C# 06871

REGULAR ARBITRATION

In the Matter of Arbitration	)	
Between	)	Opinion and Award
Northeast Florida Letter	)	Case # S4N-3R-D-35445
Carriers, Branch 53	)	
National Association of Letter	)	Irvin Sobel
Carriers	)	Arbitrator
and	)	
United States Postal Service	)	
Jacksonville, Florida	)	
	)	
Grievance of John P. Blow	)	

Appearances:

For the Employer: John A. Harrison
Labor Relations Assistant
U.S. Postal Service (USPS)
Jacksonville, Florida

For the Union: Judson Vaughn
Regional Administrative Assistant
Atlanta Region (NALC)
Atlanta, Georgia

Hearing and Appearances

The subject matter in arbitration was referred to the undersigned arbitrator. A hearing was held at the Jacksonville, Florida Main Postal Facility on February 20, 1987, at which time the parties were provided full and equal opportunity to introduce evidence, examine and cross examine all witnesses and argue their respective positions. No issues of arbitrability, or defect of form were raised by the parties to the proceedings. However, the Union cited certain procedural breaches by the Employer which it deemed sufficiently serious to warrant separate treatment before addressing the substantive matter cited below. The following issue was presented at the hearing:

> Was the Grievant John P. Blow disciplined for just cause, and if not what is the appropriate remedy?

The parties concluded the hearing with oral arguments.

Relevant Contract Provisions and Regulations:

Article 15 Section 2 Step 2(f)

> When agreement is not reached the Employer's decision shall be furnished to the Union representative in writing within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period.....

Article 16. Section 4

> "In the case of discipline involving suspensions of fourteen

(14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended after ten (10) calendar days during which ten day period the employee shall remain on the job or the clock (in a pay status) at the option of the employee."

Chapter 1--City Delivery Carriers.

112.21 Obey the instructions of your manager.

133.1 Always exercize care to avoid personal injury and report all hazardous conditions to the unit manager._

Background:

On either June 23rd or 24th, the grievant, a Letter Carrier T-6, received a Notice of Disciplinary Action dated June 18th,1986 from Mark A Bodway, Manager of the Lake Shore Station. That notice states:

You are hereby notified of your suspension from duty without pay for five (5) consecutive calendar days for the following reason:

CHARGE NO. 1: FAILURE TO FOLLOW INSTRUCTIONS/UNSAFE WORK PRACTICES

On May 29, 1986, you reported that you had fallen on May 28, 1986, at 4845 Sunderland Road and injured your back and left side. Your statement read, "A

piece of cement sidewalk shifted and I fell on left side." On June 12, 1985, you had an accident and injured your foot. You were instructed at that time to watch out where you were walking. When questioned concerning this matter, you were told that an inspection of the accident site revealed no loose stones and you made no comment. Your actions were contrary to Methods Handbook M-41, Parts 112.21 and 133.1, which state, "Obey the instructions of your manager," and "Always exercise care to avoid personal injury and report all hazardous conditions to the unit manager."

In addition to the above, the following element of your past record was considered in taking this action:

(1) On November 5, 1985, you were issued an official letter of warning for failure to follow instructions/failure to complete route deliveries.

You will remain in an active duty status during this advance notice period.

Date and time suspension to commence: beginning of your tour on Wednesday, July 2, 1986.

Date and time suspension to end: end of your tour on Sunday, July 6, 1986.

On July 11, 1986 the Union filed its 2nd Step Appeal and following a hearing on July 29th received a denial of said appeal, on

August 25th signed by, the afore cited, John A. Harrison. After receipt of a denial on November 7th at the Step 3 level, the Union on November 25, 1986 timely appealed the above matter to final and binding arbitration.

Position of the Parties:

Since the relevant arguments and contentions of each party will be presented and discussed in the Arbitrator's Opinion no purpose other than increased length and verbiage would be served by their reiteration. Accordingly, only a bare bones summary of each party's contentions will be presented under separate attribution.

Union Contentions:

The Union argued that; a) the Employer's failure to allow the grievant the contractually required ten (10) days before the inception of the suspension and the approximate one month delay in rendering a Second Step decision were procedural breaches of sufficient severity to warrant sustention of the grievance on procedural grounds alone; b) the Step 2 decision was based upon new issues and charges not stipulated in the Notice of Suspension; c)the element of past record cited is for an infraction of an entirely different nature than that which evoked the instant grievance and thus cannot properly be utilized for justifying the instant suspension on progressivity grounds; and d) absent the slightest modicum of proof, either that the grievant's fall was caused by any practice on his part which violated any safety regulation or that he disregarded any meaningful instructions regarding safe work

practices, the Employer has failed to establish "just cause" for its actions.

Employer's Contentions:

The Employer advocate, in addition to amplifying the charges in the Notice of Suspension, also raised a number of additional contentions as well as advancing counterarguments to the rationale stated by the Union. Among the most significant were; 1) the alleged procedural breaches, which involved no more than a one day difference between the contractual requirement of ten (10) days for beginning the suspension and the nine (9) days actually accorded the grievant, are so slight as to be meaningless; 2) The Union, had verbally agreed to extend the deadline for the 2nd Step Appeal decision and since that decision addressed itself to and encompassed all the issues discussed at that appeal hearing it could not be construed as alleged by the Union, as containing "Surprise" elements; and 3) given that both the Union's second and third Step Appeals limited themselves under Corrective Action Requested to, "The Letter be removed from all files, folders, records and destroyed", neither back pay nor any other additional remedy could be acceeded to by the arbitrator should his decision result in sustention of the grievance.

Procedural Issues:

This arbitrator in previous decisions has been willing not only to accord the parties some reasonable latitude in the administration of the National Agreement but also to recognize that at the shop level, especially in stations removed from the major facility where the operatives are generally relatively unfamiliar with the niceties

of contract administration, all the "dotting of the P's and Q's" of the LMRA may not be possible. Accordingly, as long as the Employer has made a reasonable effort to notify the employee of his suspension as expeditiously as possible, this arbitrator has not sustained arguments based on either a one, or even two day formal lapse in notification. However, in the instant situation the Employer's agent Supervisor Logerson, failed by far to make a reasonable effort to deliver the Notice of Suspension to the grievant expeditiously after it was received at the Lake Shore Station. The only official document available, namely USPS' Form 3811, which had been signed by the grievant in front of the aforementioned Supervisor, cites June 24th as the date of receipt of the Notice. Moreover, the Supervisor's explanation of the circumstances surrounding the delay in delivery of the letter, designed to induce belief that he actually delivered it on June 23rd, are far from convincing. If he (Logerson) permitted the grievant to affix the wrong date on a Certified Mail form, he was guilty of gross negligence. Even assuming arguendo that he (Logerson) delivered the Notice on the 23rd, his rationalization of why he waited as long as he did to deliver what was both an official document and a piece of Certified mail cannot be accepted as consonant with the behavior of a responsible Supervisor making a reasonable effort to deliver a vital document within the contractually stipulated period.

Thus, a so-called contractual breach, which this arbitrator would normally find so minor as to be devoid of any but the slightest mitigatory significance, assumes more major proportions given the

unreasonableness of the Employer agent's behavior.

The other alleged procedural breaches are so minor and inconsequential that they must be dismissed. Although, the three weeks elapsed time between the issuance of the Notice, and the incident which evoked it, seemingly was a long one that period neither was burdensome to the Union nor even unusually protracted in terms of the normal issuing procedures prevailing at the Jacksonville branch stations. A request for discipline has to receive a number of official approvals in its passage from a branch through the Employment and Labor Relations office. Once it has reached E/LR additional time must be allowed for investigation as well as writing and processing the Notice itself.

Similarly examination of the evidence and testimony involving past practices, would strongly indicate that there was a verbal agreement between the 2nd Step hearing officer and the responsible Union Steward, lengthening the period of notification in order to permit the former to properly investigate allegations brought forth at that level by the Union. The new charge alluded to in that decision namely, that the grievant had deviated from his proper route, was a matter more than amply discussed by the parties at the 2nd Step. The Union had every reason to expect it would be taken up in that decision and more importantly, that decision was available to the higher level designees on both sides for discussion and consideration at the 3rd Step Appeal. No surprise which could constitute a procedural breach resulted from the written decision of the Employer's 2nd Step hearing officer.

While any violation of the National Agreement by the Employer would be damaging to the Union in order for it to have any significance, either in a "threshold" sense or even in a mitigatory context, it must result in inflicting substantial harm not only to the Union but also to the grievant. In the instant grievance the violation impacted seriously upon the grievant. Had the grievant been given his proper ten (10) day notification instead of eight (8), his suspension would have begun two days later, and given his work schedule, he would have lost only three (3) days pay instead of five (5).

Nevertheless, the procedural breaches while serious are far below that degree of severity required to sustain the grievance on procedural grounds. They are, however of, sufficient magnitude to justify some mitigation should the grievance be denied on substantive grounds.

The Substantive Issue:

Responses to certain fundamental questions are a prerequisite to the resolution of the instant grievance. These are: 1) Was the accident of May 29th caused by the grievant's violation of a safety rule or practice? 2) Did the grievant fail to follow instructions, either specifically issued by his Supervisors or even those of a more generalized nature which would have ensued from his training? 3) Was the incident of November 12, 1985 for which the grievant was given a Letter of Warning properly cited as a past element; and 4) Could the fall be linked to the grievant's deviating from his assigned route?

The Employer clearly has the right and responsibility to adopt

and enforce any safety rules and regulations which can be reasonably related to the efficient conduct of its enterprise and to the protection of all employees. An accident which ensues from a violation by an employee of a specific safety rule would constitute proof of an improper or unsafe practice by that employee. However, accidents can occur in entities which have excellent training programs and in which employees exercize reasonable caution, are not careless or heedless, and do not violate any specific rules or regulations.

The environmental circumstances surrounding performance on any job sometimes unexpectedly change it's nature and create unforseen hazards by altering the flow and pace of work. Individuals who are not automatons, for a variety of psychological and physiological reasons, cannot always maintain the same work rythms and movements. Accidents will occur in the absence of any violation of work rules and above all, people under optimal circumstances make mistakes, even when they are not violating rules. No amount, either of instructions to be careful nor the imposition of discipline will prevent mistakes or errors. A carrier may safely walk thousands of steps a day, through rough terrain containing hidden hazards for years, and yet stumble once or twice despite exercising due care. Not only do individuals lack perfect eye-body coordination even when they are consciously making an effort to be careful, but also a highly conscious effort to do so may so interrupt normal body rythms and movements that the person concerned may intensify his/her vulnerability to accident.

In the instant grievance by citing a very generalized statement regarding safety, namely, Regulation (133.1), which in essence only says "be careful" the Employer is attempting to link this accident to a violation of a safety rule or practice. In other words,in citing a regulation without citing a violation of a specific safety rule or practice Management in essence arguing that if it says to you "be careful" and subsequently, if an accident occurs that accident constitutes proof that you have been careless and thus subjects you to discipline. This automatic linkage of an accident with carelessness would imply that any employee who has an accident is subject to discipline without regard to proof of a violation of any specific safety regulation or practice. In fact, the danger of such an interpretation prompted Assistant Postmaster General Carl S. Ulsaker to write the following in 1980 to all "Regional Directors of E/LR":

> "What must be cited in any such disciplinary action (for Safety Rule Violations) are the actions of an employee in a specific situation which are violations of a Postal Service Rule or Regulation." (Union Exhibit #1)

At no point was the Employer able to point to any specific act or practice which violated any safety rule or regulation. It failed to prove that the grievant's fall was caused by or even related to any unsafe act on his part which either violated a safety rule or even an instruction received during the training period. The fact that the Employer's agents, when they inspected the area in which the grievant fell, did not find any "loose stones", does not even

approach that level of proof requisite to establishing its position that the grievant was heedless and acted in an unsafe manner. Unable to do so, the Employer introduced at the 2nd Step level what was in essence a new charge namely that the grievant's fall was caused by his deviation from his assigned route. If such deviation were proven, the "Failure to Follow Instructions" cited in the Notice of Suspension, charge would be validated.

These instructions, cited in the Notice, which Blow allegedly failed to follow originated from an incident of June 12, 1985. After that June 1985 incident in which the grievant also fell, ostensibly as a result of stumbling over a root, his Supervisor, who had no proof of any overt act or safety violation in the grievant's actions which could be related to the incident, nevertheless, had a conversation with him which he termed an informal discussion on the workroom floor. During that June 1985 conversation, the Supervisor instructed Blow "to watch out where you are walking." That very generalized, non-specific if not platitudinous statement which offered the grievant neither a specific guide to any conduct in carrying his route nor any assistance in preventing future accidents, was defined as the "instruction" which the grievant allegedly failed to follow. In short, a platitudinous statement devoid of specific content was defined for purposes of establishing a bases for discipline as an "instruction". The apparent logical sequence is that the two falls-ipso facto-were linked by the grievant's failure to watch where he was walking. Thus, since Blow had been advised, approximately one year before to watch where he was walking, his fall

must have been caused by his not following official instructions. Generalized instructions which neither offer specific guides to conduct, nor even inform what specific actions are in violation of such regulations, cannot be used as proof of violation of an equally generalized regulation such as "Obey the instructions of your manager." In short, a statement such as "watch where you are walking" even when delivered by a Supervisor do not, by this token, acquire that degree of specificity requisite to establishing them as "instructions", as that term is understood. For instance, what does "watch where you are walking" mean specifically when you are also instructed to be simultaneously fingering mail?

The Employer through employing a diagram, which allegedly traced the grievant's route and comparing that itinerary with what it stated was the proper one, attempted to prove that the grievant had at the instance of his fall deviated from his proper route. Unfortunately, from its standpoint, the diagram which it offered as evidence, not only located 4845 Sunderland on the opposite side of the street from where it actually was, but also had the grievant first moving down the odd numbered side of the street (i.e. from 4801 to 4845 Sunderland). After moving along the odd side of the street the grievant was supposed to cross over to the even side and proceed back to his parked vehicle. In fact, the actual route taken by the grievant was down the even side of Sunderland (from 4800 to 4848 Sunderland) after which he crossed over to the odd numbered side in order to complete his loop. If such were the case and he was proceeding directly towards the 4845 address, the locus of his fall

was in a reasonable sense along the most direct line to that destination. The Employer neither offered any documentation of the routing which it contended was the proper one, nor showed that the grievant a T-6 who was carrying the route for the third time, had been given any routing, either by a Supervisor/Trainer, or the individual who normally carried the route, different from the one he claimed to have followed.

The Employer offered as evidence a picture of a mailbox on a tree in the lot adjacent to 4845 Sunderland. It alleged that the box was the proper one for that address, and argued that if the grievant were properly delivering mail to the box, his route to it would have been entirely different from the one along which he fell. The grievant contended that he had never been informed of the existence of that box and since it was not readily visible along his route, he initially attempted to deliver mail at the house, as he had done two weeks previously the only time he had ever delivered mail to that address. In his only previous delivery at the 4845 location, he had inserted the one (1) piece of mail in an opening below the door, but on May 28th because he had too much mail (4 pieces) he was unable to do so, and thus proceded more directly to his next delivery and brought back the undelivered four pieces of mail to the station.

The picture presented as evidence either is not conclusive as to the degree of likelihood to which a person, who neither has been informed nor who does not know precisely where to look, would see the object. A tree located some distance from the curb in a location at least ten feet away from the termination of the sidewalk and in

somewhat rough terrain is neither a conventional or usual entity to which a mailbox is appended, nor is it a usual location for it.

Thus, given these facts, the Employer was demonstrably unable to prove its contention, stated in its 2nd Step decision, either that the grievant was off his route when he fell or that the deviation, assuming arguendo it had taken place, had anything to do with the fall. Moreover, no evidence was presented by the Employer to indicate that the grievant had been informed by either the regular incumbent of the route or any of the Supervisors including Bodway of the placement of that mailbox.

The Employer's contention that the grievant attempted to mask his failure to follow safety precautions by stating in his accident report that "the cement sidewalk shifted and caused his fall" must be examined. The Employer's major protagonist, Station Manager Bodway argued that he became suspicious of the grievant when he and Supervisor Hill, checked the "shifting" story by jumping up and down on the blocks and were unable to dislodge them. They thus stated they found "no loose stones". The grievant and the Union contended that the Supervisors, since the routing the Supervisors had in mind was an entirely different one from the one he took, did not "check" the grass-obscured cement blocks adjacent to the drainage ditch alongside where he actually fell. Moreover, since it was raining heavily on the day of the fall namely, May 28th, and they "checked" much later on the 29th at which time the ground had firmed, the circumstances which affected the "shifting" had been altered. In short, conflicts in both the evidence and in the respective versions of the

protagonists, which after a lapse of nine months cannot be reconstructed by this arbitrator, render this line of argumentation highly inconclusive.

The Employer based much of its argumentation around the fact that the grievant in reporting the accident stated it had taken place on the 4800 block of Sunderland an-"odd side"-rather than where it actually took place, namely, adjacent to 4845 Sunderland. In fact, Manager Bodway showed where he had altered that statement by penciling in (with his initials) the 4845 address. He (Bodway) also expressed doubts "if he (Blow) fell at all". The above arguments in addition to the allegations that "no loose stones" were found, comprised a major share of the Employer's case and all were attempts to infer that since the grievant falsified his report in the above cited contexts, he must be guilty of the charges cited as the basis for suspension. Yet the Employer never charged the grievant with falsifying a report, a more serious but far less nebulous charge than the actual one at issue, despite devoting a considerable part of its case to that endeavor.

The November 5, 1985 LOW cited as a past element, although superficially linked to the instant grievance through a similar generalized charge of "failure to follow instructions" is based upon a breach namely "failure to complete route deliveries"so dissimilar to "Unsafe work practices" that it cannot be used to justify, on progressivity grounds, a five (5) day suspension. Thus, the Employer not only has failed to establish just cause for its particular disciplinary action but also for the imposition of any discipline at

all. Accordingly the grievance will be sustained on its own merits.

Given the right of the arbitrator in circumstances when a grievance is sustained, to fashion a remedy appropriate to making the grievant "whole" this arbitrator cannot acquiesce to the able Employer advocate's contention, that he is bounded by and limited to the Union's requested "Corrective Action". The arbitrator does not have to take the less than precise verbiage of a frequently inexperienced and sometimes technically unschooled Union Steward as gospel, either when that officer requests, far more than the grievant (or Union) is entitled to, or as in this comparatively rare instance, too little. In fact, arbitrators revise or modify (Union) requests far more often in a downward rather than an upward direction. Not to restore the pay lost due to the suspension, would not only fail to render the grievant whole, but also would effectively be tantamount to denying the grievance in large part. Thus, the Employer's attempt to limit the remedy on grounds of the arbitrator's restricted authority, is hereby rejected.

Award:

The grievance of John P. Blow is hereby sustained. All references to his five (5) day disciplinary suspension of June 18, 1986 will be expunged from any and all of his personnel records. The grievant will be awarded back pay for five (5) days or forty (40) hours at his rate of pay prevailing on the date of suspension.

March 7, 1987

Tallahassee, Florida

This is a certified true copy of Arbitration Award.

Irvin Sobel

Irvin Sobel, Arbitrator