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In the matter of the arbitration)
) Grievant: J McKenna
between)
)
UNITED STATES POSTAL SERVICE) Post Office: Waterbury, CT
)
And)
) Case No: B01N4BD07214289
BRANCH 20, NATIONAL ASSOCIATION) Union NO. 01-38-07
OF LETTER CARRIERS, AFL-CIO DRT # 14-071282

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Before Garry J. Wooters, Arbitrator

Appearances:
For US Postal Service: Vernon Tyler
Labor Relations Specialist

For NALC: Ronald Augustus
Local Business Agent

Date of Hearing: October 10, 207

Place of Hearing: Waterbury, CT

Date of Award: October 26, 2007

Relevant Contract Provisions: Article 8

Contract Year: 2000-06

Type of Grievance: DISC

Award Summary: There was not just cause for the removal of a carrier where the evidence fails to show that he failed to immediately report a known injury or worked in an unsafe manner. The grievant should be reinstated with back pay.

Signature _____ Garry J. Wooters

OPINION AND AWARD

Statement of the Case

The undersigned heard the above-captioned matter on October 10, 2005 in Waterbury, Connecticut sitting as a member of the Regular Regional Arbitration Panel. The arbitration arises out of a grievance filed by Branch 20, National Association of Letter Carriers, AFL-CIO ("Union") against the United States Postal Service ("Service"). Testimony was taken under oath, in the presence of the above named advocates. The case was orally argued at the close of the evidence.

Issue

As per B Team. Did management violate Article 16 of the National Agreement when they issued carrier McKenna a notice of removal? If so, what shall be the remedy?

Summary of the Evidence

Prior to his removal effective in July of 2007, James McKenna was a full-time city carrier with about twenty years of

seniority. The Notice of Removal, issued June 25, 2007 cited two charges: (1) failure to work safely and (2) failure to report immediately an accident The notice cited six prior elements of discipline including a fourteen-day suspension for failure to be regular in attendance; a fourteen-day suspension, later reduced to seven, for failure to be regular in attendance; a seven-day suspension for violating the Zero Tolerance Policy on violence and threats, reduced to a letter of warning; a fourteen-day suspension later reduced to seven for violating the District Zero Deviation Policy, Failure to Follow instructions; another seven-day suspension for violating the District Zero Deviation Policy; and a Letter of Warning for Failure to be Regular in Attendance.

On May 29, McKenna was delivering his route when, in attempting to close the back door of his LLV, he pulled on the strap with one hand. As he did so, his hand became caught. McKenna testified that as he pulled, he felt a twinge. He did not notify anyone of the incident and competed his shift without problems.

That night, he awoke about 2:00 a.m. And his shoulder hurt more than normally. McKenna had a preexisting shoulder injury which bothered him when he slept. He called the ERMS number and

requested sick leave.

The morning of May 30, McKenna said that his shoulder felt more sore than usual and he called his doctor. He got an appointment for the next day.

McKenna called in sick on May 30 and went to his doctor. Upon examination and questioning of McKenna, the doctor concluded that McKenna had sprained his rotator cuff when he pulled down the LLB back door on May 29.

McKenna testified that, until his doctor reached this conclusion, he did not attribute his shoulder pain to the incident on May 29. Having received this diagnosis, he called the acting supervisor from his car and told her that he had been injured in the incident on Tuesday. He also said that he would be able to work his next scheduled tour, which was Saturday and would be available on Friday if needed.

When McKenna returned to work on Saturday, he was directed to fill out a form CA-1[1]. He did so, checking the box indicating he was seeking continuation of pay. McKenna testified, however, that when OWCP contacted him about his claim, he did not pursue

1 The form CA-1 is sued in the federal workers compensation system for first report of injury.

it. He has received no workers compensation benefits due to this injury.

CSC Ed Hogan testified that he made the decision to remove McKenna based on his conclusion that McKenna had failed to work in a safe manner on May 29 and had failed to immediately report the accident, as required.

Hogan believed that McKenna had worked in an unsafe manner by pulling the door closed with one hand instead of using both. He could cite no manual or safety talk where employees are directed to use both hands to close the rear door on an LLV. Rather, he believed that employees should do what was reasonable under the circumstances.

Hogan also testified that he believed that McKenna had a clear responsibility o report the accident on May 29 and May 30. failing to do so was a basis for discipline.

Hogan concluded that termination was the appropriate penalty based on Hogan's extensive disciplinary record with six active elements of past discipline on his record.

Positions of the Parties

The Union argues that management charged McKenna with two offenses and has failed to prove either.

There s no evidence that McKenna failed to work in a safe manner. Management has still not produced any manual or instruction requiring employees to use two hands to close the door of an LLV. There is no evidence that employees were ever given such an instruction in safety talks. Speculation cannot support discipline, especially the severe discipline in this case.

Nor has management supported its claim that McKenna failed to promptly report an accident.

McKenna has testified that on May 29, he did not believe that he was injured. Even when he had pain on May 30 and 31, he did not attribute it to the incident on may 29. Only when his doctor concluded that the May 29 incident had caused his shoulder pain did he make this connection. At this point, he reported it promptly.

McKenna knew he had to report any accident immediately. He had done so in the past. In this case, he did not know he had anything to report until May 31.

Thus, management has failed to sustain either charge against McKenna.

Should the arbitrator find there has been some violation, he should view McKenna's prior discipline in a sympathetic light. The prior discipline is not related and McKenna is a twenty year employee.

Management has not shown just cause for the discharge of this long-term employee. He should be reinstated with back pay and his record expunged.

The Service argues that it has established just cause for the removal.

Although Hogan could cite no rule which McKenna violated by the manner in which he closed the back door of the LLV, at some point, a rule of reason must be applied. If a door is stuck, the employee should use two hands. The vehicle is designed with a strap and a handle.

It is clear without dispute that McKenna failed to promptly report his accident in May 29. by his own testimony, he Felt a "twinge" at the time.

On May 30, McKenna called in sck, and called his doctor. he could and should have called to report the accident, bt did not do so. tis was a clear violati of a known rule.

McKenna knew he was required to report any accident immediately, and failed to do so.

McKenna's prior discipline shows that removal was justified in this case. Prior warnings and suspensions have not caused McKenna to alter his conduct.

The grievance should be denied.

Relevant Contract Provisions

16.1 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.

Discussion

I conclude that neither charge against McKenna has been established and the grievance must be sustained.

Any injury or accident must be immediately reported. Employees cannot report an injury if they do not know or have reason to believe that they have sustained one.

In this case, McKenna, the only witness to the injury or accident on May 29, testified that when it occurred, he did not know he was injured. The evidence does not establish that he should have known he was injured or that a "reasonable man" in his position would have known he was injured. The only sign of any problem was a "twinge" when McKenna pulled down the back door. He did not feel that he had any injury. He had no pain and continued his route, finishing without problems.

McKenna was awakened by pain that night, but testified that he still did not attribute it to the incident in closing the LLV door on May 29. I credit this explanation largely because of McKenna's prior medical history. He broke the same shoulder

years before and has chronic problems, including from sleeping on his side. It is credible that McKenna attributed his shoulder pain on the morning of May 30 to the prior injury and not to the seemingly insignificant incident the day before. While not free from all doubt, nothing in the record contradicts this testimony and it is a reasonable, credible explanation.

For the same reasons, it is credible that McKenna did not make the connection between the events of May 29 and his shoulder pain until his doctor concluded that this is how the injury occurred.

Beyond these facts, it is difficult to find a motive for McKenna to fail to report an injury if he indeed believed he had sustained one. He had promptly reported known injuries in the past. Why would he not do so on May 29? Even more perplexing is why, if he was trying to conceal the injury for some unknown reason, did he then report it after going to his doctor? By that time he had recovered and was ready to work. If there was a reason to conceal the fact of the injury, he would have continued to conceal it. If there was no reason to conceal it, why would he not have reported it if he knew he was injured.

On this record, I find management has not sustained this

charge against McKenna.

Nor am I persuaded that McKenna worked in an unsafe manner on May 29 resulting in injury.

There has been no rule or policy cited advising carriers to use two hands in closing the back door of an LLV. The fact that McKenna may have injured himself closing it with one hand does not show it was unreasonable or inherently unsafe. If, as the testimony shows, he had been doing it that way for his entire career, without injury and without being instructed to do otherwise, how would he know he was going to injure himself on May 29? Management suggests that, if the door is difficult or stuck, the carrier should know to use both the strap and handle to close it. But, McKenna did not know it was going to stick until he pulled down on it.

There is the suggestion in this case, and in others, that all accidents are "preventable" and, therefore, if there is an accident, the employee must have done something wrong. I do not accept such an approach which makes employees subject to discipline - discharge of a twenty year employee in this case - for using a work practice which is known to management and has been condoned.

I find no support for a finding that by closing the back door of his LLV with one hand McKenna failed to work in a safe manner.

Even in a "last straw" case there must be clear evidence that the employee has violated some known rule. As I have found neither charge against McKenna to be supported, I must sustain the grievance in its entirety. McKenna is to be reinstated, with back pay and benefits.

Award

There was not just cause for the notice of removal. McKenna is to be reinstated, with back pay, retroactive to the date of his termination.

Garry J. Wooters, Arbitrator October 25, 2007