

C-20036

SOUTHERN REGULAR DISCIPLINE ARBITRATION PANEL

In the matter of
an arbitration between:

United States Postal Service)
Employer)
and) Grievant: Lori Zapata
National Association of)
Letter Carriers, AFL-CIO) Case No. G94N-4G-D 99131969
Union)
Austin, Texas)

Before: Leonard C. Bajork, Arbitrator

Appearances:

For the Employer: D. G. Claye, Advocate

For the Union: Dana R. Culpepper, Advocate

Place of hearing: Austin, Texas

Date of hearing: August 19, 1999

Award: The Union's grievance is sustained.

OK
HJ

Date of award: October 18, 1999

Statement of the Case:

The Union's grievance 1999-10 arose on February 3, 1999 at the Employer's Austin, Texas, Bluebonnet Station, postal facility where Ms. Lori Zapata, the Grievant, was a City Letter Carrier with 5 years service.

All dates are 1998 unless otherwise specified.

On December 18, the Grievant was delivering her route when, at 1:25 p.m. the LLV which she was driving, struck the rear of a privately owned vehicle (POV). The traffic was stacked up as it began to rain a short time earlier. The Employer conducted a pre-disciplinary interview with the Grievant the same day.

On January 22, 1999, the Employer issued a Notice of Removal (NOR) to the Grievant. Grounds for removal were Unsatisfactory Safety Performance - Failure to Follow Proper Safety Procedures Resulting in an At-Fault Accident.

Positions of the Parties:

The Employer:

The Grievant was removed for just cause. She violated the ELM's Section 814.2 and HR-93-SH-011.

The Grievant has a past record of having committed 5 preventable accidents. The referenced rules and regulations require that Postal employees maintain the proper distance from the lead vehicle. On December 18, the Grievant was traveling too close behind the POV.

Although no past elements of discipline were cited as a consideration for the removal penalty, the Grievant has been disciplined in the past for failure to follow safety instructions.

While the Grievant has a clean disciplinary record, she was forewarned that committing a preventable accident would subject her to discipline. Past efforts, including remedial training, have failed to correct the Grievant's unsafe driving habits.

Therefore, the Employer feels that the Union's grievance is without merit and respectfully asks the Arbitrator to reject it in its entirety.

The Union:

The Grievant was removed without just cause.

Procedurally however, the Employer committed harmful error. The January 22, 1999 NOR was issued by the Employer's Station Manager, Customer Services, contrary to the National Agreement's Article 15, Section 2 Step 1(a). The Grievant was not allowed to first meet with her immediate supervisor. Mr. Charles Corona, with whom she met, was the Station Manager.

Second, the Employer failed to conduct a fair investigation of the December 18 accident. Not only did it fail to note and measure the skid marks at the scene, it failed to gather and consider the only other eyewitness' account of the accident who stated that she saw the LLV skid.

Significantly also, no Accident Review Board was subsequently convened to review what had happened inconsistent with the Employer's September 1, 1994 bulletin, Customer Service Operations Safety Instruction.

On the case's merits, the Employer failed to prove that:

1. The December 18 accident was, in fact, preventable and,
2. The accident was not caused by a mechanical malfunction, that is, a defective brake system.

The parties agreed that the issues properly before arbitration for final and binding determination are:

Was the Grievant's removal for just cause?

If not, what is the proper remedy?

Each party was given full opportunity to examine and cross examine witnesses of their choosing, to introduce relevant document evidence and to make closing oral argument. The parties elected to file post-hearing briefs in lieu of closing oral argument. The briefs and supporting case authority were timely postmarked due September 3, 1999, reviewed and fully considered.

Discussion and Findings:

A Question Of Harmful Error

Harmful or prejudicial error is easiest understood as the Employer's improper action which affects a case's outcome. In discipline cases, the incidence of prejudicial error, and there are several, denies the Employer from exercising its Article 16 right to discipline or discharge an employee for just cause. It is though the Employer has no such right.

I reject out-of-hand the Union's position regarding the Employer's alleged violation of Article 15.2, Step 1(a). Mr. Corona was Acting Station Manager, Customer Services, due to the absence of the actual manager. The evidence is also that the removal was concurred in by a postal official of higher authority than Mr. Corona. I find that these facts are consistent with Article 16.8 of the National Agreement.

Regarding the Union's second position, the Employer argues in its brief that it conducted a fair investigation of the accident. It states:

As evident in the police report, there were no skid marks to measure. The supervisor did interview the driver of the POV at the scene and the grievant later in the afternoon after she returned to the office. The grievant was given an opportunity to give her side of the story in regard to the accident. The grievant's prior accident history/safety record speaks for itself.

The evidence is that, again, Mr. Corona conducted a pre-disciplinary interview with the Grievant the same day as the accident. He noted that the police authorities at the scene issued the Grievant a citation. He also stated that he observed no skid marks at the scene. Finally, the Employer maintains that the Grievant was given a fair opportunity to relate her side of the story, but failed to say anything other than she, a) was driving at a safe distance, b) properly applied the brakes and, c) the LLV skidded into the rear of the POV.

The Union counters however that the Employer failed to convene either a Safety Review Board (SRB) or an Accident Review Board (ARB). There is no evidence that the Employer initiated either review after the pre-disciplinary interview on December 18. However, according to Mr. William Reynolds, steward, an ARB was convened but its findings were not made part of the case's record. Missing also is any accounting of the only Union eyewitness' observation of the accident, Ms. Jocilyn Clark, City Letter Carrier was behind, driving a 2-ton truck. At hearing, she claimed that she saw the Grievant's LLV skid. However, she could not see the distance between the LLV and the POV.

The Employer cites in support of its position on fairness, Case No. A94C-1A-D 98013185 (1998) decided by Arbitrator Jacquelin F. Drucker, who it quotes having said:

Were this a typical disciplinary removal case, the union would be entirely correct in each of its contentions. This case, however, is less about discipline than it is about safety. Each of the alleged shortcomings in the just cause case are subsumed within the principle that removal of an employee for safety reasons sometimes merits deviation from the traditional principle of corrective and progressive discipline.

Also cited by the Employer is Case No. N7N-1MD 13153 (1988) decided by Arbitrator J. Liebowitz who stated:

There is no doubt under precedents between the Postal Service and the Unions that an employee may be removed for failure to work safely after being given the training and the opportunity to do so.

The Employer concludes by arguing in its brief:

I would like to remind the Arbitrator the grievant was removed for Unsatisfactory Safety Performance - Failure to Follow Proper Safety Procedures Resulting in an At-Fault Accident which was seriously aggravated by the grievant's accident history/safety record and not for failure to meet the requirements of her position.

I am not sure of what this reminder is about or the distinction which it makes between the causes of action. Presumably, the Employer argues, as Arbitrator Drucker found, that employee inattentiveness, a safety concern, transcends Article 16.1's application for corrective and, therefore, progressive discipline. I may agree but this is a merits position which deals with severity of penalty. However, it illustrates a fundamental problem I have with the Employer's position on employee fairness, the Union's procedural concern.

In its March 11, 1999 letter of additions and corrections, the Union quotes the Employer's Step 2 decision to have read in part: "The grievant may have a clean record as far as active discipline, reduced by adjudication, but the grievant's safety record is far from clean." In this regard, the Union argues:

The very point of our contention Ms. Brott (Employer's Step 2 designee) is indeed ignored and subverted here in your own statement. The fact is that the Carrier has no live discipline and we are discussing DISCIPLINE here not safety records in this instant grievance.

This exchange between the parties reveals my fundamental concern about the case's direction. The Employer's January 22, 1999 NOR refers to but a single event for which the Grievant was removed - the December 18 vehicle accident. While the document evidence lists the Grievant's past safety record as including 5 preventable vehicle accidents and 1 preventable industrial accident, having occurred between July 22, 1993 and November 12, 1996, to which the Employer alludes as "aggravating circumstances", the Grievant was not charged with the same. The effect of using the Grievant's past safety record in combination with the stated cause of action, a single event, is to shield from arbitral scrutiny the truth and accuracy of the Employer's claim that they also were "preventable" as to their final disposition. Any incidence of unfairness associated with the Employer's investigation of the December 18 accident however pales in significance to the flawed NOR. If the Employer's case against the Grievant is one of safety based on the Grievant's entire record, then it was incumbent on the Employer to have so charged. Afterall, past elements of

discipline are routinely included in the Employer's statement of charges. Because they are, the Employer must stand the burden of showing their contribution toward its decision for discipline or removal. I therefore hold that the Employer's charge against the Grievant is limited to exactly the December 18 accident which it claims was preventable. And, as a stand alone charge like the Union argues, the question is one of just cause for the removal - the merits issue.

In concluding the discussion on the procedural issues raised by the Union, I find that the Employer's failure to note the LLV's skid marks, if there were marks to be noted, is incidental to a question of harmful error. As is the Employer's failure to include in its investigation the statement of the Union's eyewitness and hearing witness, Ms. Clark. Neither contributes conclusively to the notion that that the accident was not preventable. The merits question is whether it was preventable. More problematic is the Employer's failure to assemble a joint Accident Review Board. Or worse, if Mr. Reynolds testimony is to be believed about one having been conducted, the result of its review.

The evidence is that ARB's are commissioned by the Employer's 1994 District bulletin on safety. Yet, according to Mr. Robert Arthur, Human Resources Safety Specialist, ARBs are seldom conducted presently, unlike the past. According to his testimony, while the result of a Board's review may not be used as basis for employee discipline, it is another matter to suggest that ARBs have no significance in determining or in assisting in a determination on the question of an accident's preventability. Here, the Employer relies largely on the police authority's on-the-scene investigation for which the Grievant received a citation. However, the Union rebuts this on grounds not important for discussion here. Yet, the Employer failed to counter the Union's challenge with a showing of its own. What is left is hardly proof of the accident's prevention. By failing to conduct an ARB, the Grievant was not only denied a due process protection, the Employer forfeit the only potential for showing that the December 18 accident was preventable. Its failure therefore unfavorably constitutes harmful error in addition to constituting a fatal blow to its merits argument. It has but proved that the Grievant

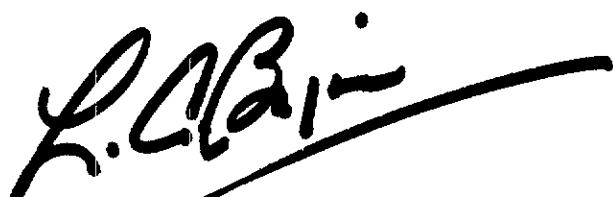
committed an accident. Both, I find, are sufficient to set aside the Grievant's removal penalty.

I am not without sympathy for the Employer's plight. The Grievant has a poor safe driving record. But the Employer must decide the track on which it intends to proceed in the future, either administrative or disciplinary unlike here where it attempted to mix the two. Administratively, it may choose to provide the Grievant with more remedial training or, possibly worse for the Grievant, may revoke her driving privilege. Or, as happened here, to discipline or remove the Grievant on safety performance grounds should there be a repeat. However, either track it chooses in the future will subject its action to at least the potential for grievance and arbitration. Proof therefore is of the essence with either choice.

As remedy, the Employer will:

1. Immediately offer reinstatement to the Grievant to her former position. While the Employer may require remedial training of the Grievant upon reinstatement, it may not as a condition of either reinstatement or, unless the Grievant objects to such, her continuing employment. The Grievant's past driving record remains intact as a result of it not having been properly included in the instant case's statement of charges.
2. Immediately make the Grievant whole in every respect which will include backpay less interim earnings.

Respectfully,

A handwritten signature in black ink, appearing to read "L.C.Bajork".

Leonard C. Bajork, Arbitrator