

C-36185

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration.	(Grievant: Cory Mesko
Between)	Post Office: Williamsport, PA
United States Postal Service	(Case No.: 4B 19N-4B-D 23042282
and)	Union No.: W502298
National Association of Letter Carriers, AFL-CIO	(DRT No.: 12-592117

BEFORE: Arbitrator Zachary C. Morris

APPEARANCES:

For the Service: Rick Zimmerman, Labor Relations Specialist

For the Union: Stephanie Baiungo, National Arbitration Advocate

Place of Hearing: 2901 W. Reach Rd., Williamsport, PA 17701

Date of Hearing: Wednesday, April 19, 2023

AWARD:

Relevant Contract Provisions: Article 16

Resolution: The grievance is sustained.

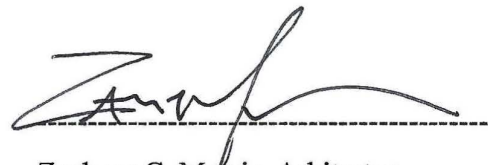
Date of Award: Monday, June 12, 2023

PANEL:

Pennsylvania 1

Award Summary

For the reasons set forth above, the grievance is sustained. The grievant shall be returned to work and made whole, as set forth below. The arbitrator retains jurisdiction for a period of 90 days.



Zachary C. Morris, Arbitrator

PROCEDURAL BACKGROUND

This grievance was filed on November 30, 2022, alleging that Management violated Article 16 and Handbook M-39 §115 when they issued a Notice of Removal to the grievant, Mr. Cory Mesko. Denied at the lower steps of the grievance-arbitration procedure, the grievance is now before the arbitrator for a full and binding review.

Testifying on behalf of the Service were: Manager of Post Office Operations (MPOO), Jasmin Hughes; Postal Inspector, Michael Bond; Supervisor of Customer Service, Craig Kaufman; and Postmaster James Young. Testifying on behalf of the Union were: Steward/Informal A representative, Jeremy Kropp; Branch 50 President/Formal A representative, Steven Sampsell; T-6 Carrier, Adam Reaser; Letter Carrier, Candra Perry; Letter Carrier, Jesse Wertman; T-6 Carrier, Alexis Wolfe; Letter Carrier and Safety Captain, Bill Evelhair; and T-6 Carrier/Grievant, Cory Mesko.

At the conclusion of testimony, the advocates elected to submit post-hearing briefs which were to be postmarked no later than May 8, 2023. The arbitrator received the Service's brief on May 10 and the Union's on May 12, at which point the record was closed. Both the Postal Service and the Union were ably represented and were given a full and fair opportunity to present evidence, examine and cross examine witnesses, and make arguments. In reaching the conclusions and making the Award set forth herein, the Arbitrator has given full consideration to all evidence of record.

ISSUE

Did Management violate Article 16 and Section 115 of the M-39 Handbook, via Article 19 of the National Agreement, when they issued the grievant a Notice of Removal dated November 9, 2022, for Unsatisfactory Performance? If so, what is the appropriate remedy?

STATEMENT OF THE CASE

The grievant, Mr. Cory Mesko, is a T-6 (Utility) Carrier at the Williamsport Post Office and has been employed by the Postal Service for 5 years. He has no discipline of record.

Mr. Mesko was issued a Notice of Removal for Unsatisfactory Performance on November 9, 2022. The events leading up to this removal, however, begin on August 9, 2022.

On that morning, City Carrier/Local Vice President James Pryor was loading up his delivery truck for the day. Another carrier at the Williamsport Post Office, Joe Scocchera, who was serving as a 204(b) in Montoursville at the time, drove by and yelled out to him something along the lines of: “You keep my fucking name out of your mouth or you’ll be sorry! I know where you live. I’ll knock all of your teeth out.”

An investigation into the event was undertaken by Postal Inspector Michael Bond. He received a statement from Scocchera who did not deny having made the threats, although he did add that Pryor was not a complete innocent in the matter. Inspector Bond completed his report, decided that no further action need be taken on behalf of the Inspection Service, and referred the matter to postal management.

Six days later, on August 15, Safety Captain Bill Evelhair completed a PS Form 1767 (Report of Hazard, Unsafe Condition of Practice) in order to report the threat to Management. Supervisor Craig Kaufman notated that he was going to “push for an IMIP”. Postmaster James Young concurred with Kaufman’s decision.

The following day, a safety meeting was held between Management and Union officials to discuss the matter. At this meeting, Postmaster Young informed Union representatives that Mr. Scocchera would not be allowed back in the building until the IMIP investigation was completed. The results of the investigation ended up being inconclusive, as evidenced by a letter in the File written by Labor Relations Manager Adam Davis. However, this letter was not issued until October 12, 2022 – well after the incident which led to the grievant’s removal.

In the weeks of late August and early September, numerous employees of the Williamsport Post Office participated in the investigation in Mr. Scocchera’s harassing behavior. Meanwhile, Mr. Scocchera continued to work his detail in Montoursville. However, his detail eventually ended and he reported back to work in Williamsport on Saturday, September 17, 2022. The carriers working expressed their concerns to Supervisor Kaufman that they did not feel safe working with him in the building. As a result, Scocchera was sent home for the day and paid administrative leave. However, on Monday, September 19 when Mr. Scocchera next reported for work, Management was unwilling to send him home again.

Bill Evelhair and James Young approached Postmaster Young and reminded him that Scocchera was not supposed to be in the building because of what Young had promised them in the safety meeting – that Scocchera would not be allowed back until the IMIP investigation was complete. Young attempted to assuage their fears, telling them that he would be standing at Scocchera’s case and would stay there. However, he did not.

At this point, Evelhair testified that he went over to the nighttime supervisor’s desk and talked to Union President Steve Sampsell, who went to go find Postmaster Young and MPOO Hughes. Meanwhile, numerous carriers had again voiced their concerns to Supervisor Kaufman. Kaufman testified that he told them Postmaster Young would come and speak to them to address their concerns. However, Postmaster Young ended up deciding not to do that.

By this point, a crowd of carriers had gathered at the supervisors’ desk, waiting for Steve Sampsell and Derek Evans to return with Postmaster Young. Before Sampsell and Evans could return, Postmaster Young and MPOO Hughes approached the crowd. Numerous carriers and Management officials testified as to what happened next.

Postmaster Young testified that he had assured employees there was no cause for concern and added that when he came back out with MPOO Hughes, he told the crowd to return to work twice and, when they refused, to either get back to work or to go home.

Carrier Adam Reaser testified that when he arrived, he approached Supervisor Kaufman and requested to address his safety concerns with Management. His statement reads:

“Meanwhile, Jim and Jasmin (Young and Hughes) approached myself and my fellow carriers. We stated that Steve and Derek (Sampsell and Evans) went to find them and wanted to talk as a group and Jasmin immediately got snappy and pointed her finger and said, ‘You don’t work for the Union, you work for the United States Postal Service. You have a job to do. Go case your mail or go home.’ We stated we were waiting for Steve and Jasmin said, ‘Then go home.’ Jim Young said, ‘Go home.’ Jesse (Wertman) said ‘Excuse me?’ and Jim and Jasmin said together: ‘GO HOME.’” On cross examination, Reaser testified that MPOO Hughes directed him to case mail, and that he didn’t immediately go to do that but that he did leave when he was told to.

Carrier Candra Perry testified that she was casing her mail when she heard Postmaster Young and James Pryor arguing out in the parking lot. She stated she decided to leave her case and stand by the door. She heard Postmaster Young say he would be on the floor with the carriers, but then he disappeared. She stated that there was no Union presence on the floor and

the Postmaster had just left, so someone went to go get Steve Sampsell. She testified that when Hughes and Young came up to the group, they told them to leave. Jesse Wertman asked what they had said, and they repeated it. She testified that she was never given instructions to return to her case. She added that the final instruction she received that day was to clock out and go home. On cross examination, she clarified that she was not asked to go back to work or to go home, but simply to go home.

Carrier Jesse Wertman also testified to what occurred that morning. He was aware of the issues with Mr. Scocchera and became agitated when he saw him arrive for work because he knew that he wasn't supposed to be in the building. Wertman walked away from his case to collect himself and then did a vehicle check. He testified that he also overheard the conversation between Evelhair and Young. When MPOO Hughes came out, Wertman said that they had a problem. She replied, "No, you don't. You work for the USPS. You have a job and you'll do what your Postmaster says." Wertman told her that the Union President was coming and she said, "Nope. Go home." Wertman then looked over to Postmaster Young and said, "Jim?", to which Young told him to go home. On cross examination, Wertman stated that he was simply waiting on his Union President to arrive when he was told to go home. He clarified that he was not instructed to go to his case or go home. Rather, he was simply told to go home.

Alexis Wolfe testified to her statement in the File, which reads: "When I noticed Joe Scocchera was on the work floor, I immediately stepped off the work floor because I felt unsafe. Management did not address the situation whatsoever. Steve Sampsell came over to us and went to go get Jim Young. As Steve was looking for him, Jim and Jasmin (POOM) came over and asked what we were doing. We said we were waiting for Sampsell to come over as he was just looking for him. Jsamin then stated we don't work for the Union, we work for the USPS and told us to get back to work. We then stated we felt unsafe and both Jim and Jasmin told us to go home."

Finally, the grievant, Cory Mesko testified. He stated that he arrived to work at 8:00, attended the morning safety meeting, and then did a vehicle check. He saw the conversation between Postmaster Young and Bill Evelhair occurring and wanted to say his piece because he had previous encounters with Scocchera and had participated in the IMIP investigation interviews. Mesko approached Postmaster Young after Evelhair had gone and was told that there were no safety concerns. Mesko then returned to his case and just stood there for a minute,

trying to think of what to do. He saw carriers heading off the workroom floor and decided to follow suit. They were waiting for Steve Sampsell because they wanted assurances from the Union. When Young and Hughes approached, they asked what was going on. Mesko told them that they would like to wait for Union representation before having this conversation and that was when MPOO Hughes told them that they don't work for the Union.

Other carriers said their pieces and Postmaster Young told them to case their mail or go home. Carriers attempted to talk with them after that but Management didn't want to hear it. At that point, both Young and Hughes told them all to go home. He added that, at no point, did Management intimate to anyone that they were engaging in a work stoppage or strike. He stated that he tried to voice his concerns to Management at least four times that day but that they would not listen. He added that he did not participate in a strike and demanded no concessions from Management. He was merely wanting to talk with them about it in the presence of Union representation.

NALC Region 12 NBA Brian Thompson later spoke with officials from the local branch and all carriers reported to work the following day.

On October 4, a pre-disciplinary interview (PDI) was held for Mr. Mesko, geared toward his alleged insubordination. It was conducted by the investigating supervisor, Craig Kaufman, and Jeremy Kropp served as his Union representative. In it, Mesko stated that what occurred was not pre-planned and that he was just seeking to have his safety concerns addressed. He also stated that the carriers were not given an option at the end. They were told to go home, in no uncertain words, by the Postmaster and the MPOO.

On October 12, the Union was informed that the IMIP Investigation into Joe Scocchera's prior actions was complete and that the findings were inconclusive.

On November 3, Supervisor Kaufman requested a Notice of Removal of Unsatisfactory Performance. Postmaster Young concurred the same day and on November 9, the Notice of Removal was issued. It reads, in part:

Specifically, you reported to work on September 19, 2022. Once you were at work you then took it upon yourself to leave work without approval from management with a group of 12 employees. You were a part of this group that made a premeditated decision to abandon your job, violating Article 18 (no strike)

of the National Letter Carrier Contract. You along with this group left the Williamsport Post Office together at the same time that morning claiming that it was due to feeling uncomfortable. You deserted the mail for your route without making proper disposition of the mail for the day.

An Informal A grievance was filed on November 30. The Union's representative, Jeremy Kropp testified that Kaufman wanted to settle the grievance but that he had to follow orders because he had a family to feed. Kaufman refuted that depiction, saying that he would have been willing to settle the discipline down, but that the Union told him he would either have to expunge the discipline entirely or move it up.

On December 8, a Formal A meeting was held between President Sampsell and Postmaster Young. Young denied the grievance, testifying that he did so because there was no safety issue and because the carriers left work after being told to get back to work.

RELEVANT CONTRACTUAL PROVISIONS

Article 16.1 – Principles – In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Article 14.1 – Responsibilities – It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Union will cooperate with and assist management to live up to this responsibility.

Article 14.2 – Cooperation - ...If an employee believes he/she is being required to work under unsafe conditions, such employee may:

- a. Notify such employee's supervisor who will immediately investigate the condition and take corrective action if necessary;
- b. Notify such employee's steward, if available, who may discuss the alleged unsafe condition with such employee's supervisor

Article 18.1 – Statement of Principle – The Union in behalf of its members agrees that it will not call or sanction a strike or slowdown.

Article 18.2 – Union Action – The Union or its local Unions (whether called branches or by other names) will take reasonable action to avoid any such activity and where such activity occurs, immediately inform striking employees they are in violation of this Agreement and order said employees back to work.

Handbook M-39 §115.1 – Basic Principle – In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

Handbook M-39 §115.3 – Obligation to Employees – When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves, as well as to the employee, to:

- a. Find out who, what, when, where, and why.
- b. Make absolutely sure you have all the facts.
- c. The manager has the responsibility to resolve as many problems as possible before they become grievances.
- d. If the employee's stand has merit, admit it and correct the situation.

You are the manager; you make decisions; don't pass the responsibility on to someone else.

ELM §665.11 – Loyalty – Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service.

ELM §665.13 – Discharge of Duties – Employees are expected to discharge their assigned duties conscientiously and effectively.

ELM §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.

ELM §665.21 – Incomplete Mail Disposition – It is a criminal act for anyone who has taken charge of any mail to quit voluntarily or desert the mail before making proper disposition of the mail according to 18 U.S.C. 1700.

ELM §375.2 – Unsatisfactory Performance – *Unsatisfactory Performance* is a level of performance that is repeatedly or consistently below the minimum requirements expected of an employee in the position, based on an evaluation of job-related factors such as reliability, willingness to work with fellow employees, quantity or quality of work production, and attendance. If a supervisor determines that an employee’s performance is unsatisfactory and reasonable efforts toward improving performance to a satisfactory level have not been successful, effort is made to reassign the employee to a job that the employee can be expected to perform satisfactorily. If there is no such job available and if disciplinary action must be taken, the appropriate adverse action procedure is followed.

Handbook M-41 §112.1 – Efficient Service – Provide reliable and efficient service. Federal statutes provide penalties for persons who knowingly or willfully obstruct or retard the mail. The statutes do not afford employees immunity from arrest for violations of law.

Handbook M-41 §112.21 – Obey the instructions of your manager.

POSITION OF THE SERVICE

Employees of the United States Postal Service cannot be allowed to go on strike. The movement of mail throughout this country is far too important a mission to allow for work stoppages. In addition to being set out in Article 18 of the National Agreement, Federal law prohibits Federal employees from striking under 5 U.S.C. §7311. Not only are postal employees prohibited from going on strike or creating a work stoppage, but the Union, under Article 18.2, has an affirmative obligation to “take reasonable action to avoid such activity and where such activity occurs, immediately inform striking employees they are in violation of this Agreement and order said employees back to work.” In the instant case, the evidence is clear that the 15 carriers, including the grievant, who congregated around the supervisor’s desk demanding action be taken by Management were, in fact, participating in a strike. Local Union officials either stood by silently or participated in the strike themselves. The fact that NALC Region 12 NBA Brian Thompson eventually told the employees that they needed to return to work the following day only confirms the NALC’s acknowledgement that what was going on in Williamsport was a strike/work stoppage.

Participating in a strike not only warrants discipline, but immediate removal despite a lack of prior discipline. Arbitrator Wittenberg had the following to say about the matter: “Furthermore, participation in a strike has been found to constitute just cause for discharge under the no-strike provision of the National Agreement and the terms of the Appointment Affidavit. The Postal Service regards the violation of the no-strike provision of such significance as to warrant discharge. The Arbitrator cannot find that the Service’s decision to discharge in this case, given the particular circumstances herein, was either improper or unjust.” *Case No. NON-IM-D 6895*, Arbitrator Carol Wittenberg (1992), at 17-18.

The Union has attempted to cloud the arbitrator’s vision in the instant case with allegations that are unfounded and unproven by documentary evidence and testimony. The employees, including the grievant, claimed they were concerned for their safety but there were no immediate safety concerns that day. The building wasn’t on fire. Asbestos wasn’t falling down from the ceiling. The grievant simply didn’t want to work with a particular fellow employee and thought he could go on strike with other employees to force Management’s hand.

Not a single Union witness testified that Mr. Scocchera ever approached them on September 19. He did not because he was diligently working at his case, unlike the grievant.

The Union also alleges that Management failed to respond to their concerns, but this is similarly untrue. Postmaster Young heard the concerns of Mr. Evelhair, Mr. Mesko, and all of the employees and assured them there were no safety concerns. He, by this point, had reviewed Inspector Bond's report that indicated that no further action need be taken by the Inspection Service. Postmaster Young testified credibly that he was confident there would be no further issues with Scocchera.

Turning to Just Cause, the Union claims there is no rule prohibiting the grievant's behavior, but this is patently false. He was participating in a strike, in violation of Article 18, and he was aware of it. He was questioned about his participation in that strike at his PDI and his removal notice makes clear that the strike was the reason he was being removed. Management's investigation was thorough and objective and the discipline was timely issued, considering the number of removals that were happening at the time and the number of interviews that needed to take place with each of those employees.

The Union's witnesses that testified at the hearing attempted to twist the words of MPOO Hughes and Postmaster Young around to make it seem as if they were simply following their orders to go home. This is an absurd reading of what actually took place. The employees were told to return to work numerous times to no avail and were finally told to get to work or to go home. No reasonable person, when their boss tells them to get to work or go home, comes to an understanding that their boss is giving them the day off. Anybody would understand that statement to actually mean that they need to get to work. Mr. Mesko knew quite well that he was abandoning his duties and walking off the job, but he did it anyway.

The facts are simple. A strike can be defined as a refusal to perform work, organized by a body of employees, as a form of protest in order to gain concession from an employer. This is precisely what occurred on September 19 and nothing the Union says can change that. Mr. Mesko refused to work until Mr. Scocchera was escorted off the premises and when Management refused to do so, he walked out on his job.

The grievant can no longer be trusted to perform the duties of his position. Sustaining this grievance and returning the employee to work would send a message to other employees that if they don't agree with a decision made by Management, they can simply refuse to work until

they get their way. No business can be expected to operate effectively under such conditions. As such, the Service asks that the Notice of Removal be upheld and the grievance denied in its entirety.

POSITION OF THE UNION

The Union reminds the arbitrator that, because this is a disciplinary grievance, the burden is on the Postal Service to show that the grievant acted as charged and that just cause existed to issue the discipline. Furthermore, the Union argues that because the grievant is alleged to have participated in a criminal act punishable by Federal law, the evidentiary standard has been raised beyond the typical “preponderance of the evidence” standard, and elevated to “beyond a reasonable doubt”, or at the very least, “clear and convincing”.

Management has attempted to portray the grievant as some disgruntled employee standing outside of a picket line with a sign in one hand and a bullhorn in the other. This is a preposterous take on what actually occurred. Mr. Mesko, along with some other concerned employees, approached Management with their safety concerns. They attempted to do so in the presence of Union representation. Management not only failed to retrieve a Union representative for these employees (as testified to by Steward Kropp and President Sampsell), but dismissed their concerns outright. The grievant tried to express his concerns to them no fewer than four times and, ultimately, the Postmaster and the MPOO told all of the employees to go home. The grievant did as he was told.

There is no shred of evidence that supports Management’s argument that this was a strike or a work stoppage. There is no evidence that anything that occurred on September 19, 2022 was premeditated or a calculated move to slow or stop the flow of mail. There is no evidence that Mr. Mesko was ever given a direct order to return to work and that he refused to comply with that order. Management never gave him a direct order. They gave him two options – go case your mail while we do nothing to assuage your well-founded fears or you can go home. In short, the Service has utterly failed to show that the grievant acted as charged.

This leads to one of many due process concerns with the discipline as well, and that is the fact that the charge itself is defective. The grievant was brought in for his PDI to discuss an alleged instance of insubordination, yet he was ultimately charged with Unsatisfactory

Performance. A review of the ELM definition of this term makes quite clear that it is an improper charge in the instant case. There were no issues with the grievant's job performance. Compounding this error on Management's part is the fact that the grievant was never actually referred to or questioned about unsatisfactory performance at his PDI. An employee has a right to know what he or she is charged with at the PDI because that is his or her day in court. The grievant was deprived of this right.

Secondly, there are serious concerns with the review and concurrence of the discipline. First, the discipline was proposed by Supervisor Kaufman on November 3 and Postmaster Young concurred with his request that same day. Postmaster Young's "failure... to make an independent substantive review of the evidence prior the imposition of a suspension or discharge", as Arbitrator Eischen put it in *Case No. E95R-4E-D 01027978*, Arbitrator Dana Edward Eischen (2002), is clearly a fatal flaw in the imposition of this discipline.

Furthermore, the evidence is clear that Management was not even done with their investigation when discipline was proposed. Steve Sampsell testified that PDIs for other carriers about the events of that day were still ongoing after November 3.

Finally, Mr. Mesko was denied due process when Postmaster Young not only issued the order to get to work or go home, but also served as concurring official and even Management's representative at Formal A. How could we expect Young to provide a fair assessment of the facts when he was involved in the situation that led to discipline? Moreso, how could we expect Postmaster Young, at Formal A, to be willing to listen to the Union's arguments and consider settling the grievance when he had already concurred on the discipline, thereby signifying that he had made his mind up that the discipline was warranted and issued for just cause? The fact is that we can't because Postmaster Young was judge, jury, and executioner in this case.

The last due process issue concerns a violation of Article 15.2 Informal Step A(b), which reads: "In any such discussion the supervisor shall have authority to resolve the grievance." The Union's Informal A representative, Jeremy Kropp, gave credible testimony indicating that Supervisor Kaufman wanted to settle the grievance, but "had his orders". Kropp further testified that he attempted get that in writing as an "undisputed fact", but that Kaufman declined to do so because he had a family to feed. This is clear and credible evidence that Supervisor Kaufman did not have authority to settle this grievance at Informal A and this only makes sense when you

consider the fact that the event leading up to the discipline directly involved his boss, Postmaster Young, and his boss' boss, MPOO Jasmin Hughes.

Finally, there are six elements of just cause set forth in the JCAM, of which the Union cites three as having been violated – *Is there a rule?; Was a thorough investigation completed?; and Was the disciplinary action taken in a timely manner?*

As to the first, the Union again points out that there is no indication the grievant was aware of the rule. He was never notified on that day that he was engaged in what the Service considered to be a work stoppage or strike. The first mention of that was during Mr. Mesko's PDI. Also as mentioned before, Mesko was charged with unsatisfactory performance but was never questioned about that or made aware that this was a rule or that he might be in violation of it until the day he received his Notice of Removal.

Management also failed to conduct a thorough and objective investigation. Supervisor Kaufman knew very well that Management had given the employees the option to work or go home as evidenced by an interview he gave with Steward Kropp. Kropp asked him if Management gave carriers "the option to either stay and work with their safety concern or go home". Kaufman answered that yes, they did. It is clear Kaufman knew this was not a strike, but yet he proceeded to charge the grievant with going on strike anyway. Furthermore, as indicated before, Management had not completed its investigation into the event prior to the request for discipline for Mr. Mesko. Management's need to continue investigating after the request for discipline clearly indicates that even they knew that, as of November 3, 2022, the investigation was not complete.

Finally, the grievance was untimely issued. The incident occurred on September 19, the PDI was held on October 4, and yet Management waited until November 3 to request discipline. When the Union asked for "any and all information relied on" to issue the Notice of Removal, all they received from Management were the PDI notes, Mr. Mesko's 3971, and the disciplinary action request. Clearly Management relied on little else beyond the PDI. Why then did they sit around doing nothing for a month from October 4 to November 3 before taking any action?

Because Management failed to prove the grievant acted as charged, because they denied the grievant his due process rights in numerous ways, and because they failed to show that the Notice of Removal was issued for just cause, the Union asks that the grievance be sustained. As a remedy, they request that the grievant be returned to work, that he be made whole for all lost

wages and benefits, including lost overtime opportunities, and the arbitrator retain jurisdiction for a period of 90 days.

OPINION

At the outset, I will address the issue of the appropriate standard of proof. Typically, the standard of proof in labor arbitrations is a simple “preponderance of the evidence” standard. Where allegations of moral turpitude are involved or where the grievant is accused of criminal conduct, an elevation of the standard to “clear and convincing evidence” is appropriate. The Union provided examples in which arbitrators felt the standard could be raised even higher in similar circumstances to a “beyond a reasonable doubt” quantum of proof.

I am of the opinion that “clear and convincing” is the highest standard of proof appropriate in a labor arbitration setting. The most Mr. Mesko stands to lose in this proceeding is his career with the Postal Service, which is no small matter of course. However, the “reasonable doubt” quantum of proof is appropriate in a criminal trial because the accused stands to lose his freedom or, in certain cases and in certain states, his very life. Because the grievant is accused of a federal offense, it is my decision that the Service must carry its burden of proof by clear and convincing evidence, but I am unwilling to elevate the standard even higher.

As fact finder, it is the arbitrator’s duty to determine a coherent narrative when, as here, there are differing accounts of the event in question. While each person who testified had slightly differing memories of what took place and some heard things that others didn’t, the following is my assessment of the most important details concerning the events of September 19, 2022 and those leading up to it.

Joe Scocchera had a history, shall we say, with many carriers at the Williamsport Post Office. He had, on August 9, made verbal threats of physical assault toward James Pryor at the Williamsport Post Office. Management determined that an IMIP investigation into the alleged threats were necessary. Numerous carriers, many of which were involved in the events of September 19, participated in that investigation by giving interviews to the two Postmasters conducting it. Those carriers seemed to fear retaliation for their participation in the investigation from Mr. Scocchera. Postmaster Young gave the Union assurances that Scocchera would not be allowed back into the building until the IMIP investigation was complete.

Despite these assurances, Scocchera was permitted to return to work at the Williamsport Post Office prior to the completion of the investigation based on a decision of the Inspection Service that no further action was necessary on their part. When Scocchera first returned on Saturday, September 17, carriers went to Supervisor Kaufman about it. Being the only managerial presence in the building, Kaufman decided to send Scocchera home and pay him administrative leave.

On Monday, the 19th, however, Scocchera returned and some carriers took their concerns to Postmaster Young this time, who assured them everything would be okay because he would be standing on the workroom floor next to Scocchera's case to ensure nothing happened. Postmaster Young then went back to his office. This caused the carriers a great deal of concern because they had twice been given promises from Postmaster Young that turned out to be empty, and a carrier who had admittedly threatened to kick another carrier's teeth in was now walking amongst them. Worse, that carrier likely had cause for animosity toward Mr. Mesko and the other carriers because of their participation in the IMIP investigation.

Restless, the carriers began to congregate at the supervisor's desk and requested their President, Steve Sampsell, go retrieve Young and MPOO Hughes so that everything could be sorted out.

While Sampsell was gone, Young and Hughes returned, asking what the fuss was all about. The carriers informed them that they wanted to wait until Sampsell had returned because they felt this was a conversation that demanded a Union presence. MPOO Hughes told them they did not work for the Union, they worked for the Post Office, and they needed to return to their cases and work. The employees did not immediately comply, instead attempting to voice their concerns without a Union presence. MPOO Hughes told them to either get to work or to go home. Carrier Jesse Wertman asked for clarification about what she had just said, and both Hughes and Young told the carriers to go home. At that point, the carriers, including the grievant, clocked out, gathered their belongings, and left for the day. They all returned to work the following day on the advisement of NBA Thompson.

Considering the facts presented at the hearing and the documentary evidence in the File, I cannot come to the conclusion that the employees participated in anything resembling a strike. The employees had, in my eyes, legitimate safety concerns considering the fact that Scocchera

had recently threatened to kick one of the employees' teeth in. Bear in mind that this was not an allegation. Scocchera admitted as much to Inspector Bond.

But even if there was no immediate safety concern, as the Service argues, there is no evidence that there was a concerted effort to refuse to work until Scocchera was removed from the building. In short, there was no strike. Rather, the employees wanted to have their concerns addressed with Young and Hughes in the presence of President Sampsell. They were not afforded that opportunity because Management never went to get President Sampsell. Instead, they told the carriers to get back to work.

At this point, it is true that Mr. Mesko and the other employees did not immediately comply with that order. It is also true, however, that there was no testimony given that the employees threatened a strike at this time. They continued to try speaking to Young and Hughes until they were told to work or go home. Shocked by what they had just heard, they asked for clarification, and were told to just go home.

I will quote from a similar case decided by Arbitrator Chapdelaine that is on point in this regard:

This Arbitrator agrees completely with Arbitrator Aaron that the Service must provide proof that the striking employees acted together and that a concerted effort was made to urge other employees to walk off the job, too. This Arbitrator also agrees that the Service must prove that the supervisor gave a direct order to her subordinates that they must return to work before those employees left for the day. In the instant case, no conclusive evidence was submitted during this arbitration hearing to establish that the Grievant had overheard Zittle invite other employees to walk out or that he had acted on such invitation. In addition, based on the testimony of Supervisor Rennecamp, Rucker had said "if you can't follow instructions, **you can go home**". That permissive statement falls far short of a direct order to the employees that they must return to work, and it does not support Management's contention that the Grievant participated in a concerted strike or slowdown. *Case No. J11N-4J-D 16670060*, Arbitrator Paul Chapdelaine (2017), at 11.

In my view, the absolute worst the grievant could be charged with under these facts is Failure to Follow Instructions due to the fact that he did not immediately comply when MPOO Hughes told him to return to his case. It is not as if Mr. Mesko walked out of the building when she initially told him to return to work. While admittedly not complying with her order, it can't be said his actions were unreasonable when he requested a Union presence be there to make sure his rights were being looked after. The entire series of events lasted no longer than a few minutes. Mr. Mesko was not involved in a prolonged refusal to work. He, quite reasonably in my view, sought nothing more than to have his concerns addressed by Management.

It is my opinion that, at the very least, the discipline must be reduced to a Letter of Warning due to the fact that Mesko has no prior discipline and the only postal regulation he was possibly in violation of was ELM §665.15 – Obedience to Orders. The only thing Mr. Mesko is alleged to have done that would warrant immediate removal is participating in a strike and I have already determined that he did no such thing.

However, the Union presented numerous other arguments which were quite convincing. While I found Mr. Kaufman's rebuttal testimony concerning his ability to settle the grievance at Informal A quite convincing and find no violation of Article 15.2 Informal Step A(b), I do find Postmaster Young's multiple roles in this grievance troubling. Postmaster Young was directly involved in the event, he served as concurring official, and then he served as the Service's Formal Step A designee.

As I have stated before, "Article 15 provides for an independent review of the discipline imposed at Step 2 and it is difficult to envision such an independent review being afforded the grievant when the person charged with independently reviewing that discipline is the one who issued it in the first place." *Case No. 4J 19N-4J-D 22264020*, Arbitrator Zachary C. Morris (2023), at 11.

I am not the only arbitrator to hold such a view: "The initiating official, the Manager who discovered the piece of mail, was the same person that concurred in the removal. Additionally, that very same person was the Employer's Step A official. The same Manager initiated the action, concurred in the removal and also acted as the Step A representative. This fact demands repetition." *Case No. H06N-4H-D 09346279*, Arbitrator Lawrence Roberts (2010), at 10-11.

Even the Postal Service's own Supervisor's Guide to Handling Grievances (Handbook EL-921) envisions the concurring official to be a separate person from the Step 2 designee: "A

situation may arise where the Step 2/Formal Step A designee finds the discipline either unwarranted or too severe based on the facts and evidence presented at the Step 2/Formal Step A discussion. If so, the Step 2/Formal Step A designee should discuss the case with the reviewing authority and the supervisor involved before rendering a decision. Step 2/Formal Step A designees must not handle grievances as though they were 'rubber stamping' decisions that have already been made."

Additionally, there are serious problems with the Notice of Removal itself. It charges the grievant with Unsatisfactory Performance. ELM §375.2 reads, "If a supervisor determines that an employee's performance is unsatisfactory and reasonable efforts toward improving performance to a satisfactory level have not been successful, effort is made to reassign the employee to a job that the employee can be expected to perform satisfactorily. If there is no such job available and if disciplinary action must be taken, the appropriate adverse action procedure is followed."

This is quite clearly a regulation designed to correct employee behavior and yet is it used here in this Notice of Removal to remove an employee with no prior discipline and where there is no evidence of unsatisfactory performance. Making matters worse is the fact that the grievant was never questioned about this charge at his PDI, yet was charged with it in his Notice of Removal.

As to the Union's arguments concerning just cause, the most persuasive is the tenet that discipline must be issued in a timely manner. While there are certain situations in which there is good cause for investigations to linger, such as where a lengthy OIG investigation is underway, there is no evidence of such being the case here. In fact, when the Union, in its RFI, requested "any and all documentation relied upon to issue the discipline", the Service provided nothing more than a PS Form 3971, the disciplinary action request, and Mr. Mesko's PDI which took place on October 4. Yet the discipline was not issued until well over a month after that and almost two months after the alleged "strike". What exactly was occurring between October 4 and November 3? The documentation provided to the Union in response to its RFI would indicate the answer was nothing, at least in regard to Mr. Mesko's discipline.

Numerous other arguments made by the Union, while persuasive, need not be addressed here. The Service denied the grievant his due process rights, they failed to show that the discipline was issued for just cause, and perhaps most importantly, they failed to show that the

grievant committed the offense for which he is charged. Consequently, the grievance shall be sustained.

AWARD

For the reasons set forth above, the grievance is sustained. The grievant, Cory Mesko, shall be returned to his former position at the Williamsport Post Office as soon as administratively possible. He will be made whole in all ways, to include back pay, benefits, lost overtime opportunities, and his seniority shall be restored. The arbitrator shall retain jurisdiction for 90 days in the unlikely event that there is a dispute concerning the application of this remedy.

A handwritten signature in black ink, appearing to read 'Zachary C. Morris', is written over a horizontal line.

Arbitrator Zachary C. Morris

Charlottesville, VA

June 12, 2023