

BEFORE THOMAS F. LEVAK, ARBITRATOR

In The Matter of the Regular
Western Regional Arbitration
Between:

C 6299

U. S. POSTAL SERVICE
THE "SERVICE"

(Idaho Falls, Idaho)

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO
THE "UNION"

(E. Alvarado, the "Grievant")

DISPUTE AND GRIEVANCE
CONCERNING REMOVAL FOR
MISHANDLING MAIL/CODE
OF CONDUCT VIOLATIONS

W4N-5L-D 12735

ARBITRATOR'S OPINION
AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., June 19, 1986 at the offices of the Service, Idaho Falls, Idaho. The Service was represented by Clyde Buckley. The Union was represented by Jim Edgemon. The Grievant, Edward L. Alvarado, appeared and gave testimony on his own behalf. Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGES AND THE ISSUE.

The December 16, 1985 Notice of Proposed Removal provides:

This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 days from the date of your receipt of this letter.

CHARGE 1: MISHANDLING MAIL MATTER

The M-41 Handbook, City Delivery Carriers Duties and Responsibilities, part 112.25 states in part "Be prompt, courteous, and obliging in the performance of duties..." The Code of Conduct contained in the Employee Labor Relations Manual (ELM) states in part 661.3 "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."

On 12-9-85 at approximately 11:30 AM I received a phone call from Robison's Inc. at 690 Northgate Mile, stating that you had delivered a package. They had asked that you not drop the package. You dropped the package to the floor anyway. Your response to the customer was that the package was from Taiwan and had probably been dropped several times in getting there.

I found you on your route and brought you back to the post office. I took you into the office and asked you what happened. You stated that you would not say until you heard the complaint. I then repeated to you about the call and my visit to Robison's. You then described to me what had happened and it was the same story.

Your failure to properly handle this package is a failure on your part to be courteous, obliging, and has adversely affected the confidence of the public in your continued performance as a public servant.

CHARGE 2: VIOLATIONS OF THE CODE OF CONDUCT.

The Code of Conduct contained in the ELM Part 666.1 states "Employees are expected to discharge their assigned duties conscientiously and effectively." Part 666.2 states "Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the postal service..."

On 12/9/85 at approximately 11:30 AM after dropping the package listed in the above charge, you went out to your vehicle and got a small bundle of mail for Robison's business. You came back in the door and threw the bundle of mail towards the counter (approximately 21 feet) hitting one of the employees. In her written statement she states that "If I hadn't put up my hand it would have hit me in the head."

When I talked to you, you stated that this was a regular practice to throw the mail. Written statements from employees at Robison's describe you as having a really bad attitude, "He got ignorant. His language and attitude has been a problem in the past also, but this day was really a little too much."

I find your behavior on 12-9-85 to be an outrageous breach of the professionalism expected and required of a postal employee.

In addition, the following element(s), of your past record will be considered in arriving at a decision if the charge(s) are sustained:

1. On October 9, 1985 you received a 14 day suspension for failure to follow instructions.
2. On January 16, 1985 you received a letter of warning for failure to follow instructions.
3. On October 9, 1984, you received a letter of warning for failure to follow instructions.

(J2H)

The January 6, 1986 Letter of Decision provides:

On 12-17-85 you were issued a notice proposing to remove you based on the charges outlined in the notice.

I have given full consideration to your unsigned written answer dated 12-23-85, your verbal response to me on 12-24-85, and all other evidence of record. I find, however, that the charges stated in the notice you received on 12-17-85 are fully supported by the evidence and warrants your removal.

In your written response you justify dropping the package at Robison's by stating it had no markings on it to indicate it was fragile or not to be dropped. A carrier with your postal service should have known that to drop a package in front of a customer is totally unacceptable and totally unprofessional, irregardless of whether the package is known to be fragile or not. Your rationale for this blatantly discourteous act are unacceptable.

As to your statements concerning Mr. Walker's immediate investigation into this matter, I find his actions both appropriate and timely. As to your alleged quote of Mr. Walker i.e. "Your finished, and we're going to get rid of you because you are too reckless.", I find to be not true. He never made that statement.

You state that "Three written complaints were not received until December 10th and 11th. This removal was decided before Walker heard

Alvarado's side of the story." That statement is also not true. The final decision to remove you from the postal service is being made now, after I have reviewed the evidence, your written and verbal statements which were given to me 12-24-85.

You challenge the prior discipline cited in the Letter of Proposed Removal as not being remotely connected to the charges cited. I find that they are related to your behavior. Your failure to follow instructions and your failure to follow prescribed driving and safety rules.

In no instance have you denied dropping the package on the floor and you do not deny throwing the bundle of mail at the customer. I find your throwing mail at a customer to be totally unacceptable and dangerous conduct. Your action in this case could have resulted in an injury to this customer.

I have not read or heard any mitigating circumstances which would warrant any modification of my decision. I have, though, considered the nature and seriousness of your actions and conclude your action warrant your removal from the postal service.

It is my decision, therefore, that you be terminated from the postal service effective end of your tour of duty 01-16-86. (J2G)

The stipulated issue is as follows:

Did just cause exist, as required by Article 16 of the National Agreement, for the removal of the Grievant for mishandling of mail matter in violations of Code of Conduct? If not, to what remedy is the Grievant entitled?

II. FINDINGS OF FACT.

This case arose at the Idaho Falls, Idaho Main Office of the Service. The Idaho Falls postmaster was Mel Kuykendall. Kuykendall issued the Letter of Decision. The Grievant's immediate supervisor was Supervisor of Delivery and Collection Merrill E. Walker. Walker issued the Notice of Proposed Removal. The Idaho Falls shop steward was Roger Whitmill. Whitmill processed the grievance at Steps 1 and 2.

The Grievant has been a Service letter carrier for 24 years. He served his first 15 years at the San Francisco, California

office, and since August 1978 served as a carrier at the Idaho Falls office.

The Grievant's regular mounted route contains a number of businesses, including "Robison's," a sporting goods store located at 690 Northgate Mile, Idaho Falls, Idaho. The Grievant had delivered mail to Robison's for at least several months. The normal employee comment at Robison's is part-owner/manager Larry Robison and 4 delivery/stock/sales employees Jill Robison, John Larson, Angela Scott and Sam Beck. Larry and Jill Robison both testified at the arbitration hearing, and their statements and the statements of the other 3 Robison employees were received into evidence as joint exhibits.

At approximately 11:00 a.m. on December 9, 1985, the Grievant arrived at Robison's in his postal vehicle with a 1/2 to 1" bundle of mail, a 1/2 to 1" bundle of flats and a rectangular parcel approximately 3'x1'x6" in size, weighing approximately 10 to 15 lbs.

The Grievant walked into Robison's front door carrying the parcel by its straps at waist height. All of the Robison employees were behind the counter about 25' feet away, except for Beck who was in the back room. From a standing position, and in full view of the employees, the Grievant let the parcel drop 3' to the floor, instead of setting it down in any careful manner.

In the Grievant's own words, one of the employees said to him words to the effect of: "Geez, don't do that. It's breakable stuff in there." The Grievant responded in a somewhat curt and caustic manner with words to the effect of:

How was I supposed to know that? This package came all the way from Taiwan. You don't know what's happened to it on the way. It's not marked fragile and Post Office employees throw these packages around.

The Grievant testified at the arbitration hearing:

In hindsight, I shouldn't have made that "Taiwan" statement. It made a poor public image.

The Grievant also testified:

The parcel didn't have any fragile markings on it. I had no idea what was in it. They made such a big fuss about it.

There is no contention by the Service that the package was marked "fragile."

The Grievant went back to his vehicle and picked up the flat and letter bundles and brought them to the counter. While he

discussed a postage due with Jill Robison, she, in the Grievant's own words,

was glaring at me like she wanted to cut my throat. I asked her what she wanted me to do about it. She ragged me real good about the parcel. She was real mad about that. I got the postage due and walked back to the door.

The Grievant testified that he was embarrassed and upset because Jill Robison and one or more of the other employees kept complaining about the dropped parcel in front of store customers. He testified that because of that embarrassment he forgot to leave the letter bundle at the counter with Jill, so when he got to the door he turned around and tossed the bundle to Jill standing about 25' away.

The Grievant testified that over the preceding months he had sometimes tossed bundles of flats and mail to employees at Robison's and to employees in an appliance store next door, yelling out words such as: "Airmail!" He testified that he never threw the mail unless employees were ready to catch it.

The Grievant testified that when he threw the bundle toward Jill Robison, he thought that she was looking at him. He did not call out any kind of warning. In fact, Jill Robison was not paying attention to the Grievant.

The thrown bundle of letters flew directly toward Jill Robison's head. When Robison noticed the bundle, she reflexively raised her arm to protect her face and the bundle struck her in the forearm. The evidence established that had she not raised her head, the bundle would have struck her in the head or face. As Jill Robison testified:

It would have hit me somewhere from eyes to the top of the head. It stung my arm and it would have hurt real bad if it hit me in the face.

The Grievant also testified:

Evidently, Jill didn't expect me to throw it. She raised her hand up as she testified. But, she has seen me throw it before.

Neither Larry nor Jill Robison felt that the Grievant intentionally threw the mail at Jill with the object of hurting her. Both testified that they thought he threw the mail because he was angry and in a bad mood. Both also testified that they had never before seen the Grievant drop a parcel. It is evident to the Arbitrator that the Grievant did not intend to hit Jill, and that he simply committed an unthinking and careless act that was the result of his being embarrassed and upset.

After the bundle struck Robison, it broke apart and hit the floor. The Grievant did not attend to Jill Robison or apologize to her and simply got into his vehicle and drove away.

For the next 15 to 20 minutes, the Robison employees waited on customers and discussed what to do about the incident, including whether to lodge a complaint with the Service. Their discussion centered around the Grievant's attitude. As Jill Robison testified:

Most of the time Alvarado came in, he was kind of cross and acted like he didn't want to be there. But on this last day, he was very cross and angry. He threw the mail in anger. We had talked about his conduct in the past.

Finally, and after some discussion, employee John Larson stated: "I'm gonna call the Post Office and file a complaint." Manager Larry Robison stated: "That's okay with me." So, at about 11:30 a.m., Larson called the Main Office, talked to Supervisor Walker and lodged a formal oral complaint, describing what had happened at their store.

Walker immediately went to the store and interviewed all 5 employees, who recited the above-noted general facts. Walker then went out onto the Grievant's route, took the Grievant off the route and took him to his office. Walker recited the employees' complaint in detail and asked the Grievant for an explanation. The Grievant admitted having dropped the parcel and also admitted having thrown the mail and that the mail had struck Jill Robison's arm. The Grievant offered no special explanation for his misconduct.

Pending further investigation, Walker kept the Grievant off his route and assigned him to throwing flats. The next day, Walker went back to Robison's and asked each of the 5 employees to provide him with statements of the incident in their own handwriting. On the following day, Walker went back to Robison's and picked up the statements. The written statements simply restated the employees' earlier oral statements.

Subsequently, Walker recommended to Postmaster Kuykendall that the Grievant be removed, and ultimately the Notice of Proposed Removal was issued.

The M-41 and the Code of Conduct.

The Grievant did not dispute that he was aware of that portion of the M-41 which is cited in Charge #1. The evidence established that the Grievant was never provided a copy of the ELM or the Code of Conduct and that the Code of Conduct was never posted at the Idaho Falls office. It was the position of the Service that every letter carrier knows or should know that the standards encompassed by the cited Code of Conduct provisions are inherent requirements of the position of letter carrier.

Established Practice Concerning the Dropping of Parcels or Throwing of Bundles.

The Union and the Grievant did not contest the fact that it is improper to drop parcels in front of customers or to throw bundles of mail to them. The Grievant also conceded that he has never seen postal employees throw parcels within the Idaho Falls office. He did testify that when he was at the San Francisco office, employees within that facility would throw parcels over 10' into the air into tubs.

The Grievant's Past Record.

The October 9, 1984 Letter of Warning was issued as a result of the Grievant having violated posted written instructions against taking beverages onto the workroom floor and loitering on the workroom floor. The Grievant admitted at the arbitration hearing that he violated those written instructions when he took a cup of coffee onto the workroom floor and stopped to talk to an employee, and testified that he did not file a grievance to protest the warning letter.

The January 16, 1985 Letter of Warning was issued to the Grievant for failing to follow previous instructions to not stop at a certain business location on his route because the stop was not authorized. The Grievant conceded at the arbitration hearing that he committed the infraction cited in the Letter of Warning when he made an unauthorized stop on his route to pick up a package of cigarettes, and testified that he did not grieve the Letter of Warning.

The October 9, 1985 Letter of Suspension was issued to the Grievant for violating driver safety rules relating to the backing of a postal vehicle. Basically, the Grievant improperly backed his vehicle and struck a pole with a vehicle door. The 14-day suspension was grieved and at Step 3 the suspension was reduced to a 6-day suspension.

At some time during the past 2 years the Grievant received additional discipline. That discipline was grieved and the matter was subsequently processed to arbitration. On or about December 3, 1985, an arbitrator set aside the discipline. These facts are recited only because the Union alleges that the Service overreacted to the arbitrator's decision by removing the Grievant.

The Grievant has never been disciplined for having a bad attitude, for being discourteous to patrons, for mishandling the mail, for violations of the Code of Conduct, or for altercations with patrons or fellow employees.

The Grievant has never had a step increase withheld.

Additional Robison Employee Comments.

Larry Robison testified that when he gave his statement to Walker he commented regarding the Grievant:

If he's kept on, I'd rather he wasn't on our route anymore.

Jill Robison testified:

If the carrier were reinstated, I'd rather come to the Post Office and pick up the mail instead of having him deliver it to the store. He's just rude. If it had been up to me, I would have been picking up the mail all along.

III. SERVICE CONTENTIONS.

The Service concedes that discipline should be corrective, rather than punitive; however, under certain circumstances, progressive discipline is not appropriate. In the instant case, the Grievant's misconduct is so heinous as to justify removal.

The Grievant deliberately dropped a parcel in front of postal patrons and he threw a bundle of mail that hit a patron in the arm. Had the patron not reflexively raised her arm, she could have been blinded or otherwise seriously injured. Those actions are far below postal standards, especially considering the Grievant's long experience as a letter carrier.

The Service concedes that the Code of Conduct was never published or given to the Grievant. However, a carrier with the Grievant's background should be charged with the responsibility of understanding the nature of the code. Further, a carrier with the Grievant's background should reasonably be held to understand that he must never drop a parcel in front of a patron or throw a bundle of mail at a patron.

The Grievant's disciplinary record shows some disregard for postal regulations and rules. The Grievant's failure to follow instructions in previous cases relates to his failure to follow requirements of the M-41, the Code of Conduct and other inherent requirements for the position. The unsafe practice and the Letter of Suspension also relates to the Grievant's unsafe practice in Charge #2 of the instant case.

The Service's witnesses were credible and believable and established the Grievant's commission of the charges offenses. The Union has blown "alot of smoke" in this case, mostly in an effort to divert attention from the real issue which is that the Grievant has engaged in disgraceful and dangerous conduct. Either charge alone would justify removal.

IV. UNION CONTENTIONS.

It should first be noted that the Grievant has not been charged with the commission of an unsafe act, and that there has been no allegation within the charges that he violated any safety rule or regulation contained in any handbook or manual. The allegations of lack of safety are simply a smokescreen argument developed after the fact. The Grievant's status must be determined solely under the specific charges.

The Service contends that its witnesses were very credible. Let us examine each of the credible statements of those witnesses. First, Walker testified he receives about 10 carrier complaints a day, an enormous amount; yet, he also testified that this case was the first time he ever solicited a patron to make a written complaint. The reason is the personal vindictive relationship caused by an arbitrator having reversed discipline 5 days before the Grievant's acts. It is obvious that the Service was upset by the arbitrator's decision and moved against the Grievant in retaliation.

Further, the evidence established that Walker never went over the witness statements with the Grievant, which denied the Grievant's right to due process and his right to confront his accusers.

Numerous violations of the M-39 existed. Walker never asked employees to demonstrate how the box was dropped. Neither did Walker learn how many pieces of mail were thrown in the bundle. Neither did Walker interview the Grievant after he received the witness statements.

Charge #1 is faulty in its entirety. It is established from Walker's testimony and from the testimony of the Robison witnesses that the Grievant was not told to not drop the package before he did. In fact, all employee comments were after he dropped the package.

The Code of Conduct was never posted or given to the Grievant, so cannot serve as a basis for the charges against him.

The Grievant's statements concerning Taiwan and the Postal Service were improper, but they were true. It was common practice for mail to be thrown around, if not at the Idaho Falls office, then at the San Francisco office where the Grievant had worked. The Grievant's dropping of the parcel was a part of his heritage within the Post Office. He has been led into a false sense of security and believed that such action was not improper.

Walker failed to gain all the facts in this case before taking action against the Grievant, and when he later learned of all the facts, it was too late because positions had become polarized.

It is undisputed that there was no negative publicity

against the Service in this case, i.e., the public was not affected because the matter was not reported to the press or the media.

The Postal Inspector's Office was never called in this case. Hence, we can only draw the conclusion that the matter was not serious enough to justify removal. Similarly, no emergency suspension was issued in this case, so we can only conclude the matter was not serious enough to justify removal.

At the time the Notice of Proposed Removal was issued the Grievant was escorted from the office like a common criminal. Such unfair conduct by the Service makes its motives questionable.

There has never previously been any patron complaints against the Grievant for discourtesys to customers, throwing parcels in front of customers or any other complaints related to the instant case. Neither was there any discipline against the Grievant for any similar infraction. It is well established by arbitrators that for discipline to serve as a past element in a case, the alleged progressive discipline must be reasonably related. In this case, there is no reasonable relationship between the prior elements and the charges cited in the Notice of Proposed Removal.

It is undisputed that there was never claim by Robison for damages.

It is also undisputed that Walker never issued any directions to the Grievant not to go to Robison's; neither did Robison's request that the Grievant not come to their store after the removal.

It is also undisputed that no letter carrier has ever been removed for circumstances relating to a customer complaint, except where theft has been involved.

Larry Robison conceded that he had been asked by Walker to write a statement and that he would not have written a statement otherwise. Robison also testified that he felt that the Grievant had not thrown the mail with the intention of hitting Jill Robison, and also that the Grievant threw the mail underhanded.

Larry Robison also testified that he did not personally complain to the Service and that he did not ask Larson to complain. Robison also noted that he had made no claim for damages based on any damage to property within the parcel.

Robison also testified that he had seen the Grievant throw mail before, and that he did not ever ask the Grievant not to throw mail, and he never complained to the Service about that.

Larry Robison also testified that the package that was

dropped was not marked fragile.

Jill Robison testified that the Grievant had thrown mail before and that she had never complained to the Grievant or to the Service about that. She also testified that she did not feel that the Grievant had tried to hit her. He noted that the Grievant was not any more mad at her than at any other employee. Because she saw the Grievant throw the mail, she couldn't have been too surprised. Also, she had seen him throw the mail before.

In all probability, the parcel that was dropped only fell about 1 1/2'; so, it was more in the nature of a gentle lowering than a drop from any great height.

The Grievant testified that he threw the mail in order to save steps, not because he was malicious. Perhaps the Grievant was lazy, but he had no intent to hurt anyone.

It appears to the Union that Walker had some personal relationship with Robison employees which he denied during testimony. The fact that he called them all by their first name supports that contention.

The Union's position in this case is supported by the Arbitrator's decision in Case No. W4N-5D-D 10711, dated 4/7/86.

The Union acknowledges that the Grievant used poor judgment, but that lack of judgment does not warrant the penalty of discharge. No more than a short suspension is merited in this case. The Grievant should be reinstated to his former position and route with full pay and benefits, except for a short period of suspension.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that Service has failed to establish by clear and convincing evidence that the removal of the Grievant was for just cause. However, the Service has established that just cause existed for a thirty (30) calendar day suspension. Accordingly, the grievance is sustained in part. The following is the reasoning of the Arbitrator.

First, as the Arbitrator has noted in other cases (See, e.g., Seattle Case #W4N-5D-D 10711, 4/7/86), National Agreement Article 16 requires that discipline be corrective, rather than punitive, and also sets forth a relatively clearly defined progressive discipline program. In the Seattle case the Arbitrator further noted the following principles: (1) major offenses allow summary discharge, while minor offenses require progressive discipline; (2) neither the National Agreement nor any handbook or manual clearly delineate major and minor offenses; (3) past practice may establish certain offenses as major; and (4), absent the showing of a "nexus," actions of

carriers which bring discredit to the Service under ELRM Section 666.2 are not major offenses.

Second, an additional principle applicable to this case is that where progressive discipline is to be applied in an increasingly severe manner to the point of discharge, there should be some reasonable relationship between the chain of offenses. That is, there should be more than a remote connection between the types of offenses in the chain.

In that regard, it must be remembered that some sort of connection can always be established. For example, virtually every type of infraction within the Service is covered by some handbook or manual. So the Service can always argue that the infraction is always related to a failure to follow instructions. Similarly, virtually every disciplineable act is the result of either intentional misfeasance or non-feasance (carelessness or negligence). So the Service can always argue that every act of misfeasance is akin to a failure to follow instructions, and every act of nonfeasance is the result of a safety violation, which in turn may be construed as a failure to follow instructions relating to safety. Such a general connection does not satisfy the last stated principle; a connection between types of offenses must be more than remote.

Third, another principle applicable to this case is that the degree of progressive discipline must be reasonable. That is, the degree of discipline imposed for a related minor offense must not be unreasonably greater than the earlier minor offense. For example, it is a reasonably well-established practice within the Western Region for a 7-day suspension to be followed by no more than a 14-day, or at the most, a 30-day suspension. The Arbitrator knows of no cases upheld by Western Region arbitrators where a removal has followed a 7-day suspension.

An exception to both of the last-stated principles sometimes is allowed where an employee is guilty of a very high number of unrelated offenses within a very short period of time. In some cases, the types and numbers of offenses are simply overwhelming. The situation is similar to that in which a series of offenses in rapid succession makes it impossible for an employer to administer progressive discipline, and the employee's acts will be deemed as a whole to justify discharge. See Elkouri & Elkouri, How Arbitration Works, BNA 4th Ed., at p. 673, fn. 112.

In applying the aforesaid principles to the facts of this case, the first point is that, taken to its lowest common denominator, the Grievant has been charged with discourteous and offensive conduct which adversely affected the confidence of the public in the integrity of the Service. The Grievant has been charged only with E&LRM Sections 661.3.f, 666.1 and 666.2 and with M-41 Section 112.25. He was not charged with a violation of any safety regulations; he was not charged with the negligent or careless mistreatment of mail; he was not charged with any failure to follow instructions; and he was not charged with

damaging any property or injuring any person. He was charged only with performing acts that caused Service patrons to react unfavorably to him and to the Service.

The next point is that while the Grievant had never been provided a copy of the E&LRM, and while the Code of Conduct had never been posted, the nature of the infractions are such that the Grievant and all carriers are charged with knowledge of the cited provisions. Indeed, the Grievant admitted his actions were improper and the Union stipulates that some discipline is appropriate.

The third point is that the Grievant's actions on December 9, 1986 can only be characterized as a minor offense, as opposed to a major offense. At the common law, less serious forms of discourteous, offensive or outrageous behavior at the office of a customer which reflect both upon the employee and his employer, do not rise to the level of a dischargeable offense. More serious forms of improper behaviour, such as sexual misconduct, racial slurs or sexual harrasment, are not at issue in this case.

Within the Service, the Arbitrator knows of no custom and practice within or without the Western Region whereunder such isolated acts historically have been treated as dischargeable offenses. It is noted that the Service cited no arbitration decisions in support of its position. The only exception (and one not relevant hereto) involves "nexus" type cases where the employee's actions have been generally publicized and have therefore undermined the confidence of the general public (as opposed to the confidence of a single business) in the employee. Thus there is no reason for the Arbitrator to treat the Grievant's misconduct as other than relatively minor.

The fourth point is that the Grievant's actions of December 9, 1985 are only remotely connected with the actions cited as past elements. None of the prior elements relate to the Grievant's interaction with or affect on members of the public. None of the prior elements relate to discourteous, offensive or outrageous misconduct, involving either patrons, supervisors or fellow employees. And none of the prior elements relate to an appearance of impropriety. The prior elements are only remotely connected with the Grievant's actions in the sense that they relate either to some form of misfeasance or nonfeasance.

The fifth point is that the degree of discipline imposed in this case was not reasonable. The Grievant's last prior element was agreed by the parties at Step 3 to merit no more than a 6-day suspension. It is patently unreasonable for the Service to have moved directly from 2 warning letters and a 6-day suspension for unrelated offenses to a removal. The fact that the 6-day suspension was originally a 14-day suspension is irrelevant. The reduction took place after the Service's final removal decision on January 6, 1986. In any event, removal would be unreasonable even in the face of an unmodified 14-day suspension.

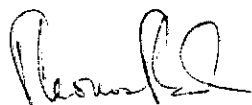
It should finally be noted that the Service never made it clear at the arbitration hearing whether it considered the Grievant to have been progressively disciplined to the point of removal or whether it considered the Grievant's December 12 misconduct to be removable of itself. The Arbitrator's impression is that the Service felt that the Grievant had committed a major infraction which justified summary removal. If that is the case, the Arbitrator can only respectfully disagree.

The Grievant committed a minor offense. At the most, a 30-day suspension would have been justified. Because of the nature of the Grievant's offense and the reaction of his patrons thereto, the Service shall have the right to assign the Grievant to another route, provided such reassignment does not violate the rights of any carriers covered by the National Agreement. Accordingly, the removal will be modified to a 30-day suspension.

AWARD

The removal of the Grievant was not for just cause. Just cause existed for a thirty (30) calendar day suspension. The Grievant shall be immediately reinstated to his former position with full back pay less the period of suspension and with full benefits and seniority. The Service may, in its discretion, assign the Grievant to any route within the geographical jurisdiction of the Idaho Falls, Idaho office, provided that such assignment shall not violate the rights of any other carriers under the National Agreement.

DATED this 30th day of June, 1986.



Thomas F. Levak, Arbitrator.

C-24238

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Barlow
)	
between	)	Post Office: Memphis, TN
)	
UNITED STATES POSTAL SERVICE	)	USPS Case No.: H01N-4H-D
	)	02224202
and	)	D42602D
)	
NATIONAL ASSOCIATION OF LETTER	)	NALC Case No.: DRT 08-039406
CARRIERS, AFL-CIO)	

BEFORE: Louise B. Wolitz, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Eddie Harmon

For the Union: Pete Moss

Place of Hearing: 555 South Third Street, Memphis, TN 38101

Date of Hearing: February 25, 2003

Date of Award: April 30, 2003

Relevant Contract Provisions: Articles 2, 15, 16, 17, 19, 31

Contract Year: 2001 - 2006

Type of Grievance: Discipline

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MEMPHIS REGION
N.A.L.C.

Award Summary:

The grievance is sustained. The arbitrator finds that the *Notice of Proposed Removal* issued to Letter Carrier Robert W. Barlow on August 5, 2002 violated *Article 16, Section 1 of the National Agreement*. It was not issued for just cause. The charges were not proven. No proper investigation of the charges was made. The employee's due process rights were violated. The *Notice of Proposed Removal* was punitive rather than corrective in nature. It is hereby removed from all records of the Postal Service. Carrier Barlow is to be restored to his position as Letter Carrier with no loss of seniority. He is to be made whole for all pay and benefits lost as a result of this removal.

Louise B. Wolitz, Arbitrator
Louise B. Wolitz, Arbitrator

RECEIVED

MAY 15 2003

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

DISCUSSION

RELEVANT PROVISIONS

2001-2006 NATIONAL AGREEMENT:

ARTICLE 16 DISCIPLINE PROCEDURE

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.

Section 5. Suspension of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure....

.....

ARTICLE 17 REPRESENTATION

Section 5. Rights of Stewards

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The steward, chief steward, or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses, during working hours. Such requests shall not be unreasonably denied.

...

ARTICLE 31 UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or designee....

THE EMPLOYEE AND LABOR RELATIONS MANUAL

666.51. Employees will obey the instructions of their supervisors. If any employee has reason to question the propriety of a supervisor's order, the individual will nevertheless carry out the order and immediately file a protest in writing to the official in charge of the installation, or appeal through official channels.

666.1 Discharge of Duties.

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

666.2 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service....It does require that Postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

666.85 Incomplete Mail Disposition

It is a criminal act for anyone who has taken charge of any mail to quit voluntarily or desert the mail before making proper disposition.

M-41 HANDBOOK, Section 112.3

112.3 Security

112.31 Protect all mail, money and equipment entrusted to your care.

112.32 Return all mail, money and equipment to the Post Office at the end of the workday.

THE ISSUE

The issue before the arbitrator is: Was the Notice of Removal dated August 5, 2002 issued to the grievant for just cause? If not, what is the appropriate remedy?

BACKGROUND

The hearing was held on February 26, 2003. The Postal Service had a court reporter present. The Union argued that it had never been notified of the court reporter. The Postal Service argued that the Union had been notified at the National level. The Union spoke to the National office and was informed that no notification had been received. The Postal Service produced a copy of the letter dated February 12, 2003, addressed to Mr. Gary Mullins, that they maintained had been sent by regular mail and also faxed to the national office of the Union. The arbitrator spoke by telephone to the office employee who supervised the preparation of the letter and its dissemination by mail and fax. This employee testified under oath that her assistant, who was not present at work that day, had faxed the letter to the National office of the Union and that either she or her assistant also mailed it on the 12th. The arbitrator accepted the fact that the Union never received the notification. The arbitrator ruled that the Postal Service had shown the intention to notify the Union and that the court reporter could stay. The arbitrator received a copy of the transcript, which she has read. The arbitrator's own notes remain the official record of the hearing.

The hearing proceeded in an orderly fashion. Witnesses were sworn and sequestered. Each party had the opportunity to present their witnesses and evidence and to cross examine the witnesses. At the request of the Postal Service, the parties did not close orally, but submitted briefs. The arbitrator received the briefs of both parties timely as agreed and the record was closed on March 26, 2003.

The *Notice of Proposed Removal* to Letter Carrier Robert W. Barlow, dated August 5, 2002, was signed by Supervisor of Customer Service Nancy Spinosa. It contained four charges for rule violations between July 12, 2002 and July 19, 2002:

Charge 1. Failure to Follow Instructions.

Specifically, on July 12, 2002, I was advised that you were not completing the 4570, USPS Vehicle Time Record, for your assigned vehicle #4315218. I instructed you to complete, in its entirety, a 4570 each day you used a Postal vehicle. A review of 4570's on July 22, 2002 revealed that after specific instructions you failed to complete a 4570 for your assigned vehicle on 07/17, 07/18, 07/19, and 07/22/02.

On July 17, 2002, you signed for six (6) express mail pieces on PS form 3867. I instructed you to deliver all six pieces, and to deviate from your line of travel if necessary to effect timely delivery. I was advised on July 18, 2002, that you had not been cleared on two of the express mail pieces. You stated that you handed the two pieces off to Special Delivery Messenger Larry Hart for delivery. You did this without authorization.

Charge 2. Conduct Unbecoming a Postal Employee

You have been asked and instructed to follow instructions given by supervisors without unnecessary feedback or comments. On July 17, 2002, I gave you instructions to carry a cut off. You became unruly and upset and protested that you were not on the overtime-desired list. I again instructed you to carry the cut off. You responded, "Send me home, I want you to." I instructed you to remove the empty equipment from the mail room at 200 Jefferson Ave. You again became upset and stated, "What do you want? Get out, I'm through with you." On July 25, 2002 during an interview, you called me a "Devil", and stated, "I don't have to listen to what you say." Your actions and conduct are unsatisfactory, and cannot continue to be tolerated.

Charge 3: Use of Unauthorized Overtime

On July 15, 2002, you were assigned to route 0326. In addition, you were assigned/authorized one hour of overtime on route 0332. You did not request overtime for your route on PS form 3996. You were on the clock a total of 9.68 hours. .68 hours were not authorized. On July 17, 2002, you were assigned/authorized one hour overtime on route 0316. You were on the clock a total of 9.93 hours. .93 hours were not authorized. On June 01, 2002, you used .20 hours of unauthorized overtime. On June 15, 2002, you used .18 hours of unauthorized overtime.

Charge 4: Delay of First Class Mail

On July 19, 2002 at approximately 6:30 a.m., I observed your mail satchel inside your assigned vehicle. I removed the satchel from the vehicle and discovered several pieces of raw first class mail. The mail had a return address of 140 Adams, an address on your route. The mail had been left in your assigned vehicle overnight, causing an unnecessary delay. When advised of the incomplete mail disposition you stated, "So what."

The Notice of Proposed Removal states that Carrier Barlow violated the *Employee and Labor Relations Manual*, 666.51, 666.1, 666.2 and 666.85, which we have quoted above, and which are quoted in the Notice, and also the *M-41 Handbook* 112.3, 112.31 and 112.32, also quoted above.

The Notice of Proposed Removal lists two past elements of record, a *Letter of Warning* dated 08/06/01 for *Having a Preventable/At Fault Vehicle Accident* and a *14-Day Suspension* dated 09/06/01 for *Conduct Unbecoming a Postal Employee*.

The Union filed a *Joint Step A Grievance Form* stating that: *The discipline issued the Grievant is punitive, procedurally defective and without just cause. The charges against the Grievant are false, erroneous and do not rise to the level of Removal. Charge 1: Disparate treatment and false allegations. Charge 2: Grievant maintains that the only thing that occurred is in the office during interview. Charge 3: USPS has not substantiated charges of Unauthorized OT. Two (2) instances are on cut-offs. Grievant maintains he called in on other instances and was authorized OT. Charge 4: Grievant maintains he is not aware of this infraction. The USPS has failed to carry the burden of*

proof in its allegations. The arbitrator notes that Carrier Barlow's seniority date is 6/28/80. He has been working for the Postal Service for 22 years.

Step A was initiated on 08/29/02; the *Step A Meeting* was held on 09/19/02; the case was received at *Step B* on 09/23/02; the *Step B* decision denying the grievance was received on 09/26/02. The Dispute Resolution Team (DRT) was unable to resolve the grievance and declared an impasse. The parties agreed that the dispute is now properly before the arbitrator.

POSITION OF THE POSTAL SERVICE

In its opening statement, the Postal Service argues that this discipline was for just cause and not in violation of the National Agreement. This grievant has a history of insubordination and blatant disregard of supervisors' orders. The grievance should be denied.

The Postal Service's first witness was Supervisor of Customer Service Nancy Spinosa. Supervisor Spinosa testified that on July 12, 2002, she had instructed Mr. Barlow to complete daily in its entirety his Form 4570 truck card, on which the carrier records the mileage and actual time he is using the vehicle on the street. On July 22nd, Supervisor Spinosa testified that she did a unit review of the 4570s and found that Mr. Barlow had not followed these instructions. Supervisors are required to submit a vehicle utilization report, with the actual mileage and the actual hours used for those vehicles, at the end of every AP.

On July 17th, Mr. Barlow was instructed to deliver six pieces of Express Mail, for which he signed an accountable sheet (Jt. X 2, p. 61). He delivered four of these pieces, according to the accountable sheet. So, according to the accountable sheet, two of these pieces were not delivered. Mr. Barlow said that he gave them to someone else to deliver. Mr. Barlow was not authorized to do that.

Supervisor Spinosa testified that she has instructed Mr. Barlow to follow instructions given by supervisors without unnecessary comment or feedback. On July 17th, she assigned Mr. Barlow a cutoff. When she gave him instructions to carry the cutoff, Mr. Barlow told her that he wasn't on the overtime desired list and that he wasn't going to carry the cutoff. When she again told him his instructions were to carry the cutoff, he got very disruptive and told her that he wanted her to send him home, Mr. Barlow said, *Just send me home.* Supervisor Spinosa testified that she said, *Follow your instructions.* He became very belligerent and continued to argue and tell her that he wasn't going to carry it, just send him home. Other employees were working on the floor. It created a disturbance. Mr. Barlow eventually carried the cutoff. He was authorized one hour to carry the cutoff in. He took one hour to carry the cutoff. He ran over on his route, 93 clicks. He worked overtime 1.93 hundreds. According to his Unauthorized overtime record, Mr. Barlow had unauthorized overtime on three other days besides that one.

Supervisor Spinosa testified that on July 17th, she met Mr. Barlow at the mail room out on his route at 200 Jefferson Avenue. Supervisor Spinosa said that she went to the mail room to see if there was empty equipment there, and to instruct him to remove all the empty equipment. She went to the mail room because she had received complaints from a customer and from the supervisors of collections. When Mr. Barlow saw her, he said, *What do you want?* He said, *Do you see any empty equipment?* Supervisor Spinosa said that there was quite a bit of empty equipment and she proceeded to instruct Mr. Barlow to make sure that he got that equipment and brought it back to the office and disposed of it properly. Supervisor Spinosa testified that at that point, Mr. Barlow got very belligerent with her and told her he was sick of her. He said, *I'm sick of you. I'm tired of you. I'm tired of you messing with me. I want you out of here. You need to get out. You need to get out of here.* Mr. Barlow told her that he did not have to listen to her. He did not have to listen to anything she told him. He did not have to do what she told him to do. Supervisor Spinosa said that Jack Clark was with her.

Supervisor Spinosa testified that on July 19th, she conducted her normal A.M. vehicle inspection at the station. She saw Mr. Barlow's mail satchel in the vehicle. She went inside, got the vehicle keys, got the mail satchel and brought it inside. In the mail satchel was quite a bit of raw mail. The return address was on his route. It was bundled up in his mail bag. That mail was delayed. Carriers are not supposed to leave empty equipment or mail or personal items in their vehicles overnight. When a carrier collects raw mail from customers, the carrier has taken charge of that mail and he needs to put it into the distribution equipment. Supervisor Spinosa testified that Mr. Barlow has been made aware of the relevant Postal policies and requirements because they are posted and they are in the M-41s, and through prior discipline. She has also had one-on-one conversations with him concerning these regulations.

Supervisor Spinosa testified that union official Dennis Diffie faxed a request for documents to her. Mr. Diffie said that he would be by later that day to pick them up. Mr. Diffie never came by for them, although she had them ready for him.

On cross examination, Supervisor Spinosa testified that she had been both a letter carrier and a union shop steward before she was a Postal supervisor. She said that she did a proper and thorough investigation on these charges. Ms. Spinosa was referred to the *Investigative Interview* form dated 7/25/02 (Jt. X 2, p. 29). She said nothing was listed on the form under *infractions/misconduct*. Ms. Spinosa was referred to the *Investigative Interview* form dated 7/18/02 (Jt. X 2, pp. 40-41). Under *infractions/misconduct* on this form *unauthorized ot, accountable mail handed off* and *vehicle time record* are listed. On the following page, under *employee's response*, there is a statement that Mr. Barlow *stated he has never worked unauthorized overtime on his route*. There is nothing about *accountable mail hand off* or *vehicle time record*. Supervisor Spinosa said that they didn't have a thorough investigation there because during the investigation, Mr. Barlow became very belligerent with her. Mr. Barlow said that he was pleading the 5th, and he wasn't going to make any further comments. She wrote down that he said that he was pleading the 5th. She did not write down that he was belligerent. Supervisor Spinosa said that she had a discussion with Mr. Ehring, Mr. Barlow's T-6, also about filling out the truck form

4570, but she did not issue discipline to Mr. Ehring because after the discussion, Mr. Ehring did what he was supposed to do. Supervisor Spinoza said that while she did not notate her discussions with Mr. Barlow about the form 4570, she did have discussions with him. She also said that on unauthorized overtime, she does take into consideration possible traffic problems. Carriers are supposed to call in to the station if they cannot be back in their authorized time and explain why. Mr. Barlow did not call back. There have been stand-up talks to cover that.

The Postal Service's second witness was Jack Clark. Mr. Clark testified that on July 17, 2002, he was in supervisor training. He accompanied Ms. Spinoza to the mail room at 200 Jefferson Avenue. Mr. Barlow and Ms. Spinoza had some words about the empty equipment. Mr. Barlow *talked down to her pretty good*. Mr. Barlow said to her, *I'm through with you. Get out of my face*. Then they went about their business. Later that day, Mr. Barlow told him that he didn't have anything against him, and he did not want to get off on the wrong foot with him, he just had a problem with Ms. Spinoza. Mr. Clark also testified that he witnessed Ms. Spinoza verbally giving Mr. Barlow instructions concerning filling out his 4570 truck card. Mr. Barlow said, *I'm not going to fill out the card*.

In its brief, the Postal Service argued that Supervisor Spinoza *has documented the overtime discrepancies, the failure to complete required records, and the belligerent attitude displayed by the grievant towards management and customers*. (J - 2, pp. 46, 51, 52, 58). The Postal Service argued that *Supervisor Spinoza gave the grievant the opportunity to explain his problem, or to tell his side of the story concerning his conduct and actions, on three separate occasions during investigative interviews. In the first interview the grievant plead the 5th and stated he had freedom of speech under the constitution (J - 2, pgs. 40-41). In the second interview concerning the express mail and delayed raw mail his main response and attitude was "So What", (J-2, pgs. 47 - 48). In the third interview the grievant became angry and threatened Spinoza with a pair of scissors. His only comments in this interview were telling the supervisor that she was stupid, and the grievant stated to the supervisor, "Now you know why Bin_Laden did what he did. The grievant's remarks are unsettling at the least. He failed to address any problems he was experiencing. Management attempted to allow the grievant to voice his concerns and or problems. Instead the grievant chose to be belligerent, rude, and threatening. (J-2, pgs. 29 -34). Supervisor Spinoza felt it necessary to call the Postal Inspectors for assistance after this interview. Postal Inspector Swindle conducted an investigation and filed an Assault and Threat Specialty Report (j-2 pgs. 36-37). (Management Brief, p. 7). The Postal Service further argued that while Supervisor Spinoza has adhered to the Postal Service policy that demands that all employees, management and craft, treat each other with dignity and respect, the grievant has failed to do so. The grievant, through his dealings with customers and management has exhibited a rude and unprofessional attitude. The grievant threatened business customer that allegedly complained about his job performance (J-2 pgs. 26-27). The grievant argued with his supervisor on each occasion she gave him instructions. He admitted in his written statement that he called supervisor Spinoza the Devil during her attempt to*

conduct an investigative interview. This clearly shows that the grievant has no respect for his job or for management (J-2 pg 23). (Management Brief, p. 7)

The Postal Service further argues that the Union has not shown that any article of the National Agreement, specifically articles 15, 16, and 19 or any Postal Manual or Handbook has been violated. The Postal Service maintains that the removal action was reviewed and concurred on by Acting Manager of Customer Service, L. Green, and Manager Customer Service Operations, P. Frederick, two higher level officials. The Union did not raise the issue of not having a request for discipline with a higher level official's review and concurring signature at *Step A* or *Step B* in the grievance procedure, nor in additions and corrections. Therefore, this issue should not be considered at arbitration, under *Article 15.2 f* and *g*. (Management Brief, p. 8)

The Postal Service argues that it had just cause to issue the grievant a *Notice of Removal* for the charges cited. The grievant has had ample opportunities to correct his improper behavior. *The documentation contained in the grievance file clearly demonstrates that the grievant has a history of exhibiting unacceptable behavior in violation of Postal rules and regulations. Supervisor Spinosa testified that the grievant had been made aware of the rules and regulations, and his violation thereof, via written notices, verbal service talks, verbal one-on-one conversations, and through prior disciplinary action. The attendant circumstances show that the grievant has a long history of making threats in fits of temper. The grievant's actions and behavior have resulted in anxiety and disruption in the work place. Employees have a right to a work atmosphere free from this type of behavior. The penalty of removal is within the bounds of reasonableness. This type of conduct and behavior does not warrant mitigation of the removal penalty. This type of conduct directly affects the Postal Service's obligation to maintain a non-hostile work environment and is disruptive to the efficiency of the service we are paid to provide. If this grievance were to be sustained it would send a clear signal to the grievant and other employees that it is proper to disregard the instructions of supervisors, to exhibit unprofessional and unacceptable behavior, to use any amount of time to complete assignments, and to delay U. S. mail. (Management Brief, p. 8)* The Postal Service further notes that the grievant has never displayed *any remorse or sorrow for his wrongdoings*.

The Postal Service calls the arbitrator's attention to Arbitrator McCoy's statement that, *Arbitrators through the years have held that once an arbitrator finds a grievant "guilty" on an act warranting discipline, the arbitrator should not interfere with the degree of discipline unless he/she finds it to be abusive, that is arbitrary or capricious. In this case, there is no doubt that the grievant is guilty of the charges against him. The Notice of Removal is neither abusive, arbitrary nor capricious. Therefore, the Postal Service argues that the grievance should be denied.*

POSITION OF THE UNION

In its opening statement, the Union argued that this is a disciplinary case, so the burden of proof is on the Postal Service. The grievant, Robert W. Barlow is a city carrier

with a seniority date of June 28, 1980. This discipline was issued without just cause. It was punitive, not corrective in nature, violating *Article 16* of the *National Agreement* and the *M-39, Section 115*. The Postal Service violated the *M-39, 115.3*, which says that the supervisor has the obligation to the employee to find out who, what, when, where and how before issuing discipline. Management here failed to get all the facts. The *Notice of Removal* should be rescinded and the grievant should be made whole for all lost wages and benefits.

The Union's first witness was Grievant Robert Wayne Barlow, Sr. Regarding the truck card, form 4570, Mr. Barlow testified that the supervisor told him on July 12, 2002 that he had not been filling the card out and he needed to do so. Mr. Barlow said that he told her that at the station he came from, they did not use that form, but he will start filling it out. He did start filling it out. The supervisor never gave him instruction on how to fill it out. Mr. Barlow said that he did fill out the form to the best of his ability on July 17, 18, and 19. Mr. Barlow testified that on July 22, he was on annual leave.

Mr. Barlow testified that on July 17th, he signed for six pieces of accountables. He said that a collection box key is also considered an accountable piece of property. People have to sign for them. Some carriers did not sign for them (Jt X 2, p. 61). They were not disciplined.

Mr. Barlow testified that when his supervisor gave him instructions to carry a cut off, he explained to her that he was not on the overtime desired list. He did not want to work any overtime because he has two teenage kids and he is a single parent. He needs to get off on time.

Regarding the empty equipment at the mail room on 200 Jefferson Avenue, Mr. Barlow testified that he knew there were some complaints about the empty equipment in the hallway. He had removed all of the equipment and put it in the mail room. He followed his supervisor's instructions to get the empty equipment out of the mail room.

Regarding the unauthorized overtime, Mr. Barlow testified that he has been told to call the post office if he could not make it back on time. On the cutoff, he asked supervisor Nancy Spinosa what she wanted him to do with the cutoff if it was more than an hour. Ms. LaQuita Green, the station manager, intervened and said, *Well, I want you to carry the mail*. So he already had the instructions to carry the mail. If he ran over, he was already authorized, because he asked her on the front end what to do. He was told to carry the mail. Mr. Barlow said that he had never seen the forms on pp. 44 and 45.

Regarding the mail found in his truck on July 19th, Mr. Barlow testified that he had never seen this mail. His supervisor never showed it to him.

Regarding the investigative interview form dated 7/25/02, Mr. Barlow testified that there was no subject listed. Regarding the investigative interview dated 7/18/02, Mr. Barlow testified that there is nothing about raw mail, or his comments regarding the 4570 truck card, or the accountable mail hand off.

On cross examination, Mr. Barlow testified that he has been a letter carrier for 21, 22 or 23 years. He has worked at several stations. It has been quite a few years since he was required to fill out a form 4570. Mr. Barlow said that he had been given instructions to fill out the 4570 and was told to put the mileage in. So he started filling it out and putting his mileage in. Mr. Barlow said that he has never been disciplined for not signing for keys. He said that on 6/15, he was not given discipline for not filling out the 4570 correctly. He said that Mr. Ehring was never given discipline for not completing a 4570.

Mr. Barlow acknowledged on cross examination that he had called Ms. Spinosa, *the devil*. Mr. Barlow testified that he did follow the instructions to remove the equipment. Mr. Barlow acknowledged that if someone collects raw mail from an individual house or business, and they do not enter it in at the end of the day to be processed, that mail would be delayed.

On redirect, Mr. Barlow testified that he has not been on the overtime desired list for years and he has not been paying attention to the form 3996. He does not know what is on the back of the form.

In its brief, the Union argued that the testimony from both witnesses for management and the grievant do not add up to the charges against Mr. Barlow. The Postal Service has the burden of proof. Mr. Barlow has been an employee of the Postal Service for more than 21 years and is a veteran of the United States Marine Corp., and suddenly the Postal Service is saying he has become a bad employee. As a procedural matter, the Postal Service violated *Article 16, Section 8* of the *National Agreement*, which requires review and concurrence by the installation head or designee. Supervisor Nancy Spinosa is the only name on the Letter of Charges. The request for discipline is also missing from the list of documents in this grievance. Secondly, the Union argued that contrary to Ms. Spinosa's testimony that union steward Diffie never came by to pick up his requested information, the information was faxed to Mr. Diffie. Mr. Diffie requested a copy of the latest 3999s for routes 0316 and 0332 (J-2, p. 19). The Union did not receive them. These documents would show the amount of time for the cut-offs that Mr. Barlow carried when he was charged with unauthorized overtime. The Union requested the 4570's for July 1, 2002 through August 5, 2002 (J-2, p. 19), but only received those for the period of June 15 to July 22 (J-2, pp. 51 and 52). Perhaps this is because after July 22, the carriers did fill them out. The Union also requested the daily call in log (J-2, p. 19), which also was not provided. The Union requested a list of all carriers at Front Street who have used unauthorized overtime (J-2, p. 20). The Union did not receive this information. Management did not provide all the information that the Union requested.

The Union quotes from the M-39, Section 115.1, 115.2 and 115.3. These sections include the basic principle that discipline should be corrective in nature, rather than punitive, and the obligation of the delivery manager to make every effort to correct a situation before resorting to disciplinary measures. It further says that a manager should: *Let the employee explain his or her problem – listen! If given a chance, the employee will tell you the problem. Draw it out from the employee if needed, but get the whole story.*

The manager has an obligation to their employees and to the Postal Service to find out who, what, when, where, and why and to make absolutely sure that they have all the facts when problems arise.

The Union alleges that management did not provide the vehicle clock rings (4570's) for 7/1/02 to 8/5/02, especially the ones for 7/12/02 to 7/16/02. The Union requested these but did not receive them. Ms. Spinosa acknowledged in her testimony that she did not have an investigative interview on the 4570's, but Mr. Barlow was charged with this offense. Mr. Barlow was denied his due process rights by being charged with something and not being able to give his side of the story. Ms. Spinosa did not thoroughly investigate whether Mr. Barlow handed off the Express Mail pieces he is charged with not delivering, The Postal Service did not produce a copy of the Express Mail receipt. The Postal Service did not call Station Manager LaQuita Green to rebut Mr. Barlow's testimony that Manager Green had given him permission to hand the express mail off. On both the 4570's and the signing of accountable items, management was guilty of disparate treatment, treating Mr. Barlow differently from other carriers who had done the same or similar things. The Postal Service has not shown that these rules were consistently and equitably enforced. The Postal Service has not shown that a thorough investigation was completed. The Postal Service did not support its claims with documented evidence. The Postal Service did not get the whole story from Mr. Barlow on the 4570's or on the accountables. The Investigative Interview addressed the unauthorized overtime issue only. Ms. Spinosa did not get all the facts in the investigative interview. She did not listen. She did not list any questions on the Investigative Interview form and has only one response, on unauthorized overtime only. The supervisor has denied Mr. Barlow his due process rights, charging him with a violation not letting him explain his side of the story. Therefore, the Union asks the arbitrator to dismiss *Charge 1, Failure to Follow Instructions*.

On *Charge 2, Conduct Unbecoming a Postal Employee*, none of the Investigative Interviews shows that Mr. Barlow was asked about his conduct on July 17, 2002. Again, a thorough investigation was not completed. The statements of Mr. Clark and Ms. Spinosa on pages 58 and 59 were not similar. The statements do not mention that Mr. Barlow called her a *devil*. Mr. Clark's statement offers no direct quotes or information on what was said. When Mr. Barlow was instructed to bring the empty equipment at 200 Jefferson Avenue back, he did bring it back. Therefore, he followed the instructions given to him by Ms. Spinosa. The Union requests that *Charge 2* be dismissed because there was not a thorough investigation and the statements from the supervisors do not match.

On *Charge 3, Use of Unauthorized Overtime*, management never produced a time card to show the amount of time Mr. Barlow worked. Management also never furnished to the Union the 3999's for city routes 0316 and 0332, which were requested. On PS Form 1017 (J-2, p. 46), on July 15, 2002, the unauthorized overtime (column 8) entered is .17, but on that date, Mr. Barlow is charged with .68 unauthorized overtime in the *Notice of Removal*. On July 17 and June 1, there is no explanation on the form of the reason for the unauthorized overtime charged. The Postal Service has not furnished one time card to

show the actual time Mr. Barlow worked on the days in question. Therefore, the Union requests that *Charge 3* be dismissed.

On *Charge 4, Delaying First Class Mail*, the Postal Service has not provided any evidence of the raw mail being left in Mr. Barlow's truck on July 19, 2002. Ms. Spinosa did not do a thorough investigation on this charge. There are no photo copies to support their position. Therefore, *Charge 4* should be dismissed.

The Union argues that the Postal Service has failed to have a thorough investigation on each of the four charges. They also have shown disparate treatment. They also have pyramided the charges in their attempt to find one that sticks. The Postal Service has failed to bear its burden of proof. The Union requests that the grievance be sustained in its entirety and the Grievant be made whole by granting him all his back pay and benefits.

DISCUSSION AND FINDINGS

Article 15, Section 2, Formal Step A (d) of the 2001 – 2006 National Agreement clearly states: *At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representative shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 17 and 31. Article 15, Section 2, Step B, (b) states:...It is the responsibility of the Step B team to ensure that the facts and contentions of grievances are fully developed and considered, and resolve grievances jointly..... Article 15, Section 2, Step B (c) states: The written Step B joint report shall state the reasons in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Formal Step A. The Step B team will attach a list of all documents included in the file.* Nowhere in any of these steps is there mention of a violation of *Article 16, Section 8, Review of Discipline* which requires that a suspension or discharge be *reviewed and concurred in by the installation head or designee*. Yet, the Union tried to raise this as a procedural issue at the arbitration hearing and in its brief. It is clearly too late for the Union to raise this argument. The arbitrator has not considered this argument. The arbitrator also finds that the Union has not proven its argument that Carrier Barlow was treated disparately when compared with other employees who have done the same or similar things.

The Union has argued from the beginning that the burden of proof is on the Postal Service to prove the charges made against the grievant. This is certainly correct. The Union has also argued from the beginning that in issuing discipline, it is the responsibility of the Postal Service to conduct a full, fair and thorough investigation of the charges before issuing the discipline. Certainly, discipline cannot have been issued for just cause unless a full, fair and thorough investigation has been conducted and the

employee has had a chance to present his response to all the charges. The arbitrator fully agrees with these fundamental tenets.

In this case, we have four charges against a letter carrier who has been employed by the Postal Service since June 28, 1980, certainly a long term employee. There are two past elements listed on the record. The first is a *Letter of Warning* dated 08/06/01 for *Having a Preventable/At Fault Vehicle Accident*. The second is a *14-Day Suspension*, dated 09/06/01 for *Conduct Unbecoming a Postal Employee*. This *14-Day Suspension* was the result of a DRT resolution of a *Notice of Proposed Removal*. The DRT agreed that just cause existed for disciplinary action against the grievant and also agreed that the disciplinary action should be mitigated by the employees' long length of service. The DRT decision referred to conduct not acceptable on the part of the grievant. The DRT decision in the record indicates that there were statements from customers indicating that they felt threatened by the grievant's conduct on August 23, 2001. (Jt. X 2, p. 26) This previous discipline is relevant to *Charge 2. Conduct Unbecoming a Postal Employee*, of the case before us.

Of the four charges on this letter, the arbitrator finds that *Charge 1, Charge 3 and Charge 4* do not provide just cause for any discipline, and certainly not for the discipline of discharge, which would be so disproportionate to the alleged offenses, even if proven, as to be arbitrary and capricious. Grievant Barlow has no live discipline on his record for *Failure to Follow Instructions, Use of Unauthorized Overtime, or Delay of First Class Mail*. The incidents alleged here, even if proven, would be the first incidents of their kind for this twenty-three year postal employee. While employees have been discharged for continued documented instances of *Failure to Follow Instructions*, there is no history here of discipline for *Failure to Follow Instructions*. In *S8N-3A-14659* before Arbitrator Holly, for example, the carrier had three previous instances of progressive discipline for *Failure to Follow Instructions*. The fourteen day suspension contained *thirteen separate occasions between September 26, 1979 and December 18, 1979 on which the Grievant failed to follow instructions relative to the use of unauthorized overtime on his route*. The fourteen day and seven day suspensions were grieved and arbitrated and the arbitrator denied the grievances. Arbitrator Holly denied the discharge grievance. In this case, we have no previous discipline for *Failure to Follow Instructions*. While employees have been discharged for a record of continuing *Use of Unauthorized Overtime*, surely the few instances listed here, even if proven, would not support a discharge. Again, we have no previous discipline for *Use of Unauthorized Overtime* in Carrier Barlow's record.

The arbitrator finds that *Charge 1, Failure to Follow Instructions*, also was not proven by the evidence in the record. It was not proven because there is no evidence in the record that it was properly investigated. On the charge about form 4570, the truck form, we have testimony by both Supervisor Spinosa and Carrier Barlow that Supervisor Spinosa instructed Carrier Barlow to fill out this card, but no testimony that she ever sat down with Carrier Barlow, called the dates in question to his attention, explained to him what he should have done, and listened to his response. For example, Mr. Barlow testified that he was on annual leave on one of the dates listed, July 22nd. We have no

rebuttal testimony or any evidence about whether he was at work or not. It is the Postal Service that bears the burden of proof. Even if the Postal Service had proved this charge, there is no way it could support a discipline of discharge. The second element supporting *Charge 1* was that on July 17, 2002, Mr. Barlow signed for six pieces of Express Mail and was instructed to deliver all six pieces timely. On July 18th, Supervisor Spinosa found that he had not been cleared on two of the pieces, which Mr. Barlow stated he had handed off to Delivery Messenger Larry Hart. Supervisor Spinosa says that the two pieces were handed off without authorization. Carrier Barlow says in his statement dated August 26, 2002 (Jt X 2, p. 22) that Station Manager Laquita Green said that he could hand off the pieces to Larry Hart. The Postal Service did not call Station Manager Laquita Green to testify. Again, there is no evidence that this was properly investigated. We also have no knowledge of whether the pieces were delivered timely or not. The arbitrator finds, therefore, that *Charge 1, Failure to Follow Instructions*, was not properly investigated. The Postal Service has failed to bear its burden to prove this charge. Moreover, even if it had proven the charge, this was the first instance of *Failure to Follow Instructions* for this employee, and could not possibly support a discipline of discharge.

On *Charge 3, Use of Unauthorized Overtime*, again we have no evidence that the Postal Service properly went through the dates and the alleged unauthorized overtime with Grievant Barlow and listened to his responses. We have no time cards. We have an inconsistency between information on PS Form 1017 (J-2, p. 46) and the time listed in the *Notice of Removal* for July 15, 2002. (.17 versus .68) We have an employee with no previous discipline for *Use of Unauthorized Overtime*. We have a claim by the employee that on at least one of the days he was told up front to deliver all the mail by Manager Laquita Green. We have no rebuttal testimony from Manager Laquita Green. Again, even if the Postal Service had properly investigated and proven the charge, this was the first instance of *Use of Unauthorized Overtime* for this employee, and could not possibly support a discipline of discharge.

On *Charge 4, Delay of First Class Mail*, we have a potentially more serious charge. However, again, we have no investigation and no proof. Supervisor Spinosa never showed the mail to Mr. Barlow. She never asked him about it. She never showed it to anybody else who could serve as a witness. She never photographed it. Mr. Barlow testified that he had never seen this mail. Supervisor Spinosa never said that she had shown it to him. No investigation was conducted. The Postal Service has failed to bear its burden to prove this charge.

So we arrive at what this discipline is really about, which is *Charge 2, Conduct Unbecoming a Postal Employee*. For this charge, we have a past element, a *14-day Suspension*, dated 09/06/01, for inappropriate conduct with customers. Now we have instances of alleged inappropriate conduct with Supervisor Spinosa. The first incident occurred on July 17, 2002. Supervisor Spinosa testified that she gave Carrier Barlow instructions to carry a cutoff. She alleges that he became unruly and upset and protested that he was not on the overtime-desired list. She instructed him to carry the cut off. He allegedly responded, "*Send me home. I want you to*". There was a second incident, in the mail room at 200 Jefferson Avenue, in which Carrier Barlow again allegedly became

upset and said to Supervisor Spinosa, "*What do you want? Get out, I'm through with you.*" There was a third incident, during an Investigative Interview on July 25, 2002, when Carrier Barlow called Supervisor Spinosa a "*Devil*" and stated "*I don't have to listen to what you say.*" Regarding the first incident, on July 17, 2002, both parties agree that Carrier Barlow did carry the cutoff. Regarding the second incident, in the mail room at 200 Jefferson Avenue, the evidence shows that Carrier Barlow did follow his instructions to remove the postal equipment. For this incident, Supervisor Spinosa had brought along a witness, a supervisor in training, Jack Clark. Mr. Clark testified that Mr. Barlow *talked down to Supervisor Spinosa pretty good*. He said to her, *I'm through with you. Get out of my face.*

The arbitrator notes that the Postal Service clearly has an obligation to conduct a fair, impartial and thorough investigation of a problem with an employee. It stands to reason that if an employee and his supervisor are having difficulty getting along, a third party should step in. If an employee and his supervisor are having continued direct conflict, as clearly was the case here, it is imperative for a third party, preferably someone higher in the chain of command, to step in to try to address and resolve the sources of conflict. If the conflict continues to the point where it results in allegedly inappropriate conduct and discipline, the requirement of a fair and impartial investigation of the conduct dictates that the investigation must be conducted by someone other than the supervisor in question. Yet, in this case, it seems that nobody else was involved. All the attempts at Investigatory Interviews in this record were made by Supervisor Nancy Spinosa. Given that she was the only party to the allegations, she could not possibly conduct a fair and impartial investigation. Moreover, the employee could not possibly believe that he would be participating in a fair and impartial investigation conducted by a supervisor with whom he was in perpetual conflict. The arbitrator must agree with the Union that no fair and impartial investigation was conducted here and that the grievant's due process rights were violated.

Moreover, the record is full of allegations which are not in the *Notice of Charges*. These allegations are, in fact, more serious than those in the *Notice of Charges*. Clearly, the Postal Service decided that the allegations which were not in the *Notice of Charges* could not be proven by the available evidence. If the Postal Service thought that they could have been proven, they would have been in the *Notice of Charges*. Yet, even though they are not in the *Notice of Charges*, they continue to be offered throughout the grievance process and even in the Postal Service's brief, to support the discipline. This is an egregious violation of the employee's due process rights. It also demonstrates that the investigation was biased throughout by allegations not made.

These allegations are on the *USPS-NALC Joint Step A Grievance Form*. It says, *The grievant is out of control when he picks up scissors and makes stabbing motion at the supervisor.* (Jt. X 2, p. 3). In the *Grievance Summary Step 2*, we see: *Mr. Barlow has gotten to a point that he is about to explode. He is belligerent. He talks to customers and supervisors in a totally disrespectful and unprofessional. Apparently he does not care about what he does because he continues to do it. This time he took scissors and used them making stabbing motions in the supervisors face. What will it be next time?* (Jt. X 2,

p. 10) But Mr. Barlow was already disciplined for whatever problem he had with some customers. There is nothing in the *Notice of Charges* about making stabbing motions in the supervisors' face with a scissors. Yet, this is used in defense of the charges. The management member of the DRT said: *The documentation further shows that when the supervisor attempted to conduct an investigative interview with the grievant, related to customer complaints, he became angry and took a pair of scissors, and shook them in the supervisor's face, while telling her she was nick-picking and harassing him. The supervisor told the grievant to put the weapon down; he complied and started shaking his finger in her face. The supervisor further told the grievant not to shake his finger in her face and not to speak to her in that manner. He continued to talk about her stupidity and that he was being harassed. She further told him that she was his supervisor and he was to follow her instructions and to keep his comments to himself. He then stated, "Now you know why Bin'Laden did what he did."* (Jt. X 2, p. 13) None of this is in the *Notice of Charges*. These comments continue to be cited in the Postal Service brief (p. 7). The DRT report further says, *The grievant's words, remarks and behavior are not in dispute. These actions are unsettling in the least. They are unconditional and strongly suggest that the supervisor would suffer bodily harm at the grievant's hands. Further the attendant circumstances show that the grievant has a long history of making threats in fits of temper. The grievant's actions has resulted in anxiety and disruption in the workplace. The grievant's supervisors and co-workers are clearly frightened....* (Jt. X 2, p. 14) Yet, none of this behavior is in the *Notice of Proposed Removal*. No evidence or testimony was presented to support these allegations. This is an egregious violation of the grievant's due process rights.

The *Notice of Proposed Removal* is dated August 5, 2002. This confrontation allegedly took place at an Investigative Interview on July 25, 2002. The Postal Inspection Service was called to investigate an alleged employee assault/threat. The Postal Inspection Service concluded *further investigative attention by the Inspection Service is not warranted at this time*, by letter of July 26, 2002 to Laquita Green, Postal Manager, Front Street Station. (Jt. X 2, p. 36) These allegations were not included in the *Notice of Proposed Removal*. But the case was treated as though those allegations were there.

Due process requires that the employee be presented with a statement of the charges and evidence against him. In this case, the Postal Service keeps arguing from charges not made. This is entirely improper and is a gross violation of due process rights.

It seems to this arbitrator from the record at hand that Carrier Barlow does have a problem with frustration and anger management. He responds inappropriately to situations in which he is criticized. Mr. Barlow needs to find better ways of dealing with frustration and anger. The arbitrator in no way intends to *send a clear signal to the grievant and other employees that it is proper to disregard the instructions of supervisors, to exhibit unprofessional and unacceptable behavior, to use any amount of time to complete assignments, and to delay U.S. mail* (Postal Service brief, p. 9) The arbitrator cautions Mr. Barlow that continued documented instances of belligerent conduct will eventually result in his removal from the Postal Service. It is imperative that he learn to control his responses to criticism and supervision which he may resent. There

is no evidence, however, that Mr. Barlow cannot learn to do so. The arbitrator recommends that Mr. Barlow seek the assistance of the EAP program or in some other way work on his anger management skills. However, the arbitrator notes that even in this confrontational mode, there is no charge that Mr. Barlow used profanity toward his supervisor and there is no charge of any physical violence or threat. Carrier Barlow also carried out his instructions.

Because the Postal Service did not meet its obligations to this long term employee to honor his contractual due process rights, to state clearly the charges against him, to investigate thoroughly, fairly and impartially, and to work to resolve a problem rather than to punish an employee, the arbitrator must find that the *Notice of Proposed Removal* issued to Letter Carrier Robert W. Barlow on August 5, 2002 violated *Article 16, Section 1* of the *National Agreement*. It was not issued for just cause. The charges were not proven. No proper investigation of the charges was made. For *Charges 1, 3 and 4*, the Postal Service clearly did not bear its burden of proof, and, even if it had, these charges clearly could not support a discipline of removal for this long service employee for the first occurrence of any of these problems. *Charge 2* was not investigated fairly and impartially. There is no evidence that a third party was brought in to hear calmly what the problem was between Carrier Barlow and Supervisor Spinosa. Nothing was done to hear Carrier Barlow's position in a calm and neutral environment. Throughout the grievance process, the Postal Service was arguing from charges not made. The *Notice of Proposed Removal* was punitive rather than corrective in nature. It is hereby removed from all records of the Postal Service. Carrier Barlow is to be restored to his position as Letter Carrier with no loss of seniority. He is to be made whole for all pay and benefits lost as a result of this removal.

C-25994

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
)
 between)
)
 UNITED STATES POSTAL SERVICE)
 (hereinafter "USPS"))
)
 and)
)
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO)
 (hereinafter "NALC")
)

Grievant: Lnenicka
Post Office: Yakima, WA
Case No: EO1N-4E-D 05044299
Local No: MMB-2005-04
DRT No: 02-042309

BEFORE: Janice S. Irving, Arbitrator

APPEARANCES BY:
For USPS: Susan Houser, Labor Relations Specialist
 Seattle Customer Service & Sales District
 P.O. Box 90204
 Seattle, WA 98109-9401

For NALC: Mary Martinez, Regional Administrative Asst.
 NALC of the USA (AFL-CIO)
 P. O. Box 87386
 Vancouver, WA 98687

Place of Hearing: USPS
 205 W. Washington Ave.
 Yakima, WA 98903

Date of Hearing: May 10, 2005

AWARD: The grievance is sustained without back pay and a time served suspension. This award serves as a notice to the Grievant that removal will follow any future failure to follow safety procedures.

DATE: June 10, 2005
Compton, CA

Janice S. Irving
 Janice S. Irving, Ph.D.

RECEIVED
 JUN 13 2005
 PAUL PRICE, NBA
 National Association Letter Carriers

RECEIVED
 JUN 20 2005
 VICE PRESIDENT'S
 OFFICE
 NALC HEADQUARTERS

CONTRACT PROVISIONS

AGREEMENT

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Article 3: Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties.

Article 16: Discipline Procedure

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.

Section 5: Suspension of More Than 14 Days or discharge

In the case of suspension of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 8: Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In post offices of twenty (20) or less employees, or where there is no higher-level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

Section 10: Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

Article 19: Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

BACKGROUND

This Arbitration proceeding was convened by the parties pursuant to Article 15 Section 4 of the National Agreement between United States Postal Service and National Association of Letter Carriers, AFL-CIO. The grievance that led to this proceeding stems from Management issuing a Notice of Proposed Removal charging Failure to Operate a Motor Vehicle in a Safe Manner dated, January 12, 2005.

The record from the Arbitration Hearing comprises testimony from two (2) witnesses called by the USPS, and two (2) witnesses called by NALC. In addition to the witnesses there were nineteen (19) Joint Exhibits entered. There were thirteen (13) Arbitration Awards submitted.

Both parties submitted closing briefs. The hearing officially closed on May 17, 2005.

I tape-recorded the hearing solely as an extension of my personal notes and not as an official record.

ISSUE

Did just cause exist for the Notice of Proposed Removal charging "Failure to Operate a Motor Vehicle in a Safe Manner" issued to David Lnenicka on January 12, 2005? If not, what is the appropriate remedy?

STIPULATIONS

1. This involves an at-fault accident and the facts of the accident are not in dispute.
2. Handbook EL-921: Supervisor's Guide to Handling Grievances is Management's instructions to Managers, is not an agreed upon document.

POSITION OF THE PARTIES

USPS

The Service reviewed the accident in question and called attention to the Grievant's past history of conduct infractions of various kinds, cited a 7-day Suspension for Misconduct; Letters of Warning for Safety Infraction, and a Proposed 21-day Suspension. In this instant case the Service called attention to the Grievant's entire record which was considered prior to making the decision to remove him. In addition, the Service called to attention the Grievant's credibility in this instance and prior instances.

To the issue of disparate treatment the Service maintains that progressive discipline was predicated on the two (2) carriers' live record of discipline. The level of discipline imposed in the Carrier Fischer case was progressive with an active Letter of Warning, which then called for a 7-day Suspension. In the case of the Grievant, his entire record of live discipline was considered and the next level of progressive discipline was removal. The Service maintains that the next level of progressive discipline was still removal, even though the infractions are unrelated.

In regards to the issue of Review and Concur the Service argued that Supervisor Perron testified that he proposed the decision to remove the Grievant and Manager Shields reviewed and concurred the proposed decision to remove the Grievant as requested by Supervisor Perron.

Consequently, the Service is asking for a finding against separate discipline tracks, a finding that the concurrence was proper, that there was no showing of disparate treatment and ask to carefully consider the credibility concerns.

NALC

The Union argued that the Service has not shown that moving from a Letter of Warning for the Grievant's last vehicle infraction to a Notice of Proposed Removal is justified. The Union noted that for discipline to be properly progressive and corrective the charges must be similar and notes that the Service is obligated under the "Just Cause" standard to impose discipline of increasing degree for like infractions prior to removing an employee, unless the infraction is so egregious. The Union maintains that the Service has relied upon dissimilar charges to support the removal of the Grievant and thereby has failed to issue the Grievant progressive and corrective discipline.

The Union further asserts that the Grievant and Carrier Fischer had similar records and notes that the discipline issued to Carrier Fischer for the similar accident (7-day Suspension vs Removal) was disparate.

The Union argued throughout the moving papers that a proper review and concurrence did not take place and the Service did not take advantage of a full opportunity at hearing to clear the record nor prove that a proper review and concurrence took place.

The Union request that the discipline must be overturned for the failure of the Service to show due process which was not afforded the Grievant as required by the Collective Bargaining Agreement. The Union asked that the Notice of Proposed Removal dated, January 12, 2004 be rescinded and expunged from all Postal records and files.

SUMMARY OF TESTIMONY

ANDREW PERRON

Perron testified that he was on high-level detail as a 204B Supervisor Trainee at the time the Grievant's accident occurred. Perron stated he had been in his assignment in the Yakima, WA installation for about three weeks before the accident occurred. Perron testified that he was promoted to Supervisor upon completion of his four-month training on April 29, 2005. He testified that he was the Grievant's immediate supervisor. Perron testified that after conducting an on-scene investigation, driving the Grievant back to the facility, completing the required Accident Report Form, having the Grievant review some training videotapes, entering into the room came his Supervisor (Leslie Shields) asking to speak with him, stepping outside the room with his supervisor and speaking with her about the Grievant's accident. Perron testified that Manager Shields instructed him to send the Grievant home on an Emergency Placement. Perron testified in regards to Grievant's prior discipline record there were Letters Of Warning, a 7-day Suspension, and he did not see a 14-day Suspension, only a 21-day Suspension. Perron stated that he reviewed the Grievant's OPF on the date of the accident which was December 17, 2004, and later held an investigative interview on December 21, 2004. Perron concluded that the Grievant was at fault for the accident by failing to use safety procedures and he determined that some formal discipline was necessary, so the next progressive step for action was removal. Perron testified he would have recommended a 14-day Suspension had he not seen the 21-day Suspension was active.

LESLI SHIELDS

Shields was Manager of Customer Services at Yakima, WA Post Office on December 17, 2004. Shields testified that on the day of the accident which was

December 17, 2004, she was concerned about what had happened in regards to injuries or damages. Shields testified that she went to speak with Supervisor Perron after his return from the accident scene. Shields stated that she had Perron step out of the room, asking him to tell her about the accident, Perron stating that there were no injuries, but there had been quite a bit of damage to both vehicles, Perron telling Shields that the Grievant had been cited by the Yakima Police.

Shields testified that she was not the driving force behind the Grievant's proposed removal and did not make the decision to remove the Grievant. Shields testified that Perron did the on-scene investigation, conducted the investigative interview, and she believes he reviewed the Grievant's OPF. Shields stated that Perron, who was the Grievant's supervisor, made the decision to remove him, and she received the request for discipline. Shields testified that she reviewed the documentation that Perron submitted. Shields further stated that when she received the request for personnel action from Perron she believes he provided her a copy of the discipline which she reviewed, along with the investigative interview. Shields stated that she did review and concur the proposed removal as she felt that the documentation Perron provided was in order and she did not feel that his request was out of line. Shields felt that Perron was being progressive and she felt he had made the right decision.

Shields testified that she believes that the 21-day Suspension was in the packet that she received from Perron to review, however, she cannot remember if the 21-day Suspension was in the packet.

Shields confirmed that Perron was a 204B Acting Supervisor at the time of his decision to remove the Grievant. Shields stated that Perron as a 204B Supervisor could issue discipline.

DAVID LLENICKA

The Grievant, David Lnenicka was an 18-year Letter Carrier in Yakima, WA Post Office at the time of the accident on December 17, 2004. The Grievant stated that after the on-scene investigation was completed Supervisor Perron drove him back to the facility and had him to review some training video-tapes. The Grievant testified that Manager Shield entered the room during the time that Perron had him watching the training tapes. The Grievant stated that Perron left the room for 4 to 5 minutes to speak with Shields. The Grievant stated that Perron returned, asking for his badge, keys, reading a letter to him, placing him on Emergency Suspension, escorting him out of the building and telling him to call the next morning at 10:00 a.m. The Grievant testified that on December 21, 2004, he was told to come in for an Investigative Interview. Following that interview the Grievant stated he was told that he was sent home based on the letter Perron had received from Manager Shields, which he later received a copy in the mail.

MARY BRASHER

Brasher testified that she was a 20-year Postal Employee in December 2004, and also a Union Representative, in Yakima, WA. Brasher testified that she discussed the case with Supervisor Perron regarding progressive discipline. Brasher stated that on Saturday, December 18, 2004, she spoke with Supervisor Perron and he told her that when he issued the Emergency Leave to the Grievant he was doing as he was told by Manager Shields. Supervisor Perron also stated that he had not yet looked at the Grievant's OPF.

DISCUSSION

After reviewing the record, it is concluded that the Service has met its burden of establishing that the Grievant is guilty of the offense as charged, Failure to Operate a Motor Vehicle in a Safe Manner. This conclusion is based upon a review of the evidence and testimony provided regarding the Grievant's at-fault accident when he failed to yield the right-of-way, the accident happened on December 17, 2004. In that the Grievant admits he failed to operate his postal vehicle safely by failing to yield the right-of-way to a private owned vehicle, when exiting an alley, causing a collision, being ticketed by Yakima Police Department, and paying the ticket without a challenge. The Grievant is guilty of the offense as charged, however the Arbitrator is not persuaded that the prior safety infractions are sufficient to warrant removal. Nor is the Arbitrator persuaded that the last 21-day Suspension which is unrelated to safety, is sufficient to merit removal.

Of great concern is the Service's belief that they are not bound to separate discipline tracks, the Service lack any proof other than their belief to support this assertion. The Service offered no contract language to guide the Arbitrator in supporting their belief regarding not being bound to separate discipline tracks. There is nothing in Article 16.1 which requires a rigid scheme of progressivity toward discipline tracks. The language in Article 16.1 does not support unrelated discipline tracks. Article 16.1 states that, **the basic principal shall be that discipline should be corrective in nature rather than punitive.** The language mandates corrective discipline which is to call to the attention of the employee his derelictions and to give the employee an opportunity to cure them. There is no presumption that the basic principal shall be that discipline should be corrective regardless of the relativity. The Collective Bargaining Agreement Article 16.1 just does not read that way because the touchstone of Article is "just cause".

Nonetheless, the Service asserts that the Grievant had received the full range of progressive and corrective discipline available to him short of removal, even though the underlying conduct was separate and distinct. The Service asserts they followed the scheme of progressive and corrective disciplinary action, Letters of Warning, a 7-day suspension and a 21-day Suspension which the Service contends these corrective actions were to call to the attention of the Grievant his derelictions and gave him an opportunity to cure them.

The Service contends any discipline can be considered when taking the next step in the line of progressive and corrective discipline, even if the underlying conduct is separate and distinct, but quite the contrary. While Article 16.10 permits the Service to go back two (2) years in reviewing discipline, the language found in Article 16.10 must be read in the light of Article 16.1, which mandates corrective action. It is only logical that a mandate of corrective action requires a general sense of compatible actions. If the Collective Bargaining Agreement Article 16.1 do not read that any discipline can be considered when going to the next step in the process of progressive and corrective discipline, then Service is wrong to adopt this principle and are obligated to prove themselves right. The Service carry the burden of proof. Article 16.1 do not set forth a rigid scheme of progressivity and corrective discipline.

Moreover, in this dispute the Union asserts the defense of disparate treatment. It is concluded that the Union did not establish that the Service treated the Grievant in a disparate manner. In order for comparative evidence relating to other employees to be considered relevant, those employees must be similarly situated, all relevant aspects of the Grievant's grievance must be nearly identical to those of comparative employees. In order to be similarly situated, other comparative employees must have reported to the same supervisor; must have been subject to the same standards governing discipline; and must have engaged in

conduct similar to the Grievant's without differentiating or mitigating circumstance that would distinguish their misconduct or the appropriate discipline from the Grievant. The Union offered Carrier Fischer as a co-worker who was similarly situated in comparison to the Grievant. However, these facts do not indicate that the Grievant was treated disparately.

It is undisputed that the conversation between the Grievant's supervisor and Shields led to the Grievant being placed on an Emergency Placement on December 17, 2004. While the Grievant was placed on an Emergency Placement, there was no clear-cut warning of possible removal. The Union asserts that the review and concurrence was improper, yet the Union allowed Shields' testimony that she was not the driving force behind the Grievant's removal to go unchallenged. Other than an assertion that the review and concurrence was improper, there was insufficient evidence to establish that the Service violated Article 16.8. It is concluded under these circumstances the evidence fails to support the fact that Manager Shields instructed Perron to remove the Grievant. It is concluded that the review and concur was proper.

The greatest concern in this dispute is the cited elements in the Grievant's Notice of Removal which showed a 7-day paper Suspension on December 22, 2001 issued for improper conduct, two (2) prior Letters of Warnings issued against the Grievant for safety infractions. The safety infractions occurred between February 2, 2002 and December 6, 2002. It is concluded that no safety charges other than the two (2) Letters of Warnings had been issued against the Grievant prior to the accident of December 17, 2004, plus the most recent element cited the 21-day Suspension dated September 18, 2003, which was for work-related conduct which had nothing to do with safety.

The Arbitrator was particularly troubled by Manager Shields who apparently held that the damage incurred was the determinant to measure the appropriate

discipline to impose. It must be pointed out it is not the amount of damages, but the amount of negligence on the Grievant's part that must be the foundation of the discipline to impose. Although the Grievant was at fault for the accident for failure to yield the right-of-way, when exiting an alley. The record shows that the Grievant who is an eighteen-year employee who had received numerous safe driving awards prior to the February 2, 2002, safety infraction. It must be concluded that the Grievant's collision was not such an egregious breach of reasonable and prudent conduct to demand his removal. It is concluded that the discipline imposed by the Service was not appropriate. Given the disciplining supervisor indicated that he was considering recommending a 14-day Suspension.

Accordingly, based upon the record, the arguments of the parties, the arbitration awards and the discussion above, the following award is issued, that the grievance is sustained, without back pay, as a time served suspension and the award serves as a notice to the Grievant that removal will follow any future failure to follow safety procedures.

AWARD

The grievance is sustained, without back pay, as a time served suspension and the award serves as a notice to the Grievant that removal will follow any future failure to follow safety procedures.

Date of Award:
Compton, CA

June 10, 2005


Janice S. Irving, Ph.D.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Kenneth Brauer
Between)	
	)	Post Office: Southampton, PA
)	
UNITED STATES POSTAL SERVICE	)	USPS Case No.: C01N-4C-D 05108409
)	
and	)	DRT No.: 41-7920
)	
NATIONAL ASSOCIATION OF)	
LETTER CARRIERS, AFL-CIO)	

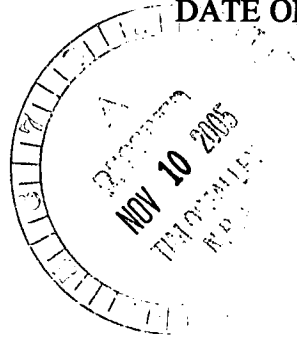
BEFORE: Jane Minnich, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Olivia Bodner, Acting Labor Relations Specialist
For the Union:	Patrick Fullam, Advocate
Place of Hearing:	Southampton, Pennsylvania
Date of Hearing:	November 4, 2005

AWARD: The grievance is sustained in part. The Grievant was issued a Notice of 7-Day Suspension on April 22, 2005, charged with "Failure to Follow Instructions". On April 18, 2005, the Grievant was involved in an argument with his supervisor, in which he used foul language. While there were circumstances contributing to the Grievant's actions, he engaged in misconduct when he lost his temper. Inasmuch as the Grievant's prior disciplinary record only includes a Letter of Warning for unintentional errors, it is concluded that a 7-Day Suspension does not constitute progressive discipline and was therefore without just cause. In light of the Grievant's actions and the circumstances presented, reasonable discipline is a Letter of Warning.

DATE OF AWARD: November 7, 2005



Jane Minnich
Jane Minnich, Arbitrator

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NALC HEADQUARTERS

ADMINISTRATION

By letter dated August 24, 2005, the undersigned was notified of her selection by the parties to hear and decide a matter in dispute between them. Accordingly, a hearing was convened on November 4, 2005 in Southampton, Pennsylvania. At that time, the parties were afforded full opportunity to present evidence, both written and oral, and to argue their respective positions. The Grievant appeared and testified on his own behalf. At the conclusion of the hearing, the record was closed. This matter is now ready for final determination.

BACKGROUND

The Grievant, Kenneth Brauer, is employed by the Postal Service as a full-time regular Letter Carrier at the Southampton Post Office. On April 22, 2005, the Grievant was issued a Notice of Suspension of Seven Days No-Time Off Suspension, in which he was charged with "Failure to Follow Instructions." The basis for this charge was stated as follows:

Specifically, on Monday April 18, 2005 at approximately 18:06, I asked you why you didn't notify Management that you would not maintain your schedule. You became belligerent and hostile towards me. You began shouting, "I'm fucking tired of this fucking shit...Management always wants us to be back when they say we should...they don't fucking know what it is like". You continued to shout curses in a loud and boisterous manner.

I had to ask you to leave four times before you attempted to leave the building. As you were walking out the door you continued to shout, "Now I'm leaving for the fucking day" and other words that I couldn't understand.

You were warned in the past concerning your unacceptable behavior. This type of behavior will not be tolerated nor condoned.

The Union initiated a grievance on May 7, 2005, in protest of the Grievant's suspension. It is the Union's contention that the Postal Service did not have just cause to issue the Grievant a 7-Day suspension. The Postal Service disagrees, arguing that the discipline was reasonable in light of the Grievant's hostile behavior, inappropriate language, and prior disciplinary record.

The issue to be determined is whether the Postal Service had just cause to issue the Grievant a 7-Day Suspension. If not, what shall the remedy be?

FINDINGS AND DISCUSSION

The Grievant was issued a 7-Day Suspension for his actions toward his supervisor, Mark Ferretti, on April 18, 2005. On that date, the Grievant returned late to the Southampton Post Office at approximately 6:00 p.m., after the 6:05 p.m. dispatch truck had left the facility. Although another supervisor was on the telephone with Supervisor Ferretti and overheard the Grievant's voice, there were no real witnesses to an incident between the Grievant and Supervisor Ferretti that followed the Grievant's return to the building. The Grievant and Supervisor Ferretti provided differing accounts of what occurred. On the one hand, Supervisor Ferretti testified that after he merely spoke to the Grievant regarding his late return, the Grievant responded by raising his voice, using foul language and disobeying his orders. On the other hand, the Grievant asserted that Supervisor Ferretti yelled at him and would not let him explain his actions. The Grievant maintained that he did not use foul language and that he followed Supervisor Ferretti's directions by punching out and leaving the building after emptying his truck and retrieving his personal items.

After careful consideration, it is concluded that neither participant provided an entirely credible recollection of the April 18, 2005 incident. In piecing the evidence together, it is concluded that what occurred was an altercation between the Grievant and Supervisor Ferretti. When the Grievant returned to the Post Office at 6:00 p.m., Supervisor Ferretti confronted him about his late return. The nature of this confrontation was not a discussion, but rather, a chastisement for returning after his scheduled time and failing to notify Management in advance. By all indications, the Grievant was not given the opportunity to explain what had occurred. The Grievant responded to Supervisor Ferretti's words by getting upset and using foul language. However, he then punched out as instructed and left the building after retrieving mail from his truck and gathering his personal belongings. There is no evidence that the Grievant posed a physical threat to Supervisor Ferretti at any time.

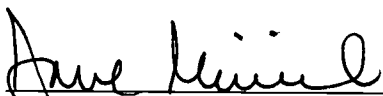
Additional information was presented in explanation of the Grievant's conduct on April 18, 2005. There is no dispute that due to an error of Management, the Grievant did not have a vehicle when he was scheduled to leave for the street that morning. As a

result, he was delayed between ten to twenty minutes, which Supervisor Ferretti did not take into account when scheduling the Grievant's overtime for the day. In addition, Supervisor Ferretti chose to release the 6:05 p.m. dispatch truck prior to the Grievant's return to the station, even though he acknowledged that he has held the truck in the past. While these circumstances provide an explanation for the Grievant's state of mind when Supervisor Ferretti confronted him on April 18, 2005, they do not excuse the Grievant's conduct. There is no question that an employee cannot direct offensive language toward a supervisor. Had the Grievant felt that Supervisor Ferretti acted inappropriately, he was obligated to keep in control of his emotions, obey the instructions and file a grievance later. Since the evidence indicates that the Grievant responded by losing his temper, it is concluded that he engaged in misconduct.

As stated in the Notice of Suspension, the Grievant's disciplinary record contains a Letter of Warning dated January 25, 2005, in which he was charged with "Failure to Follow Instructions." Under normal circumstances, progressive discipline would require that the Grievant receive a 7-Day Suspension for his repeated offense of the same charge. However, from the evidence presented, it is apparent that the January 25, 2005 Letter of Warning was not for similar conduct. Rather, it was issued due to the Grievant's unintentional scanning and delivery errors. There is no evidence that the Grievant was previously reprimanded or disciplined for the type of actions that he displayed toward Supervisor Ferretti on April 18, 2005. Due to the lack of prior conduct of a similar nature by the Grievant, it is concluded that a 7-Day Suspension was not the appropriate progressive disciplinary action. In light of the Grievant's actions and the circumstances presented, a Letter of Warning would have been a reasonable disciplinary response.

AWARD

The grievance is sustained in part. The 7-Day Suspension issued to the Grievant on April 22, 2005 was without just cause, in violation of Article 16.1 of the Agreement. The 7-Day Suspension is reduced to a Letter of Warning.



Jane Minnich, Arbitrator

November 7, 2005

REGULAR ARBITRATION PANEL

 In the Matter of the Arbitration)
)
 between)
)
UNITED STATES POSTAL SERVICE)
)
 and)
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)

H01N-4H-D 05134833
 NALC DRT#: 09-052699
 Local #: MIA051293
 Grievant: Maria Rodriguez
 Post Office: Pompano Beach, FL

BEFORE: Arbitrator Mark I. Lurie

APPEARANCES:
 For the N.A.L.C.: Mark Travers
 For the U.S. Postal Service: Maria A. Villar-Avery

Place of Hearing: Pompano Beach, Florida Main Post Office
Date of Hearing: January 19, 2006
Date of Award: January 25, 2006
Relevant Contract Provision: Article 16
Contract Year: 2001 - 2006
Type of Grievance: discipline

Award Summary:

While removal is the next step in progressive discipline following a 14-day suspension, it is not a mandatory penalty. Discretion can and should be exercised to assure that the severity of the penalty reflects the severity of even an event of recidivistic misconduct. In the case at hand, the Arbitrator finds that the discharge of this 17-year employee for her having failed to put on her seat belt was manifestly disproportionate, and was not for just cause. The removal is to be reduced to a 14-day suspension and the Grievant reinstated and made whole of all wages and benefits of employment. And the Arbitrator directs that any disciplinary action for the Grievant's overestimation of auxiliary assistance on May 2, 2005 be expunged.


 Mark I. Lurie, Arbitrator

Judith Willoughby, NALC
National Business Agent

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ISSUE

The issue agreed upon at Step B was the following: Did Management have just cause to issue the Grievant a Notice of Removal dated May 23, 2005 charging her with two instances of unsatisfactory performance? If not, what is the appropriate remedy?

FACTS

Maria Rodriguez (the "Grievant") is a Letter Carrier at the Tropical Reef Station of the Pompano Beach Post Office. She has 17 years of service with the Postal Service. She was issued a Notice of Removal (the "NOR") dated May 23, 2005, to take effect on July 22, 2005. Two charges were cited for the Removal; each charge was captioned as "Unsatisfactory Performance." The first was that, on April 19, 2005, she had driven her Postal vehicle on a public access road without first securing her seat belt. The Grievant acknowledged that she had secured the seat belt only after setting her vehicle in motion, but testified that her conduct had not been unsafe because it had occurred while her vehicle was still in an empty parking lot, and that she had secured her seatbelt before advancing onto the public access road. The Grievant acknowledged having been aware of the Postal rule requiring that seat belts be worn whenever one's Postal vehicle was in motion: "Seatbelts must be worn at all times the vehicle is in motion..." (M-41 Handbook, Section 812.3).

The Grievant's testimony differed from that of two managers who had observed her that day. Supervisor Mark Berger and Manager James Mulvey testified that the Grievant did not have her seat belt on by the time she pulled out of the parking lot and onto the street.

The second charge pertained to the Grievant's request, on May 2, 2005, for 1.50 hours of auxiliary assistance, following which her immediate supervisor, Mark Berger, accompanied her on her route, and the Grievant completed the route with 20 minutes undertime. This resulted in the following substantive charge in the NOR:

"[Failure] to provide a satisfactory estimate of the time required to perform your assigned duties in order to bring you back to the office by your scheduled end tour."

The Grievant was not charged with having intentionally extended her street time.

The NOR cited 2 elements of prior discipline. The first was a September 26, 2003 7-day suspension for unsafe driving practices. Specifically, the Grievant was charged with driving her Postal vehicle on a public road with her seatbelt unfastened and with her door in an open position. The Union grieved the suspension through arbitration; Arbitrator Donald E. Wright denied the grievance. The Union argued, in the instant case, that Arbitrator Wright found that the Grievant had driven with her door open, but also found that the Service had not proven that

the Grievant's seatbelt had been unfastened. This Arbitrator finds that Arbitrator Wright made no such explicit finding with regard to the seatbelt charge; he stated only that the Grievant had denied the charge in her testimony, while admitting that her door had been open. This Arbitrator finds that the 7-day suspension was extant as a prior element with regard to all elements cited therein, including the seatbelt infraction.

The second disciplinary event was a February 28, 2005 14-day suspension for the safety infraction on February 11, 2005 of having used her cell phone while driving her Postal vehicle. The Grievant acknowledged that she had done so but testified, before this Arbitrator, that she had done so only to retrieve voice-mail messages while stopped at a red light. (The Postal regulations provide for no such exception, and prohibit the use of cell phones "in all official postal work areas" and – for those employees whose job responsibilities include regular or occasional driving – "while driving.")

The Union argued that the charge that the Grievant had failed to provide a satisfactory estimate of the time required to perform her assigned duties (referred to hereinafter as her "auxiliary assistance estimate") was unrelated to the vehicular safety violations that were the basis of the progressive disciplines upon which Management had justified her removal. Management responded that both the driving safety infractions and the auxiliary assistance estimate were examples of "Unsatisfactory Performance," and that the latter was therefore a valid basis for progressive discipline. The Arbitrator agrees with the Union. The Arbitrator cannot think of any conduct that could not be encompassed within the rubric of "Unsatisfactory Performance," and finds it is too broad a descriptor to be the standard by which genera of misconduct are delineated for purposes of progressive discipline. The Agreement requires that discipline will be corrective, rather than punitive. Corrective discipline entails the application of progressive discipline for recidivism of the same type of behavior; the purpose of the progressive discipline is to place the employee on increasingly emphatic notice of the misconduct, and to dissuade the employee from continuing to engage in such behavior. Nothing in the prior discipline of the Grievant for safety violations would have put her on notice that she should be mindful of the accuracy of her auxiliary assistance estimates, and the Arbitrator finds that discipline of any such inaccuracy should have been disciplined independently of safety violations.

The Auxiliary Assistance Estimate - Facts

The Union cited several reasons in justification of the Grievant's estimate, including her large volume of parcels and the fact that her Workload Status Report for that date (the data for which was derived from the DOIS system) showed that she would require overtime or auxiliary

assistance of 2 hours and 51 minutes. Management responded that, as was normally the case for the Grievant's route, most of the parcels were to be delivered to a single customer, greatly reducing the delivery time, and that this was a factor that the Workload Status Report did not take into account, and for which it consistently over-allotted time.

The Union also asserted that the Grievant was constrained to curtail some of her cased mail, and that she was precluded, by Supervisor Berger, from obtaining any of her accountable mail (the delivery of accountables being a time-consuming activity). As evidence that Supervisor Berger had intervened to preclude the Grievant from obtaining her accountable mail, the Union presented the accountables record sheet (PS Form 3867) which contained no signature for the Grievant on May 2nd. The Grievant would have had to have signed the sheet in order to obtain her cluster box arrow key; the implication being the Supervisor Berger had obtained the key on her behalf. According to the Grievant Supervisor Berger told her (and Supervisor Berger testified in the arbitration hearing) that there was no accountable mail for her on May 2nd. The following day, however, the Grievant's route had 24 certified letters.

The Grievant also testified that she finished with undertime on May 2nd because Supervisor Berger had unreasonably rushed her during the performance of her street duties. An example was that he sometimes instructed her not to lock her vehicle when making deliveries inside of customers' businesses. (Supervisor Berger acknowledged that he had instructed the Grievant not to lock her vehicle, but also stated that the vehicle would have remained visible to the Grievant through the businesses' windows, and therefore did not need to have been locked.) The Arbitrator was not taken to the site, and therefore cannot make an independent assessment of the accuracy of Supervisor Berger's assertion. The Grievant also alleged that Supervisor Berger had harassed her, and that he had otherwise interfered with her performance of her duties (some of which interference, the Arbitrator notes, would have prolonged the Grievant's street time rather than shorten it).

The Union claimed that discipline issued the Grievant constituted disparate treatment. The Service responded with an exhibit showing that, of the 6 regular routes for which Supervisor Berger had performed street supervision between November 5, 2004 and May 18, 2005, those Carriers who had come within 15 minutes of their estimates (i.e., 2 Carriers) had received no discipline, while those whose estimates had been overestimations of 45 minutes or more (i.e., 4 Carriers) had been issued discipline.

Finally, the Union proffered the Regular Panel decision of Arbitrator Michael E. McGown in G94N-4G-D 98002174 (1998) in which the arbitrator held, *inter alia*,

"...if a carrier is expected to make an *estimate*, then it is unreasonable for management to fault the carrier when the estimate proves not to be *accurate*. An estimate is, by definition, a rough calculation, while accurate means 'having no errors.' Thus, the two terms are, at least in the mind of this Arbitrator, somewhat incongruous."

The Auxiliary Assistance Estimate - Decision

The Arbitrator finds as follows. The Postal Service has not proven that the Grievant's undertime achieved on May 2nd – compared to her estimation of auxiliary assistance – constituted proof that the overestimation was either the product of gross negligence or willful overstatement. The Arbitrator comes to this conclusion based not upon Supervisor Berger's purported conduct on the street (that Mr. Berger had unreasonably coerced the Grievant to be expeditious – an affirmative defense for which the Union bore the burden of proof) but rather because the Union has established the possibility that a portion of the mail the Grievant was to have delivered on that day remained in the Tropical Reef Station when the Grievant left for the street.

The Auxiliary Assistance Estimate - Award

The Arbitrator directs that any disciplinary action for the overestimation of auxiliary assistance on May 2, 2005 be expunged. Having so ruled, the Arbitrator shall not address an argument, raised by the Union, that the discipline of the overestimation was not timely undertaken.

The Seatbelt Infraction - Facts

Regarding the Grievant's failure to secure her seatbelt; her testimony differs from that of Supervisor Berger and Manager Mulvey only insofar as the former asserts that she secured her seatbelt before pulling onto the public access road, while the latter testified that they had observed that she had not. The Arbitrator finds the Management witnesses' testimony more credible than that of the Grievant because they had no demonstrable motive to dissemble while the Grievant did, and because they corroborated each other's testimony. However, the Arbitrator deems the disparity to be irrelevant. The crux of the Grievant's misconduct was that she knowingly violated the regulation that required her to secure her seatbelt before setting her vehicle in motion (whether or not on a public road). In the arbitration hearing, the Grievant attempted to justify her conduct by asserting that the risk of attaching her seatbelt while she was driving her vehicle in a parking lot was minimal, just as she had attempted to portray her prior use of a cellular telephone while at the wheel as minimal risk. These were not her judgments to make and, when made, they were made badly; one can readily apprehend the unintended and devastating consequences that these reductions in her margins for error might have produced.

The foregoing notwithstanding, the Arbitrator finds that Management has not shown either that the Grievant is beyond rehabilitation, or that she poses an unacceptable risk of harm to the public or to herself. The Grievant has served as a Postal employee for 17 years, a duration that must be taken into consideration when removal is being considered. Employment for that duration favors a presumption that the Grievant is capable of complying with regulations, and also affords the Grievant a bank of good will that ought to have been considered as a mitigating factor; there is no evidence that it was. In Management reports captioned OBSERVATION OF DRIVING PRACTICES (PS Forms 4585) dated March 2, 2005 and May 9, 2005, the assessment was that "the driver exhibited safe and professional driving practices, and is to be commended."

While removal is the next step in progressive discipline following a 14-day suspension, it is not a mandatory penalty. Discretion can and should be exercised to assure that the severity of the penalty reflects the severity of even an event of recidivistic misconduct. In the case at hand, the Arbitrator finds that the discharge of this 17-year employee for her having failed to put on her seat belt for a brief interval was manifestly disproportionate, and was not for just cause.

With this decision, the Grievant is, once again, being apprised that she must comply with the letter of Postal Service vehicular safety regulations, and does not have discretion to deviate. Having been so advised, she should not be sanguine about the severity of discipline for such misconduct in the future.

The Seatbelt Infraction - Award

The removal is to be reduced to a 14-day suspension and the Grievant reinstated and made whole of all wages and benefits of employment.

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REGULAR ARBITRATION PANEL

In the Matter of the Arbitration *

between: *

United States Postal Service *

and *

National Association of
Letter Carriers, AFL, CIO *

Grievant: T. Allen

Post Office: Covington, GA

USPS Case No: H06N-4H-D 08195684

NALC Case No: 08195684

09-101098

BEFORE:

Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service:

Cynthia Brundridge

For the Union:

Robert Henderson

Place of Hearing:

Postal Facility, Covington, GA

Date of Hearing:

September 23, 2008

Date of Award:

October 31, 2008

Relevant Contract Provision:

Article 16

Contract Year:

2006

Type of Grievance:

Discipline

Award Summary:

The Grievant was removed for Attendance issues consisting mostly of tardiness. The record shows the Grievant was dealing with several serious personal matters that appear to have been corrected. The Union asserted that the discipline action was punitive rather than corrective and that the Employer waited too long to impose their discipline. The removal action is vacated and replaced with a 21 day paper suspension.

JUDITH R. WILLOUGHBY, NALC
National Business Agent



Lawrence Roberts, Panel Arbitrator

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SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on September 23, 2008 at the postal facility located in Covington, GA, beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The record was closed on 10 October 2008 upon receipt of arbitral cites from the respective Advocates. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case works as a City Letter Carrier at a Covington, GA Postal facility.

The cause of this dispute came about when a 3 April 2008 "Notice of Removal," was issued by a Customer Service Supervisor. The charge, as cited on that document, was "Failure to be Regular in Attendance." And, in pertinent part, that verbiage included the following:

"Specifically, a review of your attendance record reveals that you have been absent from your official duties on unscheduled absences and/or tardy on the dates outlined below:"

The Notice of Removal goes on to cite other elements of the Grievant's record that were considered in arriving at the decision to issue that letter.

Some of the facts relied upon by the Union, in defense, were in direct contrast to the contentions cited by the Employer in the Notice of Removal. The Union claims some of the facts mentioned upon by the Employer were inaccurate. The end result was the filing of the instant grievance.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. On 27 May 2008, the Step B Team reached an impasse. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed on 10 October 2008, the receipt date of arbitral cites from the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package
3. HOURS CODES (payroll code)
4. M-39 Handbook (in pertinent part)

COMPANY'S POSITION:

It is Management's contention the evidence will show that, despite prior warnings, the Grievant continued to record unauthorized, unscheduled absences from duty including excessive

tardy reporting of which some were "NO CALL" AWOL ABSENCES, with no foreseeable end. Hence, in the opinion of Management, the Notice of Removal and the disciplinary action was for just cause.

The Service asserts these absences had an adverse effect on Postal Operations, in which the Grievant would have been assigned and presents a burden that no Employer should have to bear.

The Employer insists the Grievant's attendance record will show that from 15 March 2007, through the time of her removal, she was absent, on an unscheduled basis, on approximately twenty three occasions. Furthermore, the Service mentions the Grievant had been absent from duty on several occasions where she failed to call in to advise that she would not be reporting on time.

And according to the Agency, all Employees are required to be regular in attendance. Management suggests the Grievant is a seasoned Employee with an unacceptable attendance record.

The Employer points out the Union alleges procedural errors in the instant case. And according to Management, the Union must prove these errors were made and that they were "harmful" errors that affected the final action taken against the Grievant.

Management argues the framers of the Agreement recognized that certain behavior and/or misconduct, is just and sufficient cause for discipline. And in the view of the Service, the failure to be regular in attendance and tardiness are examples of such behavior.

And in light of the above, it is Management's position the action taken by the Supervisor in this case was appropriate.

Therefore, the Service requests the instant grievance be denied.

UNION'S POSITION:

It is the contention of the Union that Management did not have just cause to issue the Grievant the Notice of Removal. According to the Union, the removal is punitive and not corrective in nature.

The Union mentions that Management failed to consider the personal issues being experienced during this particular time frame.

It was also argued by the Union the discipline was not issued in a timely manner as required by Article 16. According to the Union, Management's allegations, cited in the Notice, are back dated over a year. It is the belief of the Union that, given the time frame, some of the instances should not have been included in the Notice of Removal.

The Union also contends the Notice of Removal is flawed in many respects. One example pointed out by the Union is the 1.14 hours of tardiness cited on 15 March 2008. However, the Union references the 3972 (@p17 of Joint 2) showing an unscheduled annual leave of .21 hours.

Additionally, the Union references the 24 August 2007 date. On that day, the Union pointed out, the Grievant accompanied her husband to the hospital. And the Union argues that particular day should have been charged FMLA instead of paid EAL.

Furthermore, the Grievant was granted a revised schedule on some of the days in which she worked more than eight hours.

The Union insists the discipline in this case is certainly not progressive. It was also mentioned by the Union there is no record of referral to EAP by Management.

It is the argument of the Union that the Grievant did come to work on all but two occasions. Even though the Grievant was tardy, the Union argues this did not create any burden whatsoever upon the Service as she actually worked overtime on those days.

The Union requests the instant grievance be sustained and the Grievant made whole.

THE ISSUE:

Whether or not just cause exists for the Notice of Removal dated 4-03-08, charging the Grievant with failure to be regular in attendance? If not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

SECTION 1. Principles

DISCUSSION AND FINDINGS:

This matter involves an issue of removal, wherein the Parties differ somewhat regarding the facts bringing rise, to the 3 April 2008 Notice of Removal.

That Notice specifically cites some eighteen instances of tardiness, accompanied with several other alleged attendance related infractions. Those various cites included in the Notice of Removal, span a time frame of a little over a year, specifically from 15 March 2007 and ending on 26 March 2008.

Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous, however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee.

The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning. The criteria varies from case to case, as a set of strict guidelines is non-existent. Just cause is satisfied via the preponderance of

evidence rule.

In addition, the just cause standard cannot be gauged in the same matter in all cases. Each discipline case is unique to its own set of facts and circumstances.

The infraction list, mentioned above, covers a period of one year and the Union insisted that the Employer should have taken corrective action sooner, rather than allow the Grievant to continue with her poor attendance.

The Supervisor testified that she spoke to the Grievant on several occasions. According to the testimony, it was Management's sole purpose to correct the indiscretions of the Grievant. The record does show the Supervisor documented those discussions.

The record also shows a "Disciplinary Action Request" dated 27 March 2008, requesting a "Proposed letter of removal." That Request mentions a "7 day paper suspension issued 2/14/06."

However, it was clear that Management improperly considered that particular suspension since Article 16, Section 10 mutes that 2006 suspension via the following language:

"The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years."

Clearly, the Supervisor along with the concurring official, erred via inclusion of that 14 February 2006 suspension for consideration.

Also, that same Disciplinary Action Request document included a 22 January 2007 "preventable vehicle accident."

A preventable vehicle accident has nothing to do with the issue at hand, that being, a charge of "failure to be regular in attendance. Clearly, this is not part and parcel to the contractual demand of progressive discipline.

In my view, progressive discipline requires, the showing of progression to return an Employee's behavior to an acceptable state of being. And to me, progressive means a showing of an Employer effort to correct a deficiency of any Employee. And in this case, I was unable to make any correlation between a vehicle accident and attendance. While both may be discipline, the two events are not related by any stretch of the imagination.

For I do not believe this was the intent of the negotiators Article 16 reference of progressive discipline. A series of consistent blunders of varying mythologies could suggest an Employee was simply unable to perform effectively, regardless of circumstance. However, I do not believe that one single instance, clearly unrelated to the others, was the meaning and intent of such language.

Yet Management, via mere inclusion, attempted to show a relationship that otherwise, failed to exist. Instead, the intent of the negotiators was for the Employer to show a progressive behavior correlation . A vehicular accident was clearly out of sync with attendance and, for that reason, was considered inappropriate for inclusion in that document. Clearly, the Employer's case in chief is based on an Employee's alleged failure to be regular in attendance.

The fact the Grievant was involved in a "preventable vehicle accident" is far separated from any alleged attendance deficiencies. And in my considered opinion, to list such an occurrence as being related, was clearly an error on the part of Management. Had the record in this case been sprinkled with numerous unrelated incidents, this would certainly suggest a pattern of misconduct. However, in this case, it is simply not part and parcel to the matter at hand and, a one time incident, simply fails to identify any type of pattern.

In my view, that isolated event was totally separate and apart from the issue at hand. Therefore to include it as a part of the progressive discipline package would clearly go against the grain of the meaning and intent of the progressive discipline language of Article 16.

For the issue in this case involves attendance, albeit tardiness. The Union also mentioned other dates found in the removal notice that, in the end, were found to be improperly identified and

cited.

Furthermore, the record is absent a showing of any official counseling or discipline pertaining to the Grievant's alleged attendance issues. Even though a Supervisor documented various discussions with the Grievant regarding attendance, this record is clearly devoid of an official action for over a year.

The Notice of Removal lists numerous incidents of tardiness. The Union did not dispute the fact that the Grievant was late for work on those occasions. And the Supervisor testified that an Employee who is not regular in attendance causes a major problem for not only the Employer, but other Letter Carriers as well. That is understandable.

However, the Union did dispute several of the incidents identified on the Notice of Removal. A mention of one example would be 13 March 2008. The Grievant was tardy that Thursday, however documented evidence shows the Grievant not only delivered her assignment, but also carried another route.

Even though the Grievant was initially thirty two (32) minutes late that day, she not only completed her assignment, but also worked on another route. In my considered opinion, this singular instance was indicative of the Grievant's true intent. For it was quite obvious to me, the Grievant was truly considerate of her Postal employment. Other "Employee Everything Reports" found in Joint Exhibit 2 indicated

similar occurrences on other days as well.

In the past, I've upheld many removals wherein the evidence showed the Grievant simply wasn't interested in coming to work. And when those Grievants were issued a Notice of Removal, a myriad of excuses would often times be raised in defense.

But this case is unique, in that, the Grievant was certainly tardy for a period of time. However, that tardiness did not lack a valid reason for mitigation. And once the Grievant's issues subsided, she was able to return to an anticipated, albeit normal, work schedule.

The Union also pointed out that even on the days the Grievant reported late, she always worked a full 8 hours and often worked overtime. There was also a showing that the Grievant did not require assistance in completing her route on the days she was tardy. Instead, the Grievant often assisted on other routes, even on those days that she was tardy.

The Supervisor also testified that she was not aware of all the personal problems experienced through this time frame by the Grievant. The same Supervisor admitted this was not considered in the formulation of the Notice of Removal.

Additionally, it was agreed by the Employer that excused absences could not be used against the Grievant. The Union identified at least

one excused absence that should have been excluded.

Several of the incidents identified were a result of an emergency situation which should have been taken into consideration, however, was never considered by Management.

There have been other cases where an Employer was justified in removing a Grievant for poor attendance. This, certainly, is not one of those instances. The record was sprinkled with errors and the removal action in this situation was simply inappropriate. The Employer relied upon certain dates cited in the Notice of Removal. But the evidence shows some of those dates should not have been included in that 3 April 2008 Notice of Removal.

I do agree with the Employer, in that, any Employee accepts the inherent obligation to work a regular schedule. However, there are certain facts that often times mitigate such a carte blanche requirement.

The just cause element sweeps with a broad stroke. And in this very particular instance, well founded reasons for mitigation shortened the sweep.

Significant was the fact the Employer's witness testified that the Grievant was an excellent worker. Additionally, the Grievant indicated she was remorseful for the inconveniences she caused the

Employer.

I'm sure the Grievant realizes the facts of this particular case are certainly unique. Any repeat in the future could certainly result in a much different outcome.

For all the above reasons, it is my finding there was no just cause for the Removal and the Removal action was punitive rather than corrective. In addition, it was found that many of the allegations relied upon by Management in their decision making process were later proven to be false.

Accordingly, the Removal action will be vacated and replaced by the Union's requested discipline at Step 1, that being, a twenty one (21) day paper suspension. In all other aspects, the Grievant will be made whole.

AWARD

The Notice of Removal is reduced to a twenty one (21) day paper suspension.

Dated: October 31, 2008
Fayette County PA