28040

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of Arbitration	Grievant:	Denise Miles-Shields
Between	Post Office:	New Orleans, LA
United States Postal Service	USPS Case No.	G06N-4G-D 08259401
And	NALC Case No.	08-106515
National Association of Letter Carriers, AFL-CIO		

Before: Richard O. Brooks, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Ernest J. Parfait
Labor Relations Specialist

For the Union: Pete Moss
Regional Administrative Assistant

Place of Hearing: New Orleans, LA

Date of Hearing: November 6, 2008

PANEL: SOUTHWEST AREA REGULAR

Date of Award: January 7, 2009

Richard O. Brooks, Arbitrator

RECEIVED
JAN 9 2009
NALC REGION 8

RECEIVED
FEB 9 2009
VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

NATURE OF THE CASE

The grievance arose under the National Agreement between the United States Postal Service (Management) and the National Association of Letter Carriers, AFL-CIO (Union). The grievance, not being settled in the earlier steps of the grievance procedure, was presented to the Arbitrator at 9:00 AM on November 6, 2008 at the Postal facility located at 701 Loyola Avenue, New Orleans, Louisiana, at which time all parties were afforded a full and complete opportunity to present any and all written evidence; to present, examine and cross-examine any and all witnesses and to present any and all arguments in support of their case. Both parties filed briefs and the record was closed upon the timely receipt of both the Agency's and the Union's briefs on December 8, 2008.

ISSUE

The issue, as determined by the Arbitrator, is: "Did Management have just cause to issue the Grievant a notice of removal for failure to follow instructions?"[1]

BACKGROUND

The Grievant, a Transitional Employee, worked as a Carrier at the Central Station in New Orleans. On June 20, 2008, the Grievant was given a Notice of Removal which notified the Grievant that she would be removed from the Postal Service on July 11, 2008. (JTX2-25, 26) The Notice of Removal was dated June 6, 2008 but was not signed until June 19, 2008, due to the Manager of Customer Service Operations being on leave for two weeks. (Testimony of Mr. Gregory Meeks, Manager of Customer Service) The Grievant received the notice on

June 20, 2008. The Notice of Removal charged the Grievant with FAILURE TO FOLLOW INSTRUCTIONS; "specifically, on Tuesday, May 19, 2008, you were assigned route 1910. At approximately 08:30 PM you returned to the unit with undelivered first class mail. You brought back a half of foot (sic) of flats and three quarters of a foot of letter mail." (JTX2-25) The Grievant was given an investigative interview on May 21, 2008. The Notice of Removal was prepared and dated June 6, 2008, although the letter was not signed by Management until June 19, 2008, due to the two week absence of the Manager, Customer Service Operations, who was the concurring official. (Testimony of G. Meeks)

Testimony by the Grievant revealed that on May 19, 2008, she returned approximately one and one half feet of mail because it was too dark and she felt she was not safe in the delivery area. The Grievant testified that she did try to call the station but no one answered the telephone. The Grievant testified that she did not have Mr. Meeks' cell phone number, however, on cross examination she said she had called him before. The Grievant stated that she had been told that if she couldn't finish her route by 3:00 PM, to call and that she had not been told to come back to the station if she couldn't make contact. Although the Grievant testified that she had been told to follow the instructions of her Managers, she testified that she did not remember a January meeting about which Mr. Meeks testified in which he had informed her of her obligation to follow her Managers' instructions. Finally, the Grievant testified that she filled out a Form 1571 when she brought back the mail on May 19, 2008, (JTX2-29) and that she did not bring any mail back on May 20th as charged.

POSITION OF MANAGEMENT

Management argues that the Grievant violated the instructions of her Manager when she brought back mail without calling for instructions and/or assistance in completing her deliveries. In support of Management's position the following were offered:

1. There was a rule covering the infraction with which the Grievant was charged.
2. (Testimony of Meeks and ELM 665.13 and 665.15 as well as several sections of the City Delivery Carriers Duties and Responsibilities M-41)
   112.21 Obey the instructions of your manager.

131.33 Unless otherwise instructed by a unit manager, deliver all mail distributed to your route prior to the leaving time for that trip and complete delivery within scheduled time. It is your responsibility to inform management when this cannot be done.

131.45 Do not curtail or eliminate any scheduled delivery or collection trip unless authorized by a manager, in which case you must record all facts on Form 1571.

2. The employee was aware of the rule. (Grievant's testimony)
3. The rule was reasonable.
4. The rule was consistently and equitably enforced. There was no evidence to the contrary.
5. A thorough investigation was completed. An Investigative Interview was held on May 21, 2008. (JTX2-7)
6. The severity of the discipline was appropriate for the violation.
7. The discipline was issued in a timely manner.

Management argued that the Union did not mention the improper date for the infraction in Step A and was, therefore, precluded from subsequently using that argument at the hearing. Management argued that Transitional Employees may be removed in accordance with the provisions of Article 16 of the Collective Bargaining Agreement, which provides: " Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge"

Management further argued that the Union cannot argue that Management used the wrong date for the events responsible for the Grievant's removal because it is a new argument and the Union is prohibited from using a new argument after step A of the grievance procedure. Finally, Management argued that the Arbitrator should deny the grievance in its entirety and uphold the Grievant's removal from service.

POSITION OF THE UNION

The Union argues that Management did not follow the requirements of just cause for the Grievant. The Union argued that even if there was a rule, the employee was not aware of it and that Management had produced no training records which would demonstrate that the Grievant had been paid for time to read and study them. The Union further argued that the rules would be reasonable if Management had informed the Grievant of such rules/regulations. The Union also argued that the rules had not been consistently and equitably enforced and that a thorough investigation was not made and the discipline was not issued in a timely manner. The Union further argued that the Grievant was not given a thirty day notice of the Agency's intent to remove the employee. Finally, The Union argued that Management used the wrong date of the incident upon which the removal was based.

DECISION

Both Management and the Union presented cases in support of their respective positions and they were all read and carefully considered. This Arbitrator will not unnecessarily clutter the record with lengthy quotes, but will briefly quote from them only if deemed necessary. In order for Management to prevail in this case, it must prove, by a preponderance of the evidence, that the Grievant committed the offense. The Arbitrator is prohibited by the provisions of the Collective Bargaining Agreement from altering the punishment if the Grievant is proven guilty of the offense. In addition, Management must prove that it did not violate the terms of the Collective Bargaining Agreement in doing so. Most of the facts of the case are uncontroverted. There is no question that the Grievant returned mail to the station on the evening of May19, 2008. The Grievant admitted she brought the mail back and that she did so without being told to do so by her Manager as she had been instructed. The Grievant completed a Form 1571 and it was signed by Manager Rainey. (JTX2-29) There can be no question that the rules exist and are

published. Although it cannot be proved whether any employee has read and understands the rules, the Grievant testified that she was aware that she must follow the instructions of her Manager and that she was aware that she was to call her Manager if she could not complete her deliveries by 3:00 PM (15:00 hours). The Grievant testified that she called the station and no one answered but that she did not know Mr. Weems' number, even though she had called him on at least one prior occasion. The Collective Bargaining Agreement contains no provision requiring Management to compensate employees for reading the work rules.

Article 3 of the Collective Bargaining Agreement affirms Management's right to operate the business in an efficient manner. These rights are very broad, even when limited by other provisions of the Collective Bargaining Agreement. Subject to the aforementioned limitations, Management makes and enforces various rules it determines necessary to maintain an efficient and safe operation. Although the Union argued that the rules were not consistently and equitably enforced, there was no offer of proof. Therefore, the finding of the Arbitrator is that, in the absence of proof to the contrary, the rules have been consistently and equitably enforced.

The Union's argument that a thorough investigation was not completed falls due to the fact that an Investigative Interview was held on May 21, 2008 and the Grievant admitted she brought mail back without her Manager's approval. (JTX2-19) Under the conditions existing at the time, the discipline was issued in a timely manner. The fact that the Grievant was not given a thirty day notice of the Agency's intent to remove her was adequately dealt with when she was paid eight hours per day for thirty (30) days, from May 30, 2008 through July 11, 2008, thus making that argument moot. (JTX2-20)

There is no doubt that the discipline issued was punitive rather than corrective or progressive. A removal is always punitive, since it has been known as industrial capital punishment for many years. However, there are a number of instances in which progressive discipline may not be appropriate. The Collective Bargaining Agreement does not require Management to administer progressive discipline to Transitional Employees.

The remaining problem is Management's use of the wrong date on the Notice of Removal and substantially every other document in this case. The parties agreed that the Union first brought up the date in the Step B meeting. Management argued that the

Collective Bargaining Agreement prohibits the Union from making a new argument that was not made in Step A. Although it is correct, the same argument applies to the Agency's argument that the date was merely a typo. The date of May 19, 2008 appeared on every document the Arbitrator could find, including Management's opening remarks and in the initial parts of Management's post hearing brief.

This Arbitrator does not consider using the wrong date on the very document issued for the express purpose of ending the employee's employment with the Agency, an insignificant matter. The entire case went forward using the wrong date, even though the Union had made Management aware of the error in Step B. Instead of correcting the date, the case continued with the Union arguing it was improper and Management arguing, in the hearing and in brief, that it was merely a typo. If the Union is prohibited from arguing the date is wrong, equity requires that Management be prohibited from arguing that it was merely a typo. Many cases have been lost in the courts due to similar mistakes. Management presented no proof that the Grievant returned any mail on May 20, 2008 and that is the date she was charged with doing so.

AWARD

The discipline cannot stand. The Grievant must be reinstated and paid for hours missed from July 12, 2008 until the end of her current appointment.

Date: January 7, 2009

Richard O. Brooks, Arbitrator

[1] At the outset of the hearing the parties could not agree on the proper issue. The Union insisted that the parties could not change the issue from the Step B decision and Management argued that the parties could either agree on the appropriate issue or the Arbitrator could determine the issue. The issue was determined by the Arbitrator.