

**REGULAR ARBITRATION**

In the Matter of Arbitration	)		
	)		
between	)	Grievant:	Lisa Key
	)		
UNITED STATES POSTAL SERVICE	)	Post Office:	Chicago IL (Harwood Hts)
	)		
and	)	USPS Case No:	J06N-4J-D 13048204
	)		
NATIONAL ASSOCIATION OF	)	NALC Case No:	122655
LETTER CARRIERS, AFL-CIO	)	DRT No:	03-280308

**BEFORE:** Barry E. Simon, Arbitrator

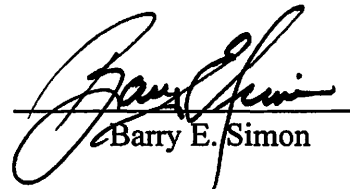
**APPEARANCES:**

For the U. S. Postal Service:	Tamara R. Johnson Barbara J. Singleton
For the Union:	Michael Caref Erika Estrada
Place of Hearing:	Chicago IL P&DC
Date of Hearing:	April 10, 2014

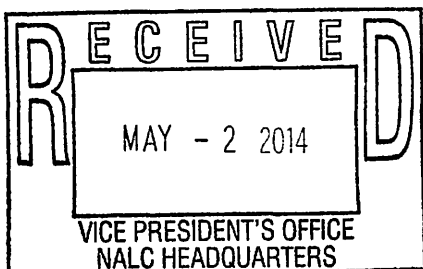
**AWARD:** The Arbitrator finds that the Postal Service has not met its burden of proof and did not have just cause to issue Grievant a Notice of Removal. The grievance is sustained. The Postal Service is directed to remove the Notice of Removal from Grievant's record, return her to work and make her whole for any wages and benefits lost as a result of this action.

Date of Award: April 18, 2014

GREAT LAKES AREA REGULAR PANEL



Barry E. Simon



**Background:**

Grievant, Lisa Key, has been employed by the Postal Service for twenty-one years, first spending eleven years as a Mail Handler and then as a Letter Carrier. At all times relevant to this dispute, she was employed as a Full Time City Letter Carrier at the Harwood Heights Station of the Chicago Post Office. On June 4, 2012 she was working as a Technician (Floater) on Route 3. Sometime between 3:30 and 4:00 pm, Grievant was delivering mail at La Residencia Elegante, an apartment building at 7525 West Lawrence Avenue.

On June 16, 2012 John DeVries, Commander of Criminal Investigations for the Harwood Heights Police Department, received a report from Marianne Romito, a resident of La Residencia Elegante, that she had not received a parcel containing three rings valued at \$364.50 which she had ordered from a television home shopping show. After contacting the show, Romito learned that the parcel had been delivered by United Parcel Service at approximately 3:56 pm on June 4, 2012.

Sometime in June, pictures showing a Postal Service employee standing at the lobby mailboxes was sent to the Post Office by the La Residencia Elegante Homeowners Association. Manager Customer Service Linda Morris-Adams showed the pictures to Grievant, who denied she was the employee, stating that she did not own a hat like the one worn by the employee in the picture. Adams accepted Grievant's statement and gave the matter no further thought.

On July 24, 2012, video from the apartment building's video surveillance system was reviewed by Commander DeVries and Office of the Inspector General (OIG) Special Agents Michael Merletti and Nicholas Bucciarelli. The video showed Grievant delivering mail at the building while a delivery person left a package on the shelf beneath the mailboxes. The Special Agents then began surveillance of Grievant on her route, but found nothing out of the ordinary in her performance of her duties.

On September 19, 2012 Grievant was arrested by the Harwood Heights Police Department while at work at the Post Office. She was charged with theft/unauthorized control over property not exceeding \$500 in value, a Class A misdemeanor. After she was booked and questioned by DeVries, Grievant was interviewed by Special Agents Merletti and Bucciarelli. During her questioning by DeVries, Grievant was shown the video and acknowledged she was the employee delivering the

mail. When Grievant later returned to the station, she was placed in a non-duty non-pay status pursuant to Article 16.7 of the National Agreement. The Union filed a grievance in connection with that action and management, at Formal Step A on October 19, 2012, agreed to rescind the suspension and return Grievant to work without loss of wages and benefits.

On October 10, 2012, Special Agent Merletti delivered a Report of Investigation to Adams. The letter of transmittal stated, "Please advise Special Agent Michael Merletti, in writing within 30 days, of your decision in this matter. If you decide to take disciplinary action, please furnish him a copy of the letter to the employee and your final decision letter." It is undisputed that Adams did not communicate with Merletti within thirty days.

On October 17, 2012 Adams conducted an Investigative Interview with Grievant. Following the Interview Grievant was apparently placed in an off-duty status pursuant to Article 16.6. The parties have affirmed that the grievance over this action has been resolved.

On November 26, 2012 Grievant was convicted of theft in the Cook County Circuit Court. She was sentenced to six months of court supervision and fined \$150 plus fees. That conviction is currently under appeal.

On December 5, 2012 Adams issued Grievant a Notice of Removal dated November 29, 2012. The Notice of Removal charged Grievant with "Unacceptable Conduct / Removed a UPS package (3 rings) valued at \$364.50 intended for a resident of La Residencia Elegante." A timely grievance was filed by the Union on Grievant's behalf. The grievance was denied by the Service and was then progressed through the grievance process in accordance with the procedures of the National Agreement. The case was, in due course, submitted to arbitration before Arbitrator David A. Dilts on September 27, 2013. Arbitrator Dilts wrote:

The merits of this case involved the discharge of the Grievant. However, at hearing it became clear that the parties did not agree on what documents were properly a part of the joint grievance file. After repeated objections from the Union concerning various elements of the joint file, and the Union introducing a decision from the B Team concerning information which was withheld from the grievance package, this Arbitrator proposed to remand this case to Formal Step A to properly construct the joint grievance package. Neither party gave cause why this matter should not be remanded; therefore, this matter is remanded.

\* \* \*

The appropriate remedy for this matter is that the Postal Service must pay for this date, and must remedy the harm that befell the Grievant by delaying a final decision in this case. Therefore, beginning with September 14, 2013 the Grievant is to be placed back on the payroll until such time as a final disposition of this case is had (which includes full backpay and benefits for the period from September 14 until her return to pay status).

The grievance was subsequently reconsidered at Formal Step A and at Step B. The parties being unable to reach resolution, the grievance was again submitted to arbitration, this time before the undersigned Arbitrator. The parties concurred that the record before the Arbitrator was complete.

**Issue Presented:**

Was the Notice of Removal dated November 29, 2012 issued to Letter Carrier Lisa Key for just cause in accordance with Article 16 and the M-39 Section 115 via Article 19 of the National Agreement, and if not, what is the proper remedy?

**Position of the Service:**

The Postal Service asserts it has proven that Grievant took a package that had been left for a customer by a United Parcel Service deliveryman. It maintains that the video provides evidence that the package was left while she was delivering mail and was not there when she departed the building. It denies the video shows her delivering the package to a mailbox.

The Service argues Grievant has breached the trust it must have in its employees. It notes it has a contractual relationship with United Parcel Service which entrusts it to handle some of its parcels. The Service also refers to the trust its customers, including the addressee of the package, have in its operation. It stresses that the Postal Service is the most trusted government agency.

Additionally, the Service asserts theft of mail is a criminal offense and has consistently been found by arbitrators to be just cause for removal. It insists Grievant was aware of the requirements for honesty from the day she was hired, and should have also been aware of the consequences for

breaches of those requirements. It concludes, therefore, that it had just cause for issuing her a Notice of Removal.

The Service denies that the disciplinary action was untimely. First, it argues the National Agreement contains no time limit for the issuance of discipline. Furthermore, it denies it had sufficient knowledge of the facts until it received the Report of Investigation from the OIG. It says it would be inappropriate to consider June 4, 2012 as the date giving rise to the discipline inasmuch as nobody knew about the missing package on that date.

For these reasons, the Service asks that the grievance be denied in its entirety. In support of its position, the Service cites the following Awards:

A06N-4A-D 09177623)	
A06N-4A-D 09193457)	Arbitrator Roberts
E06N-4E-D 11289875	Arbitrator Eisenmenger
E10T-1E-D 12180263	Arbitrator Gomez
C00C-4C-D 04098272)	
C00C-4C-D 05124800)	Arbitrator Klein
J06N-4J-D 12208441	Arbitrator Dilts
J98M-1J-D 00157265	Arbitrator Simon
F94M-1F-V 97114646	Arbitrator Snow

**Position of the Union:**

The Union denies the Service has proven that Grievant took the package in question. It points out that the Circuit Court is a separate forum and its decision in the criminal charge is not binding upon the Arbitrator. It also notes that there was no mention of the court's decision in the Notice of Removal, so the fact that Grievant might have been found guilty in court has no bearing upon the action taken by the Postal Service.

The Union says the case raises many questions that suggest the Service has not met its burden of proof. It says the parcel that is allegedly missing was never identified. Without tracking information from United Parcel Service, it says it is impossible to determine if the package delivered while Grievant was in the building is the same package that the customer claims is missing. It says there is no evidence as to what was in the package in the video or what the value of the contents was.

Finally, it points out that United Parcel Service contends the missing package was delivered at 3:56 pm, although it is undisputed that Grievant scanned an MSP sticker on the mailboxes when she began to deliver the mail at 3:37 pm. Because the video showed that Grievant was in the building for only 13 minutes and 35 seconds, the Union concludes the package in the video is not the one that was delivered by UPS. Instead, the Union suggests that Grievant placed the package in a mailbox 11 minutes and 48 seconds into the video.

If Grievant happened to bring the package back to the station, the Union contends there is no evidence she kept it or its contents. It notes that the station's records show that there was one UPS parcel that was returned that day.

The Union additionally complains that the Service's investigation was ineffective and was based entirely upon hearsay. On the other hand, it contends Grievant had twenty years of honorable service and has the support of her fellow employees. To prove theft, the Union argues the Service must prove she intended to take the package. It denies the Service has met this burden. Finally, the Union insists the delay between the Service finding that the package was missing and their action to remove Grievant was excessive and warrants rescission of the Notice of Removal.

Concluding that the Service did not have just cause to issue Grievant the Notice of Removal, the Union asks that the grievance be sustained, that the Notice of Removal be rescinded, and that she be made whole for wages and benefits lost. In support of its position, the Union cites the following Awards:

W1N-5H-D 27023	Arbitrator Snow
C8N-4A-D 9831	Arbitrator Dobranski
E01N-4E-D 06188333	Arbitrator Dilts
S1N-3W-D 2205	Arbitrator Schedler
S1N-3W-D 45373)	
S1N-3W-D 46383)	Arbitrator LeWinter

**Discussion:**

To meet its burden in this case, the Postal Service must present sufficient proof to establish that Grievant took a parcel that was intended for a customer and kept it for the purpose of depriving

the rightful owner of the contents. Its case must be proven with evidence, and not with supposition or conjecture. Unlike a criminal case, the Service does not have to meet its burden of proof beyond any reasonable doubt, but there cannot be so much doubt that the Arbitrator is not satisfied Grievant is guilty of the offense for which she is charged.

As he did at the hearing, the Arbitrator must note that the findings in the criminal matter against Grievant have absolutely no bearing upon his decision. Significantly, Grievant was not charged with being convicted of a crime, so her conviction cannot be considered an element of her alleged offense. The Arbitrator, under the terms of his contract with the parties, sits as a trier of fact in a hearing *de novo*. Different rules of evidence, rules of procedure and standards of proof apply in the two fora. The judge and the Arbitrator are two separate people who may see things differently and reach different conclusions. The Arbitrator has no idea what testimony or evidence was reviewed by the judge. The judge's decision has the same impact upon the Arbitrator as the Arbitrator's decision would have upon the judge – none.

The primary evidence in this case is the building's surveillance video, which runs for approximately 13 minutes and 35 seconds from the time Grievant enters the building's lobby until she leaves. The time stamp on the video is unquestionably incorrect. We have some idea, however, when she was in the building because she scanned an MSP label inside the mailbox at 3:37 pm, according to Postal Service records. She did this shortly after opening the mailboxes and before she delivered any of the mail. This occurs 46 seconds into the video. From this, the Arbitrator concludes she was out of the building by 3:50 pm.

According to the Notice of Removal, the missing package that was addressed to Marianne Romito was delivered by UPS at 3:56 pm. This strongly suggests the delivery of the missing package was made after Grievant had left. There is no clear evidence that the deliveryman in the video is, in fact, from UPS. It is impossible to discern any markings on his uniform, and the color quality of the video is not sufficient to determine if his uniform is the familiar brown that is worn by UPS employees. Because the deliveryman came into the lobby before Grievant performed her MSP scan, the Arbitrator would have to believe he did not record the package as having been delivered until approximately 20 minutes later. There is no support for such a conclusion. There-

fore, the Arbitrator must find that the package that was delivered while Grievant was in the lobby was not the package Ms. Romito claims was missing. If it was, in fact, missing, the evidence does not show that Grievant took it.

While this should end the analysis of the case, the Arbitrator would be remiss if he did not address what he saw, or did not see, on the video. The Service's primary witness against Grievant was Special Agent Merletti. He testified that he watched the video no less than 50 times and was certain he observed Grievant place the package that had been dropped off by the deliveryman in her satchel. He denied that she placed the package in a mailbox. The Arbitrator cannot reach the same conclusion. Instead, the Arbitrator clearly observed Grievant pick up the parcel at 11 minutes and 47 seconds into the video, and then place it into a mailbox one minute later. When she gathered up the out-going and undeliverable mail on the shelf before she left, the parcel was no longer visible. It could not be seen being placed into her satchel.

The Arbitrator notes that the video was reviewed on October 19, 2012, prior to the issuance of the Notice of Removal, by Manager Adams, Supervisor Bender and Stewards Morgan and Green. They all reached the conclusion that Grievant had delivered the parcel. It was on the basis of this review that Adams agreed to return Grievant to work.

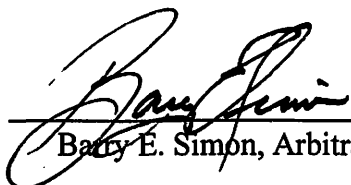
When asked why she issued the Notice of Removal, Adams emphasized that Grievant had initially denied it was she in the pictures and then declined to answer all of the questions at the Investigative Interview on the advice of her attorney. The Arbitrator does not find that to be sufficient cause to conclude Grievant took the package.

The Arbitrator does not give significant weight to Grievant's statement to the Special Agents that she might have brought the package back to the station. She made it clear that she did not remember handling the package, and the Arbitrator takes her statement to be nothing more than speculation rather than an admission.

For these reasons, the Arbitrator finds that the Postal Service has not met its burden of proof and did not have just cause to issue Grievant a Notice of Removal. The grievance must be sustained for this reason and it is not necessary to address the Union's procedural arguments.



**Award:** The grievance is sustained. The Postal Service is directed to remove the Notice of Removal from Grievant's record, return her to work and make her whole for any wages and benefits lost as a result of this action. The Arbitrator will retain jurisdiction for sixty days from the date of this Award solely for the purpose of resolving any issues related to the remedy awarded herein.

  
Barry E. Simon, Arbitrator

Dated: April 18, 2014  
Arlington Heights, Illinois