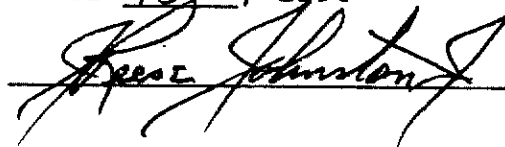


obtain other employment during the period that he was removed from his job. I will therefore retain jurisdiction of this case for 30 days from the date of this opinion and if either party wishes to hold further hearings on the question of the amount, if any, of back pay I will schedule such a hearing at the earliest possible convenient.

Date of Award: September 18th, 1990

, Arbitrator

BACKGROUND

On March 1st, 1990 the grievant, Richard H. Knaggs, received a Notice of Removal which reads as follows:

"You are hereby notified that you will be removed from the Postal Service effective April 5, 1990. The reasons for this action are:

Unsatisfactory Services - Inability to perform the duties of your position in a safe and efficient manner/unsuitable for Postal Service Work Environment.

Charge No. 1: Inability to perform the duties of your position in a safe and efficient manner/unsuitable for Postal Service Work Environment.

You are a full time city carrier assigned to duties under my supervision at the Northwest Station in Dallas, Texas.

Investigation reveals that since your employment with the Postal Service, February 27, 1988, you demonstrated that you were accident prone and therefore cannot be relied upon to perform the duties of your position in a safe manner. This is evidenced by the fact that you have had five (5) accidents since your employment with the Postal Service. A review of your record indicates that you have been involved in on duty accidents as follows:

1. On July 9, 1988, you were involved in an unreported vehicle backing

accident at Parkland Blood Donor Center resulting in \$125.00 damage to a Postal Vehicle.

2. On September 19, 1988, you were involved in a backing accident in violation of the MSC Baking Policy resulting in \$250.00 damage to a private vehicle.
3. On November 7, 1988, you sustained a lower back injury due to improper lifting techniques.
4. On May 22, 1989, you sustained a personal injury caused by a dog bite.
5. On February 5, 1990, you were involved in a motor vehicle backing accident which resulted in \$50.00 damage to the postal vehicle and about \$350.00 damage to the private vehicle.

In addition to the individual training you received as you entered the Postal Service, you are well aware of your safety responsibilities through safety talks. As a direct result of your accident record, additional personalized training and interviews were given to you in an effort to increase your safety awareness. There can be no doubt that during your almost two (2) year term of employment you have been made aware of the need to work safely and apply a common sense approach to safety on your job. The Postal Service has been extremely patient in permitting you to be adapted to this work environment by

exposing you to regular safety meetings and parties.

Despite these extended efforts, you continue to be involved in accidents. In reviewing the accident reports submitted by you, there has not been an indication of continued unusual circumstances surrounding your accidents. Postal employees are expected to perform normal handling of the mail without causing injury to themselves or damaging the personal property of others. You have demonstrated by your actions that you are unsuitable for your present work environment and unable to perform the duties of your position without being involved in an accident. Your removal from the environment is in your own best interest since continuing as you are could result in accidents of a more serious nature to yourself or others. Your record of accidents clearly indicates that allowing you to remain in your position will result in future accidents which could cause permanent disabling injuries to yourself or others. For your protection as well as the protection of the Postal Service, you should be removed to seek other acceptable forms of employment. You are unsuitable for this Postal Service work environment. You demonstrated inability to work safely directly impacts efficiency of operations by lost time accidents, limited duty assignments and requiring reassignments or overtime to cover critical work assignments.

It is obvious that you cannot adjust to the industrial work environment of the Postal Service without causing personal

injury to yourself of damaging the personal property of others including the property of the U. S. Postal Service. Your record of unsatisfactory services is totally unacceptable. Your removal is warranted and necessary to promote the efficiency of the service as well as to protect you from harming yourself.

Your actions are in violation of the following Postal Service rules and regulations:

Section 661.3 of the Employee and Labor Relations Manual states in part:

Employees must avoid any action, whether or not specifically prohibited by this Code, which might result in or create the appearance of:

f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

Section 666.1 of the Employee and Labor Relations Manual States:

Employees are expected to discharge their assigned duties conscientiously and effectively.

In addition, the following elements of your past record have been considered in arriving at this decision:

You were issued a seven day suspension for Unsatisfactory Work Performance/Failure to properly operate a Postal Vehicle on September 20, 1988.

You were issued a 14-day suspension for Violation of Safety Rules/Unsafe lifting on November 28, 1988.

You have the right to appeal this action under the Grievance-Arbitration procedure set forth in Article 15, Section 2 of the National Agreement within 14 days of your receipt of this notice.

In this action is overturned on appeal, back pay will be allowed, unless otherwise specified in the appropriate award or decision, ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained in the ELM, Section 436 (COPY ATTACHED).

As a result of this Notice of Removal the Union filed a grievance. The grievance filed by the Union gave the facts as follows: "Grievant received a Notice of Removal dated 3-1-90-Inability to Perform Duties of your position in a safe and efficient manner/unsuitable for Postal Service work environment."

The Union's contentions were: "The Union contends the removal is not for just cause. 1. Discipline punitive, not corrective. Violation of Postal Service disciplinary policy for accidents."

The corrective action requested was: "Expunge removal notice from grievant's file and make him whole in every respect, including all back pay."

The Postal Service gave its' letter of decision in regard to the Step 2 appeal and this decision reads as follows:

This is in response to your Step 2 appeal form received in the Labor Relations office on March 7, 1990, concerning a grievance filed on behalf of Richard H. Knaggs, carrier at Northwest Station. You cite Article 16.5 as being violated.

A Step 2 meeting was not held.

FACTS:

The Grievant has demonstrated a continued inability to perform his duties without causing injury to himself. The Grievant has established a clearly ;unsafe work record as outlined in Letter of Removal dated March 1, 1990.

UNION CONTENTIONS:

The union contends violation of Article 16.5. It is alleged that Grievant was removed without just cause. The Grievant is not subject to removal action even if he were found to be accident prone.

MANAGEMENT CONTENTIONS:

The Grievant's inability to work in safe and efficient manner warrants the Grievant's removal. The union has failed to consider Management's right to run an efficient operation.

The continued employment of an employee who has demonstrated repeatedly his inability to perform his duties without sustaining injury to himself is of the utmost concern to the Postal Service.

In the instant situation the removal of the Grievant is warranted. The notice of Removal outlines an unsafe employee who posed a serious safety concern.

REASON FOR DENIAL:

The Grievant has demonstrated that he is unable to work in a safe manner.

The Grievant has been involved in as many as five accident beginning on July 9, 1988 through February 5, 1990. Grievance denied.

Upon receipt of the Step 2 decision the Union appealed the case to Step 3 and sent a letter to the Director of Employee and Labor Relations which stated as follows: "The above numbered grievance is being appealed to Step 3 of the Grievance/Arbitration procedure pursuant to Article 15 Step 2 as Management has failed to schedule a

meeting within the time limits prescribed."

The Union's grievance appeal to Step 3 reiterated the same reasons for appeal and the same corrective actions were requested. However, the Union did not raise as a lack of due process the failure of the parties to meet at the Step 2 meeting.

The Postal Service gave its' Step 3 answer which answer read as follows:

Decision:

We have considered all available evidence in the record and that offered by the Union at the Step 3D Hearing on the above referenced case.

The grievance is denied.

There was just cause for the removal. The grievant continued to violate safety rules and regulations resulting in an accident. The grievant has been previously discipline with a 7-day suspension and a 14-day suspension but has failed to correct the problem.

The matter not being resolved by the parties in the procedural steps of the grievance procedure the matter was referred to arbitration and was the matter heard by this

Arbitrator on July 27th, 1990. The representatives of both parties requested the right to present post hearing briefs. Said briefs were received on August 29th, 1990.

The Union at the arbitration hearing raised the issue of arbitrability in that there was no Step 2 hearing between the parties and therefore the grievant was denied procedural due process and this having been denied the grievance should be sustained on that basis and therefore, there would be no necessity for deciding the grievance on its merits.

The Arbitrator informed the parties that he would first consider the question of arbitrability and if his decision was that procedural due process had not been provided the grievant that he would sustain the grievance and would not consider the merits of the case. However, if his finding was that procedural due process had been afforded the grievant, then he would deny the lack of arbitrability question raised by the Union and proceed to decide the case on its merits.

Article 15 of the National Agreement in Section 3, Paragraph (C) states as follows: "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."

It is my finding that in light of the clear language of the above quoted provision in the National Agreement the Union by its' actions in appealing the case to the third step due to the failure between the Postal Service and the Union to have a mutually agreed on extension time does not materially violate the due process rights of the grievant. Therefore, the Arbitrator will proceed to resolve this grievance on its' merits.

The issue as seen by the Postal Service is as follows: "Did the Postal Service act within its' right under the National Agreement when it removed the grievant from the Postal Service effective April 5th, 1990, for inability to perform the duties of his position in a safe and efficient manner - unsuitable for Postal Service work environment?

The Union sees the issue as follows: "Was removal for just cause? If not, what is the appropriate remedy?

The Arbitrator finds the issue to be "Did the Postal Service in its' removal of the grievant from the Postal Service act in an unreasonable, arbitrary or capricious manner based on the reasons for such removal as set out in the Removal Letter dated March 1, 1990? If so, what should the remedy be?

DISCUSSION

I have reviewed my tapes of the testimony of the witnesses. I have read the exhibits introduced into evidence by the parties and I have read and studied the excellent briefs filed by the representatives of the parties, including the cases cited in support of said briefs.

Let me state in the beginning that I do not believe nor find that every removal is necessarily disciplinary in nature. However, where an individual is removed from his employment there is an obligation on the part of the employer to justify its action of removal and to show by clear and convincing evidence that its action was not unreasonable, arbitrary or capricious.

This burden on the employer is not the same as it would be in the case of the necessity of proving just cause as is necessary in a disciplinary discharge.

Section 1 of Article 16 of the National Agreement which reads as follows:

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.

The above quoted section appears to limit the right of the Postal Service in disciplining or discharging an employee to a question of just cause. However, this language apparently through the arbitration cases submitted by both parties seems to have been found by these

arbitrators to include a removal without the necessity of proving just cause if an employee is found to have the inability to perform the duties of his position in a safe and efficient manner or if under all the evidence such employee is unsuitable for the Postal Service work environment.

The Postal Service quotes in support of this proposition a fairly recent decision by Arbitrator Michael Jay Jadel in Case No. S7M-3W-D 786 which was decided on September 2nd, 1989. In that case Management contended that "Discharge cases such as this one have been decided by Postal Service arbitrators on basis other than that of disciplinary action. Under these circumstances, it has been recognized that the test of just cause did not apply. The grievant simply demonstrated his unreliability at performing the duties of his position in a safe and efficient manner and therefore his removal was proper."

He cited the arbitration case decided by Arbitrator Holley in M-8-S-2518-D wherein Arbitrator Holley stated as follows: "The evidence presented by the employer conclusively establishes that the grievant was provided the

same safety orientation, instruction and training afforded all mail handlers. Despite this fact, the grievant experienced an unusually high accident rate; so high in fact, that she was only a 50% employee for almost a year and a half. Her history of repeated injuries indicates that she is unable to perform the duties of mail handler without injury to herself."

Also quoted was Arbitrator Searce in Case S8M-3D-D 11927 wherein he stated, "The service's action in this case are (sic) not perceived as disciplinary in nature. It is well-established that removal from duty need not necessarily be a disciplinary act; nonetheless, the burden of proof does issue to the Service that its actions meeting the test of reasonableness, are in concert with established procedure and policy and do not violate the grievant's rights under the agreement or other related documents. The burden issues to the Union to demonstrate...if it so claims... the Service's actions were arbitrary, capricious or disparate in nature; it raises no such claims...The Union offers no repudiation of the Service's statistics on the grievant's injury record which is, in a word, extensive: 11 industrial

accidents...or over fifty (50%) percent of his potential work time.... Even if the Union's suggestion that the grievant was not properly trained in safety procedure had merit, his accumulation of accidents far exceeds those which would be considered reasonable under any such circumstance. If, as the Union contends, the grievant was required to work unsafely, he had available to him a means to forego such directives...the grievance procedure....The Service cannot be asked to bear the continuing burden of an employee whose availability is so substantially reduced and whose propensity for accidents has resulted in cost to such a level as in this case. In sum, I am persuaded that the grievant, for whatever reasons, was not capable of making himself available for duty to a sufficient level."

He also quoted Arbitrator Weisenfeld in Case No. N8M-1J-D-16225 as follows: "... (The grievant) had given the Service just cause to dismiss her... (she) violated safety regulations in at least seven incidents, a consequence of which resulted in her failure to be regular in attendance, over an extended period of time...

"The extensive loss of (her) services and the cost attendant thereto have been have been excessive. The Service cannot be asked to retain in its' employ and individual whose propensity for accidents is as grave, seemingly, the grievant's."

Also quoted is Arbitrator Marx in Case No. N4C-1E-D-30041 as follows: "There is a question of whether an employee is basically suitable for continued employment, not by his deliberate actions but because of his apparent continuing inability to perform any work...in a safe, accident-free manner...Surely he must realize by now that he is unable to meet the basic requirements of Postal Service employment. The removal is obviously based on this conclusion and not on the basis of discipline to punish the grievant."

Also quoted is Arbitrator Carraway in Case No. S4M-3W-D-64198 as follows: "An employee cannot discharge the obligation of his job if he is continually being involved in accidents and losing work time by reason of being out on injury disability. He then proceeds to identify the key question as being: Whether the evidence showed that (the

grievant) is so accident prone that he must be removed from the Postal Service as being a liability to its operations. To make a determination on this question, it is necessary to review each of the accidents which the Postal Service relied upon to make its conclusion to remove."

In the above quoted case by Arbitrator Carraway, the Arbitrator concluded that based on the facts on each of the incidents relied upon by the Postal Service that the grievant could not be considered "accident prone" under such circumstances and his reinstatement was ordered.

In the case before Arbitrator Jadel he examined each of the 12 accidents experienced by the grievant in that case which accidents covered a period of time of approximately 4 years and 8 months.

With the above background I will now review each of the incidents cited by the Postal Service in its' Notice of Removal of the grievant, Mr. Knaggs.

No. 1 is: "On July 9, 1988, you were involved in an unreported vehicle backing accident at Parkland Blood Donor Center resulting in \$125.00 damage to a Postal vehicle." The testimony in regard to this incident shows

that the grievant did in fact cause some slight damage to the Postal vehicle he was driving by backing into a post. This is to be considered an accident caused by the negligence or carelessness of the grievant. The grievant likewise failed to report this accident which is in violation of the Postal Service's Rules and Regulations.

The second incident was stated as follows: "On September 19, 1988, you were involved in a backing accident in violation of the MSC backing policy resulting in \$250.00 damage to a private damage." The grievant admits that in this case he did violate the backing policy and did strike a parked vehicle causing the damage. This likewise will be considered an accident caused by the carelessness or negligence of the grievant.

The third incident is stated as follows: "On November 7th, 1988, you sustained a lower back injury due to improper lifting techniques." This incident was not observed by anyone, however upon the grievant describing what had happened to his supervisor, his supervisor determined that the grievant had not used the proper lifting techniques and therefore the supervisor concluded that the

grievant was in violation of the Postal Service's Rules and Regulations regarding lifting techniques.

The fourth incident was that on May 22nd, 1989 you sustained a personal injury caused by a dog bite. It is difficult if not impossible for the Arbitrator to feel that for a letter carrier to be bitten by a dog is a result of carelessness or negligence. To do so would be to leave out the fact that the dog was the aggressor in the affair and apparently this is the first and only time that the grievant had a problem with a dog even though the Postal Service's exhibits and testimony indicated that this was a neighborhood that had an unusually large number of vicious dogs. I cannot fault nor charge the grievant with negligence or carelessness or being accident prone in this incident.

The fifth incident was on February 5th, 1990, you were involved in a motor vehicle backing accident which resulted in \$50.00 damage to the Postal vehicle and about \$350.00 damage to the private vehicle. I have examined the exhibits and reviewed the testimony of the Postal Service witness and it is my finding that in this matter based on

the testimony, the grievant was not guilty of negligence or carelessness in this incident. It is obvious and apparent to me that the accident was caused entirely by the driver of the other vehicle.

Since at least two and possibly three of the five incidents that were the basis for the determination by the Postal Service that the grievant had the inability to perform the duties of his position in a safe and efficient manner and also being unsuitable for Postal Service work were not sustained in the opinion of this Arbitrator; therefore, it is my finding that several of incidents that the Postal Service relied upon to remove the grievant from the Postal Service employment were not sustained. The grievant therefore should be returned to his job with the Postal Service.

In reviewing the cases cited by the parties it is interesting to note that in one of the cases there were twelve incidents in a relatively short period of time and in another there were 24 incidents in a longer period of time. It appears to this Arbitrator that the Postal Service in its decision to remove the grievant was precipitous and did not

carefully review the five incidents that they charged him with.