

REGULAR DISTRICT ARBITRATION PANEL
Northern Ohio District

In the Matter of an Arbitration

Between

**UNITED STATES POSTAL
SERVICE**

And

**NATIONAL ASSOCIATION OF
LETTER CARRIERS**

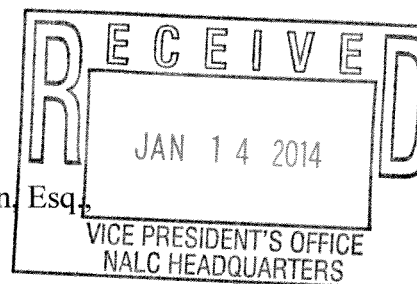
Grievant: Christine Strauser

Post Office: Lorain, Ohio

USPS Case No.: C11N-4C-D13249260
U15/30/2013

NALC Case No. U15/30/2013

Before: Robert Tim Brown, Esq.
ARBITRATOR



Appearances:

For the Postal Service: Bernadette Rolen, Labor Relations Specialist

For the Union: David A. Ditchey, Local Business Agent, Advocate;
Mark Camili, Regional Administrative Assistant,
NALC Region 11

Place of Hearing: Lorain, Ohio Post Office

Date of Hearing: November 20, 2013

Date of Award: January 2, 2014

Relevant Contract Provisions: 14, 15, 16

Contract year: 2011

Type of Grievance: Discipline (Removal)

RECEIVED

JAN 03 2014

DANIEL E. TOTH

Award Summary:

Grievance sustained. There was not just cause for removal, but there was just cause for imposition of a 7-day suspension. Details and full remedy within.


Robert Tim Brown

cc: Grievance and Arbitration Processing Center, David Ditchey, Jill D. Miniard, Daniel E. Toth, Bernadette Rolen

AWARD

This case was heard under the auspices of the Regular Arbitration Panel established to hear disputes between the National Association of Letter Carriers and the United States Postal Service (Northern Ohio District), pursuant to the collective bargaining agreement in effect between them. Hearing in this case was held on November 20, 2013 at the Lorain, Ohio Post Office. Labor Relations Specialist Bernadette Rolen represented the Service at the hearing, and NALC Local Business Agent David A. Ditchey represented the Union and the Grievant. The Grievant was present and testified at the hearing.

ISSUE: The issue in this case was:

Did the Postal Service have just cause, on May 20, 2013, to issue Grievant a notice of removal, and, if so, what shall the remedy be?

FACTS

Grievant is a City Carrier Assistant (“CCA”) who at the time of the events in this case had 2 years of discipline-free service. On May 6, 2013 Grievant was operating her postal vehicle and her vehicle struck and damaged a parked car. She acknowledged that the cause of the accident was her inattention, in that she reached while driving to straighten mail that was on the parcel shelf next to her, by doing so took her eyes off the road, and when she looked up the parked vehicle was in front of her, too close for her to stop. She was duly licensed to drive but did not have her license with her at the time of the accident. She was not cited by the police for any violation of law.

Carriers are required both by USPS regulation and by Ohio law to carry proof while driving that they are licensed to drive. Carriers are also required to give driving their full attention and Grievant’s action in shifting her attention to mail on the parcel shelf violated that requirement. There was no dispute in this case that this was an at-fault accident, and that Grievant was also in violation of the rule requiring her to carry her license. It was not a serious accident but it could have been, had one or more humans rather than a car been struck.

There were no special factors that would have heightened the risk of injury, eg., children walking or playing, pedestrians walking or crossing, etc.

One additional factor that was cited by the Service was that the police report stated that Grievant had told the police officer that she had been blinded by the sun and the report

made no mention of shifting mail. The police officer did not testify. The conflicting statement which the officer alleged in the report had been made was not mentioned in the notice of removal, and Grievant testified that she did not mention sun blinding to the officer.

The issue in this case may therefore be distilled down to whether there was just cause to remove, in a first discipline, a CCA who, by violating USPS rules by briefly diverting her attention from the road while operating a vehicle, allowed her vehicle to collide with and damage another vehicle, and while so doing was not in possession of her [valid] drivers license.

NOTICE OF REMOVAL

The notice of removal in this case read, in relevant part, as follows:

This is advance written notice to remove you from the Postal Service no sooner than 30 calendar days from the date of your receipt of this notice. However, as a result of the USPS-NALC Dispute Resolution Process, the decision in this case will be deferred until after the Step B Decision has been rendered or fourteen (14) calendar days after the appeal is received at Step B, whichever comes first.

The reasons for this action are:

CHARGE NO. 1: Failure to Follow Instructions

CHARGE NO. 2: Failure to Operate a Postal Vehicle in a Safe Manner

On Monday, May 6, 2013, you were involved in a vehicle accident while driving Postal vehicle #0214732. At approximately 1745 hours, you phoned the unit and reported to A/Supervisor Dietz that you were involved in a vehicle accident in the front of 1298 Michigan Ave. Management went out to the scene and the local police was called.

A Pre-Disciplinary Interview (P131), conducted on Wednesday, May 8th, with your union steward present. You were asked to explain what occurred at the time of the accident. You stated, "I reached over to push the mail back in the mail tray, and while moving the mail, I must have pulled the wheel to the right. When looked up, saw the parked vehicle right in front of me. I did not take my eyes off the road for more than a second or two. I guess I never should have taken my eyes off the road to move the mail in the tray."

The Lorain Police were called. Upon their arrival, Management discovered that you did not have your Ohio Driver License. Not having your drivers license in your possession while operating a vehicle in the course of official duties violates Postal policy and Ohio State law. Ohio Revised Code 4507.35 states that you have a duty to display license or furnish satisfactory proof of license upon demand.

Driving distracted is very dangerous and can place you and the public at risk of injury and/or property damage. Being aware of your surroundings and in control of your vehicle are primary responsibilities of letter carriers while on their routes. This accident was due to your lack of attentiveness.

Your accident on May 6, 2013 was preventable. Your failure to adhere to postal policy on safe driving resulted in damage to a customer's vehicle. You failed to operate your vehicle in a safe manner and failed to follow instructions on safe vehicle operations that have been provided both verbally and through postings.

You have been made aware of Postal policies and regulations through Safety and Service Talks. Service talk This talk [sic] encouraged all drivers to stay focused.

Your actions were in violation of Postal rules and regulations such as, but not limited to the following:

Employee and Labor Relations Manual (ELM)

Section 665.13 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

Section 665.15	<p>Obedience to Orders</p> <p>Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual must nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels.</p>
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Section 814.2 Responsibilities

All employees are for:

d. Performing all duties in a safe manner.

g. Driving defensively and professionally, extending courtesy in all situations, and obeying all state, local, and Postal Service regulations when driving a vehicle owned, leased, or contracted for by the Postal Service.

Section 831.332 Drivers' Responsibilities

Drivers must drive safely and defensively, practice personal safety, obey all state and local traffic laws and Postal Service driving policies, and extend courtesy in all situations.

Handbook M41, City Delivery Carriers Duties and Responsibilities

Section 112.21 Obey the instructions of your manager.

Section 112.4 Conduct your work in a safe manner so as not to endanger yourself or others.

Section 812 Safety Practices

Section 812.1 Practice safety in the office and on the route.

Section 812.2 Observe all traffic regulations prescribed by law. Rules applying to the public also apply to operators of postal vehicles.

Section 812.5	Arrange letter mail, flat mail, and small parcels in the work tray provided on the ledge behind the windshield so as not to obstruct vision or use of the vehicle controls. Trays must not be piled on top of other trays on the ledge behind the windshield.
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Handbook EL-814, Postal Employee's Guide to Safety

Section X: Motor Vehicles

Vehicle accidents are a major source of serious personal injury for Postal Service employees. Defensive driving is the best way to prevent vehicle accidents because it involves both the desire and the ability of a driver to control accident-provoking situations. You are expected to drive all Postal Service vehicles in a dependable, efficient, safe and courteous manner.

A. Licenses

Only authorized personnel can operate Postal vehicles. You must have in your possession a valid state driver's license when operating a postal vehicle or any vehicle when on postal business.

6. Loading

Make sure that any mail you load into a vehicle will pose no hazard to the operator when the vehicle is started, stopped, turned, or otherwise operated on a mail delivery route. Do not place large parcels, bulky items, or bundles of mail on the tray or ledge to the extent that they can obscure your vision or break the windshield during a sudden stop.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within fourteen (14) calendar days of your receipt of this notice. This removal will be deferred until a decision is made on the grievance, if one is filed, at the Step B level of the NALC-USPS Joint Dispute Resolution Process, or 14 calendar days after the appeal is received at Step B, whichever comes first.

B TEAM DECISION

The B Team decision read, in relevant part, as follows:

ISSUE: Did Management violate Articles 8, 11, 15, 16, and 19 as well as ELM 436 when they issued City Carrier Assistant (CCA) Christine Strauser (grievant) a Notice of Removal without just cause? If so, what is the appropriate remedy?

DECISION: The Dispute Resolution Team (DRT) has agreed to an impasse of this grievance. The National Business Agent may appeal this grievance to arbitration within fourteen (14) days of its receipt.

The Step B Team has considered all arguments and evidence in the case file and any of this material may be cited in the event of arbitration.

EXPLANATION: Management at the Lorain, OH Post Office issued the grievant with a Notice of Removal dated 5/30/2013. The grievant is charged with "Failure to Follow Instructions" and "Failure to Operate a Postal Vehicle in a Safe Manner". The Notice states in part:

[text of N.O.R. omitted]

The NALC Step B Member is in agreement with the Informal and Formal A contentions from the NALC representatives forwarded in this grievance. These written contentions by the NALC representatives will not be copied verbatim, but are to be considered part of this Team member's position summary.

The grievant has been employed by the Postal Service for two years as a Transitional Employee (TE) and a CCA. During this career the grievant has not receive any discipline.

The Union argues that Management's action have violated articles of the National Agreement particularly Article 16 and questions and answers relating to CCAs in the Das Award.

Unlike TEs, CCAs have been given expanded protections against unjust discipline.

The Q&A regarding CCAs states in part:

2011 National Agreement

AWARD DATE: JANUARY 10, 2013

32. Will CCAs have access to the grievance procedure if disciplined or removed?

A CCA who has completed 90 work or 120 calendar days of employment within the immediate preceding six months has access to the grievance procedure if disciplined or removed. A CCA who has previously satisfied the 90/120 day requirement either as a CCA or transitional employee (with an appointment made after September 29, 2007), will have access to the grievance procedure without regard to length of service as a CCA. Further, while in any such grievance the concept of progressive discipline will not apply, discipline should be corrective in nature. The parties agreed that the concept of progressive discipline will not apply however Management has not shown through evidentiary proof that the offense is so egregious that removal is the appropriate action or that any corrective measures were taken. Management's PS Form 1769 question #72 under accident follow-up asks "Preventive Action", Management's response to this question is to "Provide Training/Instruction". This is not the corrective action Management took; the only action was to terminate the grievant.

The Union also argues that Management has treated the grievant disparately. One of the tenets required to show just cause as outlined in Article 16 is:

NALC-USPS Joint Contract Administration Manual - April 2009 Page 16-1

- Is the rule consistently and equitably enforced? A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor.

Consistently overlooking employee infractions and then disciplining without

warning is improper. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one.

The Union has included two cases in which letter carriers in the Lorain Post Office were involved in vehicle accidents and the corrective action for these two carriers was a letter of warning. The only difference in the instant case is that the grievant is a CCA carrier and the other two carriers were Regular carriers however; both categories of carriers have access to the grievance procedure which includes Article 16 and the tenets of just cause.

While nothing in the case file shows the grievant was cited for the accident or not having an operators license, the grievant has not denied being at fault. Ohio State law states "The operator of a motor vehicle shall display the operator's driver's license, or furnish satisfactory proof that the operator has a driver's license". The police report included in the case file shows the grievant's driver's license number as RQ017301. The Union concludes the degree of Management's action in the instant case is too severe. Termination of employment is a penalty which has ramifications which not only deprive the grievant of her livelihood, but also has lasting impacts on the ability to obtain future employment. Carriers in the Lorain Post Office, under similar circumstances, have been treated in a corrective manner unlike the grievant. The grievant should have received what was recommended by Supervisor Karen L. Klonowski on form PS Form 1769, "Training/Instruction".

The Union requests the Notice of Removal dated 5/30/2013 be expunged; grievant be returned to her position as a letter carrier at the Lorain Post Office; grievant be made whole.

This USPS Team Member is in agreement with the Informal and Formal A contentions from the Management representatives forwarded in this grievance. These

written contentions by Management representatives will not be copied verbatim, but are to be considered part of this Team member's position summary.

Local Management contends the grievant is a CCA carrier assigned to the Lorain Post Office and was involved in a preventable motor vehicle accident on May 6, 2013. The charges against the grievant are Failure to Follow Instructions and Failure to Operate a Vehicle in a Safe Manner. In the Pre-Disciplinary Interview (PDI) held with the grievant she indicated "I reached over to push the mail back in the mail tray, and while moving the mail, I must have pulled the wheel to the right. When I looked up, I saw the parked vehicle right in front of me....I guess I never should have taken my eyes off the road to move the mail tray". The statement given to the Local Police Department indicates the grievant veered to the right due to blinding sunlight. The grievant never mentioned to the Police that she was moving mail in the mail tray just prior to the accident. A copy of the Police Report is included in the case file.

Management states Article 16, Section 1 of the National Agreement, on page 16-1 in the JCAM states:

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 disciplined or 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.

It has been determined the grievant did not observe safety rules and regulations. The grievant indicated in the Pre-Disciplinary Interview (PDI) that while driving, the grievant moved mail in a mail tray and took her eyes off the road. Lack of attention was the root cause of the accident. In addition to this, the grievant could not produce a valid driver's license at the time of the accident. In the EL814, Employee's Guide to Safety, section X. it states in part:

A. Licenses

- ☐ Only authorized personnel can operate Postal Service vehicles. You must have in your possession a valid state driver's license when operating a Postal Service vehicle or any vehicle when on Postal Service business. State driver's licenses are not required for operating PITs on Postal Service premises.

E. Driving Regulations

1. General Rules

- ☐ Never finger mail or hold it in your hands while you drive.
- ☐ Move your vehicle only when you are absolutely certain that it is safe to do so, especially if children may be nearby. If necessary, get out, circle your vehicle, and check underneath it to make sure.

The Union contends the degree of discipline Management has imposed is too severe. Included in the case file is the grievant's PS Form 2432, Individual Training Progress Report. The grievant was well aware of the safety procedures of operating a vehicle for the USPS as the grievant had her vehicle training on 4/6/2012. This is only a year from the date of this incident.

Management further contends the grievant is a CCA Employee and is not guaranteed work hours. The grievant has not been scheduled to work since the time of the accident. The grievant has not been placed on an emergency status.

TESTIMONY

Supervisor Joseph Dietz testified that he was called to the scene of the accident and observed that Grievant's vehicle had struck another vehicle. He said that she said she had become distracted. He said that the other vehicle was parked and unoccupied, that there were no injuries, and that his involvement in the case ended there.

Supervisor David Eggert testified that he reviewed the accident reports and conducted the PDI with Grievant. He said that Grievant admitted that she had become distracted by shifting her attention to the parcel shelf inside her vehicle, and that he considered this a very serious safety violation. He also said that she had not had her drivers license with her at the time.

He said that he considered her inattention that led to the accident to be such a serious safety violation that he gave no consideration to whether removal was corrective and recommended removal as the only appropriate penalty.

[Note: witnesses testified as to alleged disparate treatment of other employees, and I have not given attention to this testimony, as there was neither showing that there was a substantial pattern of immediate removal, or of lesser penalties imposed and sustained for safety lapses of this sort. A few instances do not make out a pattern].

Grievant testified that she was nearing the end of her tour, and thought that she had very limited time before moving into penalty overtime, which could have caused her a problem. She said that she thought that items on her parcel shelf might fall, and reached to straighten them, looking down. She said she must have steered a bit to the right and that when she looked up, she was upon the other vehicle.

She denied having mentioned the sun to the police officer. She said her husband had been holding her license on a trip they had taken, and that that was the reason she did not have it. She said the officer had accepted her social security number to use to clear her licensing.

CONTRACT PROVISIONS.

Memorandum of Understanding (Applies to TE Employees)

Re: Transitional Employees-Additional Provisions

Article 16

Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual. Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge. In the case of removal for cause, a transitional employee shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement. [emphasis added by Arbitrator]

NATIONAL AGREEMENT 2011 LANGUAGE (Per Das Award, new in 2013)

CCAs may be disciplined or removed within the term of their appointment for just cause and any such discipline or removal will be subject to the grievance arbitration

procedure, provided that within the immediately preceding six months, the employee has completed ninety (90) work days, or has been employed for 120 calendar days (whichever comes first) of their initial appointment. A CCA who has previously satisfied the 90/120 day requirement either as a CCA or transitional employee (with an appointment made after September 29, 2007), will have access to the grievance procedure without regard to his/her length of service as a CCA. Further, while in any such grievance the concept of progressive discipline will not apply, discipline should be corrective in nature. [emphasis added by arbitrator].

In the case of removal for cause within the term of an appointment, a CCA shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 15 of the National Agreement.

DISCUSSION

The principles of just cause are well established under the National Agreement and it is not necessary to set the agreement's language out here in full. There must be a full and thorough investigation which includes a "day in court" for the employee, there must be a well known and fair rule that is equitably and evenly enforced, discipline must be progressive and utilize a penalty that is appropriate to the offense, and must be corrective in nature.

Grievant is employed in a recently created job category ("CCA") which was detailed in the interest arbitration award of National Arbitrator Shyam Das issued January 10, 2013. Previously a similar but not identical employment category was covered by modified discipline language that specifically limited an arbitrator's authority to determining guilt or innocence of a charge, but precluded arbitrator modification of the penalty. In the case of a CCA, there is no such limitation (both clauses are set forth above). What still remains to differentiate the rights of CCAs from those of career Carriers is a provision that the requirement for progressive discipline does not apply to CCAs, but the agreement still provides that discipline should still be corrective.

This is an agreement in which progressive discipline is rather closely defined, with language outlining ascending levels of discipline ranging from warning to removal. The elimination of those detailed requirements does not nullify the JCAM requirements that discipline be appropriate to the offense and corrective, and the latter requirement is re-

affirmed in the Das award. There also remains the right of the Service to immediately remove an employee for an egregious offense, such as theft of mail, physical assault, workers compensation fraud, etc.

The concept of “corrective rather than punitive” is usually defined in terms of progressive discipline, but the inclusion of the term “corrective” here in the same section in which the requirement for progressive discipline is eliminated requires that there be an accommodation between these two provisions. Quite obviously, a removal is not “corrective” in the context of employment by the Postal Service, as it is final. It is therefore necessary to evaluate discipline with that in mind, and it would seem that an appropriate approach is to determine whether there is a showing that the employee is incorrigible, i.e., most likely can not be brought into compliance with the rules.

In the context of driver safety, the consequences of any lapse can be catastrophic and costly both in terms of life and property, but that is not to say that it is impossible to evaluate a safety lapse in terms of severity, intention and attitude. Arbitrators are frequently confronted with rollaway accidents in which vehicles improperly parked careen out of control down an incline, and even in those instances removal may not be supported by just cause depending on all of the circumstances, including longevity of employment, driving record and other factors. In this case, momentary inattention caused an accident and could have caused major harm, but inattention can take different forms, in some cases reflecting crass disregard for safety (texting while driving comes to mind), in some cases reflecting distraction due to personal issues, and so forth.

In a situation in which an employee is under time pressure it is easier to become distracted, and avoiding such distraction can be a function of experience and training. It is probably not uncommon for something to happen within a vehicle that causes tension between the driver’s need to watch the road and also to maintain order in the vehicle, and training and experience teaches us to let the relatively trivial issue go while focusing on the critical. Here, Grievant tried to straighten items on her parcel shelf and looked down from the view of the road. The Service argues that this was such a dangerous act that Grievant must be removed, but has given no indication of why it believes that Grievant would not learn by her experience here that it is far better to allow the inside of her vehicle to fall into

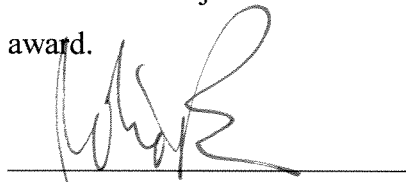
disarray than to take her eyes off the road. In some cases there are other indicators that corrective action will be ineffective, but here there were none.

Grievant testified that she did not have her license with her because her husband had been holding it for a vacation they had taken together, and that omission was a violation of the rules and of Ohio law. The police officer was able to obtain her license number using her social security number, and did not cite her for that. The officer did note that she said that the sun had blinded her, and supervision indicated in the record and at hearing (but not in the notice of removal) that this indicated to them that she had not been forthright at that time inasmuch as sun could not have been an issue at that time and place. The officer did not testify and we do not know more—the officer had to know as well as anyone later on would know whether blinding sun was an issue and may have preferred not to issue a summons for driver inattention.

CONCLUSION

There was not just cause for removal, because removal is not corrective in nature and there was no showing here that Grievant was incorrigible or had committed an offense that rose to the level of one justifying immediate removal. The removal is to be rescinded and expunged from the record, and its place there shall be substituted a 7-day suspension. Grievant is to be restored to her position and status, made whole for losses suffered as a result of the removal, and the measure of such losses including loss of benefits is to be her employment history (work hours) during a reasonable period prior to the removal. I note that the record indicates that her employment was effectively terminated (by ceasing to assign her any work) without the required notice, based on the rationale that she had no minimum hours of employment, and I make no separate finding on that aspect of the Service's action inasmuch as the stated remedy should cover any losses due to that issue.

I retain jurisdiction to resolve any dispute that arises out of implementation of this award.

A handwritten signature in dark ink, appearing to read "Robert Tim Brown", is written over a horizontal line.

Robert Tim Brown, Esq., Arbitrator, Dated and issued January 2, 2014