

REGULAR ARBITRATION PANEL

In the Matter of Arbitration

United States Postal Service	)	Grievant:	Michael Martinez
)		
and	)	Post Office:	Ft. Worth, Texas
)		
National Association of Letter Carriers, AFL-CIO	)	Case No:	G11N-4G-D 16695440
	)	DRT No:	10-374711
	)	Grievance No:	226-16-107-D

Before:	Ruben R. Armendariz, Arbitrator
Appearances:	
For the USPS:	Halton Reeves III, Labor Relations Specialist Edna Bethea, TA
For the NALC:	James D. Kimbrell, Local Business Agent Michael Barrett, TA
Place of Hearing:	Fort Worth, Texas
Date of Hearing:	December 6, 2016
Date Hearing Closed:	December 19, 2016
Date of Award:	January 18, 2017
Relevant Contract Provisions¹:	Article 16
Contract Year:	2011 -2016
Type of Grievance:	Contract

AWARD

Based on the facts as stated herein, this grievance is sustained. Management is hereby Ordered to rescind the Notice of Removal issued to grievant and to immediately reinstate grievant to his former position and to make him whole with respect to wages and benefits. Jurisdiction will be retained to resolve any disputes over the remedy until effectuation of the remedy.


Ruben R. Armendariz
Arbitrator

¹ The parties are in possession of the relevant contractual articles cited and need not be restated herein.

ARBITRATOR'S DISCUSSION, OPINION AND AWARD

This matter was heard on December 6, 2016 in Fort Worth, Texas. The parties to this proceeding agreed there are no procedural or substantive issues of arbitrability and the grievance is properly before the arbitrator. Postal Service presented for testimony Manager John Whatley and Supervisor Errick Ford. Union presented for testimony Steward Johnnie Gray and grievant. They were afforded full opportunity to be heard, to examine and to cross-examine witnesses and to introduce evidence on the issues. Based on the entire record, my observation of the witnesses, after examination of the evidence, exhibits presented, closing arguments² presented and arbitration citations³ submitted, this arbitrator makes the following findings and renders the following Discussion, Opinion and Award as follows:

ISSUE

The parties agreed to frame the issue as defined by the **STEP B** team as follows:

Did management violate Articles 3, 16 and 19 of the National Agreement with reference to the M-39 Section 115, when there was not just cause to issue the grievant a Notice of Removal dated June 9, 2016 for the Charge: Unacceptable Performance-Unauthorized Delay and Disposal of Mail? If so, what is the proper remedy?

STATEMENT OF THE CASE

This is a discipline grievance. On June 9, 2016 Supervisor of Customer Service, Errick Ford issued to Michael A. Martinez, the grievant herein, a Notice of Removal. The action is based on the following:

Charge: UNACCEPTABLE PERFORMANCE

Specification – UNAUTHORIZED DELAY AND DISPOSAL OF MAIL

As a full-time regular City Carrier with more than two years of training and experience, you have a duty and responsibility to deliver all mail assigned to your route without delay. You have been instructed on the proper procedure for delivering the mail so as to avoid unauthorized delay. You have also been instructed not to curtail or discard deliverable mail without authorization from management.

² The parties agreed to submit written closing arguments by December 19, 2016. Both parties written arguments were timely received, thus the hearing closed on December 19, 2016.

³ The parties provided several arbitral citations and all were read. Only those citations of substantive value will be discussed herein.

On Wednesday, May 25, 2016 you were assigned to serve your route 423 as well as a hand-off on route 424. In the performance of your duties on the street, rather than deliver all the mail entrusted to you, you culled out a total of 817 pieces of mail including several pieces of First Class Mail from the routes then placed the mail in UBBM waste.

During an investigative interview conducted May 27, 2016 you acknowledged that you are aware of your duty and responsibility to deliver all mail entrusted to you daily for the route(s) assigned to you. You also acknowledged your understanding that mail marked UBBM and left at your case in the UBBM tub are considered to be undeliverable, waste mail that will be picked up and discarded. When asked about the large volume of mail found in UBBM at your case on May 25, 2016, you admitted that you threw deliverable mail in UBBM waste. You stated you did not know some of the mail you threw away was First Class Mail but conceded that you placed a large number of good mail in waste to "save time." You explained that a lot of people give mail back to you because they don't want it. You admitted to culling deliverable mail from routes 423 and 424 to get back on time and justified it saying customers do not want that mail. You conceded that you made the decision on your own to make your time and because customers do not want mail labeled "Current Resident." You said you delivered First Class and flats and tossed the rest.

Your explanation is noted; however, it remains unacceptable.

Delivery of the mail is the cornerstone of the Postal Service and customers trust and depend on our agency to deliver all their mail in a timely manner. You had no authority to dispose of any deliverable mail for your assigned routes. If you felt overwhelmed, it was your responsibility to notify your supervisor and follow instructions to either deliver it, receive assistance, or curtail the mail for delivery the following day. You instead chose to dispose of it in the waste. Your actions not only resulted in unnecessary delay of mail, but also permanently damaged the bond of trust between you and your employer. It is therefore determined to be in the best interest of the Postal Service to discharge you from employment.

Your actions, as described above, are in violation of postal rules and regulations not limited to the following:

Employee and Labor Relations Manual
665 Postal Service Standards of Conduct
665.13 Discharge of Duties

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665.15 Obedience to Orders

M-41 Handbook, City Delivery Carriers Duties and Responsibilities

112.2 Diligence and Promptness

112.21 Obey the instructions of your manager.

131.3 Actual Delivery

131.33

On June 22, 2016 an Informal Step A grievance was initiated with no resolve. On August 4, 2016 a Formal Step A Meeting was held with no resolve. On August 10, 2016 the grievance was received at Step B and on August 18, 2016 a Step B decision issued to "IMPASSE."

This matter was submitted to this arbitrator for decision

POSTAL SERVICE POSITION

Postal Service argues they have proven there was "Just Cause" to issue grievant, Michael Martinez, a Notice of Removal for discarding deliverable mail. Testimony was received from Station Manager John Whatley on how the tubs of deliverable mail marked as UBBM were found at grievant's case. Whatley called grievant at home to confirm if the mail found at the case marked as UBBM mail was UBBM mail and grievant told him that it was. Whatley isolated the mail so it could later be reviewed and confirmed by Supervisor Errick Ford.

Postal Service argues that on grievant's next scheduled work day, Supervisor Ford presented the deliverable mail marked as UBBM mail to grievant for identification. Grievant told Supervisor Ford and testified that the mail found at his case marked as UBBM mail was the mail he had placed in the tubs. Grievant never denied the UBBM mail found was not assigned to him for delivery.

Postal Service argues Supervisor Ford testified that he had City Carrier Nelson case the mail found in the tubs marked UBBM in City Route cases 423 and 424 and photos were taken and are on pages 88-91 of JX-2. After all mail was cased, Supervisor Ford asked grievant why there so much mail for his assignment brought back to the station and marked as UBBM mail. In an Investigative Interview grievant said the customers gave the mail back to him. Each one of the slots in the photos represented an address of a customer. Grievant would like for us to believe that a customer at each address informed him that they did not want their mail for that day. This scenario is highly unlikely. Based on the un-rebutted testimony of Supervisor Ford, the mail marked as UBBM, which was found at the grievant's case was delivered on Friday, May 27, 2016, which proves that this mail was deliverable.

Postal Service argues that during the Investigative Interview and the given testimony during this hearing, grievant affirmed that he understood his responsibilities to deliver all mail entrusted to him on a daily basis. He also answered in the Investigative Interview and testified that he understands that UBBM mail is considered throw away mail to be picked up and discarded. Grievant acknowledged that he does know the system dealing with UBBM mail and what is to be done with UBBM mail once it is placed in the tubs next to a carrier's case. Grievant's intentions were to have the mail marked as UBBM and discarded. If Whatley did not discover this mail, it would have been thrown away. Also found in the mail marked as UBBM was one household's First Class Mail, a gas bill.

Postal Service argues that Whatley and Supervisor Ford testified on how the UBBM mail is collected and dispose of at the Downtown Station. UBBM mail is collected and disposed of on a daily basis by clerks, unless something unusual occurs. The only thing that was unusual in this situation was, that the three tubs of mail marked as UBBM at the case of City Route 423 was placed there by grievant. These three tubs caught the attention of the Station Manager and initiated an investigation of the mail marked as UBBM.

Postal Service argues they have proven through testimony and the file documents that there was Just Cause to issue grievant a Notice of Removal. There are rules stated in the Employee Labor Relations Manual Section, and the M-41 Handbook, (City Delivery Carriers Duties and Responsibilities). The rules are reasonable because they have been negotiated by both parties at the National Level. The Postal Service's expectation of all employees to deliver all mail entrusted to them is the core mission of this organization. The rules are consistently and equitably enforced, the Union has not proven that any of the rules stated in this hearing are not enforced consistently or equitably. An investigation was conducted, the grievant was provided an opportunity to tell Management why he decided to put good as addressed mail in a tub marked as UBBM. Delivering the mail is the cornerstone of the Postal Service; mailers trust and depend on the Postal Service to deliver all their advertisement in a timely manner. The grievant has no authority to dispose of deliverable mail for any reason without authorization from his Manger or Supervisor. Mailers pay the Postal Service millions of dollars to ensure their advertisement is delivered to potential customers. Therefore, the severity of the discipline was reasonably related to the infraction of the grievant. The discipline was taken in a timely manner. The grievant was issued a Notice of Removal on June 9, 2016, thirteen (13) days after the Investigative Interview.

Postal Service requests the grievance be denied.

UNION POSITION

Union argues Postal Service did not have just cause to issue grievant a Notice of Removal for Unacceptable Performance. Union proved through documentary evidence

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and testimony that management failed to conduct a thorough investigation in this case. The evidence also proved discipline was not progressive. Management has to issue discipline in a progressive fashion in order for it to be considered corrective and they failed to do so in this case. This is a discipline case, and the burden of proof is on management.

Union argues that one of the elements of just cause is whether or not a thorough investigation was completed; this did not happen in this case. Union argues this is a grave due process error committed by management. This was proven through documentary evidence found on pages 19-23 and 78-82 of JX-2. This was further proven by testimony given by management's chief witness, Errick Ford. He admitted to taking pictures of the mail. When asked if he took pictures that showed the addresses, he at first said "yes" but when questioned further, he changed his answer to no. Whatley also testified that he took the mail away from route 423 and secured it on May 26. Ford then testified that on May 27 he found the mail at the case for route 423. Thus, this mail was not secured. These two witnesses gave conflicting testimony.

Union argues Whatley had testified there were eight or ten pieces of first class mail found in the UBBM at route 423. Ford in his statement found on page 106 of JX-2 stated there were three pieces of first class mail found. When shown the pictures on pages 94-96 of JX-2 Ford said that these were the three pieces of first class mail. Then Ford was asked to place the picture on page 94 side by side with the picture found on page 96, and he admitted that it was a duplicate picture. Now all that management has shown is that there are two pieces of first class mail. So the union would ask how many pieces of first class was actually there. Furthermore, not one piece of mail out the 817 alleged pieces that management claims as "good deliverable mail" were identified as having belonged to either route grievant serviced on May 25, 2016.

Union argues grievant is charged with unauthorized delay and disposal of mail. Whatley testified the mail was secured so it couldn't be disposed of. If the mail wasn't disposed of then why is the grievant being removed from the Postal Service for disposing of it then? Whatley further testified that carriers do not dispose of mail, which is a job duty of a clerk. Furthermore, management failed to show if any of this mail the grievant is being removed for was actually delivered.

Union argues grievant has no discipline in his record. Management issued him a Notice of Removal without considering any lesser form of discipline. There is an interview on pages 14-15 of JX-2 that was conducted with J. Martinez, Jr. This employee was a CCA and discarded two and a half streets worth of mail inside a mailbox at a vacant house. This employee only received a discussion from management. Not only is the discipline not progressive, but the grievant was treated disparately in this case as well.

Union requests grievance be sustained. The Notice of Removal rescinded and

grievant immediately reinstated to his former position and made whole with respect to wages and benefits.

DISCUSSION AND OPINION

In discipline matters, the burden of proof rests on the Postal Service to establish just cause through a preponderance of evidence.

THE TESTIMONY

The Postal Service presented two witnesses, Manager John Whatley and Supervisor Errick Ford. Whatley testified that he had secured the UBBM mail found at route 423 on May 26, 2016. He also stated that either 8 or 9 pieces of 1st class mail were found in the UBBM and that there was somewhere around 800 pieces of bulk mail. Under cross-examination Whatley was asked if it is the carrier's responsibility to dispose of mail and he answered "no," that it is the clerk's job to dispose of the mail found in the UBBM.

Supervisor Errick Ford testified that he was not at work on May 25, 2016 due to his off day but upon his return to work on May 27, 2016 he noticed the buckets of UBBM at the carrier case for route 423. The arbitrator finds the mail was not secured on May 26, 2016 as Whatley had testified. Under cross-examination, Ford admitted that 2 of 3 pictures of 1st class mail were the exact same picture. The arbitrator finds management did not know how many pieces of first-class mail were found in the UBBM. In the Service's closing arguments, it was stated there was only one piece of first class mail. Ford testified that he took notes verbatim in the investigative interview but Johnnie Gray's notes were more extensive where grievant denied throwing deliverable mail in the UBBM. Ford agreed that not a single address of the alleged 817 pieces of UBBM mail were identified in the Notice of Removal nor was grievant ever questioned about any specific address at the investigative interview.

The Union presented Steward Johnnie Gray and grievant. Gray testified that he represented grievant through the Investigative Interview and the Informal Step A grievance process. In the Investigative Interview, he took verbatim notes and were more detailed with the actual answers grievant had given Ford. Under cross-examination Gray was asked if his notes and Ford's notes were similar and he stated they were to a certain extent but that Ford decided to stop taking notes and ignored grievant's additional key responses. Gray stated Ford left out several important key points from grievant's answers during the investigative interview.

Grievant testified that he has been with the Postal Service for about 3½ years and is a regular carrier. He has no discipline on his record. Grievant denied throwing any deliverable or first class mail into the UBBM containers. He also testified that the answers he gave to the questions asked by Ford in the investigative interview were

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accurately documented by Gray's notes and not by Ford's notes. He also testified the UBBM tubs at route 423's case had not been picked up for 2-3 days prior to May 25, 2016.

The MERITS

The arbitrator finds the Postal Service did not have just cause to issue grievant a Notice of Removal. Management did not conduct a thorough investigation in this case and is one of the elements of just cause. Grievant is charged with Unacceptable Performance – Unauthorized delay and disposal of mail. Record evidence revealed that Supervisor Ford took bulk pictures of the mail in the tubs but he failed to ascertain their addresses. Manager Whatley testified that he took the mail away from route 423 and secured it on May 26, 2016. But Ford testified that he found the mail on May 27, 2016 at the case for route 423. The arbitrator finds that these witnesses gave conflicting testimony, thus, the mail was not secured.

Additionally, Whatley testified there were 8 or 9 pieces of 1st class mail found in the UBBM at route 423. Ford however stated in his statement (page 106 of JX-2) there were three pieces of 1st class mail found. When the Union showed the pictures on pages 94-96 of JX-2, Ford said that these were the three pieces of first class mail. Ford was then asked at the hearing to place the picture on page 94 side by side with the picture found on page 96, where he admitted it was a duplicate picture. The arbitrator finds management investigation was not thorough and consistent.

Record evidence further revealed that out the 817 pieces of mail that management claimed as good deliverable mail, not one piece of mail was identified as belonging to either route grievant had serviced on May 25, 2016.

This arbitrator credits the testimony of Gray over Ford as to grievant's answers to the questions asked of grievant at the Investigative interview. I also credit grievant's testimony that he did not delay mail or dispose of any deliverable mail in the UBBM. According to Gray's notes, grievant never told or admitted to management that he threw deliverable mail in the UBBM much less 1st class mail. Grievant never admitted to culling mail from routes 423 and 424 to get back to the office on time. This arbitrator finds Management failed to properly secure the mail. Management failed to properly identify the mail with addresses and dates. Management failed to determine if this was deliverable mail that was given to grievant for May 25, 2016 to deliver.

Additionally, at pages 14 and 15 of JX-2 employee R. Martinez, Jr., admitted that he had disposed of 2½ streets of rent a center mail in a vacant house on Morningside Drive. Management did not discipline him but only gave him a discussion to never to do this again. This arbitrator finds that this treatment to a CCA reveals management disparately applying and enforcing its rules and regulations regarding the delivery and the disposing of mail.

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Thus, it is this arbitrator's Opinion the Postal Service did not meet its burden of proof to establish just cause through a preponderance of evidence. Accordingly, the following Award is hereby **ORDERED**.

AWARD⁴

Based on the facts as stated above, this grievance is sustained. Management is hereby Ordered to rescind the Notice of Removal issued to grievant and to immediately reinstate grievant to his former position and to make him whole with respect to wages and benefits. Jurisdiction will be retained to resolve any disputes over the remedy until effectuation of the remedy.

Issued at San Antonio, Texas, the 18th day of January 2017.


Ruben R. Armendariz
Arbitrator

⁴ These proceedings were recorded in preparing this award and are erased upon issuance of the award.