27963

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

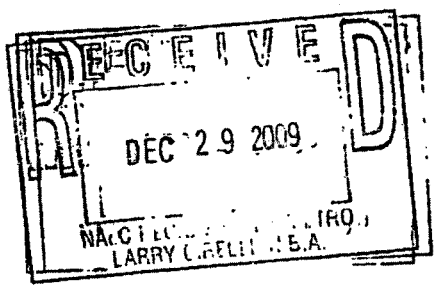
-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO

Grievant: Jason Perez

Post Office: Brooklyn - Homecrest

USPS Case No: A06N-4A-D 08269343
NALC Case No: 08NDD617



Before: Bruce Fraser, Arbitrator

Appearances:

For the U. S. Postal Service: Betty Peek

For the Union: James Yates

Place of Hearing: Brooklyn GMF

Date of Hearing: November 18, 2008

Date of Award: December 18, 2008

Relevant Contract Provisions: Article 16; Memorandum Re: Transition Employees

Contract Year: 2008

Type of Grievance: Discharge

TE Jason Perez did commit the act for which he was terminated, namely "use of a privately owned vehicle without authorization." However, the Postal Service did not meet the standard of just cause as presented in the JCAM. While recognizing that the concept of progressive discipline does not apply in the case of discipline of TEs, the evidence does not show that: (1) the grievant was aware of the rule of not driving his POV to his route; (2) the grievant was not aware of the penalty for violating of this rule; and (3) the rule was not consistently and uniformly applied across the Brooklyn installation. He shall be reinstated to his position and made whole for wages and benefits.

Bruce Fraser

THE ISSUE

At the hearing the parties agreed upon the following issue:

> Did Management have just cause to issue Jason Perez a Notice of Removal, dated June 6, 2008, for Failure to Follow Instructions/Unauthorized Use of a Privately Owned Vehicle
>
> If not, what shall be the remedy?

THE FACTS

Jason Perez, the grievant in this case, began working for the Post Office as a T.E. on December 22, 2007. He was assigned to the Homecrest Station in Brooklyn, although he was frequently loaned to other stations including Vanderveer, and Bay Station.

On Saturday, May 3, 2008, he was on loan to the Vanderveer Station and was assigned to Route 30, a walking route. He drove his personal vehicle to the route, delivered the mail, and as he was returning to the Station, was involved in an auto accident.

On June 6, 2008, he was issued a Notice of Removal by the Vanderveer Supervisor of Customer Service Deborah Johnson which reads in part as follows:

> You are hereby notified that you will be removed from the USPS effective June 10, 2008.
>
> The reasons for this actions are:
>
> **Charge 1: Failure to Follow Instructions/Unauthorized Use of Private** (sic) **Owned Vehicle.**
>
> ...
>
> Postal Rules and Regulations state that in order for you to use your private vehicle in the performance of your duties you must have a "drive-out" agreement with management. You have no such agreement.
>
> As a part of your Postal training you have been trained and instructed not to use your privately owned vehicle while on duty. Also, service talks are given at the stations in regards to this. You are required to follow the official travel instructions for the route assignment which you are assigned to. Travel to and from the route is included in the total street time of the assignment. On the aforementioned

> day, you failed to follow instruction by using your POV while on-duty in Vanderveer Station. As a result of your failure to follow management's instructions you were involved in a motor vehicle accident which resulted in personal injury to yourself. (sic)
>
> On May 6, 2008, a Pre-Disciplinary Interview (PDI) was held with you in the presence of Union Representative, Steward Vinny Geraci. During this interview, you stated that you completed your route at approximately 03:50 p.m. and were on your way back to the station when the accident occurred. You also stated that you were not authorized to use your own private vehicle.
>
> Your actions are in direct violation of the following sections of the Employee & Labor Relations Manual (ELM):
>
> **Section 665.154 Obedience to Orders**, which states: "Employees must obey the instructions of their supervisor...
>
> **Section 665.13, Discharge of Duties**, which states: "Employees are expected to discharge their assigned duties conscientiously and effectively"
> ...
> By your own actions you chose to ignore instructions concerning the use of your privately owned vehicle procedures.(sic) Thus, appropriate action must be taken to correct the situation. This behavior cannot be condoned or tolerated. Therefore, your removal is for just cause and warranted to promote the efficiency of the Postal Service.
> ...

At the hearing Supervisor Deborah Johnson testified that she gives the complete Daily Service Talk each morning and includes advisory Number 20, "Do not use your automobile while on the clock." She emphasized that TEs in Brooklyn do not have driving routes and do not drive to their routes. She stated that the Route Book for Route 30 specified that it was a walking route, that the grievant would have read this when he was familiarizing himself with the route. Moreover, she stated that when a TE is first hired in Brooklyn, they are told that they do not drive, in contrast to other areas, and his identification badge has printed on the front: "Non-Driver." However, she agreed that her knowledge of the training was not firsthand.

Subsequent witnesses for the Service testified that at the Orientation and the Carrier Academy, Brooklyn TEs are told explicitly that they will not be driving, but none of the witnesses made clear if this driving restriction was in reference to a Postal Service vehicle, to a POV, or both. Moreover, none of the Service witnesses testified that the penalty for driving a POV was explained at any of the training meetings for Brooklyn TEs nor were the details of a drive-out agreement presented.

The Union presented a series of witnesses to the effect that letter carriers were driving to their routes, as did the grievant the day of the incident. Steward Riveria testified that some carriers who did not have a drive-out agreement at his station nevertheless drove to their route each day and he was sure management was aware of this. He specifically named three TEs from his station who drive their POV to their route. There was no rebuttal testimony from the Service.

Steward Geraci from Vanderveer Station, where Perez was assigned on the day of the incident, testified that whereas TEs walk to their routes, to his knowledge, only one carrier has a drive-out agreement, but many of the rest just take their POV to their routes. He stated that early in the morning there are 14 or so cars in the parking lot, whereas at 11 a.m. there are perhaps 2, a fact that management could not continually overlook. He stated that he was not aware that TEs are not authorized to drive in Brooklyn but did so in other districts.

Steward Browning from Homecrest Station testified that there are no drive-out agreements in the station but carriers, including TEs, drive to their routes, especially to a route such as Garrison Beach which is far from the Station. He, also, stated that there are many cars parked near the Station in the morning but gone in the afternoon.

The grievant, Jason Perez, testified that he used his POV on the day in question, something he had done several times previously, and noted that some supervisors asked him if he had a car,

presumably implying that he should drive to the route. He added that he just assumed that Johnson knew he was driving to the route, although he acknowledged that neither she nor any other management person had ever said that he should use his POV rather than walk. On the other hand, he stated that no one ever said, "Don't use your POV." He stated that after May 3, he did not use a car again during the weeks he continued working before being terminated.

He continued that he recalled being told that TEs were not permitted to drive in Brooklyn, but always assumed the reference was to LLVs, not to his POV. At his PDI, he agreed that he was not authorized to drive his POV, but stated that he continued with "I didn't know you had to be authorized to use your car." He stated that no one had ever told him not to use his car, and noted that when "I went to Bay Station, management asked me if I drove," presumably because the routes were distant. He stated that he also saw other carriers use their cars, and thus assumed there was no prohibition against it. He did not recall the mention of not using POVs during the Service Talks, but noted that he usually reported in about 10 a.m.

The Memorandum of Understanding between the Postal Service and the NALC, included in the parties' agreement, reads in relevant part:

> **ARTICLE 16**
>
> Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except when the separation is pretextual. Transitional employee may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar dates, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge...

The JCAM, dated November 2005, pages 16-1 through 16-3, contains the following:

Article 16 Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive....

Just Cause Principle

The principle that any discipline must be for "just cause" established a standard that must be applied to any discipline or discharge of an employee. Simply put, the "just cause" provision requires a fair and provable justification for discipline.

"Just cause" is a "term of art" created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

- **Is there a rule?** If so was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule?...
- **Is the rule a reasonable rule?**
- **Is the rule consistently and equitably enforced?**
- **Was a thorough investigation completed?**
- **Was the severity of the discipline reasonable related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?**
- **Was the disciplinary action taken in a timely manner?**

DISCUSSION

The MOU dealing with Article 16 provides that the standard of just cause applies to a TE who has been disciplined or discharged, with the restriction that the concept of progressive discipline cannot be applied by the arbitrator. This means that an arbitrator cannot lessen the penalty if he/she concludes that management made a serious mistake in the quantum of discipline imposed and did not make the penalty corrective rather than punitive, as called for in Section 16.1.

However, as discussed in the JCAM, once there is a showing that the grievant committed the act, as charged, the concept of *just cause* requires several considerations, all of which typically must be met, for the employer to prevail in arbitration. They are, briefly, as follows:

1. Is there a rule and if so, was the employee aware of the rule and the consequence upon violating it?
2. Is the rule reasonable?
3. Is the rule consistently and equitably enforced?
4. Was a thorough investigation completed before the discipline was given?
5. Was the penalty imposed appropriate under the circumstances?
6. Did the employer act in a timely way?

Only consideration (5) involves progressive discipline and, pursuant to the parties Agreement, must be ignored since the grievant was a TE. The other 5 are separate and distinct issues and must be considered.

I point out that the Service relies on the MOU regarding Article 16, in particular where it provides

> ...Transitional employee may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure,...Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge...

As note above, finding that a grievant is guilty of the committing the action for which he was charged, in this case using his POV to drive to his route without authorization, is not synonymous with there being just cause for the imposition of a particular discipline. Six conditions must also be met for there to be just cause. Simply put, there is a contradiction in the MOU language. In particular, the statement "The issue will be whether the employee is guilty of the charge..." is only the first part of the standard. Meeting the relevant conditions is a second. Although the con-

dition of progressive discipline is not applicable here, the other five conditions are in play and need be considered.

The charge for which the grievant was terminated was the failure to follow instructions, namely, the unauthorized use of a privately owned vehicle. There are three issues to consider. First, I am not convinced that the grievant was aware that in order to obtain authorization to use one's POV to travel to a route a carrier is required to have a drive-out agreement. There is no evidence that he even knew of the existence of a drive-out agreement. He was not asked. He stated that he knew he was not authorized to use his POV, but he also stated that he didn't know that one had to be authorized to *drive to a route*. There was no evidence that he was so informed in his training as a Brooklyn TE.

The witnesses for the Service testified that new hires/trainees are instructed on the dos and don'ts of the job, but no one specifically stated that the drive-out agreement was discussed in the Brooklyn training. Perez testified credibly that he thought the non-driving information was related to the Post Service vehicles, not his POV, and that the "Non Driver" stamped on his TE badge referred to Postal Service vehicles. In short, I am not convinced that the grievant was aware that there was a rule which he violated on May 3, 2008; hence he was not aware of disobeying instructions.

Second, assuming for the sake of argument that he was aware of the rule requiring him to have authorization to use his own POV, there is no evidence that anyone informed the grievant that the penalty the first time he was caught using his POV to travel to his route would be termination. This places the seriousness of the unauthorized use of a POV on a par with being drunk of the job or stealing from the Service, contrary to common sense.

Third, the unrebutted testimony of the stewards leaves no doubt that the drive-out requirement was not enforced consistently and uniformly. It is significant that even when Rivera gave the names of three letter carriers that routinely were driving their POVs to their routes but without a drive-out agreement, there was no challenge to his claims and no rebuttal.

In conclusion, although there is no question that Perez committed the act of using his POV while on the clock without authorization, there were two conditions of just cause that were not met. First, there was no evidence that he knew about the drive-out agreement conferring authorization to drive to one's route, or that he knew what penalty would be imposed, should he drive an unauthorized POV to his route. Second, there was no challenge to the testimony from three stewards that the rule was not enforced consistently and uniformly. I find that there was not just cause to terminate Perez for his actions on May 3, 2008.

AWARD

There was not just cause to terminate Perez for his actions on May 3, 2008. He shall be reinstated with full back pay less offsetting earnings and be made whole for all lost benefits.

December 18, 2008
Scituate, MA

Bruce Fraser
Arbitrator