

C-21561

REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration
Between
UNITED STATES POSTAL SERVICE
And
**NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO**

) **GRIEVANT:** Karen Dawson
(
) **POST OFFICE:** Cincinnati, Ohio
(
) **USPS CASE NO:** C98N-4C-D 00088215
(
) **NALC CASE NO:** 002420146
(
) **NALC GTS NO:** 20796
)

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service: Vincent P. Catalano

For the Union: Jerry Giesting

Place of Hearing: U.S. Post Office

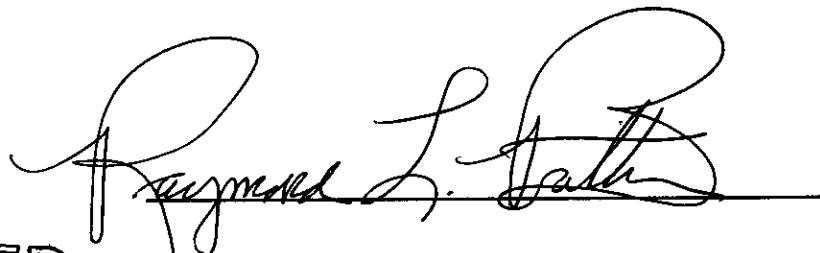
Date of Hearing: December 8, 2000

Record Closed: December 23, 2000

AWARD:

For the reasons given, the grievance is sustained and it is directed that the removal notice be rescinded from all files and that the Grievant be returned to duty and made whole for all lost wages and benefits.

Date of Award: December 30, 2000

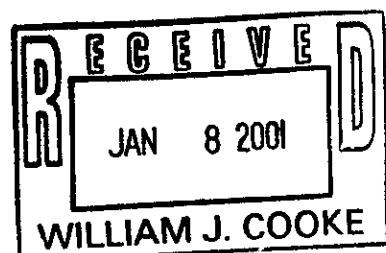


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ISSUE

Did the Postal Service have just cause for the Grievant's removal? If not, what is the appropriate remedy?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the hearing, it was agreed that the parties would present oral closing arguments in support of their respective positions. It was also agreed that the parties would submit arbitration opinions and awards in support of their positions by placing such opinions and awards in the mails not later than December 15, 2000. The arbitration opinions and awards filed by the United States Postal Service (hereinafter referred to as "Employer") were received by the Arbitrator on December 18, 2000. The arbitration opinions and awards filed by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") were received by the Arbitrator on December 23, 2000.

SUMMARY STATEMENT OF THE CASE

Karen D. Dawson (hereinafter sometimes referred to as "Grievant") is a Letter Carrier at the Sycamore Station of the Cincinnati, Ohio Post Office. On January 14, 2000, David Branson, Supervisor, Customer Services issued a Notice of Removal to Karen D. Dawson that states in relevant part as follows (Joint Exhibit No. 3):

You are hereby notified that you will be removed from the Postal Service on February 23, 2000.

The reasons for this action are:

Unsafe Act/Failure to Observe Established Safety Regulations

Inability to Satisfactorily Perform your Duties and Avoid Injury

An employee with your length of service would be aware of the requirement to safely perform your duties and avoid injury to yourself. On December 5, 1999, you were involved in a preventable vehicle accident. You drove your assigned Postal vehicle into a telephone pole, causing damage to the vehicle, and injury to yourself. Your explanation, that a dog ran out in front of you and you swerved to avoid the dog, does not have merit. I find that this accident was directly caused by your failure to control your vehicle. Your unsafe actions have resulted in this serious vehicle accident.

You have been employed as a letter carrier since August 29, 1998. During that time, you have incurred three (3) vehicle accidents and eight (5) industrial accidents. Your record demonstrates that you have failed to safely perform your duties and avoid injury to yourself. The Postal Service cannot tolerate your continuing inability to perform your duties without sustaining injury to yourself.

Your actions constitute a serious violation of USPS established safety regulations. Your conduct can not be tolerated.

Your actions constitute a violation of USPS Standards of Conduct as expressed in the Employee and Labor Relations Manual (ELM);

ELM, Section 666.1, which states, "Employees are expected to discharge their assigned duties conscientiously and effectively." Furthermore, your actions are contrary to the following sections of the Employee & Labor Relations Manual (ELM):

ELM, Section 811.3, states;

d. All employees must be trained in proper work procedures and must be educated to work safely and to understand that they are responsible for doing so. Management is responsible for the adequate safety training and education of employees. However, all employees must be convinced that they are responsible for working safely, and in doing so, they benefit not only their organization but themselves in a very real way.

e. It is good business from the standpoint of both efficiency and economy to prevent personal injuries on and off the job. In addition to humanitarian considerations, injuries cost money and reduce efficiency.

The following elements of your past record have been considered in taking this action:

Seven (7) Day Suspension, dated November 1, 1999, for Unsafe Act

Your prior discipline record and your record of being unable to perform your duties in a safe manner, without sustaining injury to yourself, constitute grounds for your removal from the Postal Service. I find that your Removal will promote the efficiency of the U. S. Postal Service.

You have the right to file a grievance under the Grievance-Arbitration procedure as set forth in Article 15, Section 2, of the National Agreement, within fourteen (14) days of your receipt of this notice.

A grievance was filed protesting the Notice of Removal and a Step 1 meeting was held on January 27, 2000 and a Step 1 decision was rendered on January 29, 2000 by David Branson. Pursuant to Article 15 of the National Agreement, the grievance was appealed to Step 2 of the grievance procedure alleging a violation of, but not limited to, Article 16 of the National Agreement and stating in relevant part as follows (Joint Exhibit No. 2):

FACTS: WHAT HAPPENED—Grievant was issued a Letter of Removal for motor vehicle accident. Management's decision is based on their refusal to accept grievant's account of the events as true.

UNION CONTENTIONS: REASONS FOR GRIEVANCE—This discipline is excessive and punitive. Grievant has excellent work record, attendance and . . . an asset to the Service.

CORRECTIVE ACTION REQUESTED: The Union requests that this discipline be rescinded. That the Grievant be returned to full duty immediately and that she be made whole. Grievant to be made whole for any time lost.

On February 16, 2000, the grievance was appealed to Step 3 of the grievance procedure. The reasons given for the Step 3 appeal were stated as follows:

No meeting (Step 2) has been held as of 2/16/00. Grievant was issued a Letter of Removal. This discipline is punitive, excessive and not corrective. Prior to accident, Grievant worked over 68 hrs plus eleven plus hours the day before the incident which occurred on 12/5/99.

On February 23, 2000, Carl E. Hill, Step 2 Designee, in a memorandum to Gary Gabbard, President, NALC Branch 43, Re: Step 2 Decision, stated in relevant part as follows (Joint Exhibit No. 2):

* * *

Pursuant to the terms and obligations as set forth in Article 15 of the National Agreement, Management's representative and the Union's designee met at Step 2 of the grievance procedure. The results of that meeting on the above referenced case are as follows.

* * *

The grievant is charged with an unsafe act. On December 5, 1999, the grievant drove her assigned postal vehicle into a telephone pole, causing damage to the vehicle and injury to herself. This accident was caused by the grievant's failure to control the vehicle. The explanation that a dog ran out in front of the vehicle and that she swerved to avoid the dog does not have any merit. The unsafe actions of the grievant resulted in this serious vehicle accident. The grievant has been employed as a letter carrier since August 29, 1998 and during this short period of time, she has had three (3) vehicle accidents and five (5) industrial accidents. Eight accidents in less than two years demonstrates that the grievant has failed to safely perform her duties and avoid injury to herself. On 10-20-99, less than two months ago, the grievant had a preventable accident in which the grievant rear-ended another vehicle. After this accident, the grievant's driving privileges were suspended until remedial training could be scheduled. I note that she was given 8 hours of safety and remedial vehicle training before being allowed to drive again in an attempt to correct her unsafe practices and avoid additional accidents. The actions of the grievant constitutes a serious violation of USPS established safety regulations and the discipline is for a just cause.

The Union has failed to demonstrate any violation of the National Agreement, therefore, based on the facts as cited above, grievance is denied.

* * *

On May 23, 2000, J. Michael Sullivan, Labor Relations Specialist, in a letter to Gary Gabbard, Re: Step 3 Decision, stated in relevant part as follows (Joint Exhibit No. 2):

* * *

Pursuant to the terms and obligations as set forth in Article 15 of the 1998 National Agreement, Management's representative and the Union's designee met at Step 2 of the grievance procedure. The results of that meeting on the above referenced case are as follows.

The grievant was issued a Notice of Removal, dated January 14, 2000, for the charge of Unsafe Act, Failure to Observe Established Safety Regulations, Inability to Satisfactorily Perform your Duties and Avoid Injury. Specifically, the grievant was involved in a preventable vehicle accident on December 5, 1999. This accident was the result of the grievant's unsafe actions when she failed to control her assigned vehicle and drove that vehicle into a telephone pole. The accident resulted in serious injury to the grievant and substantial damage to a postal vehicle. The grievant claimed she lost control when a dog ran in front of her vehicle and she swerved to avoid the dog. The grievant's explanation holds no merit. Even If a dog ran out in front of her,

she was still responsible for maintaining control of her vehicle. The accident was directly caused by the grievant's failure to maintain control of her vehicle.

Furthermore, I must note that the grievant has only been employed by the USPS since 8/29/98. In that short period of time she has been involved in three (3) vehicle accidents and five (5) industrial accidents, for a total of eight (8) accidents. The grievant has demonstrated that she is unable to perform her duties without sustaining injuries. Along with the grievant's record of accidents, I note she was disciplined (7 day suspension) on November 1, 1999, for an Unsafe Act. Her discipline and accident record in addition to her relatively short employment with the USPS demonstrate that her continued employment with the USPS is not justified.

It is management's position that the subject discipline is for just cause and corrective in nature.

Accordingly, this grievance is denied.

On June 5, 2000, the grievance was appealed to arbitration.

Provisions of the National Agreement (referred to as the 1998 National Agreement) entered into by and between the Employer and the Union pursuant to an Arbitration Award issued September 19, 1999 and effective as of that date and to remain in full force and effect to and including 12 midnight November 20, 2001 (hereinafter referred to as "National Agreement") (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

**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:

- A. To direct employees of the Employer in the performance of official duties;*
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary actions against such employees;*
- C. To maintain the efficiency of the operations entrusted to it;*
- D. To determine the methods, means, and personnel by which such operations are to be conducted;*

**ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE**

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Grievance Procedure--Steps

Step 2:

(b) Any grievance initiated at Step 2, pursuant to Article 2 or 14 of this Agreement, must be filed within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following the receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

Section 3. Grievance Procedure--General

A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

B. The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or the Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

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 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.

Section 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure.

**ARTICLE 19
HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals, and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that management had just cause to issue the discipline. The Employer contends that the Grievant is charged with an unsafe act when she failed to control an LLV and drove it into a telephone pole, causing extensive damage to the vehicle. The Employer contends that the Grievant has worked for the Postal Service for only fifteen (15) months, and during that short period of time, has had three (3) vehicle accidents and five (5) industrial accidents. The Employer contends that the Grievant has shown an inability to perform her duties in a safe manner without injuring herself or having vehicle accidents. The Employer contends that on October 20, 1999, less than two months from the December 5, 1999 vehicle accident, the Grievant had a preventable vehicle accident in which she hit the rear end of another vehicle. After this accident, the Grievant received a seven-day suspension and remedial training before being allowed to drive again in an attempt to correct her unsafe work practices. Finally, the Employer contends that the Grievant's actions constitute a serious violation of USPS established safety regulations.

The Position of the Union

The Union takes the position that just cause does not exist for the Grievant's removal. The Union maintains that the Grievant is cited in the Notice of Removal dated January 14, 2000 (Joint Exhibit No. 3) with having had eight (8) accidents, three (3) of which were vehicle accidents and five (5) were industrial accidents, as justification for her removal. The Union contends that these numbers are intentionally designed to make it appear that the Grievant is the type of employee who ignores safety rules and regulations, which is totally false. The Union contends that the Grievant was involved in a vehicle accident on December 5, 1999, while delivering parcels on several routes, and that she was found by the Montgomery Police Department not to be at fault for the accident. The Union contends that for a number of weeks prior to the accident on December 5, the Grievant had worked numerous hours week after week and that she requested December 5, 1999, as a non-scheduled day after being informed she was required to work. The Union further contends that the decision to remove the Grievant had been made by higher management prior to the completion of the investigation and that a full and complete investigation was not made. Finally, the Union contends that Article 15, Step 2 was not followed by management.

OPINION

In the resolution of this matter, the Arbitrator is basically called upon to determine whether the Grievant's involvement in a vehicle accident on December 5, 1999, together with her prior record, justify her removal from the Postal Service.

On December 5, 1999, a Sunday, the Grievant while delivering parcels on her route struck a telephone pole with her LLV. She testified that she saw a dog for the first and only time in the top mirror on the left side of her vehicle and followed the training she had received and swerved to the right in order to avoid hitting the dog. After turning the steering wheel sharply to the right, her vehicle hit the curb, which caused her vehicle to hit the pole at about the same time she applied the brakes. As described by the Grievant, the accident happened a split second after she saw the dog. As a result of the accident, the Grievant suffered personal injuries and was taken to a hospital. The LLV was extensively damaged and inoperable, and had to be towed back to the Sycamore Station lot by a local towing service.

Employer witness Charisse Gamble, Manager, Customer Services, testified that she and Supervisor Grover Taylor investigated the accident after having received a call from a carrier and the police department. Ms. Gamble testified that based on the nature of the injuries the Grievant sustained and the lack of skid marks, she concluded that the Grievant was distracted. She testified that the location of the Grievant's injuries on the right side of her face indicated that the Grievant was looking to the left, perhaps at parcels, when her face hit the steering wheel and this could have been avoided if she engaged the brakes quickly. If a dog startled the Grievant, Ms. Gamble stated that the Grievant may not have been paying attention to the road at the time. As the Grievant's vehicle jumped over the curb, which was four to five inches high, Ms. Gamble interpreted this to mean that the Grievant was traveling more than twenty-five miles per hour and had no time to react when she struck the pole. According to Ms. Gamble a photograph taken at the scene of the accident indicated that there was a large span of visibility and the Grievant should therefore have had enough time to see the animal if she had been looking straight ahead. Her assessment, together with that of Grover Taylor, was that the accident was preventable and was caused by the inattentiveness of the Grievant. After the results of her investigation were turned over to the supervisor, a removal decision was made based on the number of accidents, the nature of the two vehicle accidents in a very short span of time, and the past record of the Grievant. Ms. Gamble testified that she concurred with the decision of her supervisor to remove the Grievant.

Ms. Valorie Frazier, the Safety Specialist called by the Employer offered no specific testimony concerning the accident on December 5, 1999. Her testimony was largely confined to her review of the Grievant's safety record and her conclusion therefrom that the Grievant had an "extreme amount" of accidents for a two year span.

Ms. Gamble acknowledged in her testimony that neither she nor Mr. Taylor are safety specialists. Her testimony as to the accident is based primarily on circumstantial evidence and the inferences she drew from such evidence. While circumstantial evidence is often viewed as more reliable and trustworthy than direct evidence, the Arbitrator is of the view that the inferences drawn by Ms. Gamble, in the instant case, are not preponderant inferences and therefore cannot properly be considered as outweighing the direct testimony of the Grievant.

In the presentation of her testimony, the Arbitrator found the Grievant to be honest, forthright and candid. Her testimony indicates that when she first saw the dog she was startled and immediately reacted by swerving to the right as she was trained to do in order to avoid hitting the dog. She testified that when she turned the steering wheel sharply to the right and hit the curb, this caused her to hit the pole. This testimony, in the view of the Arbitrator, effectively dissipates the argument of the Employer that the Grievant drove her vehicle directly into the pole.

There is also uncontested testimony that prior to the accident on December 5, 1999, the Grievant had been working a significant number of hours for an extended period of time. As reflected by the Clock Rings and Hours History (Joint Exhibit No. 12), the Grievant worked 29 out of 30 days straight. She is shown to have worked approximately 60 hours a week and 12 hours a day. The Grievant testified that prior to the accident, she told man-

agement that she was working too many hours and that she needed time off. When she was told by management that she had to work on Sunday, she states that she again discussed with management the number of hours and the days that she had been working.

While Ms. Gamble testified that she does not recall the Grievant saying that she was very tired and needed the day off and only recalled the Grievant wanting time off to attend an event with her son, she also testified that the Grievant worked over 11 hours the day before the accident and this could have been a contributing factor. Supervisor David Branson testified that he was aware of the number of hours that the Grievant worked before the accident and that this could have been a contributing factor. The Grievant also testified that she felt the hours and the days she had been working might have contributed to the accident.

Supervisor Branson additionally testified that although the fact that the Grievant put in 80 hours the previous week was an important factor, the Grievant had time between shifts. In this connection, Ms. Gamble testified that the Grievant got off at 4:30 on the day prior to the accident and the accident the next day was at 10:10, which is almost 17 hours between shifts. It seems to the Arbitrator, however, that even though the Grievant might have been off approximately 17 hours between shifts, it is at least questionable whether having worked at the level here described that this period of rest was sufficient to eliminate the Grievant's fatigue as a contributing factor to the accident.

The accident resulted in injury to the Grievant and damage to a postal vehicle. This, by any definition, is a serious accident. It is recognized that the Postal Service has a very high expectation of safety, and demands that postal vehicles be handled in a safe manner. In the instant case, however, the Employer has failed to meet its burden of establishing that the Grievant violated any rule or regulation on December 5, 1999, or that the accident was directly caused by her failure to control her vehicle. The Grievant was trained in vehicle safety and she appears to have done everything she was trained to do to avoid the accident. Presented with the record in this posture, the Arbitrator is constrained to find that the Grievant was without fault and the accident unavoidable. This finding is in accord with that of the Montgomery Police Department, the agency that investigated the accident. As a result of that investigation the investigating officer found no fault on the part of the Grievant for the accident. The Grievant was not cited by the Montgomery Police Department and the report of Officer Jasper noted that the Grievant was not found guilty of any driving error.

During her relatively short period of employment, the Grievant is charged with having had three vehicle accidents and five industrial accidents. This clearly is an excessive number of accidents for an employee with a relatively short term of employment. It is indicated, however, that only in the accident that occurred on October 20, 1999, can it properly be found that the Grievant violated the rules and regulations. As to all the others, she appears to have followed the rules and regulations. The Grievant testified that on October 20, 1999, she was at fault because she followed a vehicle too closely and caused the accident for which she received a 7-day paper suspension. The only other vehicle accident occurred on August 29, 1999, during the making of a final delivery. While waiting at a stop sign, a large white truck crossed the line and struck and damaged her mirror and drove away. She was not cited by the officer but was nevertheless charged with the accident. On May 28, 1999, while delivering mail between apartment complexes, she tripped over a branch that was covered with mulch and roots not readily seen and hit and cut her knee at the edge of a sidewalk. In another accident, she stepped off a porch into a hole that she did not see and twisted her ankle. On a hot day she was hyperventilating and her hyperventilation was treated on the spot as an accident and placed in her record. On October 29, 1999, her left ankle collapsed while descending stairs without an adequate guardrail. On November 20, 1999, she was bitten by a dog on the back of her leg despite doing what she was told to do and carrying spray in her right hand.

Based on the foregoing, the Arbitrator finds that the discipline imposed on the Grievant was inappropriate and unjustified and that just cause therefore did not exist for her removal. In light of this conclusion, it is deemed by the Arbitrator to be unnecessary that he further address the issues raised by the Union as to whether there was disparate treatment or an improper investigation conducted or whether the Employer failed to follow Article 15.2 Step 2 of the National Agreement.