

In addition to the extension signed by the parties, the Arbitrator also finds it relevant that the DR Team partially resolved the grievance at the Step B Level. As the Union submits, it would seem inconsistent for the Service to settle part of a grievance that the Service believes is not substantively arbitrable. This is particularly the case where the issue resolved by the DR Team was the issue related to the Requests for Release of Information and where the requests were made

after, according to the Service, the Grievant had already been taken off the Postal Service rolls. If in fact the Service believed that the Grievant had been removed from the rolls on or about March 14, 2023, the Requests for Release of Information should have been moot given that there would not have been a grievance to pursue. The fact that the DR Team resolved that issue, indicates that at the Step B Level, the Service clearly did not treat the grievance as untimely or as substantively non-arbitrable.

In short, the Arbitrator finds that the grievance is both procedurally and substantively arbitrable. The Arbitrator next considers the merits of the grievance.

C. Merits

In cases involving discipline, the Service bears the burden of proving that the Grievant engaged in the charged misconduct, that the Service satisfied all the requirements of the just-cause standard, and that it did not infringe the due process rights of the grievant.² In cases involving termination, the Service's actions must be evaluated under the more exacting clear and convincing standard. After considering all the evidence and arguments made by the parties, the Arbitrator finds that the Service failed to meet this burden.

As summarized above, the Service contends that there is clear and convincing evidence showing that the Grievant was absent from work on the days listed in the Notice of Removal and that in dispensing discipline the Service satisfied all the elements of the just-cause standard, while also protecting the due process rights of the Grievant. In response, the Union argues that the

² The elements of just cause include: Whether there is a rule; whether the rule is reasonable; whether the rule is consistently and equitably enforced; whether there was a thorough and complete investigation; whether the severity of the discipline reasonably related to the infraction and whether it was in line with that usually administered, as well as with the seriousness of the employee's past record; whether the disciplinary action was taken in a timely manner; and whether the discipline is corrective rather than punitive. JCAM Article 16.1 (Joint Exhibit 2).

Service failed to prove that the Grievant committed the charged misconduct, given that the Service was not able to prove that the Grievant was scheduled to work on the dates in which he was charged with being absent. The Union also raises concerns about several of the elements of the just-cause standard, as well as concerns about violations of the Grievant's due process rights.

The Arbitrator agrees with the Union's initial contention that the evidence included in the file and provided at the arbitration hearing, fails to establish by clear and convincing evidence that Grievant was supposed to be at work on the dates listed in the Notice of Removal. As the result, the evidence also fails to establish that the Grievant could have been charged with being absent on those dates. Accordingly, the grievance should be upheld.³

At the time that the Notice of Removal was issued, the Grievant was a City Carrier Assistant. As the Union noted without disagreement from the Service, City Carrier Assistants do not work a set schedule but are assigned to work as needed. As such, before determining if a particular City Carrier Assistant was absent from work, one needs to know if he or she was scheduled to work on that day. The Union argues that the best evidence for knowing if the Grievant was assigned to work is the work schedule for those dates, information that the Service should have available and which the Service did not provide to the Union, even when requested.

The Arbitrator finds the Service's failure to establish that the Grievant was assigned to work on the days charged in the Notice of Removal to be determinative. As noted on page 16-3 of the JCAM, to meet the requirements of the National Agreement for dispensing discipline, the Service must "prove that the behavior took place." The evidence to make that showing is absent in the instant case.

³ Because the Arbitrator finds the issue of whether the Grievant engaged in the charged misconduct dispositive, the Arbitrator needs not address the various contentions raised by the parties regarding the application of the just-cause standard and the Grievant's due process rights.

The Arbitrator acknowledges that the casefile contains documentary evidence that could have shown that the Grievant was scheduled to work on the cited dates. For instance, the file contains a set of PS Form 3971 (Request for or Notification of Absence) for the days in question. (Joint Exhibit 3, pp. 118-123). The file also contains copies of the 2022 Leave Year Absence Analysis Report, (Joint Exhibit 3, pp. 124-125) and the Employee Key Indicators Report from January 1 to March 15, 2023. While this documentary evidence could have helped to establish that the Grievant was expected to be at work on the days cited in the Notice of Removal, in the instant case, these documents fail to do so. The Employee Key Indicators Report only covers one of the dates cited in the Notice of Removal. The 2022 Leave Year Absence Report shows that the Grievant did not work on those dates but tells us nothing as to whether he was scheduled to work. Finally, while the various copies of PS Form 3971 included in the casefile might establish that the Service believed the Grievant was scheduled to work on the days in which he was believed to be absent, the Union identified a number of inconsistencies in the forms which undermine their reliability in establishing the Grievant's schedule.

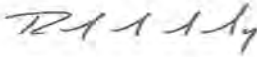
In short, the Arbitrator agrees with the Union's contention that the Service failed to establish by clear and convincing evidence that the Grievant was scheduled to work on the days for which he was cited in the Notice of Removal. Accordingly, the Arbitrator must conclude that the Service failed to prove that the Grievant had engaged in the charged misconduct and thus, the Arbitrator concludes also that the disciplinary action cannot be sustained.

Accordingly, the Arbitrator orders the February 9, 2023, to be rescinded and expunged from the Grievant's personnel records. Because the Service failed to establish that the Grievant was guilty of the charged misconduct, the Arbitrator finds that the Grievant should be reinstated

with full backpay and benefits in accordance with the terms of the National Agreement as they relate to such orders.

VI. Award

The grievance is sustained in its entirety. The Arbitrator orders the Service to rescind and expunge the February 9, 2023, Notice of Removal from the Grievant's personnel record and to reinstate the Grievant with full backpay and benefits in accordance with the terms of the National Agreement as they relate to such orders.



Rafael Gely, Arbitrator
August 16, 2023