REGULAR CONTRACT ARBITRATION PANEL

In the Matter of the Arbitration:
Between
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF LETTER CARRIERS

Grievant: B Cushing
Post Office: Fargo ND
USPS CASE No: E16N-4E-D 18197448
NALC CASE LS 18-015

BEFORE: JEFFREY W. JACOBS, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Robert Maxwell

For the Union: Joel Malkush

Place of hearing: 657 2nd Ave. Fargo, ND

Date of hearing: 8-8-18

Date of Award: 8-24-18

Relevant Contract provision: Articles 15, 16 and 19

Type of grievance Notice of Removal

AWARD SUMMARY

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated with back pay and contractual benefits within 14 calendar days of this award, but subject to a 14-day unpaid suspension. Back pay is to be mitigated by any wages, salaries or governmental wage replacement benefits paid in the interim. The union and grievant shall provide any appropriate documentation in order to properly calculate the back-pay award herein.

Dated: August 24, 2018

Jeffrey W. Jacobs, Arbitrator

ISSUES

The Service stated the issue as follows: Did Management have just cause to issue the Grievant a Notice of Removal, NOR, dated February 16, 2018 for Unacceptable Performance, Failure to Perform Your Duties in a Safe Manner and Failure to Immediately Report an Accident?

The union did not provide a formal issue statement

The issue as determined by the arbitrator, based on the evidence and arguments of the representatives is as follows:

Did management have just cause to issue the grievant a Notice of Removal, NOR on February 16, 2018, on this record? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS AND JCAM LANGUAGE

ARTICLE 16 – DISCIPLINE PROCEDURE

Just cause principle

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

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

- Is there a rule?
- Is the rule a reasonable rule?
- Is the rule consistently and equitably enforced?
- Was a thorough investigation completed?
- Was the severity of the discipline reasonably related to the infraction itself and in line with discipline that is usually administered, as well as to the seriousness of the employee's past record?
- Was the disciplinary action taken in a timely manner?

ARTICLE 16.5 – Suspensions 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 16.7 – EMERGENCY PROCEDURE

An employee may be immediately placed on an off-duty status (without pay) by the Employer but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to US Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. ...

SELECTED RELEVANT PROVISIONS OF THE JCAM

POSITIONS OF THE PARTIES

POSTAL SERVICE POSITION

The Postal Service, Service or USPS, took the position that there was just cause for the removal in this case. In support of that position the Service made the following contentions:

1. The Service asserted first that the grievant is a short-term employee, having been hired in January 2017 as a CCA in the Fargo area. As such he had been with the Service for less than 11 months when he was removed.

2. The Service also pointed to the training he received to safely drive postal vehicles. He actually failed the 2-ton driving test the first time he took it due to speeding, even though an instructor was sitting in the vehicle with him. See case file at 18. The grievant was given safety training and advised of the proper and safe manner to operate postal vehicles on multiple occasions. See e.g. case file at 17, showing 2-ton course work done in October 2017, a defensive driving course in January 2017, a formal safety awareness training on March 20, 2017, see case file at 20; and various verbal counselings to be careful when operating Service vehicles; see testimony of Postmaster Kent.

3. The Service also pointed to several other driving issues for which the grievant was specifically counseled in the short time he was employed that occurred prior to the incident that led directly to his removal. In late June 2017 the grievant was observed by management personnel driving his postal vehicle in an unsafe manner. The grievant started to leave the parking lot at a rate of speed that was inappropriate for the conditions and the area. Immediately prior to entering the road, he "slammed" on his brakes so hard that the tires screeched on the vehicle. It was apparent from this incident that the grievant was not exhibiting care for the safety of the public. There was not a pedestrian in the sidewalk area but the Service alleged that the grievant was oblivious to the fact that there easily could have been. He was directed to turn over his keys and was sent home that day.

4. The Service asserted that this incident should have been a "wake up call" to the grievant to be much more careful in the operation of Postal vehicles. Case file at 15.

5. The grievant was given a safety briefing following the above incident. See case file at page 16, yet it was apparent that the lessons there did not work to alter the grievant's driving habits.

6. There was another incident in which the grievant was observed backing up his vehicle and striking an Administrative Car. He was seen getting out of the vehicle to inspect for any damage and then going inside the building. Instead of reporting the incident, as the observer assumed the grievant was doing, the grievant simply left the scene and never reported the incident at all. While there was no damage to the other vehicle, this should have been reported. The Service asserted that this too is yet another disturbing issue in that the grievant has been told multiple times to report any mishaps no matter how slight immediately yet, as noted below, he has failed to do so on multiple occasions, including the one incident that led to his removal.

7. There was another incident in which the grievant pulled out in front of a car and almost hit that vehicle. When the driver of the other vehicle pulled up next to the grievant's vehicle at a nearby intersection and confronted the grievant about his unsafe and perilous driving, the grievant, instead of apologizing, "flipped off" the other driver with an obscene gesture. See case file at 32. The Service asserted that the grievant is simply not "getting it" and that his driving habits were unsafe and entirely inconsistent with the safety rules in place and the underlying adherence to safe operation of US Postal Service vehicles at all times. While he was not formally disciplined for this incident, this should have been clear notice of the need to be more attentive and to operate the vehicle far more safely.

8. The incident that led to the removal occurred on November 18, 2017 when the grievant backed up a postal vehicle while at a stop and struck a temporary fence. When he pulled away, he dragged the fence approximately 5-10 feet, damaging the fence, at a cost of $310.00, see case file at 28, and further damaged some Christmas trees that were leaning up against the fence that were for sale for the Christmas season.

9. The Service alleged that the grievant was again careless and inattentive and failed to make sure that his vehicle was clear of any obstructions. He further failed to even notice that he had struck the fence or that he dragged it when he left.

10. The grievant also failed to report the incident as required by Postal regulations. The Service asserted that the claim that "he didn't notice" it, cannot be credited. The grievant had an obligation to make sure that his vehicle was clear of any obstructions and his claim that he mistook the screeching of the fence along the ground as he dragged it as he was leaving for the hampers in the back of the truck moving around, is simply not credible.

11. The owner of the fence had to report this incident to the Post Office the following day. The grievant did not report it and claimed only that he was unaware that he had hit the fence. The Service asserted that failure to report a mishap is a very serious infraction that cannot be ignored.

12. Further the claim that he did not expect the fence to be there since it had only been there for a few days is likewise not credible. Whether the fence had been there for day, weeks or hours, does not matter – the fence was there and the grievant had an obligation to make sure he didn't hit it. There was also a back-up camera on the vehicle yet, the grievant acknowledged that he did not use it. See, case file at 31.

13. The Service asserted that it has met all of the necessary elements of just cause; there was clear notice in both rules, counseling and formalized training to the grievant; the rule is both reasonable – even based in common sense – to be careful to watch for obstructions and to remain vigilant and attentive to all obstructions. There was a thorough and fair investigation. The grievant was given a day in court and had ample opportunity explain his actions regarding the fence and why he failed to report it. The grievant acknowledged that he has been told not to back up unless absolutely necessary and to be very careful when doing so yet he failed to do so in this instance. Further, there is no question that the grievant struck the fence and damaged it.

14. The Service introduced photos of the damaged fence and a short video of the incident that showed the grievant's truck pulling the fence and the damage done to it. Thus, there was clear evidence that the grievant was guilty of hitting the fence and failing to operate the vehicle safely and that he did not report the incident as required. [1]

[1] There was considerable dispute about the admissibility of the video. Article 15 is clear and disallows evidence not provided to the union in the grievance steps. Here though the video was shown to the union steward at the time of the verbal emergency placement, discussed more below. Thus, on this record, even though there was a formal request for all information relied upon by management for the removal the failure to provide a copy of that very short video from the security camera at the site where the fence in question was located, did not preclude a review of the video itself. Further there was no dispute that the grievant hit the fence and dragged it several feet. As discussed herein, the video was not given a great deal of evidentiary weight on this unique record as there was no audio with it and the total length of the video was perhaps 5 second long.

15. The Service countered the union's argument that the emergency placement must be overturned because it was given verbally and not in writing. The union was clearly on notice of the emergency placement yet filed no separate grievance over that.

16. Further, the Service countered the union's contention that the discipline is fatally flawed due to the delay in implementing it – some 80 days between the investigation on November 29, 2017 an the actual NOR on February 16, 2018. The Service noted that the time frame in late 2017 was the Christmas season – traditionally the busiest time for the US Postal Service and that some of the managers were out of the office for extended periods of time on vacation or for other matters. Due to the volume of mail and the staffing situation in that time frame, there was simply not the time or urgency to impose the NOR any earlier than it was. There was no prejudice shown to the grievant or the union and the timeliness issue should not present the fatal flaw the union asserted.

17. Finally, the Service asserted that the National Agreement and JCAM are clear and do not require progressive discipline for CCA's. The Service disagreed with the union's contention that the requirement discipline not be punitive somehow also means that discipline must be progressive and argued that the two concepts are separate. The parties to the National Agreement have specifically included language that excludes CCA's from the requirement of progressive discipline. Thus, removal was the appropriate step here. The grievant had several prior driving incidents and was clearly on notice that his driving habits were below expectations.

18. The Service cited several prior awards in support of its position here. In *USPS and APWU*, C15C-1C-D 1742802 (Harris 2018) the arbitrator upheld a removal even though there had been a delay in the imposition of the discipline. There the grievant had used highly inappropriate language toward managers and co-workers. The NOR was issued some 65 days after the incident in question. The arbitrator did not find the delay to be a fatal flaw and found that there were extenuating circumstances to explain and justify the delay. He further found no prejudice to the union as the result of the delay in implementing the discipline.

19. Likewise, in *USPS AND APWU*, K15C-1K-D 17527065 (Greenberg 2018) the arbitrator upheld a removal where an employee had stolen mail and there was a delay between the time of the incident and the imposition of discipline. He further found that the failure to put the grievant in that case on emergency placement did not constitute a fatal flaw in the discipline either. The Service argued there that the mere failure to place the grievant on an Article 16.7 placement or to put that in writing should not be considered a fatal flaw in the process.

20. In *USPS and NALC*, E16N-4E-D 17651985 (Chapdelaine 2018) the arbitrator again upheld a removal where the employee allowed a vehicle to roll away. He found that the reasonable rules for the safe operation of vehicles were both necessary and clearly understood by those responsible for their operation. Slip op at page 9. He further rejected the union's claim for a lesser penalty and ruled that an arbitrator should not substitute his/her judgment of that of management. Slip op at 10. The Service asserted that there were clear violations of the rules to operate the vehicle safety and to report the incident and that the grievant failed on both accounts.

21. In *USPS and NALC*, E16N-4E-D 17592059 (Duffy 2017) the arbitrator upheld a removal even though progressive discipline was not followed. He cited the provisions of the National Agreement and the JCAM making it clear that "the concept of progressive discipline will not apply, discipline should be corrective in nature." Slip op at 7.

22. Here progressive discipline is not necessary and the Service further argued that the discipline here was not punitive. The grievant was well aware of his duties to operate the vehicle safely and to report any collisions or other mishaps, yet he failed in all respects.

23. The Service asserted that the grievant's removal was for just cause and does not run afoul of the JCAM the National Agreement or arbitral precedent.

The Service seeks an award denying the grievance for the reasons set forth above.

UNION'S POSITION

The union took the position that there was inadequate just cause for the removal and that the Notice of Removal should be expunged from the grievant's record. In support of this position the union made the following contentions:

1. The union asserted that there was an inadequate and cursory investigation that never truly sought to ascertain all the facts and that the Service began the investigation with removal already in mind.

2. The union also asserted that the discipline in this instance was overly harsh and punitive, in direct contravention to the JCAM and Article 16's requirement that discipline be corrective and not punitive.

3. The union also asserted that one of the necessary and required elements of just cause as set forth in the JCAM and Article 16 is that the discipline be issued in a timely fashion. Here the discipline was issued nearly 3 months after the investigation was done, on November 29, 2017. This delay caused material prejudice to the union's ability to investigate the scene of the accident and to mount a defense to the Service's attempt to remove the grievant.

4. The union also asserted that the investigation was cursory and conclusory. Further, there was no effort by the Service to investigate the backup cameras to see if they were even working or that they would have shown given the location of the fence. No one from management went to the site to see what the conditions were that night and the only investigation done was to review the 5 second video and ask the grievant a few questions. The union asserted that this was insufficient to gain a full picture of the events and did not clearly establish what the grievant did wrong.

5. Further, there was no inquiry to establish that the grievant failed to report the accident because he was unaware it even happened. The investigator simply discredited the grievant's version of these facts and chose not to believe him even though there was no evidence to support that conclusion.

6. The union cited several awards where a delay in the imposition of discipline was found to be a fatal flaw in management's case. In USPS and NALC, H94N-4H-D 97105263 (Brandon 1998) the arbitrator ruled that a 5-month delay in serving the actual notice of removal amounted to "something ... arbitrary and capricious." Slip op at pages 12 and 13. He also noted that the delay made it difficult for the union to effectively marshal the evidence required for the grievant's defense. Id. at 13. (Citing S4N-3W-D 27919 (Sobel 1986)). See also, the Sobel award cited herein, at page 27 where the arbitrator outlined the problems with a delay of this magnitude and noted that a delay in imposing a removal where no additional investigation was done showed that the removal was punitive and arbitrary.

7. Here, the union noted, it was clear that no additional investigation was done after the initial interview on November 29, 2017 and that the delay was due only to the facility being busy. As in the Brandon case, where the arbitrator noted that the sole reason for the delay was the human resources manager's desire to "get the wording right," this excuse should be similarly rejected. See also, *USPS and NALC*, S1N-3W-D 2205 (Schedler 1982) where he arbitrator overturned discipline based on an unreasonable delay between the time the investigation was complete and when discipline was imposed. He noted that "a delay in presenting charges can mean the loss of evidence to an aggrieved. Memories fade with the passage of time, witnesses become difficult to locate so as to reconstruct the events in question, a photograph taken of the scene taken weeks late may be inaccurate as to the conditions that prevailed on the date of occurrence. "The union noted that many of these issues were present here in that by the time the union was formally notified of the removal, it was months later. The fence was gone, the light was different and the parking lot was entirely different in configuration. The delay here caused a significant material prejudice to the union's ability to investigate the incident.

8. The union argued that the lack of written notice to the grievant or the union for the emergency placement is also a fatal flaw. The National Agreement and the JCAM and clear and unambiguous language require formal written notice for an emergency placement under Article 16.7. No such written notice was issued here and even though there was a verbal statement to that effect, that is not in compliance with the JCAM.

9. The union asserted that mere fact that the manager was new in her position and was unaware of the requirement does not erase it or make it acceptable to fail to comply with those requirements. She could easily have contacted someone in the Human Resources or Labor Relations Department to get guidance on how to comply with the requirements of the JCAM and Article 16, but failed to do so. Thus, the grievant must be awarded back pay for that period pursuant to the ruling in *USPS and APWU*, H4N-3U-C 58637 (Mittenthal 1990) the arbitrator ruled that a grievant "cannot effectively grieve unless he is formally made aware of the charge against him. He is surely entitled to such [formal written] notice within a reasonable period of time following the date of his emergency placement." Slip op at 11. Here, no notice of the emergency placement was ever given to the union or to the grievant regarding the placement.

10. The union acknowledged that the grievant is a short term CCA but argued that there was only a Letter of Warning in his record and that was for working too slowly and had nothing to do with his driving activities.

11. The union also acknowledged that the grievant did not pass his first 2-Ton truck driving test but that he eventually did so. The union also asserted that there was no other discipline imposed on the grievant even though there were allegations of poor driving. The allegation that he backed into an administrative car was never proven and there was no evidence of any damage or even that he hit that car.

12. Further, the allegation that he "nearly hit" another motorist's car was likewise never proven and no discipline was issued as the result. Finally, there was the allegation that the grievant pulled out at an excessive rate of speed and was relieved of his driving duties that day based on the observations made by managers who witnessed this incident. Again, there was no discipline issued as the result and the grievant was only required to take additional training.

13. The union maintained that the concept of progressive discipline and corrective discipline are interrelated and should be considered the same. In support of this the union cited *USPS and NALC*, E16N-4E-D 18003541 (MacLean 2018) for the proposition that "...progressive discipline and corrective discipline essentially mean the same thing; discipline should be increasing in steps of severity to correct the employee's conduct." (Citing the arbitrator's previous decision in E16N-4E-D 14269005 (2014). The case involved a CCA as well and the union asserted that the lack of any prior discipline for driving infractions as well as the lack of progressive discipline makes the removal unduly harsh and punitive.

14. The union asserted that the mere allegation of misconduct, without any corroborative evidence and no discipline issued because of it cannot be considered as evidence in support of a removal. They remain mere allegations with out any supporting evidence.

15. Moreover, the union asserted that there was absolutely no evidence of any dishonesty by the grievant he was completely forthright with investigators and claimed that he was unaware that he had struck or hooked the fence. The union noted that one of the main prongs of the Service's case was that he had failed to report the accident but they never provided any evidence that the grievant knew of the accident. Even in the investigative summary the grievant said that when he saw the video showed to him was the first he had any knowledge of it.

The union seeks an award overturning the removal and reducing that to a 7-day no time off suspension; that the Emergency Placement under Article 16.7 be considered fatally flawed due to the failure to provide written notice of the charges to the grievant as required. Further that the grievant be reinstated immediately as if he had never left, and retaining his relative standing and that he be awarded full back pay from November 29, 2017 until his reinstatement.

MEMORANDUM

FACTUAL BACKGROUND

The material facts of this case were largely undisputed. The grievant was hired as a CCA in January 2017. He received training on the operation of postal vehicles, including the 2-ton vehicle he was driving on the evening of November 28, 2017. He failed the training on the first try, due to operating the vehicle above the speed limit during the training session. He eventually did pass the training though a few months later.

There were several allegations of prior driving issues with the grievant. He was alleged to have backed up a postal vehicle and hit an administrative car in the parking lot. There was very little evidence of this other than the mere allegation of it and there was no evidence that the grievant actually struck the car. He was observed getting out of his vehicle to inspect the car and his truck and then going back inside the office but there was no evidence that he reported an accident. There was no evidence of damage to either the car or the vehicle the grievant was driving and no discipline was ever issued to him as the result of this incident, if indeed it can be called that.

The Service alleged that this should be taken into consideration in determining the appropriate level of discipline but on the record presented it could not be given great evidentiary weight given the paucity of hard or actual evidence of a collision.

He was observed to have driven a vehicle out of the parking lot at what was reported to be an excessive rate of speed, getting to the sidewalk where there was fortunately no one present and then slamming on his brakes. This was done hard enough to cause the tires to screech and it alarmed the managers who saw this. He was immediately directed to turn over his keys and given remedial training and an admonition to be more careful.

There was no evidence that he was issued any formal discipline but it was clear that he was informed not to drive in such a careless manner. This evidence, while it did no arise to the level of progressive discipline in the formal sense, was significant in that it showed that the grievant was on notice of the need to drive cautiously and safely.

Finally, there was a report from a member of the public that the grievant pulled out in front of that person's car and nearly hit it. The motorist reported that he confronted the grievant about his actions and got only an obscene gesture in return. Had there been actual direct evidence of this, it would have been very sufficient but there was only a hearsay report of this without any further corroborating evidence. There was also no significant follow u or further investigation shown on this record. It frankly cannot be determined one way or the other what exactly happened in this alleged incident and this too could not be given great evidentiary weight given the hearsay nature of the report and the lack of any follow up to determine the facts.

The event that led to the grievant's removal occurred on November 28, 2017. He backed his vehicle into a parking lot to discharge his postal duties that night. This was shown by the overall evidence to be an appropriate action given the lot itself and the need to leave by pulling forward rather than backing out of the sidewalk and into a traffic lane. It was clear that at some point the grievant had to back the vehicle up in order to either get in or get out of that lot. Given the record presented, the union's claim that it was safer to back in rather than out was persuasive.

There was clear evidence that the grievant somehow struck or hooked a temporary fence that had been recently erected there by someone selling Christmas trees in that lot. The grievant indicated that he was unaware that the fence was even there and that it was not there the last time he entered that lot.

This may well have been the case but was shown to be a double-edged sword. He may well not have noticed the fence but, frankly, it was his responsibility to notice any obstruction. The union argued that carriers are "creatures of habit" and that they generally do things the same way as a matter of routine. That may be, but that alone does not and did not excuse the grievant from observing any changes to the lot, including the fence, as he entered it.

There was as noted above, some dispute about the admissibility of a very short video showing the grievant's truck leaving the lot and dragging the fence about 5-10 feet. The fence disconnected from the truck as the grievant left the lot. There was no audio with the video so it was not clear how much noise the fence may have made as it scraped across the pavement. The grievant though testified credibly that he did hear a sound but assumed that it was for the metal hampers jostling around in the back of the truck as he exited the lot. This was shown to be plausible in that there is a slight ramp out of the lot and the truck did sway back and forth a bit as it left the lot. There was however no evidence of the hampers in the back of the truck and the only evidence on this record was the grievant's testimony.

The owner of the lot emailed the post office the following day and informed them that they had reviewed the security video from the night before after discovering the damage to the fence and saw that a postal vehicle hit it. The grievant was interviewed that day and asked about the fence. He immediately indicated he was unaware he hit anything until he saw the video.[2]

There was no indication that the grievant knew he had hit the fence but it was clear that he did and damaged the fence causing some $310.00 in damage. There was some indication that the trees may have been damaged too but there was no evidence of that nor any evidence of damage to the truck. On this record, the overall evidence showed that the grievant was indeed unaware that he had hit the fence but on the other hand was not as observant as he should have been in checking his surroundings to see what obstacles were present.

There was a backup camera on the truck and the grievant thought he had used it but simply never noticed the fence. It was unclear if the backup cameras would have shown the fence or that the grievant had backed into it in such a way that he would drag it once he left. There was some evidence that he entered the lot at a slight angle and may have hooked the fence upon leaving, but this too was never investigated or shown clearly on this record.

[2] The video was allowed to be shown due to the fact that the grievant and the steward who was with him were also shown that video at the time of the investigation. The union made a formal request for all documents in support of the Service's case after the video was shown and objected to its use at the hearing. However, the union had seen it and knew of its existence. Based on that, it was admitted but showed very little other than the fence being dragged a few feet and the truck exiting the lot without any apparent damage to the truck itself and no indication that the grievant was aware that he had hit the fence.

The manager conducted the interview on November 29, 2017 but there was no evidence of any further investigation done after that. The investigation thus consisted of the interview with the grievant. He was placed on Emergency Placement at that time and sent home where he remained in a non-pay status until the NOR was finally served on him in February 2018.

There was no evidence of any formal written notification of that placement however as the JCAM and Article 167 required. He was left in that status until his removal in February 2018, almost 3 months later.

As a CCA, the grievant serves a 360-day appointment with a 5-day break in between. During the interim of this case his break occurred and he was given a new notice of appointment. This led him to believe that he would be reinstated. There was nothing given to him otherwise until the NOR in this case. This delay was a significant problem as was the lack of a formal notice of the Emergency Placement.

When the NOR was served the new steward commenced an investigation of the site where the accident had occurred in November.[3] He drew a rough sketch of the site but noted that by the time the NOR was served and the union knew what the grievant's status was, the site had changed considerably.

First and foremost, the fence was by that time gone. Second, the light was different and the conditions that were present on the night of the accident were altered as well. As discussed below, even though the grievant failed to operate the vehicle in a safe manner, the procedural issues were significant.

The Service explained that the delay in serving the NOR was due to the facility being busy and the time of year. It was clear that the holiday season is the busiest time for the US Postal Service but there was no other explanation for why the NOR was not served earlier.

Moreover, there was no explanation for why there was no formal written notice of the Emergency Placement given, within a reasonable time after the grievant was placed in that status. The manager indicated that she had not had to do this before and assumed that her verbal notice was enough.

[3] There was a different union steward present for the investigative interview than the person who testified at the hearing and who conducted this investigation on behalf of the union.

The union filed a timely grievance over the removal and asserted at the hearing that the procedural failures were fatal flaws that must result in the overturning of the discipline. Further, in support of full back pay, the lack of written notice as required by the JCAM and Article 16,7 fully supported the claim for back pay from November 29, 2017. The grievant was "left hanging" as to his status in contravention of the JCAM requirement of a formal written notice. It is against that factual backdrop that the analysis of the matter proceeds.

EMERGENCY PLACEMENT

The evidence showed that there was a procedural defect with the emergency placement. The JCAM is clear and requires that there be a formal written notice of an emergency placement under Article 16.7. There was no such written notice provided and the JCAM does not allow a verbal notice. The union also provided an adequate explanation for why there was no separate grievance over the emergency placement – i.e. because they never received formal notice of it as required. There was also a change in union leadership during this time but without a formal written notice the emergency placement was fatally flawed. The mere fact that the manager was unaware of the need for a formal written notice upon giving a verbal notice did not on this record provide an adequate justification for the placement. This will be discussed in terms of the back pay awarded herein.

INVESTIGATION ISSUES

The record showed that the investigation consisted of an interview with the grievant. There was no evidence that the managers went to the site or looked at the vehicle to make sure the backup camera was working or what it would have showed in the context of the incident the night before. There was also no further investigation as to whether the grievant really did somehow know that he had hit the fence yet tried to hide that fact or ignore it. It was clear that the grievant was surprised that he hit the fence and was forthright and honest in the investigation.

The investigation was not perfect but on this record was not shown to be fatally flawed. The mere fact that the manager did not believe the grievant when he said he was not aware he had hit the fence was not supported by the evidence but was not a fatal flaw. It did provide some support for the claim that the discipline was in some sense punitive though, discussed below.

PUNITIVE VS CORRECTIVE DISCIPLINE

It is clear that progressive discipline is not required. The union provided an award that indicated that progressive discipline and corrective discipline are the same thing. I must respectfully somewhat differ from that conclusion in this context. Perhaps generally, progressive discipline is designed to correct errant behavior and to instill a greater sense of responsibility in an employee who has violated or ignored applicable rules. Here though, the parties to the National Agreement have specifically indicated that CCA's are not entitled to progressive discipline but that any discipline must be corrective. These two statements must therefore mean that the two are not the same when applied to CCA's.

Progressive discipline is essentially an increasingly severe set of disciplinary measures to make it clear to the employee of the need to adhere to the appropriate rules and not to repeat such infractions in the future. The notion of such progressive discipline would start with a low-level discipline followed by increasingly severe disciplinary consequences for further infractions, if any, ending in removal for repeated infractions. As noted, progressive discipline for CCA's is not required.

Some infractions are so severe that removal may be appropriate for the very first offense. Theft, assault, intentional destruction of property, failure to deliver the mail may well be the sorts of offenses that call for removal, depending on the circumstances. A minor accident of this nature likely does not rise to this level.

Obviously, a removal is not corrective in that it removes the employee. That of course does not mean that a removal cannot be imposed. After efforts have been made to correct the behavior without success, a removal may well be appropriate since correction has not worked.

Here there was a bit of a mixed bag in that the grievant has been trained and counseled to operate the vehicles more safely. He has not been disciplined for his driving habits. He was given a Letter of Warning for unrelated issues but no other discipline on this record.

There was some merit to the union's claim here that on this record, given the delay, the lack of a more thorough investigation and the lack of any formal discipline for driving problems, the removal is simply too harsh, even though the grievant is a relatively short-term employee.

TIMELINESS OF THE DISCIPLINE.

This too was a serious issue in this case; frankly it was perhaps the most significant issue here in that had the NOR been served in a timelier fashion the result here could well have been different. The JCAM and Article 16 clearly require that the discipline be issued in a timely fashion. As noted, there were some issues that proved problematic in the investigation and the manner in which it was conducted as well as the timing of when the NOR was served in relation to the incident. Frankly, without these procedural issues in the investigation and the timeliness removal might well have been appropriate given the length of employment and the number of driving incidents involved in this case. Here, though the manners in which the investigation was conducted and the timeliness concerns were enough to warrant a lesser penalty.

The Service's excuse was that they were busy and that some members of management were out of the office for various reasons. Accepting this reasoning would essentially mean that any time the Service is busy, as it usually is during the Christmas Holiday season, the requirements of the JCAM and Article 16 would be negated or that they could be ignored.

That is not what the National Agreement or the JCAM allows. These requirements must be adhered to all the time and while there certainly can be exigent circumstances, such as illness or some other issue that can cause a reasonable delay, merely being busy did not on this record provide an adequate justification for why there was no action taken with respect to the grievant between November 29, 2017 and NOR served in Mid-February. This delay also was shown to cause a material alteration of the site of the accident and hampered the union's ability to fully investigate the accident and either mount a defense or provide the best advice to the grievant about his options.

On this unique record, even though the grievant was careless in the operation of his vehicle and caused a minor accident, these procedure defects in the processing cannot be ignored or glossed over.

As in the Harris award cited above, (see page 9 of the Harris award), I too found that the delay was "troubling." Arbitrator Harris upheld the removal on the facts presented to him though and the Service sought a similar finding, essentially excusing the delay here. There were several distinguishing factors though between the two cases.

First, the offense committed by the employee in the Harris case was far more serious than that presented here. The employee had threatened physical violence and used highly inappropriate and threatening language.

Further, he found that there was no prejudice to the union due to the delay. Here on the other hand, there was evidence that the scene of the accident was quite different by the time the Service got around to making a final decision as to the disposition of this case and issued the NOR in February 2018. By then the scene was different; the fence was gone, and the light was very different. There was thus some material prejudice to the union in the delay here.

A review of the awards cited by management did not provide the support it sought. While some of those awards do allow a delay between the investigation and the NOR, there were material differences in the facts of those cases.[4] In the Greenberg award the conduct was frankly so serious; i.e. theft of mail and checks contained in it, that the slight delay and failure to impose an Article 16.7 placement appropriately was seen as harmless and non-prejudicial errors. That case is thus distinguishable from the present facts scenario on a number of bases.

Having said that, the timeliness was not the complete fatal flaw the union contended in the sense that it did not result in completely erasing all the discipline on this unique record.

Even though there was some difference in the scene of the accident, it was still abundantly clear from the testimony and the overall record that the grievant hit a fence, even though his claim that he was unaware of it, was found to be credible. The fact that he apparently had no idea that he hit it was a double-edged sword here.

On the one hand, it did explain why he failed to report it – one cannot report what one is unaware of. On the other, a driver for the US Postal Service clearly needs to be aware of their surroundings and any hazards they may face including a fence that is right behind their vehicle.

The grievant further did not use the back up camera as he was backing up nor did he look around the vehicle to see if he had hit anything while backing up. These infractions and errors cannot be excused in their entirety either. Thus, while the union showed that there was not just cause for removal, there was enough evidence for some discipline. The remaining question is what that should be.

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[4] Certainly, the JCAM does not require an instantaneous Service of the NOR or other disciplinary notice after the investigation is done. Concurrence must happen with a high official and a thoughtful review of the appropriate discipline is no doubt appropriate. Here though there was little evidence of that and the overall record showed that this discipline simply sat for several months while the grievant was left to wonder about his fate.

REMEDY – APPROPRIATE LEVEL OF DISCIPLINE

The Service relied heavily on the ruling in the Duffy and Chapdelaine awards set forth above and asserted that once there has been a finding of guilt of a particular offense, it is not for the arbitrator to change the penalty.

A review of that case as well as those cited in his award as well as arbitral commentators who have opined on the notion of just cause, shows that while arbitrators should not dispense their own brand of industrial justice, the concept of just cause allows and even in some cases mandates a review of the penalty. Initially, the inquiry must be whether the discipline imposed is punitive in nature, just as the JCAM requires,

Further, the incident in the Chapdelaine award involved a vehicle roll away due to the failure to properly secure it. There was also a citation to an award in *USPS and NALC*, G06N-4G-D 12096945 (Bahakel) that there are "certain behaviors to which progressive discipline will not apply. The grievant's negligence in securing his vehicle is one of those behaviors."

This case presents a somewhat related but materially different scenario. Certainly, striking an object with a vehicle can result in serious property damage or even injury, the mere act of striking a fence did not on this record rise to the level of what Arbitrator Bahalek and Chapdelaine were implying was a "cardinal offense," i.e. one that requires removal irrespective of any progressive disciplinary scheme or a grievant's prior record.

Here too there was insufficient evidence that the grievant intentionally failed to report the November 28, 2017 incident. He testified credibly that he was unaware he hit anything. Thus, a large portion of the basis for the removal itself was found to be without sufficient evidence.

The analysis of the appropriate remedy was somewhat difficult in that an arbitrator must refrain from simply substituting their judgment for management's. Here though, there was insufficient evidence to support the claim that the grievant failed to report the accident. Had there been evidence that he DID know he had hit the fence and either tried to hide that or not to answer truthfully in the investigation this result would have been very different.

Further, while there was evidence of carelessness by the grievant, the procedural issues, even though "technicalities" are serious and cannot be ignored. Based on the above findings a removal cannot be sustained on this record.

The union argued for a 7-day no loss of pay suspension. This was rejected in that the grievant needs to be much more careful and there should be some consequence that gets his attention that operating a US Postal vehicle is a full-time job and that doing so safely is of paramount importance. The grievant testified that he regards his work at the Postal Service as a career and that he wants to work into a career carrier position in time. This is admirable but the grievant needs to know that this requires that he be more careful in the future.

Some thought was given to reinstatement without back pay. That was rejected due to the problems noted above in the emergency placement. The requirement of a formal written notice is clear and again, cannot be ignored or cast aside because the manager was unaware of it.

On this unique record the most appropriate discipline, given that progressive discipline need not be followed is reinstatement with back pay from November 29, 2017 but subject to a 14-day unpaid suspension. Thus, the grievant is to be reinstated to his former position within 14 calendar days of this award. He is reinstated with full back pay and contractual benefits subject to the 14-day unpaid suspension set forth above. Back pay is mitigated by wage, salary or government wage replacement benefits. The union and grievant are directed to provide all appropriate documentation to calculate the back pay herein.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated with back pay and contractual benefits within 14 calendar days of this award, but subject to a 14-day unpaid suspension. Back pay is to be mitigated by any wages, salaries or governmental wage replacement benefits paid in the interim. The union and grievant shall provide any appropriate documentation in order to properly calculate the back-pay award herein.

Dated: August 24, 2018

Jeffrey W. Jacobs, arbitrator