C-24169

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	
between	)	Grievant: Fred Miller Post Office: Grayson, KY
UNITED STATES POSTAL SERVICE	)	
and	)	USPS Case No: C01N-4C-D 03042129 DRT No.: 06-041094 Local No: 001102
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE:	Arbitrator Mark I. Lurie
APPEARANCES:	
For the U.S.P.S.:	Tony Alfred
For the N.A.L.C.:	Charles "Troy" Clark
Place of Hearing:	Ashland, Kentucky Post Office
Date of Hearing:	April 3, 2003
The testimony of Pam Branham and then closing arguments were given by telephone and the hearing was declared closed:	April 7, 2003
Date of Award:	April 8, 2003
Relevant Contract Provisions:	Article 16
Contract Year:	2001-2006
Type of Grievance:	discharge

Award Summary:

The Grievant failed to follow the safety procedure of holding a handrail while descending steps, fell and injured himself. The Arbitrator finds that the transient nature of the events that occurred on those steps; the sense of urgency for the timely delivery of his mail that the Grievant exhibited; and the disruption of his normal routine that morning, contributed to the Grievant's failure to use the handrail. The Arbitrator finds that the Grievant lacked the presence of mind to grab the handrail but that, in view of these extenuating circumstances, his failure was of insufficient materiality or willfulness to constitute just cause for discharge. The grievance is sustained.

Mark I. Lurie, Arbitrator

ISSUE

The following issue was stipulated to by the parties at Step B:

> Did the Postal Service violate Article 16, Section 5, Suspensions of More Than 14 Days or Discharge of the 2001-2006 National Agreement when it issued a Notice of [Proposed] Removal, dated October 30, 2002, for the reason "Charge 1 - You are charged with Unsatisfactory Work Performance/Failure to follow safety rules."? If so, what is the appropriate remedy?

FACTS

The Grievant, Charles Frederick Miller, is a City Letter Carrier who was hired on January 15, 2000 and, at the time of his discharge, was serving as a PTF. On September 6, 2002, he was delayed in the delivery of his assigned route, in part by the malfunctioning of his Postal Vehicle, an LLV. He was driven on the route by Supervisor Paul Cordle in the latter's personal vehicle and, according to the Grievant, at the beginning of his route, attempted to run to make up time, but then thought better of it. Nonetheless, the Grievant still felt himself under a time constraint. Shortly thereafter, in the course of making a delivery and collection, the Grievant, fell down the steps of a business customer, landing on and sustaining a hairline fracture of his elbow. The weather was clear, the steps were in good condition and were dry, and a handrail was present.

The Grievant was immediately brought to a medical facility, where he received an initial evaluation and treatment. At that time, Supervisor Teri Thomas prepared a PS Form 1769 ACCIDENT REPORT, on which she entered the Grievant's description of the accident:

> "Carrier stated he walked down center of steps. He did not use the handrail. He stepped down and when he reached second step of three he fell. He fell to the blacktop drive of the business."

The standard training program for newly assigned City Letter Carriers states:

> "When going up or down steps, do the following:
> a. Take hold of the handrail before taking the first step.
> b. Look at the steps.
> c. Place your whole foot on the step; don't just catch the edge."

The EL-814 Handbook, *Postal Employee's Guide to Safety*, states in Section I.A., the following:

> "Safety rules are for your benefit; observing safe working practices and postal safety rules is a primary responsibility of all postal employees. General safety rules include, but are not limited to the following rules:
>
> ....Hold the handrail when walking down stairs."

Safety talks were conducted at Grayson Station on January 22 and March 5, 2002, at which the use of handrails was advised. The Grievant signed attendance sheets, indicating that he either attended the talks or was given the printed materials and allowed to review them on-the-clock.

On September 6, 2002, the Grievant completed a Form CA-1, NOTICE OF TRAUMATIC INJURY AND CLAIM FOR CONTINUATION OF PAY/COMPENSATION. On that form, he noted as the cause of the injury "Delivered mail to business and fell going down steps."

On October 7, 2002, the Grievant was interviewed by OIC Pamela Branham and, according to Ms. Branham, stated that he had delivered the customer's mail, had picked up two outgoing letters and, holding the letters in his left hand, had begun to descend the steps without holding the handrail when he fell. He told OIC Branham that he had known of the requirement that Carriers use handrails.

The Notice of Proposed Removal subsequently issued the Grievant cited four prior disciplinary actions:

> November 17, 2001: A letter of warning for unsatisfactory work performance. The Grievant had curtailed 5 packages and 10 pieces of regular mail without permission.
>
> January 15, 2002: A 7-day suspension for unsatisfactory work performance. The Grievant discarded 21 circulars with valid addresses, and curtailed priority mail packages without permission.
>
> June 15, 2002: A letter of warning for failure to follow instructions. The Grievant failed to have his dog spray in his possession while delivering mail, and received a dog bite.
>
> July 10, 2002: A 14-day paper suspension for failure to follow instructions. The Grievant failed to curb his wheels and set the hand brake of his Postal vehicle.

In a Letter of Decision dated November 26, 2002, Manager of Postal Operations Bill E. Johnson found that the charge was supported by the evidence and warranted his removal.

The Union charged that it had not received copies of the ACCIDENT REPORT or of safety talk sign-in sheets and materials prior to the arbitration hearing. Supervisor Thomas testified that she had mailed these documents, by certified mail, to Shop Steward Ray Lyons at the Union prior to the Informal Step A meeting; had examined copies with the Union at that meeting; and that, at Formal Step A, Steward Lyons had acknowledged that he had copies of the relevant documents. Mr. Lyons assembled and forwarded the package to the Step B team, and the Step B decision cited the ACCIDENT REPORT and safety talks. The Arbitrator finds that the Union was timely furnished with this relevant information.

THE UNION'S POSITION

Accidents alone are not a proper basis for discipline; only the violation of Postal Service safety rules or regulations, when proven, can warrant discipline. The Service has not shown that the Grievant intended to be neglectful or to fall. "He was walking down the center of the steps. He was not fingering mail or inattentive. Letter carriers ascend and descend steps hundreds of times every day." [Quoting the Union's Step B decision.] This discharge was, in effect, discipline of the Grievant's purportedly being "accident prone" but, in Regular Panel case W1N-5D-D 3543 (1982), Arbitrator Thomas F. Levak ruled that being accident-prone was not a valid basis for discipline. In Arbitrator Levak's case, a Letter Carrier, hired in July 1975, suffered on-the-job injuries between November 1976 and March 1980, but was never disciplined for negligence or safety infractions. The Carrier was discharged in 1981 – not for causing a preventable accident through improper procedures or inattention – but for "physical inability to safely perform without recurrence of injuries and/or accidents"; in other words, for being accident-prone. Arbitrator Levak observed that the discharge was not based upon progressive discipline for (1) safety rule violations, or upon a diagnosis from a fitness-for-duty examination that the Grievant was (2) physically or mentally incapable of performing his job duties. Arbitrator Levak ruled that

> "The Service may properly charge an employee with physical [or psychological] inability to perform assigned duties... or with specific acts of negligence or violations of established safety procedures. However, the Service is not entitled to concoct a bastardized form of infractions in order to remove employees it considers to be accident-prone. It appears... that what the Service has attempted to do... is invent an infraction that will serve the dual purposes of allowing it to remove an employee (1) without having to comply with the progressive discipline standards ancillary to charges of negligence or lack of compliance with safety standards and (2) without admitting the employee is actually mentally or physically unable to work, an admission that might prejudice its position in any subsequent Workers' Compensation or disability retirement proceeding. The Service cannot 'have it both ways.'"

In the instant case, Management charged that, by not using the handrail, the Grievant did not follow proper safety procedures. However, it is possible that, had the Grievant used the handrail, his injury might not have been prevented and in fact might have been worse.

The Postal Service has not shown that the non-use of a handrail violates a published safety rule or regulation. The Union requested any and all information pertaining to the disciplinary action against the Grievant, but the only record of his having possibly received training in the use of handrails was his initial new-hire training in January 2000.

The Grievant's past disciplinary history included only a single previous accident – that of the dog bite, and only two disciplinary actions regarding safety violations. Management failed to use other procedures, such as giving remedial training to the Grievant. The Grievant was a PTF, and usually reported to work after service talks had been completed. There is no evidence that the Grievant had been present during the talks regarding the use of handrails, or that he was given the associated written materials. Remedial training would have demonstrated Management's good faith effort to administer discipline that was "corrective in nature, rather than punitive." Management did not demonstrate such good faith; rather, the discipline was the product out of a "harassing and intimidating" supervisor."

At the arbitration hearing, the Union asserted that, because the Grievant was on the roles of OWCP, under ELM 545.93, the Service was required to submit a report to the Office of Safety & Health prior to discharging him. The Arbitrator finds that this is new argument, not previously raised during the grievance process, is untimely, and that its merits therefore should not be considered. Also at the arbitration hearing, the Grievant testified that the accident happened before he had proceeded to walk down the steps, and thus before he would have had the opportunity to use the handrail. According to the Grievant, he was on the top step, which was the entrance platform to the building. He turned around to descend the steps and, before he could reach for the handrail or descend that first step, he fell backward. The Service objected to this claim as new argument, and as inconsistent with the arguments advanced by the Union prior to the arbitration, all of which accepted the premise that the Grievant fell after starting to descend the steps.

SERVICE'S POSITION

The Service has the right to terminate the services of any employee who has demonstrated an inability to work in a safe matter. Not only is an employer obligated to protect the general public and employees from an employee who has exhibited a propensity for accidents and injury, but the employer is under a similar obligation to protect that employee from injuring him/herself. In this instance, there was a reasonable rule; the Grievant knew the rule; the rule was consistently and equitably enforced; the incident was thoroughly investigated; the Grievant breached the rule and he was disciplined in a timely manner and with the appropriate progressivity. The Grievant was discharged because he had repeatedly failed to follow instructions, and this was the third example where that failure pertained to safety measures.

The Grievant's "bank of goodwill" had less than three years service at the time he received the Notice of Proposed Removal. This was his fifth discipline in nine months. The Grievant's bank of goodwill was too small to mitigate the next step in progressive discipline. As precedent, the Service proffered two Regular Panel decisions. In NB-N-4298-0 (1975), a City Letter Carrier, hired in January 1973 was fired in November 1974 for having failed to collect mail on his route, after having been issued suspensions of 1 day, then 14 days, and then 28 days, all for the same offense. The employee had also been issued two letters of warning and a suspension for unrelated offenses. Arbitrator Howard Gamser determined that the Service had just cause for discharge:

> "In view of his poor record, compiled within a relatively brief career, and in further view of his response to the disciplinary actions taken and the corrective efforts of his immediate supervisors, it must be found that just cause to terminate this employee... existed."

In C94N-4C-D 97083464 (1998), a City Letter Carrier hired in 1994 was discharged in February 1997 for unsatisfactory work performance involving an unsafe to act. In that case, the incident that gave rise to the discharge was the employee's stepping off a porch, his foot slipping on a step, and the employee's falling and injuring his shoulder. Arbitrator B.R. Skelton concluded that, at the time of the accident, the employee had been fingering his mail – conduct prohibited under Section 133.2 of the M-41 handbook. The employee had had five previous industrial accidents, four of which had happened between January and October 1996, and his disciplinary record included the following disciplinary actions:

April 11, 1996	a three-day suspension for unsatisfactory work performance
May 14, 1996	a seven-day suspension for unsatisfactory work performance
July 17, 1996	a letter of warning for unsatisfactory work performance

Arbitrator Skelton concluded that this disciplinary record and the short term of the employee's tenure with the Postal Service warranted his discharge.

The Grievant's claim – that he had not yet reached the next step or the handrail when he fell – was made for the first time in the arbitration hearing, and is contradicted by his earlier statements to Supervisor Thomas, to OIC Branham, and to the Department of Labor, and by the Union's grievance documents. This newly created defense demonstrates that the Grievant is untruthful and untrustworthy, and his untrustworthiness is an additional basis for concluding that he is not suited to be a City Letter Carrier.

DECISION

The Arbitrator finds that the statements attributed to the Grievant by Supervisor Teri Thomas and OIC Pamela Branham are more credible than the portrayal of events that the Grievant proffered in the arbitration hearing – that he fell prior to beginning his descent of the stairs. This conclusion is based both upon the mutual corroboration of Ms. Thomas' and Ms. Branham's testimony, and upon the Grievant's and the Union's failure to assert this materially amplified version of events prior to the arbitration hearing. The Arbitrator agrees with the Service that the Grievant's testimony was unreliable, and the Arbitrator therefore lends no credence to the Grievant's testimony in total. The Service's argument that the Grievant's lack of veracity should constitute an additional basis for discharge under this grievance is misplaced; under the terms of the Agreement, the Arbitrator can consider only the issues brought to him through the grievance process.

The Arbitrator further finds that the Grievant had been afforded reasonable training in the importance of using handrails when descending steps. From the foregoing, the Arbitrator concludes that the Grievant knew and failed to heed the instruction he had been given to use a handrail, if available, when descending stairs.

However, given the transient nature of the events that occurred on those steps; the sense of urgency that the Grievant exhibited and the disruption of his normal routine that morning, the Arbitrator finds that the Grievant's failure to use the handrail was likely not a matter of willful non-adherence to the safety rule, but rather was a matter of his distraction by extra-ordinary matters, and of his obliviousness to the risk. The Arbitrator finds that the Grievant lacked the presence of mind to grab the handrail but that, in view of these extenuating circumstances, his failure was of insufficient materiality or willfulness to constitute just cause for discharge.

AWARD

The grievance is sustained. The discipline is to be reduced to a 14-day suspension and the Grievant reinstated and made whole of all wages and benefits of employment consistent with the reduced discipline.