

REGULAR ARBITRATION

C01233

---

IN THE MATTER OF ARBITRATION BETWEEN	*	
	*	
	*	
THE UNITED STATES POSTAL SERVICE	*	Re: Bertrand Henderson - Texas City, TX
Employer	*	
and the	*	6 S8N-3U-D-32986 - Proposed Removal
	*	
NATIONAL ASSOCIATION OF LETTER CARRIERS	*	7 S8N-3U-D-34704 - Final Decision to
UNION	*	Remove
	*	

---

APPEARANCES

For the Employer: Mr. Michael Young, Labor Relations Representative

For the Union: Mr. Peter A. Goodman, Regional Administrative Assistant

---

On February 25, 1982, the Union and the Employer authorized the undersigned to decide whether or not the Employer had just cause to remove Bertrand Henderson from service on July 31, 1981. A Hearing on the proposed removal and the final decision to remove Henderson was held on February 25 and 26 of 1982 in the U. S. Post Office in Texas City, Texas. Both parties attended, presented witnesses, and offered evidence. All evidence offered was received, all witnesses were sworn, both parties were allowed to cross examine the witnesses, post Hearing briefs have been received from both parties, and I have read and considered the briefs of the parties.

The assignment of this grievance came to me as file number S8N-3U-D-32986 and this file number was the file number for the proposed removal. The final decision to remove was rendered on June 26, 1981 and that decision spawned a 2nd grievance with file number S8N-3U-D-34704. At the arbitration, the parties stipulated:

The arbitration of grievance number S8N-3U-D-32986 will dispose of the question of the propriety of the proposed removal and the subsequent removal of Bertrand Henderson.

I will relate the events leading up to this removal as I believe those events

occurred.

Preliminary Background Discussion

Henderson began working for the Employer approximately 2½ years prior to his removal in July 1981. His tenure at the Post Office was not without difficulties and I will relate these earlier entries in the record because I believe these earlier entries largely influenced the course of action that followed the on the job injury that Henderson suffered on April 6, 1981. The following is a list of these earlier entries:

1. On May 15, 1979 Henderson injured his left shoulder while at work. He was advised to not work the remainder of the day.
2. On August 25, 1979 Henderson sprained his back and he stopped working the next day. He returned to light duty work on August 30, 1979.
3. On November 8, 1979 a dog grabbed Henderson's boot while he was on delivery. He was off the job from November 9 to December 3 and he was sent for remedial training when he returned to duty.
4. On June 12, 1980 a dog bit Henderson's right leg. There was no lost time except for emergency room treatment.
5. On August 27, 1980 Henderson was stung on the forehead by an insect. He lost 1 day of work.
6. On September 25, 1980 Henderson lost time for a rash between his legs.

The next entry was for April 6, 1980 which is the subject of this arbitration. However, before going into that matter, I will discuss a related matter of Henderson's outside work activities because those activities became relevant to the events after April 6, 1981.

Henderson taught an after hours class in karate for the Hitchcock Independent

School District in Hitchcock, Texas. The class met in Hitchcock gym for 3 evenings a week with a normal starting time of 7 p.m. This activity of Henderson's was generally known throughout the Texas City Post Office. Henderson did not request permission from management at the Post Office to teach the course, he made no secret of the fact that he was teaching karate, and management made no objection to his teaching the class.

On April 6, 1981, Henderson reported for duty as a Letter Carrier. He cased his mail and went on the street to deliver Route 19. While on delivery, he reached back to get a parcel. When he turned around he struck his right elbow on the gear shift. He finished his route that day, but his elbow was noticeably swelling by the time he reached the station. He reported the accident to Supervisor Fred Hinson and medical treatment was authorized. As soon as Henderson got off work he went to see Dr. Robert Sullivan. Henderson was off work on April 7, 1981 on a continuation of pay basis.

Henderson was not scheduled to work 4-8-1981 but he went to see Dr. Sullivan. Sullivan prescribed an anti-inflammatory medicine; he completed, signed and dated a form CA-17; and he suggested that Henderson try to do some work. The form CA-17 was a DUTY STATUS REPORT completed by Dr. Sullivan and Item 8 of the form disclosed that it was Dr. Sullivan's medical opinion that Henderson could not perform his regular duties until 4-22-1981, but that Henderson could do light duty work. In addition Item 9 of the CA-17 contained a full restriction in that Henderson was not to reach or work above his shoulder. Item 9 also had a partial restriction for "pulling, pushing, and carrying" and a partial restriction on "repeated bending." The next day, April 9, 1981, Henderson returned to work. He cased and carried his route and went off duty after 9.3 hours of work.

On April 10, 1981 Henderson reported for duty and he worked at casing his route. After working 3.22 hours he left work, but he was paid 4.78 hours for continuation of pay. The Employer maintained there was light duty work available

for Henderson that day, but Henderson maintained there was no light duty available and his elbow hurt too much. Henderson tried unsuccessfully to get an appointment to see Dr. Sullivan that day. On 4-11-1981 Henderson went to Dr. Sullivan and reported to Dr. Sullivan that there was "no light duty for carriers, but I tried to work. My elbow feels worse." Dr. Sullivan examined the elbow, an x-ray was taken, and Dr. Sullivan took Henderson off his regular duties as well as light duty. Henderson was paid for 8 hours of continuation of pay for 4-11-1981, 4-13-1981, 4-14-1981, 4-14-1981, and 4-15-1981.

Ms. Michele Lyons was a Supervisor of Customer Services in the Employer's Injury Compensation office. Her duties included working with physicians and injured employees so as to find suitable jobs for the injured employee. She was assigned Henderson's case and she was told that the Texas City Post Office was aware that Henderson taught a karate class for the Hitchcock Independent School District. Lyons telephoned Assistant Superintendent Linda J. Reaves to inquire about the relationship between Henderson and the school. Lyons went to see Reaves on April 15, 1981 and Reaves told Lyons that Henderson had taught karate classes the evenings of April 6, April 8, and April 13. Those dates corresponded with the dates Henderson drew full pay while too injured to work. Reaves gave Lyons a letter stating that information as well as other information concerning the class and the contractual relationship between the school district and Henderson. Lyons took the letter to the Postmaster at Texas City.

The evening of April 15, 1981 Superintendent of Mails Roger Landry and Postmaster Couch decided to visit the gym at Hitchcock to observe the karate class. Mr. Couch telephoned Postmaster Charles Clifford in Hitchcock; and it was decided that Landry and Couch would drive to Clifford's home in Hitchcock; then Clifford, Landry, and Couch would go in Clifford's car to the gym. That is exactly what they did and they parked in a parking lot across the street from the side entrance of the gym where they could observe traffic entering and leaving the area. At

approximately 6:45 p.m. the trio observed Henderson park his Chevrolet truck at the side entrance and he entered the gym. Henderson was dressed in karate regalia. The trio left the area to have coffee nearby.

They returned around 7:20 p.m. and went to the front door of the gym but were unable to see what was going on in the building. They walked around the left side of the gym where Henderson's truck was parked, but again, they were unable to observe into the gym. They walked around the right side of the gym and went to a door at the far end. That doorway had 2 doors with slit windows in each door. The window of the right hand door was covered with paper but they could observe into the gym from the left door. The left door window looked directly into the side of a basket goal (it will be called the "right goal"). At the top of the key way of the goal was a mat and 3 young girls dressed in karate attire were observed in karate activities. There was a 2nd mat at the top of the keyway for the left goal. There were 3 males on that mat dressed in karate attire and they were practicing karate activities. Henderson was present in the gym as the instructor.

After observing the gym through the door window for approximately 15 minutes the trio walked around to the opposite side of the building and entered the gym. Couch spoke with Henderson and directed Henderson to report for a fitness for duty examination at Dr. Hermida's office on Henderson's next scheduled work day. Henderson did report to Dr. Hermida's office as directed and he returned to full duty on April 20, 1981. His return to work on April 20 was in accordance with Dr. Hermida's instructions and Dr. Sullivan's instructions.

On June 4, 1981 the Employer issued a Notice of Proposed Removal (Joint Exhibit 2). The letter stated, among other things:

On April 10, 1981, you were scheduled to report for duty at 0700 hours at Texas City, Texas, Post Office. On this date you were unable to complete your tour of duty due to an alleged on-the-job injury. You remained off duty through April 18, 1981. You submitted a PS Form 3971, claiming continuance of pay for this entire absence. Records in this office indicate that during the above reference period you were placed in a totally disabled duty status by your physician, Dr. R. E. Sullivan.

On April 15, 1981, at approximately 1930 hours, I observed you actively engaged in instructing karate to a class at the Hitchcock, Texas High School Gymnasium. You were also observed, at this time, by Mr. A. B. Couch, Postmaster, Texas City, Texas, and Mr. C. E. Clifford, Postmaster, Hitchcock, Texas engaged in karate instruction. This activity is contrary to the physical limitations placed on you by your physician.

On June 22, 1981 the Employer affirmed the Notice of Proposed Removal by issuing a Notice of Decision that the removal would take place on July 31, 1981. Both letters were grieved and the issue to be decided by the undersigned was:

Under the terms of the National Agreement, did the Employer have just cause to remove Bertrand Henderson on July 31, 1981? If the answer is "No," what will be the remedy?

#### The Employer's Position

The Employer's position was that:

1. Henderson knowingly and willfully informed Dr. Sullivan that there was no light duty work in the shop, but there was light duty that was within Henderson's physical limitations.
2. Henderson misrepresented the truth when he informed Dr. Sullivan that Management issued Henderson direct orders to violate Dr. Sullivan's instructions on the work that Henderson was directed to perform.
3. The misrepresentations were for the purpose of obtaining continuation of pay benefits that Henderson would not have received had he been on light duty.

The Employer pointed out that on the evening of April 15, 1981 Henderson was observed participating in karate activities by the Postmaster at Texas City, the Postmaster at Hitchcock, and by Mail Superintendent Landry. Two of the observers testified as to what they saw. Mr. Landry testified that he could clearly see the floor of the gym through the slit window in the door. Landry testified he saw Henderson demonstrate 2 falls. Henderson fell on his back to the mat, then he slapped the mat very hard with his forearms and sprang to his feet. Landry testified

that Henderson demonstrated the fall 2 times to the female students. Landry felt that Henderson's injured elbow was going through a full range of motion with the fall and Landry felt that Henderson used his elbow to support his body's weight.

Landry continued his observation for 5 minutes and he observed Henderson walk to the other end of the gym and demonstrate an escape release to the male students. In the release the victim was given a "bear hug" with the aggressor behind the victim. Landry demonstrated what he saw - the demonstration disclosed that the victim used his elbows to strike the aggressor in the stomach and the face.

Postmaster A. E. Couch testified that he observed Henderson through the glass slit at the door. He testified he saw Henderson fall backwards on the mat then spring to his feet. Henderson's arms were used to push himself off the floor. He also observed Henderson demonstrate the escape release. Couch testified that when Henderson demonstrated the escape release both of Henderson's arms were bent at the elbow and Couch did not observe any restrictions in Henderson's arm movement.

Couch testified that he concurred in Henderson's removal and Couch put Henderson on administrative leave from June 4, 1981 to July 31, 1981 so as to avoid an opportunity for another injury claim.

#### The Union's Position

The Union's position was as follows:

1. The letter of removal (Joint Exhibit 2) failed to charge Henderson with a violation of any Employer rule or misconduct. The letter gave only a narrative discussion of allegations made by Couch and Landry and a failure to state specific charges was a violation of the Agreement.
2. The testimony of Ms. Lyons lacked credibility because she testified that Dr. Sullivan prescribed complete bed rest for Henderson, yet Dr. Sullivan's testimony was to the contrary.
3. It was highly unlikely that Landry and Couch could see all

the activities in the Hitchcock gym on April 15, 1981 because of the restricted view allowed by the window in the door. Furthermore the testimony of one of the karate students (who was a Company witness), Mr. Frank Tuma, was that Henderson did not engage in any physical activities the evening of 4-15-1981. The Union pointed out that Landry and Couch could not even agree upon the attendance in the gym on 4-15-81. Landry testified that only Henderson and his students were present, whereas Couch testified Henderson was there with his students and there were people in the bleachers.

#### Opinion

In this grievance, the Employer maintained there was just cause to remove Henderson because Henderson gave Dr. Sullivan false information concerning light duty, and the misrepresentation was for the purpose of obtaining benefits of continuation of pay injury compensation that he would not have received had he been on light duty. The Union maintained the removal was not for just cause. After carefully considering all the evidence, I find that the removal of Bertrand Henderson was not for just cause. I will give my reasons for this finding.

1. The letter of removal failed to charge Henderson with any misconduct, violation of Employer rules, or violation of the terms of the Agreement. The 1st sentence of Article XVI Section 3 reads as follows:

#### ARTICLE XVI - DISCIPLINE PROCEDURE

Section 3. Suspensions of More Than 30 Days or Discharge. In the case of suspensions of more than thirty (30) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. \* \* \*

A "charge in a disciplinary matter has a similar meaning to



an indictment in a criminal matter before a grand jury. Basically a "charge" is an accusation in writing that claims that the individual named therein has committed an act or been guilty by omission, and such act or omission was a violation of shop rules or usual good behavior expected of an employee and punishable by discipline. A letter of charges is the foundation of going forward with discipline; and, in the absence of a clearly written charge, what is to be the just cause for the discipline. No discipline can be sustained without a charge. For the instant grievance the removal letter merely related in narrative style the events that the Employer believed occurred on April 15, 1981. There was not a single sentence in the entire letter of removal that accused Henderson of conduct contrary to the rules of the shop; therefore his discharge was without just cause.

2. In my opinion, the testimony of management's witnesses as to what occurred the evening of 4-15-1981 in the Hitchcock gym was not entirely accurate. I went to the door where management observed the gym on 4-15-1981 and through the left hand door slit (the one that was not covered by paper on 4-15-1981) I could not clearly observe the left end of the basketball court. This would have made it difficult to see the area where the 3 male students and Henderson were located.

In addition, Employer witness Frank Tuma, who was one of the students present on 4-15-1981, testified that Henderson was limited in his techniques that evening. Tuma pointed out that Henderson had demonstrated escape techniques many times prior to 4-15-1981, but on that evening Henderson pointed and instructed or demonstrated without contact. Tuma pointed out

that warm up exercises required students to extend their arms but Henderson walked around and coached. The evening in question, Mr. Douglas Oglesby, a green belt student, demonstrated to the class while Henderson went back and forth between the 2 groups of students.

In addition, one other item convinces me that the management was not very careful in their observation. While at Hitchcock the trio walked over to Henderson's truck and looked inside the truck. Their testimony was that the truck had an automatic transmission. I inspected the truck and here is what I saw. The truck had a standard transmission with the gear box on the floor. The truck was a very old truck but it had a brake pedal and a clutch pedal. It appeared to me that at one time the truck had a standard transmission with the shift lever on the steering column but the lever was gone.

3. On April 9, 1981 Henderson reported for work and cased and carried his route. He brought a form CA-17 that had been completed by Dr. Sullivan on the 8th. I walked into the work area to see the case where Henderson worked on 4-9-81. The work limitations on the CA-17 excluded reaching or working above shoulder height, yet the top 2 shelves of the case were above Henderson's shoulder. In addition Henderson carried his entire route that day (he worked over 9 hours) and there was a work limitation on the CA-17 to partial pulling, pushing, or carrying. Furthermore, the CA-17 stated that Henderson could not perform his regular work, yet he cased and delivered his entire route. Management's statement that light duty was available does not impress me.

The Employer has extensive rules relating to outside employment. The rules are, in my opinion, quite liberal; however there are restrictions and I can summarize the restrictions as follows:

1. The outside employment does not impair the employees ability to perform Postal Service duties acceptably.
2. The employee does not receive compensation from a private source for performing Postal Service duties.
3. The employee's outside employment does not bring discredit to the Postal Service.
4. The employee does not use his official title, position, uniform, or equipment, or his authority in the endorsement or advertisement of a commercial product or service.
5. The outside employment will not compete with the U. S. Postal Service.
6. The employee will not engage in outside employment where his Postal employment gives the employee an unfair advantage.
7. The employee's outside employment may not include acting as an agent or attorney for the processing of a claim against the United States.
8. Employees are encouraged to engage in teaching, lecturing, and writing; however, the employment will not include special preparation for a class for Civil Service examinations, etc.
9. No employee will take sick leave to engage in outside employment. (Underlining for emphasis)

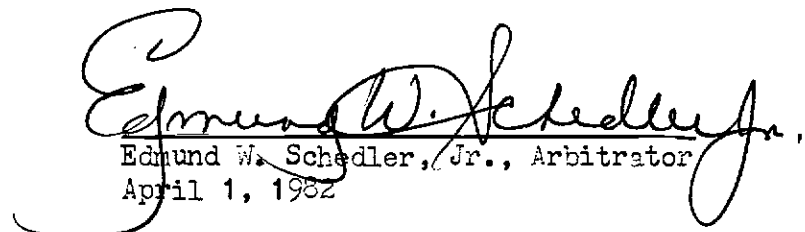
Did Henderson violate rule 9 by teaching a karage class while he had an elbow

injury? In my opinion, he did not and I will explain why he did not. First, Henderson had been teaching the class for several weeks prior to April 1981 and in my opinion his teaching of the karate class was in accordance with rule 7. Certainly he did not take sick leave to teach the class, he merely taught the class as an adjunct to his duties at the Post Office. I use the word "adjunct" in its literal meaning in that his teaching of karate was of secondary importance to his Postal duties and his teaching duties were unimportant compared to his Postal duties. Furthermore, for reasons I have already discussed, I do not believe his presence in the gym while his elbow was injured impaired or affected his ability to perform his Postal duties acceptably. This is true because Henderson was off work when the best medical opinion was that he should be off work and he returned to work when he was directed to return to work by Dr. Sullivan and Dr. Hermida.

#### Award

After a careful consideration of all the evidence and upon the foregoing findings of fact, the answer to the question at issue is "No, the Employer did not have just cause to remove Bertrand Henderson from service on June 4, 1981." The Employer will immediately offer to:

1. re-instate Bertrand Henderson to his former position without loss of seniority or other benefits of employment, and
2. make Bertrand Henderson whole for the wages he lost since he was removed from service.

  
Edmund W. Schedler, Jr., Arbitrator  
April 1, 1982