C-25100 A+B

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	GRIEVANT: Traver
between	POST OFFICE: Henderson NV
UNITED STATES POSTAL SERVICE	USPS CASE NO: F01N-4F-D 04017050 & 04017051
and	NALC CASE NO: 01-046826 & 01-046826
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	EMERGENCY PLACEMENT & REMOVAL FOR UNSAFE PRACTICES

BEFORE: THOMAS F. LEVAK, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:	Doug Alderman
For the Union:	Mike Lindemon
Place of Hearing:	404 S Boulder Hwy, Henderson NV
Date of Hearing:	February 3, 2004
Date of Award:	March 10, 2004
Relevant Contract Provision:	Article 16
Contract Year:	2003
Type of Grievance:	Discipline

Award Summary: 1) Management violated National Agreement Article 16.7 when it issued the September 18, 2003 Notice of Emergency Placement. 2) Management did not have just cause to issue the Grievant a Notice of Proposed Removal for Unacceptable Performance/Unsafe Act Resulting in a Preventable Motor Vehicle Accident on September 24, 2003. The grievances are sustained. The Grievant shall immediately be reinstated to his former position with full back pay and benefits from September 17, 2003, and without loss of seniority.

OPINION

I. THE ISSUE.

These combined cases concern an August 25, 2003 grievance and an October 8, 2003 grievance initiated by Branch 2502 which challenged a September 18, 2003 Notice of Emergency Placement ("NEP") and a September 24, 2003 Notice of Proposed Removal ("NPR")for Unacceptable Performance/Unsafe Act Resulting in a Preventable Motor Vehicle Accident on September 16, 2003.

The NEP Notice specified a "failure to observe safety rules and regulations," and gave, as the reason for the action:

> On September 16, 2003 you performed an unsafe act which resulted in a preventable motor vehicle accident. On that date you were delivering mail on the 100 block of W. Desert Rose Drive. When you pulled away from the curb the left front bumper of your delivery vehicle struck the right rear door of a personally owned vehicle which was passing by.

Similarly, the NPR charged the Grievant with "Unacceptable Performance/Unsafe Act Resulting in a Preventable Motor Vehicle Accident," specifically:

> *** [Y]ou were delivering mail in the 100 block of W. Desert Rose Drive. As you pulled away from the curb to enter the traffic lane to go around parked vehicles your left front bumper struck a privately owned vechile (POV) that was passing you in the traffic lane.

The NPR cited ELM § 666.1 and M-41 § 812.1. The NPR further cited specific past elements, namely:

> A May 30, 2003 30-day suspension — reduced from a removal by agreement at Formal Step A — for failure to follow instructions/failure to observe safety regulations/practices;[1]
>
> A May 7, 2003 14-day suspension for unacceptable conduct/failure to observe safety regulations/practices;

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[1]The suspension warned the Grievant that any further unsafe act might lead to his removal. After the Grievant served the suspension and returned to work, he was given approximately three to three and one-half hours of computer safe practices training, and his first day back on the street he was followed and observed.

A December 13, 2002 14-day suspension for unacceptable conduct/failure to observe safety regulations/practices;

A November 6, 2002 7-day suspension for unacceptable performance/failure to observe safety regulations/practices and unacceptable conduct/failure to follow instructions

The NPR further noted two additional unsafe acts which resulted in traffic accidents, one on December 2, 2000 and the other on October 25, 2002.

The stipulated issues are:

1) Did management violate National Agreement Article 16.7 when it issued the September 18, 2003 Notice of Emergency Placement; and if not, what is the appropriate remedy?

2) Did management have just cause to issue the Grievant a Notice of Proposed Removal for Unacceptable Performance/Unsafe act Resulting in a Preventable Motor Vehicle Accident on September 24, 2003; and if not, what is the appropriate remedy?

II. THE FACTS.

Background.

The Henderson office consists of two stations: the Main Station of the Henderson, Nevada office, known as "Henderson Main" and the Valley Verde Station. At the time of his removal, the Grievant was a 21-year Carrier, and had worked as Henderson Main since December 2, 2000. In the past, he had worked as a PTF, as an SDC for four years, and had served as a Carrier Trainer for ten years. During his tenure, he has received over 32 hours of safety training. Andy Moody, a three-year Henderson SCS, was the Grievant's immediate supervisor.

The Events of September 16, 2003.

While there was some argument from the Union as to whether a traffic accident occurred, the persuasive and credible evidence established the following. At approximately 4:00 p.m., on Tuesday, September 16, while the Grievant was delivering an LLV on his regular route on West Desert Rose Drive, the side of the left front bumper of his vehicle came into contact with the right rear door area of a Ford being driven by 16-year old Breanna Taylor ("Breanna"). It is also clear that the accident occurred during the following sequence of events. The Grievant had been driving eastbound on Desert between 100 and 160, delivering to residences on the south side of the street. When he arrived at Pacific St, which is near 100, he turned back on Desert and proceeded to deliver to residences on the north side of the street. Somewhere between 100 and 160, the contact between the two vehicles

occurred.

The Postal Service version of what happened is that the Grievant parked at 100 Desert Rose, delivered to it, then pulled away from the curb directly into Breanna's Ford as it was passing by in the west bound traffic lane, causing the accident. The Union's version of how the contact occurred is that the Grievant did not pull out from a parked position into Breanna's Ford, but rather was already traveling on the west bound traffic lane at 10 to 15 miles per hour, that he moved about one foot to the left to avoid the mirrors of a parked vehicle, that, at that point, Breanna passed his LLV in the middle of the road, side-swiping it, thereby causing the accident, and that the Grievant was never aware — and still was not aware at the arbitration hearing — that contact was made. The two versions of the accident are irreconcilable. If the Postal Service's version is true, the Grievant committed an unsafe act; if the Union's version is true, he did not.

Evidence in Support of the Postal Service Position.

The Postal Service did not call as witnesses either Breanna, Breanna's mother, Jeanne Taylor ("Jeanne"), a supposed witness to the sound of the contact, or the police officer who came to the scene shortly after the contact occurred. Moreover, the Postal Service did not assert that it asked any of those persons to appear at the arbitration hearing, nor did it seek subpoenas from the Arbitrator for their appearance. Instead, it relied upon the testimony and written statements of Moody, who conducted two investigatory interviews of the Grievant; Henderson Main SCS Randy Drew, who conducted the on-the-scene investigation together with Henderson Main supervisor Dianna Blackwell; Blackwell herself; formal Step A representative, Valley Verde Station Manager John Morgan; and Breanna's and Jeanne's written statements.[2]

Drew, a two-year Henderson SCS, has investigated a total of four accident scenes during that period of time; however, he has never received any specific training in the area of accident reconstruction. At the scene, he interviewed the Grievant and had him write a statement. He also interviewed the supposed witness to the sound of the contact and the police officer who came to the scene. He also instructed Blackwell to interview Breanna and her parents and to have them write written statements. Further, he examined the two vehicles and noted paint transfers in the areas of the purported contact. In addition, he took photographs of the two vehicles and the scene, which were admitted into evidence. He did not take measurements. The Grievant told him that he had seen Breanna's Ford turn onto Desert behind him, that he was already in the traffic lane when the Ford passed him, that he was unaware that any contact had been made, that he did not become aware that any problem existed until he arrived at the Breanna residence at 161 Desert, where he was confronted by Jeanne, and that Breanna was lying. The police officer, who issued a failure-to-yield citation while Drew was present, told Drew that he had not witnessed the contact but was relying on Breanna's version of the incident. The Grievant, using the photos that Drew had taken, tried to convince Drew

[2]The Union moved to strike Breanna's statement on the ground that she was not called as a witness and was not available to be cross-examined. The Arbitrator denied the motion, but advised the parties that should he find the Grievant's testimony to be credible, his testimony would outweigh Breanna's statement.

that based upon the transfer mark on the LLV bumper, the vehicles would have to have come in contact while in a parallel position on the roadway. Drew testified , however, that based upon his investigation, he found that the Grievant had caused the contact by pulling out from a parked position into the traffic lane. He explained that, in his opinion, the fact that the Ford's transfer of paint to the LLV bumper was on the side of the bumper did not indicate that the two vehicles were side by side when the contact was made, but rather was caused by the fact that the LLV had entered the roadway at a very gradual angle. [3]

Blackwell's statement, to which she attested, provided, in part, that Breanna told her that the Grievant was parked in front of a white van at 120; that as she started to pass him, he pulled out; that she tried to move to the left, but that there were people in the road; and that the Grievant's LLV hit her car and kept on going. Breanna did not honk at the Grievant.

Breanna's written statement was generally consistent with the oral statement she gave Blackwell. It also states, "I heard a bang and my car shook!" It goes on to state that she then drove into her driveway and told Jeanne what happened, and that Jeanne confronted the Grievant when he stopped at her house to deliver the mail.

Jeanne's written statement was as follows:

> I came up to our mailbox and said, "You hit our car." He said, "No, I didn't hit it." I pointed to the dent in the door and said, "Yes, you did." He said, "She was in my blind spot." Then he said, when I looked at his driver side bumper, "Well, she hit me!" and said he was driving and she hit him. He said she sped around him. He changed his story all along.

The Grievant's written statement provided:

> 4:30 p.m. Going west bound on Desert. Pulling away from box at 100 Desert. Signaled. Moved to center of street to avoid 3 vehicles parked at 120 Desert. Noticed a brown car make the turn behind me onto Desert at a higher speed than I was traveling. The car was close to the left side of my vehicle. I swerved to the right beyond the three vehicles parked at 120 Desert — continued delivery. On the return path to 161 Desert the owner accused me of hitting her daughter in the brown car. I never felt the impact or heard it.

Moody, who has served as the Grievant's supervisor for three years, was involved in all of the Grievant's prior discipline. When the Grievant returned to the station from the accident scene, he briefly told Moody a short version of what had occurred, stating that if contact had occurred it had not been his fault and that Breanna had lied. On the morning of Wednesday, September 17, about

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[3]Drew conceded that he did not complete a form 1769 on the basis of a form SF 91 and a form 1700, as required by PO-701 § 261.23.d.

one hour after the Grievant had arrived at work and had cased mail, and after Moody had finished with his morning duties and had reviewed the written statements, he interviewed the Grievant. The Grievant told him that if an accident had occurred, he was not at fault; that he had made a delivery at 100; that he then passed 120, holding the mail, because of a white van and construction at that location; that at that point, in his rearview mirror, he saw the Ford pull onto Desert; that he proceeded on Desert, passing three parked vehicles and moving a little to the left to avoid the mirrors on the third parked vehicle; that he then noticed the Ford passing him on the left; that he felt no contact; that he moved back to the right; that he continued to make deliveries; that he first became aware that anything had happened after he was confronted by Jeanne; that his flashers had been on at the time of the contact; that if he had thought contact had been made, he would have stopped; and that he had been cited. He further argued to Moody that he did not hear or feel any contact, which meant to him that both vehicles had been moving at the same time; that if the contact had occurred as Breanna claimed, it would have been physically impossible for him to have continued driving; and that the position of the paint transfer on the left side of the LLV bumper, rather than it's being on the front corner, proved that the contact could not have happened as claimed by Breanna. Immediately after interviewing the Grievant, he told him that he was placing him on "16.7," and told him to clock out and go home. The Grievant did so. He was not escorted from the premises.

Moody testified that he implemented the EP for the following reasons [paraphrased]:

> I was involved with all of the Grievant's previous discipline, and he never took personal responsibility for any of the incidents. I also considered that he had three industrial accidents while he was here. This time again, he wouldn't take responsibility for the accident. Safety is a concern under 16.7. I didn't know yet for sure who caused the accident, but based on his mind set of not taking responsibility, I chose to believe Breanna's version. I determined that it was not safe to allow him to go back on the street, and it wasn't safe for him to be in the office. I decided that if he believed he hadn't done anything, he could go out with that same mind set and commit another unsafe act; and even if he stayed in the building, he could commit another unsafe act here. It wasn't based on a single accident, it was based on his record of unsafe acts.

On September 22, Moody telephoned the Grievant and instructed him to return to the office on September 23 for a second investigatory interview. The Grievant did so. He was not escorted when he arrived. Moody conducted the interview utilizing prepared questions. The Grievant basically told the same story and made the same arguments that he previously had made, this time drawing a requested diagram of the scene. Among others, the following additional questions and answers were also made [paraphrased]:

> Q: You told Drew Breanna was speeding. How do you know.
> A: Speed is relative. She was going faster than I. She may have been under the speed limit.
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> Q: You told Drew that you did not see Breanna coming, but you told me that you saw

her coming around the corner. How to you reconcile those statements?
A: I saw her make the turn, then I didn't see her until she was next to me.

Q: Breanna said there was a bang and her car shook, and a witness said he heard a thud and a rubber squeal sound? Why did you not hear or feel anything?
A: An LLV is a lot bigger than a car, and if we were both moving, I wouldn't have felt it. There was no damage to the LLV

Q: Did you tell the mother that Breanna had been in your blind spot?
A: Yes.[4]

After the interview, the Grievant left the building unescorted.

After considering the Grievant's responses and his past record, Moody decided to issue the NPR. He testified [paraphrased]:

> I determined that he had turned out into traffic and hit Breanna's car. I had Breanna's statement and the citation.[5] I also knew that the Grievant had stopped to deliver mail and that he then turned into traffic. Also, the Grievant had told me that the car had come around the corner and did not verify its location — the first unsafe act — and also admitted that he pulled to the left to avoid car mirrors on the right — a second unsafe act. The Grievant had been disciplined for a series of unsafe acts, the last one of which was a removal adjusted to a 30-day suspension. He was warned and retrained after that suspension.

Evidence in Support of the Union Position.

The Union called the Grievant; NSALC Richard Griffin, the formal Step "A" representative; and accident reconstruction specialist William Heffner, who testified regarding an October 29, 2003 report he prepared concerning the accident; Steve Walker, the Union's informal Step "A" representative on the NEP; and John Seevers, the Union's informal Step "A" representative on the NPR. The Grievant's testimony was consistent with his prior oral and written statements, and he appeared to testify in a credible and forthright manner.

The police officer's report indicated that the contact was caused by a side-swipe.

The Union qualified Heffner as an expert. Heffner was with the Colorado Springs, Colorado Police Department for 27 years, where he retired as the sergeant in charge of vehicular accident

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[4]Drew testified, and the Grievant conceded, that there is no blind spot, as generally understood, on an LLV. He testified that when he used that term with Breanna's mother, he meant that he was looking to his right at the time.

[5]It was stipulated at the hearing that the citation was dismissed.

investigations. He has served in his present capacity with W. N. Morrison & Associations, an accident analysis and reconstruction firm for eight years. He has university training in accident reconstruction. In 1986 he was hired by Northwest University to teach accident reconstruction part-time, and upon his retirement, he moved to a full-time position. He has testified in approximately 20 arbitration hearings. Also, in one instance a U.S. Attorney's office hired him to investigate an accident involving the Postal Service, and in another instance, the Postal Service directly hired him. Heffner's analysis of the incident, based upon a visit to the scene, an examination of the Grievant's LLV, and examination of available photographs, and the written statements — Breanna and Jeanne did not respond to his requests to examine the Ford — was (1) that a collision between the two vehicles had probably occurred, and (2) that the apparent angle of the collision indicated that it occurred while the Ford was passing the LLV while both vehicles were traveling in common direction at the point of impact, and that impact did not occur as a result of the LLV entering the roadway from a parked position. He testified, "It was relatively simple to determine the angles of the two vehicles at the point of impact; they were parallel." The Arbitrator finds that Heffner testified in a credible and understandable manner, and exhibited no bias in favor of the Grievant. Heffner's report contained a few minor errors. First, the Report's "Introduction" referenced "southbound," when it should have stated "westbound." Heffner explained: "I put the wrong direction in it; that's the best I can tell you." Second, under "Conclusions" he mistakenly wrote "left side of the Breanna Ford." Third, the "North" arrow on the map faced in the wrong direction. "I put it in the wrong way," Heffner readily conceded. The Arbitrator finds that the errors, which amount to what are commonly called scrivener's errors, do not impeach the report.

For reasons stated below, the Arbitrator finds that the Postal Service did not prove that its version of the facts occurred.

IV. POSTAL SERVICE CONTENTIONS.

The Postal Service most certainly had an Article 16.7 allegation that the Grievant was involved in an at-fault accident. Further, there is more than an allegation that he is an unsafe worker with a long and extensive history of safety infractions. On the day in question, he committed at least two unsafe acts. His last discipline, which basically was a last chance, provided that any further infraction would probably result in his removal. Further, he failed to accept any accountability for his actions. That failure and his inability to see how his actions resulted in the accident necessitated him Emergency Placement because he was a danger to himself and others. He has received over 32 hours of safety training, yet safety infractions continue. Heffner's reconstruction of the accident does not help the Grievant because it contained significant errors. Management was under no obligation to reassign the Grievant to non-driving duties.

V. UNION CONTENTIONS.

The Union restates its timely objection to the consideration of the written statements of Breanna and her mother. Both constitute unreliable hearsay. See, W1N-5H-D 27023, Snow, 2/13/85. As in the Snow decision, because of management's heavy reliance on hearsay, the Arbitrator should credit the credible testimony of the Grievant. Management has the burden of proof, and it never proved that the Grievant's LLV struck Breanna's car while he was pulling away from the curb, it never proved that the Grievant committed an unsafe act, and it never proved that the Grievant violated a safety rule. To the contrary, the Arbitrator should credit Heffner's report together with the Grievant's testimony.

With regard to the Emergency Placement, the evidence is that no emergency existed on the morning that Article 16.7 was invoked. Under the facts as they occurred, management should have followed Article 29, temporarily suspended the Grievant's driving privileges, and conducted an investigation. Placing him under Article 16.7 was punitive and a misuse of that article. Management also failed in its obligation under the JCAM to assign the Grievant to non-driving duties.

Management also violated the Grievant's due process rights because it did not fully investigate the accident before issuing the NPR. It failed to complete the required Postal Service forms correctly and waited six days before conducting an investigative interview consisting of more than three questions. Management's investigation was not thorough or objective and failed to review and concur on Postal Service form 1769, and management failed to review and concur on the other Postal Service forms. Management also never took into account the photographic evidence, the physical evidence and other evidence. Moreover, management offered no testimony to rebut Heffner's report.

The NPR was without just cause. It was based on the unsubstantiated statement of a 16-year old. Indeed, the statement in the NPR that he performs his assignments at an average level shows an unfair bias against him.

VI. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Postal Service failed to demonstrate that it had good reason to invoke Article 16.7, and further concludes that it failed to prove that it had just cause to remove the Grievant. Accordingly, the grievances will be sustained. The following is the Arbitrator's rationale.

The Emergency Placement.

Article 16.7 and the JCAM provide that the Postal Service may act "immediately" to place an employee in an off-duty status in narrowly delineated "emergency" situations, one of which is "where the employee may be injurious to self or others," the provision here relied upon. In the instant

case, no emergency within the meaning of Article 16.7 existed; only the most strained reading of the last quoted provision could result in such a finding. At the most, the Grievant merely committed the last in a series of unsafe acts; and as the Union cogently argues, if management believed that the Grievant was an unsafe driver, it should have invoked Article 29. Therefore, its decision to utilize Article 16.7 was unwarranted and punitive. The Arbitrator will have additional comments regarding Article 29 below.

The Removal.

The Postal Service relies entirely upon written hearsay. The Arbitrator cannot recall any other instance among the more than 1,500 discharge and discipline cases he has heard where an employer attempted to prove its case through written statements. As the Union argues, hearsay evidence is notoriously unreliable. Hearsay is a statement or assertion that is made by someone other than a testifying witness which is offered in evidence to prove the truth of the matter asserted. Thus, hearsay may consist either of an oral statement supposedly made by an absent accuser to a testifying witness, or the written statement of an absent declarant. Hearsay is considered to be unreliable because it is not made under oath and since the declarant is not available for cross-examination to be tested for perception, memory, communication, veracity and bias. Thus, in the absence of some well understood statutory or common law exception, hearsay evidence, even if formally admitted, will be either totally excluded from final consideration, or will be given less weight than conflicting plausible direct or circumstantial evidence.[6] In the instant case, Breanna could not be tested for veracity and bias; her mother could not be tested for similar bias; the other purported witness could not be tested for perception, memory, communication and bias — as a neighbor of the Taylors, he might have been prejudiced in their favor; and the police officer could not be examined for his personal opinion of how the accident occurred — after all, he was directed by an absent superior to cite the Grievant. Moreover, the Postal Service offered no explanation, including unavailability or unwillingness to testify, why it did not attempt to call any of those three declarants as witnesses. It is well-established that, at the very least, an arbitrator may draw an adverse inference from a party's failure to call a potential witness.[7] In the instant case, since Breanna and her mother had every reason to make self-serving statements, and since the Postal Service offered no explanation for its failure to call them, or the other two potential management witnesses, the Arbitrator has no choice but to draw such an adverse interest.

On the other side of the coin, the Union offered a plausible explanation for the contact between the vehicles, specifically: While the Grievant was traveling westbound in his traffic lane at approximately 10 to 15 miles per hour, Breanna, approaching the driveway to her home at approximately the speed limit of 25 miles per hour, passed him in the eastbound traffic lane and,

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[6] *See,* Hill & Sinicropi, *Evidence in Arbitration*, Ch. 9, "Hearsay Evidence and Other Exclusionary Rules," BNA, 2nd Ed. In arbitration, unlike a judicial proceeding, arbitrators are reluctant to finally exclude evidence at a hearing before all the evidence is heard since there is no practical way, once the hearing is concluded, for the arbitrator to rectify an exclusionary ruling.

[7] *Evidence in Arbitration*, pp. 102, 128.

when the Grievant moved slightly to his left to avoid the mirror on his right, the right side of the Ford brushed the left side of the LLV, causing the contact. In fact, the Arbitrator finds that explanation to be more plausible than any alternative. The Grievant can hardly be faulted for failing to notice a car passing him in the opposing traffic lane on a residential street.

That explanation was also supported by persuasive expert testimony. As a general principle, where the issue before an arbitrator is related to some science, profession or occupation beyond the competence of the average layman, an expert may be used; and where such an expert is utilized, deference ordinarily will be given to an expert opinion.[8] In the instant case, the Union utilized an expert. Moreover, the individual who investigated the accident for management had no specific training in accident reconstruction and no substantial experience in that field or area. Therefore, the Arbitrator feels compelled to accept Heffner's patently valid report as legitimate.

One final matter, that of Article 29 and how that article relates to the arbitral common law concept of the "unsafe employee" or the "unsafe driver." Even absent contractual language similar to Article 29, many arbitrators recognize the validity of a removal charge that an employee is "accident prone," where it is alleged and proved that the employee has a greater number of accidents than would be expected of the average employee under the same conditions, or where the employee has "personality traits that predispose to accident," even where it cannot be conclusively shown that the employee was at fault in every instance. On the other hand, some other arbitrators do not recognize the concept, holding that proof of negligence must be proven in the determining instance. In any event, where the specific charge is negligence/commission of an unsafe act, not that the employee is accident prone, the employer will be required to prove that charge.[9] In the instant case, the charge against the Grievant was not that he was an "accident prone" employee; the charge was that he committed two specific unsafe acts. Whether the Postal Service might have proceeded under Article 29 is not before the Arbitrator. Management failed to prove the charges against him and failed to prove that an Article 16.7 emergency existed. For those reasons, the grievances must be sustained.

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[8] *Evidence in Arbitration*, pp. 81-82.

[9] *See, BNA Grievance Guide*, "Part II, Carelessness," 8th Ed., pp. 157-58