REGULAR ARBITRATION PANEL

In the Matter of Arbitration	
between	Grievant: Robinson, Dane
UNITED STATES POSTAL SERVICE	Post Office: Las Vegas, NV
and	USPS No. E06N-4E-D 13068577
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	NALC DRT No. 01-260701
	NALC Branch Gr. No. 1622-12D

Before: M. Zane Lumbley, Arbitrator

Appearances: For USPS: Paul Senecal
For NALC: Richard Griffin

Place of Hearing: Las Vegas, NV

Dates of Hearing: September 6 and 18, 2013

AWARD:

I. It is the Award of the Arbitrator that management did not have just cause to issue the Grievant a Notice of Proposed Removal (NOPR) and thereby violated Article 16 of the National Agreement (NA) when they issued the NOPR.

II. It is therefore Ordered that:

A. The Notice of Proposed Removal be reduced to a Letter of Warning and the Grievant be made whole for all wages and other contractual benefits lost by virtue of the removal;

B. The Grievant agree to attend and successfully complete a fitness for duty examination administered by a physician jointly acceptable to the Employer and Union within 30 days of the date of this Award;

C. If the Grievant is found fit for duty pursuant to the fitness for duty examination, he be immediately reinstated; and

D. If the Grievant refuses to take the examination or is found unfit for duty, the parties will return to the Arbitrator for guidance.

III. The Arbitrator hereby reserves jurisdiction for ninety (90) days from the date of this Award for the limited purpose of assisting the parties as may be necessary in compliance with the remedy ordered above.

Date of Award: November 23, 2013

PANEL: Pacific Regular

AWARD SUMMARY

PROCEDURAL MATTERS

This matter was convened pursuant to the parties' 2006 collective bargaining agreement (Joint Exhibit No. 1, hereinafter "National Agreement") at Las Vegas, Nevada, on September 6 and 18, 2013. Both parties were represented, jointly presented documentary evidence, called one or more witnesses and argued their positions at the hearing. The parties filed post-hearing briefs that were received in the Arbitrator's Texas office on October 11 and 12, 2013, on the latter of which dates the record was closed.

ISSUE

The parties agreed to present the following Step B issues to arbitration:

Issue No. 1:

Did management have just cause to issue the Grievant a Notice of Proposed Removal (NOPR)?

If not, what is the appropriate remedy?

Issue No. 2:

Did management violate Articles 2, 16, 17, 19, and 31 of the National Agreement (NA) when they issued the NOPR?

If so, what is the appropriate remedy?[1]

---

[1] Although the July 8, 2013, scheduling notice to the undersigned noted that an Article 16.7 emergency placement grievance would be consolidated with the removal grievance in this matter and the Union was prepared to proceed with both, the Employer announced at the commencement of hearing that it was prepared to present evidence only on the issue of the removal. After some discussion, it was agreed the Arbitrator would take evidence on the removal grievance and the advocates would address the scheduling of a hearing on the emergency placement with their respective superiors.

RELEVANT PROVISIONS OF THE NATIONAL AGREEMENT

The relevant provisions of the National Agreement are:

ARTICLE 3
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

. . .

B. To hire, promote, transfer, assign, and retain employees in positions with the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

. . .

ARTICLE 16
DISCIPLINE PROCEDURE

Section 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 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.

. . .

FACTS

The Grievant is a city letter carrier in the Red Rock Vista Station of the Las Vegas, Nevada, Post Office. He has been a carrier since June 10, 2004.

At approximately 7:00 p.m. on Saturday, November 3, 2012,[2] 617 pieces of mail, including priority mail, parcels, political mail, one or more government checks and one

[2] All dates hereinafter are 2012 unless otherwise specified.

piece of registered mail, were found by Supervisor Customer Services Hernandez locked in the back of the Grievant's assigned delivery vehicle in the parking lot of the Red Rock Vista Station as she was making a random check of the vehicles to assure that no mail had been overlooked before leaving for the evening. Hernandez testified she took some photographs, retrieved the mail and secured it inside the Postmaster's office. According to the e-mail she sent at 8:46 PM that night to Acting Manager Customer Service Reeves, the mail left in the Grievant's vehicle totaled "approximately 21 inches of DPS, 11 inches of flats and nine spurs."[3] Hernandez testified that amounted to a little less than half the Grievant's total six-hour route. Although the Grievant asserted during one of his Investigative Interviews that he, Hernandez and a closing clerk named Guadalupe, or "Lupe," had left the facility together that night, Hernandez recalled only walking Lupe out and then locking herself back in before she did her walk of the vehicles.

Reeves testified that he also took a number of photographs of the truck and mail in question. On Monday, November 5, he had Shop Stewards Desjardin and Spencer present while he counted and categorized the mail which had been kept secured in the Postmaster's office since November 3. Reeves testified he also gave instructions on November 5 for the mail to be cased up so that he could see where it started and ended. According to Reeves and the November 9 note purportedly written by the Grievant, the mail "started on 2025 Jeanne and ended at 5520 Bartlett with the exception of 5600 Reiter to 5524 Reiter."[4] Reeves ultimately determined that the

---

[3] Joint Exhibit No. 2, page 156.

[4] Although Reeves testified the note just quoted was written by the Grievant, who did not testify, Reeves advised in the undated Proposed Personnel Action written after his investigation that he "had the

Grievant did not deliver to 225 of the 526 delivery points on his route on November 3 and that the small section delivered to between 5600 Reiter and 5524 Reiter comprised "a possible 29 deliveries."[5] Reeves also testified that the Grievant drove 6 miles over and above the 15 miles normally allocated for his route, scanned a number of events out of order on that day and never made a call to supervision to advise that he was having difficulties. Reeves testified he directed another letter carrier to deliver the mail in question on November 5 including three parcels that had been scanned as delivered but had not been delivered by the Grievant on November 3. Reeves, who had been at Red Rock approximately one month before the incident under scrutiny, also stated he had been given no information regarding the taking of any medications by the Grievant that might have affected his performance.

Investigative Interviews were conducted with the Grievant on November 7 and November 9. In the first of those interviews, the Grievant stated he believed he had properly scanned all MSP's, accurately entered his times and vehicle mileage and delivered all mail as required on November 3. He also stated he thought he had removed all mail from his vehicle that night. The Grievant could not explain how Hernandez could have discovered 600+ pieces of mail in his vehicle that night because he recalled that he, Hernandez and Lupe had all left the facility at the same time. In the second interview, the Grievant stated that the only times he left his route on November 3 were to do a handoff on Route 890, to go to McDonald's across the street from the point of handoff for lunch and to take a comfort break at a gas station in the line of travel

---

carrier J Ortiz that was on Route 889 on 11/05/2012 to case in the mail and to tell me where the mail started and where it ended." Joint Exhibit No. 2, page 36.

5 *Ibid.*

between Route 890 in his own Route 889. He had no explanation for the parcels left in his vehicle that he had scanned as delivered or the piece of registered mail that was neither scanned nor delivered. Although the Grievant was asked at the end of each Investigative Interview whether he had anything else to add, his only addition came at the end of the first interview when he noted, "Yes a quick statement, it seems a little biased that mail withheld form [sic] delivery from management, that is called curtailing, but if a carrier accidentally left mail in the truck, they are being pushed for a removal."[6] He made no mention of any medical or drug-related difficulties in either Investigative Interview.

Then-Acting Las Vegas Manager Customer Service Operations McMahill testified he reviewed everything he was given by Reeves, including the results of the two Investigative Interviews conducted with the Grievant and Reeves's November 14 recommendation that the Grievant be removed and agreed that removal was appropriate. Like Reeves, McMahill testified the Grievant never alleged he had any medical difficulties which prevented him from delivering the mail.

Reeves then issued the Proposed Notice of Removal to the Grievant on November 21. It contained the following three charges:

> Charge #1: Unacceptable Conduct – Failure to Follow Instructions/Improper Mail Disposition – Failure to Deliver Mail Entrusted to Your Care;
>
> Charge #2: Unacceptable Conduct – Providing False and/or Misleading Registered Mail and/or Delivery Confirmation Mail Scans; and
>
> Charge #3: Unacceptable Conduct – Unauthorized Deviation from Your Designated Line of Travel.

---

[6] Joint Exhibit No. 2, page 39.

The Union grieved on December 4 and the dispute then was processed through the mandated steps of the grievance procedure.[7] When impasse was reached at Step B on February 19, 2013, the Union moved the dispute to arbitration and it ultimately came on for decision before the undersigned as set forth above.

DISCUSSION AND ANALYSIS

Position of the Employer

The Employer contends the Proposed Notice of Removal was issued to the Grievant for just cause and thus did not violate any provision of the National Agreement. In support of that argument, it points to what it asserts is overwhelming evidence that the Grievant acted as charged and his asserted lack of a defense at either Investigative Interview other than to say that he believed he had performed his job as required on November 3 and did not remember many aspects of that day's activities. In the Employer's view, the Union itself has conceded in this case that the Grievant acted as charged by its two remedy requests during the processing of this grievance, both of which sought suspensions and one of which suggested a Last Chance Agreement. Moreover, according to the Service, the only arguably similarly situated employee concerning whom there is evidence in the record was not, in fact, similar since that employee was unable to deliver the mail on the date in question because she was unable to obtain access to the apartment house involved. Nor, posits the Employer, can the Grievant's *ex post facto* evidence of medications he claims affect his performance serve as a mitigating factor here since the Employer was never put on notice of the

---

[7] The record demonstrates that a Letter of Decision removing the Grievant was issued on December 7. See, Joint Exhibit No. 2, pages 73-76.

need for those medications. Accordingly, in view of the seriousness of the proven charges against the Grievant, although the Service stipulated at hearing that the prior discipline referenced in the Proposed Notice of Removal was not active at the time and should not have been cited therein, it contends the decision to move directly to a removal was proper. Thus the Employer requests that the grievance be denied.

Position of the Union

The Union asserts the Employer did not establish that the Grievant's removal was for just cause and thus it must be found to have violated the National Agreement by removing the Grievant. In the first place, while not arguing that the Grievant did not leave mail in his vehicle on November 3, it contends the incident was explainable by the Grievant's PTSD that requires him to take medications with side effects, some of which are confusion, hallucinations, unusual thoughts or behavior and problems with thinking, memory and concentration. In this connection, the Union argues management should have been aware from FMLA documents in the Grievant's file that he suffered from the cited medical condition. Moreover, according to the Union, management never proved that the Grievant deliberately and intentionally failed to deliver the mail on November 3. Indeed, the Union notes that the Grievant actually did deliver a small section in the middle of one of the streets that was not delivered completely, thereby undercutting the argument of any improper intention. Additionally, as regards the scanning and delivery order charges, the Union asserts the Grievant did nothing more that day than make innocent mistakes as he has done before without reproach. In its view, particularly considering the Grievant's clean disciplinary record and the Employer's much more

lenient treatment of carriers Brown and Carter, who also failed to deliver mail as required, the discipline handed down here smacks of disparate treatment and a punitive, rather than a corrective, motive. Accordingly, the Union requests that the Proposed Notice of Removal be rescinded and the Grievant be made whole.

Decision of the Arbitrator

Having now had the opportunity to consider the entire record in this matter, I have decided that management did not have just cause to issue the Proposed Notice of Removal to the Grievant and thus violated Article 16 of the National Agreement when it did so. While I have studied all the evidence submitted and considered each argument posed by the parties, the following discussion will address only those considerations I found either controlling or necessary to make my decision clear.

In sum, this case is not so much about what occurred on November 3 as it is about why it occurred and the Employer's response to the activities of that date. It is undisputed that the Grievant left deliverable mail locked in his vehicle when he parked it in the lot on the evening of November 3. It is also clear that some of the mail he left in his vehicle had been scanned as delivered. It is less clear, although likely, given the Grievant's lack of explanation for the deviations from his route shown at page nine of the Proposed Notice of Removal, that they were improper and resulted in his driving more than the alloted mileage. However, the record is bereft of any evidence showing that the performance shortcomings exhibited by the Grievant on November 3 were intentional. Thus, although the Grievant clearly did not complete his mission that day, the record does not demonstrate why that occurred. While the Union asserts it occurred

because of the Grievant's medical condition, the Employer does not offer a reason. One point on which the parties are in agreement is that, given the stipulation reached on the second day of hearing that the Letter of Warning cited in the Proposed Notice of Removal was not citable, the Grievant's disciplinary record as of November 3 was clean. Thus, I am of the view that, even if the physical activities leading to the three charges against the Grievant were fully proven, in light of his eight years of service, his clean disciplinary record and the lack of any probative evidence that he willfully intended to perform as he did on November 3, the removal could not be sustained.[8]

As concerns the Service's claim that the Grievant's actions on November 3 were intentional, the mere fact that all the mail was not delivered cannot demonstrate intent. Nor can the fact that some pieces of mail were scanned as delivered but left in the Grievant's vehicle. Similarly, although I agree that some of the Grievant's movements on November 3 were inexplicable, the mere fact they seem not to have followed a logical sequence does not make them intentional. In this last connection, it is clear that the handoff to Route 890 created some of the Grievant's off-route movements. The point to be made about the Grievant's scans and route sequence that day is that, although not entirely as they should have been, the use of the words "false and/or misleading" in Charge #2 implies intent which, if used to justify the discipline, must be proven. Here it is nothing more than speculation.

I believe the strangeness of the Grievant's actions on November 3 should have led the Employer to question what actually was going on with him that day once it examined all the evidence. Having seen the Grievant's evidence submitted after the

---

[8] The Employer asserts I should draw a negative inference from the Grievant's failure to testify. I disagree. The burden here is the Employer's, not the Grievant's.

fact, that evidence certainly leads the undersigned to suspect the day's activities had medical underpinnings. However, I agree with the Employer that it had not been made aware as of November 3 that the Grievant suffered from any condition such as PTSD or that he needed to take the medications clonazepam, sertraline and trazodone, as the document at page 126 of Joint Exhibit No. 2 demonstrates the Grievant was in 2012. The fact that the HR Shared Service Center knew the Grievant had been approved for FMLA leave for some unspecified condition in October of 2011 does not prove otherwise. Thus, if the Grievant wanted the Employer to understand that his difficulties on November 3 stemmed from a medical condition and the medications for treating the condition, it was incumbent on him to provide that defense in a timely fashion. His failure to do so cannot be held against the Employer.

What can be held against the Employer is that the discipline selected was both disparate and disproportionate to the proven offenses in light of the Grievant's record. As to the former, the removal here is completely out of line with the seven-day no-time-off suspension given to letter carrier Carter of the Spring Valley Station in Las Vegas in September 2012 when he was found to have failed to follow instructions and ensure the proper disposition of the mails for the third time in a three-month period, the first two of which had resulted in letters of warning.[9] The testimony of Manager McMahill to the effect that he had removed another employee in another location for failing to deliver the mail as required does not assist the Employer in its response to disparate treatment

[9] Although there is much evidence in the record with respect to the Employer's decision not to discipline letter carrier Brown on an earlier occasion for failure to deliver the mail to an apartment house, I have not used that situation in my analysis here. That is because, although the evidence in the record with respect to Brown's incident is stunningly contradictory and the Union chose not to recall an earlier witness who might have been able to shed light on at least one of the contradictions, I am satisfied from the uncontradicted evidence that she could not deliver the mail on the date in question because she had not been provided with a key to enter the premises.

charge.

As to the latter consideration, i.e. the proportionality of the discipline selected, while failure to deliver the mail is a serious charge, where the alleged willful nature of the infraction is not proven and the record of the employee, particularly as to similar offenses, is completely clean, the Employer simply cannot move immediately to a removal.[10] See, for example, *Case No. C06N-4C-D 12112909/NALC Case No. 067112* (Klein, 2012), a case cited by the Union on brief, in which the arbitrator reinstated a grievant with a clean disciplinary record, albeit without back pay, even though the employee admitted he purposely hid the mail in his vehicle so that he could deliver it the next day. Here there is no such evidence in the record.[11] Instead, as Hernandez's testimony makes clear, she was able, by shining a flashlight into the window of the Grievant's vehicle, to see the mail sitting in the tubs in the vehicle.

Therefore, I find the Employer did not demonstrate that the removal was for just cause and that it thereby violated Article 16 of the National Agreement. However,

---

[10] As noted above, the parties stipulated that the letter of warning referenced in the Proposed Notice of Removal was inappropriately cited. However, it appears from the words used by both Reeves and Las Vegas Postmaster Colton in the Proposed Notice of Removal and the Letter of Decision, respectively, that the perceived presence of the cited earlier discipline was considered positively rather than negatively. Thus Reeves said, "However, notwithstanding your current disciplinary record, I find that the seriousness of your actions in this instance alone warrant this degree of action." For his part, Colton stated, "Notwithstanding these actions, I find that the seriousness of your actions warrant this degree of corrective action." Accordingly, I am not convinced that either one held the earlier action against the Grievant. Moreover, even in the Baltimore, Maryland, matter cited for support by the Union on brief, *Case No. K06N-4K-D 12212236/NALC No. 13-237953* (Greenberg, 2012), that arbitrator found, "Although it is not my view that this kind of error in a disciplinary action *per se* compels an arbitrator to sustain a grievance and reverse Management's action, this is a substantive mistake that calls into question the quality of Management's analysis." Sl. op. at page 10 [emphasis in original].

[11] The cases cited by the Employer on brief are distinguishable. Thus, in *Cases No. B90N-4B-D 95075397 et al* (Maher, 1995), that grievant was shown to have purposely abandoned his route and left 95 pieces of mail unattended in his vehicle in order to attend a dental appointment. Not surprisingly, Arbitrator Maher found that "progressive discipline in this instant matter would cause employees to believe that they could on occasion delay the mail without fear of job loss." Similarly, in *Case No. H01N-4H-D 08268272/NALC DRT No. 09-107485* (Dorshaw, 2008), the arbitrator found, "The Grievant tried to hide this mail from the prying eyes of his supervisors."

because I have no doubt the Grievant, for some reason not established in the record, did not carry out his duties appropriately on November 3, as will be seen below, I intend to direct a reduced measure of discipline.

Remedy

The Union's remedy request in this case is interestingly worded. While it requests that the Proposed Notice of Removal be rescinded and the Grievant be made whole, it suggests that, if the Arbitrator finds some discipline appropriate, he should keep in mind that the discipline was neither progressive nor corrective. This approach may hark back to the settlement discussions to which the Employer points in support of its view the parties are in agreement that the Grievant acted as charged. However, the fact that the Union may have been prepared to accept on the Grievant's behalf some lesser discipline for his November 3 activities can be given no weight in my deliberations as to the appropriate remedy since to do so would undermine the free exchange of such discussions between the parties in their efforts to resolve grievances at the lowest level of the grievance-arbitration procedure. Thus I shall devise an appropriate remedy without giving any weight to the substance of the parties' settlement discussions.

Here, since it has been demonstrated that the Grievant failed to deliver all his mail on November 3, that a portion of the mail he left in his vehicle had been scanned as delivered but had not actually been delivered and that the Grievant deviated from his route that day, it is appropriate that some discipline be placed in his record. Because I have found the Employer did not prove any willfulness on the part of the Grievant, and

since the Grievant displayed a clean disciplinary record at the time, I have decided that a Letter of Warning would have been an appropriate, progressive and hopefully corrective measure. Thus I shall order that the Proposed Notice of Removal be reduced to a Letter of Warning.

However, in light of the evidence in the record with respect to the Grievant's alleged medical difficulties and the medications the record demonstrates he was taking in 2012, the reinstatement portion of the remedy to be ordered will be subject to the caveat that the Grievant agree to attend and successfully complete a fitness for duty examination administered by a physician jointly acceptable to the Employer and Union within 30 days of the date of this Award. If the Grievant attends and successfully completes such an examination by being found fit for duty, the Employer will be directed to reinstate him immediately thereafter. If the Grievant either refuses to attend the examination or is found unfit for duty, the parties will invoke my retained jurisdiction in order to determine how to proceed. In the meantime, the Employer will be directed to proceed forthwith to calculate and pay the Grievant the wages and benefits he lost by virtue of the removal.

*

*

*

*

*

*

*

AWARD

I. It is the Award of the Arbitrator that management did not have just cause to issue the Grievant a Notice of Proposed Removal (NOPR) and thereby violated Article 16 of the National Agreement (NA) when they issued the NOPR.

II. It is therefore Ordered that:

A. The Notice of Proposed Removal be reduced to a Letter of Warning and the Grievant be made whole for all wages and other contractual benefits lost by virtue of the removal;

B. The Grievant agree to attend and successfully complete a fitness for duty examination administered by a physician jointly acceptable to the Employer and Union within 30 days of the date of this Award;

C. If the Grievant is found fit for duty pursuant to the fitness for duty examination, he be immediately reinstated; and

D. If the Grievant refuses to take the examination or is found unfit for duty, the parties will return to the Arbitrator for guidance.

III. The Arbitrator hereby reserves jurisdiction for ninety (90) days from the date of this Award for the limited purpose of assisting the parties as may be necessary in compliance with the remedy ordered above.

M. Zane Lumbley, Arbitrator

November 23, 2013
Dated