

C-21062

REGULAR ARBITRATION PANEL

BEFORE: Thomas J. DiLauro, Arbitrator

APPEARANCES:

For the Postal Service: Jack Barnett, Labor Relations Specialist

For The Union: James Korolowicz, Advocate

PLACE OF HEARING: Hopkinsville, KY

DATE OF HEARING: August 18, 2000

DATE OF AWARD: SEP 11 2008

REVELANT CONTRACT PROVISION: Article 16.1

CONTRACT YEAR: 1998-2001

TYPE OF GRIEVANCE: Discipline

AWARD SUMMARY:

The grievance is denied in part in that the Postal Service had just cause to discipline the grievant but is sustained in part in that the penalty of discharge was found to be excessive and discriminatory. The discipline is to be reduced to a seven-day suspension and the grievant is to be made whole for all loss of wages in excess of the seven-day suspension minus any wages he earned during the period he was off.

~~He carried during the period~~

~~RECEIVED~~

SFP 14 2000

RONALD BROWN

BACKGROUND:

City Carrier Rondal W. Shreve, hereinafter referred to as the grievant, was informed, by letter dated November 19, 1999, of his proposed removal from service on the charge of unsatisfactory work performance in that he failed to follow proper safety rules and regulations. Specifically, he was charged with leaving his postal vehicle parked improperly resulting in a rollaway accident which caused damage to private property and the postal vehicle.

A grievance was filed on behalf of the grievant by the Union. The Union's position was that the Postal Service's action in discharging the grievant was unjust and discriminatory in that management, at the Hopkinsville postal facility had established a past practice of issuing suspensions for rollaway accidents. It asked that the grievant's removal be reduced to a seven-day suspension and that he be made whole for all lost pay and wages in excess of seven days.

The Postal Service contended that the grievant clearly violated the Kentuckiana Cluster policy on the prevention of rollaway/runaway vehicle accidents as well as various sections of the ELM and the M-41 Handbook. It noted that the grievant's deliberate and willful act and his repeated refusal to follow postal safety policies and procedures contributed to the cause of the accident in which he was involved on October 18, 1999, resulting in property damages in the amount of \$12,034.78.

The grievance was processed through the various steps of the grievance procedure without resolution. The Union appealed it to arbitration by letter dated February 16, 2000. This arbitrator was appointed to hear the case. The hearing was held on August 18, 2000 at the Hopkinsville, KY postal facility. The parties were given the opportunity to present testimony, documents and argument in support of their respective positions. The hearing was declared closed after the completion of the parties' final oral arguments.

ISSUE:

Did the Postal have just cause to issue a notice of proposed removal and a letter of decision? If not, what is the remedy?

CONTRACT PROVISIONS:

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of the 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, 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.

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.

POSTAL SERVICE POSITION:

The Postal Service contended that the facts in this case are not in dispute. The grievant failed to follow proper policies and procedures in parking his postal vehicle which caused a rollaway accident and damaged a private residence and postal vehicle.

Postal Service witness Roger Macy testified that he inspected the vehicle involved in the incident. He stated that he conducted a number of tests to determine if there were any malfunctions in the transmission, the hand brake, the gear shift, etc. He concluded that the vehicle operated within standards and that there were no malfunctions. Mr. Macy claimed that the vehicle would not have rolled backwards if the grievant had followed the proper procedures in parking the vehicle.

Manager of Customer Service Ken Lowe testified that the grievant called him about the accident. Mr. Lowe stated he told the grievant to leave the vehicle

alone and not to move it or do anything until he got there. When he arrived on the scene, the vehicle was in reverse with the keys in the ignition. Mr. Lowe admitted that he was not sure if the grievant had touched the vehicle before or after he told the grievant not to touch it. He stated that the grievant told him that he had screwed-up..

The Manager of Customer Service on the date of the accident, Greg Sparkman, testified that he decided to take the disciplinary action of discharge and notified the Postmaster of his decision. He claimed that no pressure was exerted by anyone to impose the discipline of discharge. He stated that his decision was based upon the severity of the accident, the damage caused, and the potential for bodily harm and even death. Mr. Sparkman claimed that the severity of the accident overruled the grievant's previous good driving record. He also contended that a lesser form of discipline was not appropriate under the circumstances. Mr. Sparkman denied that he ever said anything to the grievant about having to follow any policy in assessing the discipline of discharge.

The Officer-in-Charge of the Hopkinsville, KY postal facility, Mark Hulme testified that the zero tolerance policy of the district regarding rollaway/runaway accidents means that everyone is responsible for safety and that no one should have such accidents. Mr. Hulme explained that he termed the grievant's act as "deliberate and willful" because he had every opportunity to follow the rules and regulations, regarding the parking of a postal vehicle, and he willfully and deliberately chose to disregard them. Mr. Hulme admitted that the grievant had

never been disciplined for a safety violation prior to this incident. Despite that fact, he used the term "repeated refusal to follow the postal safety policies and procedures" because, in his opinion, he felt that the grievant never followed proper safety procedures.

The Postal Service argued that there was no question that the grievant failed to follow proper policy and procedure in parking the postal vehicle in his charge which led to the rollaway accident. The grievant's supervisor made the decision to discharge the grievant based on the facts of the case. There was no evidence presented to support the grievant's claim that his supervisor told him he had no choice but to discharge him. The supervisor's decision was not shown to be arbitrary, capricious or mean-spirited. In fact, the grievant testified that his supervisor was a fair boss.

The Postal Service contended that the Union's claimed disparate treatment was not applicable in the instant case. It claimed that the facts and circumstances of each and every rollaway accident are different and that different penalties are issued dependent upon those facts and circumstances. In the instant case, the grievant admitted to a deliberate and willful act of negligence by failing to follow postal safety policies and procedures. Such action is evidence of the fact that he has no regard for his safety or the safety of his fellow employees and the public.

Based on the facts and circumstances of the case, the Postal Service asked that the grievant's discharge be upheld and that the grievance be denied in its entirety.

UNION POSITION:

The Union claimed that the burden of proof was upon the Postal Service to prove the charge brought against the grievant; namely, unsatisfactory work performance in that he failed to follow proper safety rules and regulations.

Retired City Letter Carrier Sterling Dowdy testified that he handled the grievance at Steps 1 and 2 of the grievance procedure. At both steps, he requested information of prior disciplinary action regarding rollaway accidents and was informed that there was no record of prior rollaway accidents or discipline at the Hopkinsville postal facility. He noted that, in the additions and corrections to the Step 2 decision by Mr. Hulme, he gave to management a copy of a letter of suspension for seven days, of Letter Carrier Richard Rider, for a rollaway accident on September 26, 1991. In addition, he gave them a letter from another retired Postal Carrier James M. Lewis who stated that he was suspended for seven days, which was later reduced to three days, for a rollaway accident in the late 1980's. Mr. Dowdy stated that he raised the issue of discrimination on the basis of the aforecited incidents.

Mr. Dowdy testified further that the discipline of discharge was punitive because the Postal Service discharged a long term employee with no prior discipline, a good attitude, and one who never failed to follow instructions in the past as evidenced by prior observations of his driving practices. He also noted that the Kentuckians Cluster Policy for rollaway accidents is discharge.

The grievant testified that he put his vehicle in park, took the key from the ignition and that he may or may not have engaged the emergency brake. After he left the vehicle, it began to roll back and hit into a private residence. When he got to the vehicle, the gearshift was in reverse. He got the keys from his pocket, started the engine, after placing the gearshift in park, placed the gearshift in reverse and backed the vehicle away from the house. He then placed the vehicle in park, engaged the emergency brake, took the key from the ignition and then went to telephone Supervisor Lowe. He claimed that he spoke with Supervisor Sparkman, after he had been discharged and that Mr. Sparkmam told him that he did what he was told to do concerning the discipline of discharge.

The Union noted that the Joint Administration Manual signed in June, 1998, under the Article 16 "just cause principle", poses the question about the consistent and equitable enforcement of rules. It argued that failure to apply rules consistently and equitably have provided the Union with its most successful defense in discipline cases and that the Postal Service has been overturned or reversed in a number of such cases. In the instant case, two other employees at the same facility had rollaway vehicle accidents that resulted in both receiving

seven-day suspensions. The fact that these accidents occurred a number of years ago does not mean that they can be simply disregarded. These rollaway accidents did occur at this facility and the parties involved were only assessed a seven-day discipline.

The Union contended that the grievant had no prior disciplinary record and that there was no evidence to support the Postal Service's claim that the grievant deliberately and willfully demonstrated any blatant disregard for rules and regulations. The Union argued that any discipline imposed upon the grievant should have been progressive rather than punitive in nature. It asked that the removal be reduced to a seven-day suspension and that the grievant be made whole for all lost pay and benefits in excess of seven days.

OPINION:

The advocates are to be commended on the well prepared, presented and argued cases made in support of their respective positions.

The parties agreed that the issue in this case is whether or not the Postal Service had just cause to discharge the grievant. Arbitrators have noted that the contractual right of an employer to discipline and discharge employees for "just cause" requires the arbitrators to make two determinations in considering cases: (1) whether a cause for discipline exists and (2) whether the amount of discipline

was proper under the circumstances. (Fairweather, Practice and Procedure In Labor Arbitration, Schoonover, ed., BNA, 3rd Ed. [1991]).

In the instant case, the grievant acknowledged that he may not have followed all the proper parking procedures to prevent a rollaway/runaway accident. The Union conceded that the Postal Service had just cause to discipline the grievant but maintained that the discipline of discharge was too harsh and was discriminatory. Thus, the determination of whether a cause for discipline existed has been answered in the affirmative and the only question remaining is whether the amount of discipline was proper under the circumstances.

The Union argued that the Postal Service's action was discriminatory and amounted to disparate treatment. It based its argument on the fact that the only other cases of rollaway accidents at this postal facility resulted in those carriers receiving a seven-day suspension. The first case cited by the Union involved a letter carrier who failed to set the emergency brake and the vehicle did not hold in park resulting in a rollaway accident which resulted in property damage to a customer's residence. In the second case, the letter carrier stated he stopped his vehicle to make a delivery and put the vehicle in park with the engine running. It slipped out of park into drive and ran into a privately owned car.

The term "discrimination" connotes a distinction in treatment. The prohibition against discrimination requires like treatment under like

circumstances. In the case of offenses, the circumstances include the nature of the offense, the degree of fault and the mitigating and aggravating factors. There is no discrimination or no departure from the consistent or uniform treatment of employees merely because of variations in discipline reasonably appropriate to the variations in circumstances. (How Arbitration Works, Elkouri and Elkouri, BNA, 4th Ed. [1985]).

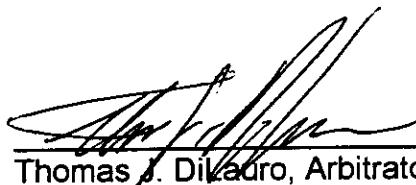
The incidents described in the foregoing paragraph closely parallel the incident in this case. The Postal Service was unable to provide sufficient rebuttal evidence to show that there were any variations in the circumstances of the instant case and the two previous cases to depart from the consistent or uniform treatment applied in those two previous cases.

The grievant was an employee with approximately 12 years of service when the accident occurred. No evidence was produced by the Postal Service to show that the grievant had ever been disciplined for working unsafely and that he, in any way, failed to follow all the rules and regulations, let alone demonstrate a "blatant disregard for rules and regulations." There is no doubt that a rollaway/runaway accident is a serious matter in that it could result in injury and even death. However, the Postal Service cannot discriminate against an employee in assessing discipline in these types of cases unless it can show a variation in the circumstances. Having failed to do so in this case, the discipline of discharge was discriminatory. Accordingly, the Postal Service is directed to reduce the discipline of discharge to a seven-day suspension. The grievant is to

be made whole for all loss of wages in excess of the seven-day suspension minus any wages he might have earned during the period he was off.

AWARD:

The grievance is denied in part in that the Postal Service had just cause to discipline the grievant but is sustained in part in that the penalty of discharge was found to be excessive and discriminatory. The discipline is to be reduced to a seven-day suspension and the grievant is to be made whole for all loss of wages in excess of the seven-day suspension minus any wages he earned during the period he was off.



Thomas J. DiLauro, Arbitrator
SEP 11 2000