REGULAR ARBITRATION PANEL

In the Matter of the Arbitration:	Grievant: E. Dwyer Post Office: Anchorage, AK
USPS	**USPS CASE: E16N-4E-D 19135480**
and	
NALC	**NALC CASE No: 19676**

BEFORE: JEFFREY W. JACOBS, ARBITRATOR

For the U.S. Postal Service:	Robert Boston, Labor Relations Specialist
For the Union:	James Frankford, IV, Local Business Agent
Place of hearing:	1601 Northern Lights Blvd., Anchorage, AK
Date of hearing:	August 13, 2019
Date of post-hearing briefs:	Service brief received 9-11-19 (The Union closed orally and reserved a reply brief, but indicated that it would not file a reply brief.)[1]
Date of Award:	September 18, 2019
Relevant Contract provision:	Article 8, 15, 16
Type of grievance	Removal

AWARD

The grievance is thus SUSTAINED IN PART AND DENIED IN PART for the reasons set forth herein as follows: The grievant is to be reinstated to her former position as a CCA within 10 calendar days of this award with all back pay and contractual benefits reinstated, subject to a 7-day suspension, as set forth herein. Back pay is to be mitigated by any wages, salary or government wage replacement benefits paid during the interim. The arbitrator will retain jurisdiction to determine any issue regarding this award.

Dated: September 18, 2018

Jeffrey W. Jacobs, Arbitrator

[1] The parties agreed that pursuant to Article 15 and *USPS and APWU,* G06N-4G-D 10120358 (Helburn 1985) no new evidence will be allowed or considered in the parties' post hearing briefs. The union declined to file a reply brief in this matter.

ISSUE

There was general agreement to frame the issue consistent with how the Step B team framed the issue as follows: Did management have just cause to issue the grievant a Notice of Removal NOR for "Unacceptable Work Performance/Failure to Safely Operate Your Postal vehicle? 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. ...

FACTUAL BACKGROUND

The facts were straightforward and the operative events of December 21, 2018 were undisputed. The grievant is a CCA, having been first hired in 2015 in the State of Washington and later transferring to the Eagle River, AK facility. She has no prior accidents or live discipline of any kind on her record as of December 21, 2018.

There was clear evidence for the clock rings and other testimony and it is well-known that December is the busiest time of year for the US Postal Service and the grievant as well as most of not all of her colleagues worked considerable overtime that month. There was clear evidence that the grievant had worked approximately 123-124 hours in the two weeks prior to the date in question and that she had worked some 14 hours the day before with less than 6 hours rest in between shifts.

There was no dispute that on December 21, 2018 the grievant was directed to get back to the facility quickly in order to catch the 5:30 outbound truck. She was both very tired, cold, as it was December in Alaska, and hurried by her immediate supervisor to get back to the facility quickly.

When she arrived at the garage door she exited her vehicle, but neglected to put it in park, did not turn off the engine and take the keys and did not set the parking brake as required when dismounting a postal vehicle She testified credibly that she understood these rules, had been trained on them and that she simply failed to observe these well-known safety rules due to being so tired and rushed.

The vehicle, a Promaster, moved forward as she got out and hit the door, damaging it slightly. There was no damage to the vehicle and fortunately for all concerned, no bodily injury as the result of this mishap.

The grievant immediately reported the accident to her immediate supervisor as well as the Postmaster who was apparently there at the time. The grievant was placed in Emergency Placement pursuant to Article 16.7 and sent home.[2]

At the time of the accident the grievant's immediate supervisor conducted an investigation, I & I on December 22, 2018 where the grievant was both honest and candid and acknowledged the error to the supervisor. The supervisor then went on leave for some time after that, but was shown to have been back at work by the time the NOR, dated January 18, 2019 was served. The Postmaster at the facility also conducted an investigation on January 3, 2019 where the grievant again was completely forthright and honest about what had happened, how she had been trained and how the mishap occurred.

[2] The parties settled the EP matter under Article 16.7 by pre-arbitration settlement, see Joint Exhibit 4, so that matter is not at issue here. The grievant was made whole for all lost wages and/or benefits from December 22, 2018 to January 17, 2019, the day before the NOR was served.

The undisputed facts confirm that the grievant "accepted responsibility from the beginning for her actions on 12/21/2018." There was also a stipulation that the grievant's actions were not intentional. See case file at # 33.

The NOR was dated January 18, 2019, but was not signed by the grievant's immediate supervisor. it was signed by the Postmaster. The Postmaster held a phone call with the MPOO, Ms. Kvale, regarding the discipline and claimed that she was consulted before discipline was issued. The Postmaster also denied that there as any command decision at play in any of this; the record did not show that there was any direct evidence of this despite the union's inference that given the harshness of the penalty here, and the clear evidence of disparate treatment of others who have also allowed vehicles to roll away or who have been observed to be outside of the vehicle while it was running, there must be some sort of command decision. As noted, though there was no evidence of this.

There was evidence that the concurring official did not look at the entire file, but rather looked at the investigatory interviews and some of the other documentation.

The parties held an Informal A step after the filing of the grievance where the immediate supervisor appeared on behalf of the employer. There was evidence that she was eventually subject to a proposed NOR as well and did not appear at this hearing. There was some evidence from the meeting notes submitted at case file pages 352 and 353 that the immediate supervisor who handled the case at Informal A stated that he would consider lesser discipline if the Postmaster "pointed out something." It was not known what he meant by that statement, since neither he nor the steward who wrote that statement appeared at this hearing. There was also some statement that the immediate supervisor felt "not good" about the statements he had been given at the Informal A and that the union had given him "a lot to think about." Case file at 354-355. On this record there was some sense that the immediate supervisor could well have had sufficient authority to settle this grievance, especially in light of the comments made about the grievant by the Postmaster who did sign the NOR.

It was clear that the Postmaster believed that the grievant was an excellent employee. She praised her work habits, her work attitude and her diligence; stating that the grievant "made the facility better," or words to that effect. The grievant has been detailed to 204B status and did extremely well there.

It was clear from this testimony that the grievant is well regarded and it was a bit curious that she was terminated for this given the clear respect for her by the very person who signed the removal letter.

As noted, the EP was settled by pre-arbitration settlement and the NOR remains at issue in this matter. It is against that factual backdrop that the analysis of the matter proceeds.

PARTIES' POSITIONS

POSTAL SERVICE POSITION

The Service took the position that there was no violation of the National Agreement and that there was just cause for the removal given the facts of this case. In support of this the Service made the following contentions:

1. The Service asserted that the grievant has been trained in the proper and safe operation of her postal vehicle and acknowledged that she failed to move the shift lever to park when she stopped her vehicle in order to open the door to the facility on December 21, 2018, she failed to turn it off, failed to take out the keys and failed to set the parking brake.

2. She acknowledged the error and her responsibility for her actions. The door was damaged, but the Service asserted that the amount of damage is not controlling; the clear fact is that the grievant failed utterly to adhere to basic safety rules and common sense.

3. The Service also dismissed the claim that the grievant was cold and tired and noted that it was December; in Alaska. Literally everyone is cold and tired during that time of year and the mere fact that the grievant was unable or unwilling to make sure her vehicle was secured before dismounting it cannot be used as an excuse. To allow this excuse would allow this defense any time there is a safety violation, giving the Service virtually no recourse for future infractions of this nature.

4. The Service also asserted that there were no due process violations here. There was a proper investigation - in fact two - I & I's done at which the grievant admitted her error in both interviews.

5. The immediate supervisor was on leave during this time and while the National Agreement provides that "normally" the immediate supervisor is the person to issue discipline, it is not required. Here, due to the supervisor's leave, this is an allowable and reasonable exception to that general statement.

6. The Service also noted that even the supervisor was issued a proposed NOR for leaving a vehicle running while he was not in it, but it never rolled away, this demonstrating the severity and seriousness of these kinds of infractions.

7. The Service also asserted that the Postmaster considered both interviews as well as all of the facts in this case before issuing the NOR in this case. She did not receive any "command decision" and was never instructed to issue the discipline. She and she alone made the decision to issue the NOR.

8. Further, the mere fact that the grievant has a relatively clean record, does not erase the clear fact that she failed to follow basic safety rules. The Service asserted too that if every time she gets cold and tired, she might fail to follow basic safety rules could well lead to more failures of this nature – one of which could well result in injury or even death. The Postmaster indicated that it was simply lucky that the grievant was in a Promaster as opposed to some other vehicle with right hand steering. If that had been the case, the grievant might well have been directly in front of the vehicle as it moved forward due to her negligence.

9. The Service quoted from the Step B decision and argued that the union's attempts at raising due process issues were specious and without merit. There was a clear rule that was violated.

10. Further, the Service argued that there was no disparate treatment as argued by the union. The cases where lesser discipline was issued were vastly different and involved an employee being outside the vehicle while it was running. Here the vehicle actually rolled away causing damage to the garage door. It could have been much worse. The Service adamantly disagreed with the union that merely being outside of a vehicle, as the management representative once was and received a 7-day suspension for it, is not on a par with allowing the vehicle to actually rollway and possibly do great damages or grievous bodily injury.

11. The Service asserted too that while older policy statements regarding rollaway/runaway vehicles may be cited by the union, the more current Western Word AREA wide publications from 2017 are far clearer about disallowing these kind of mishaps and it is clear that now these kinds of incidents are regarded as cardinal infractions, requiring termination upon a first offense, as a way to prevent such accidents in the future. Carriers are on notice of the importance of following all such directions and to not let the vehicles roll away. The grievant simply failed to follow these rules.

12. The Service noted that carriers deliver thousands of packages at that time of year requiring them to get in and out of vehicles many times per day. Forgetting to make sure the vehicle is secured and will not roll away is one of the most important safety rules involved in their duties.

13. The Service also asserted that while discipline should be corrective, it need not be progressive for CCA's per the National Agreement. Here there is no requirement that any progressive discipline be issued and even though removal is by definition not corrective, there were no reasonable or allowable mitigating factors involved in this case that would call for reinstatement.

14. The Service argued that removal was appropriate here given the potential for serious harm or damage. The Service pointed out that a supervisor was also discharged for a very similar situation and that even though his case is still pending, it is clear that management takes these violations very seriously given the potential for bodily injury or property damages.

15. The Service cited several prior arbitral cases in support of its position. In *USPS and NALC,* E11N-4E-D 14261276 (Levak 2015) the arbitrator upheld a removal and admonished arbitrators not to disturb penalties once a violation of an applicable rule has been shown. Leniency is the province of the employer, not the arbitrator. See also, Arbitrator Dworkin in *USPS and APWU,* C1C 4E D 29701 where the arbitrator cautioned arbitrators against simply substituting their own judgment for that of the employer in disciplinary decisions once there has been a clear showing of a rule violation or infraction, and Arbitrator Benjamin in NB-W 976D (1974) where the arbitrator stated virtually the same principle.

16. In *USPS and NALC,* F06N-4D-13041675 (Ames 2018) the arbitrator held that removal of a 9-year employee did not violate the National Agreement where the employee failed to observe safety rules. He further noted that postal employees receive special training on the safe operation of their vehicles and are held to a higher standard of care than the general public as a result.

17. In *USPS and NALC,* C11N-4C-D 13306303 (Braverman 2013) the arbitrator upheld the well-established rule that CCA's are not entitled to progressive discipline and that in appropriate cases going straight to removal may be appropriate.

18. Here the grievant clearly violated several rules regarding securing the vehicle, placing it in park and setting the brake before exiting the vehicle. The mere fact that she was tired and cold should not be grounds for lessening the penalty nor should the fact that the grievant here is an otherwise good employee. The Service argued that she violated a clear rule, her vehicle rolled away and caused damage, which could have been far worse.

The Service seeks an order denying the grievance in its entirety.

UNION'S POSITION

The union contended that there was not just cause for the removal in this case. In support of this position the union made the following contentions:

1. The union made a multitude of both substantive and procedural arguments in support of its position. The union first acknowledged that the grievant failed to secure the vehicle and it did in fact roll away hitting the door. There was slight damage to the door and no damage to the postal vehicle. This was a very slow speed incident that the grievant immediately acknowledged, reported to management and has been apologizing for since the moment it happened. She has been completely forthright and honest in all her interviews, acknowledging her training and the error.

2. The union claimed that due to the extreme cold, which the union analogized to having the same impact on a person as heat stroke, the grievant was not thinking clearly.

3. Further, the union also noted that the grievant had worked almost 124 hours in the 2 weeks prior to this incident and had worked 14 hours the day before with only 6 hours of rest. The union argued that this is clearly in excess of the provisions of article 8 and ELM 432.32 and that management, by requiring CCA's to work these excessive hours, bears some responsibility for the lapse of judgment the grievant made that day due to her fatigue.

4. The union asserted that these provisions in the National Agreement and the ELM are there to prevent these very sorts of incidents, i.e. a mental lapse due to extreme weather conditions and/fatigue caused by working excessive hours. The union even provided studies on sleep deprivation that it argued supported the claim that requiring employees to work excessive hours leads to these very kinds of lapses. See case file at pages 296-322. Management should not be allowed to violate the contract by requiring CCA's to work these hours and then punish those same employees for trying to get the mail out.

5. The union also asserted that the grievant is exceptionally well-regarded by her supervisors, including the Postmaster who signed the NOR in this case. The union raised the scepter of some sort of command decision in that the Service asserted in its opening statement that the Western Word AREA wants to now make the types of incidents dischargeable for a first offense, even though arbitral precedent indicates clearly that they may not be, and that despite the grievant's excellent work history and clear record, she was fired, through a command decision. The union acknowledged that it has no "hard" evidence of that, but raised that claim by inference.

6. The union also asserted that there was no adequate notice of training provided to the grievant about this. While the union and the grievant acknowledged that she had been trained on the proper and safe way to secure the vehicle, i.e. curbing wheels as appropriate, turning off the engine, taking the keys out, and setting the parking brake, there was never anything to place the grievant on notice that she could be fired for this. In fact, the grievant testified that when she was interviewed about this, both her management and the Postmaster indicated that there may be some discipline, but that this was not a violation so severe as to result in immediate discipline.

7. The union also asserted that one of the basic tenets of discipline agreed to by these parties is that it be corrective, not punitive. The union asserted throughout the process that the discipline here was in fact punitive. The union acknowledged that CCA's are not entitled to "progressive" discipline, but are entitled to corrective discipline and cited cases for the proposition that the two concepts are tied together. Here the lack of notice coupled with the grievant's conduct makes it clear that this is purely punitive.

8. The union also raised a due process argument and noted that even though the immediate supervisor did the initial I & I on December 22, 2018, he did not sign the NOR, even though his clock rings showed that he was back by then. The union also argued that while the supervisor has now himself been the subjected of a proposed NOR, he was there at the time of the NOR in this case and should have been the one to sign it.

9. The Postmaster signed the NOR yet the immediate supervisor did the Informal A grievance step. The union cited several arbitration decisions for the proposition that having a subordinate employee conduct the Informal A results in a sham. Article 16.8 and 15.

10. When read together requires that the management representative must have the authority to resolve grievances at all steps. Here the immediate supervisor was in no position to overrule his direct supervisor. Such a situation, especially where the person could have signed the NOR shows that the Service simply violated Article 15 and 16.8 and that the whole case should be dismissed due to this process failure. Employees are entitled to adequate due process under the National Agreement and the failure to have a person with true and actual authority to adjust the discipline at the informal A step undermines the whole process.

11. The union also pointed to the NOR itself and noted the rules cited by the Service as those the grievant allegedly violated are simply wrong. One does not even appear to exist. The union asserted that it cannot mount a defense without the full knowledge of exactly which rules the grievant violated. Here one of the rules pertains to fire safety, not parking. Further none of the cited rules pertain to parking a vehicle, but rather are very general safety statements.

12. The union also asserted that there was no proper concurrence as required by Article 16 and noted that the concurring official did not even read the entire file, nor was she even shown it. The matter was apparently concluded with a phone call between the Postmaster and the MPOO in the case with little or no meaningful review of the case file. There was thus no meaningful concurrence.

13. The union also asserted that discharge is simply far too harsh and that the penalty is not related to the infraction, especially given the grievant's stellar history both as a CCA and as a 204B.

14. The union also cited *USPS AND NALC*, S4N-3A-D 37169 (Nolan 1987), where the arbitrator ruled that Article 15.2 requires that Article 15.2 and 16.8 be read together and that where there is evidence that the person at Step 1 of the grievance procedure does not have the authority to settle the case at the lowest level, the grievance must be sustained. Step 1 here was likewise a sham since the immediate supervisor was not in a position to overrule his direct supervisor. See slip op at pages 5-6, where the arbitrator observed that "if a higher authority initiated the discipline, the first level supervisor would hardly be in a position to reverse that decision." See also, *USPS AND APWU*, E00T-1E-D 04115879 (Landau 2005), in a case also from Anchorage, the arbitrator cited the Nolan decision and ruled that the since the discipline had been issued by a higher level authority, the immediate manager, who appeared at the Step 1 meeting had no real authority to settle the case.

15. In *USPS AND NALC*, G11N-4G-D 14266064 (Roberts 2015), arbitrator found that "the immediate supervisor was stripped of any authority in making a decision in this matter." Arbitrator Roberts also found that the immediate supervisor could have been available – as here and his absence was such a due process violation that the entire matter was overturned.

16. In *USPS AND NALC*, S8N-3P-D 17652 (Britton 1981) the arbitrator overturned a dismissal where it was shown that that the Step 1 grievance meeting was a "charade." See also, *USPS AND NALC* E1N-2U-D 7392 (Zuman 1984) for a similar holding where the Step 1 representative was subordinate to the Postmaster who issued the discipline. The union argued that this was essentially exactly what happened here and that Arbitrator Zuman overturned the discipline in its entirety.

17. Likewise, in *USPS AND NALC,* S8N-3F-D 9885 (Holly 1980) the arbitrator overturned the discipline where there was no showing that the Step 1 representative had the authority to settle the grievance. He regarded this as a charade. Slip op at page 6.

18. In *USPS AND NRLCA*, E95R-4E-D 01027978 (Eischen 2002) the arbitrator ruled that where there is evidence that the concurring official did not conduct a full and independent review of the matter, Article 16 was violated. Here the union argued that there was no showing that management complied with the provisions of Article 16.6 and that here was not a thorough and independent review of the discipline. It was a mere "rubber stamp" that results in a sham process; also requiring that the entire case should be dismissed.

19. In *USPS AND NALC*, G16N-4G-D 18085517 (Clarke 2018) the arbitrator followed that line of reasoning and overturned the discipline where there was evidence that there was not "two separate and independent judgments" regarding the discipline. He ruled too that the requirement of two such reviews constitutes the "heart and core of Article 16." The union argued that here the mere phone call constituted a sham and a rubber stamp, prohibited by these awards. The union also cited this award for the proposition that Article 16 was violated where the Informal A representative did not have the authority to settle the grievance there.

20. In *USPS AND NALC*, S1N-3W-D 45373 (LeWinter 1985) the arbitrator ruled that concurrence is "mandatory before the employer can issue any suspension or ... discharge." Slip op at page 15. He further ruled that concurrence may not be a rubber stamp by the upper level supervisor. It requires a degree of separate action to review the discipline. See also page 159 of the case file, District Policy memo from 1995.

21. In *USPS AND APWU*, C1C-4F-D 31656 (Cohen 1984) the arbitrator also overturned the discipline where there was no attempt to issue corrective discipline. He ruled that the supervisor must make the effort even if he feels that it would do not good. Slip op at page 6. Here it was apparent, according to the union, that no effort at corrective discipline was ever even considered, thus making the removal purely punitive. See also, *USPS AND NALC*, C11N-4C-D 13249260 (Brown 2014) where the arbitrator cited the National Award by Arbitrator Das and ruled that discipline must be corrective. He reinstated the carrier even though there had been serious safety violations shown and was found to be "fingering' the mail while delivering it. He also observed that "arbitrators are frequently confronted with rollway accidents in which vehicles improperly parked careen out of control down in incline, and even in those instances removal may not be supported by just cause depending on all of the circumstances, including longevity of employment, driving record and other factors. Slip op. at page 13. In *USPS AND NALC*, G11N-4G-D 13315076 (Durham 2013) the arbitrator noted that truthfulness in the investigation is a factor to be considered and that telling the truth can mean that the employee is correctible, thus deserving a second chance. Slip op at page 6. Here, the grievant has been entirely honest and remorseful about all of this and clearly can be corrected.

22. Likewise, in *USPS AND NALC*, E11N-4E-D 13156409 (Duffy 2013) the arbitrator overturned the discipline and noted that "escalating discipline to removal rather than applying progressive discipline usually means that the employer has concluded that the employee cannot be rehabilitated." He found that the employee there could be corrected and reduced the removal to a 30-day suspension. Here the grievant can clearly be rehabilitated and the discipline must again be regarded as punitive in violation of Article 16.

23. See also, *USPS AND NALC*, E16N-1E-D 18104423 (McLean 2018) the arbitrator also overturned a discharge where there was a rollaway. He ruled that "not every rollaway/runaway accident is so egregious that it requires summary discharge. Slip op at page 7. He reduced the removal to a 14-day suspension.

24. Here, the facts of this case are clear that the potential for serious harm was not as present as it was before Arbitrator MacLean. Similarly, in *USPS AND NALC*, C98N-4C-D 00088215 (Britton 2000) the arbitrator found that fatigue had contributed to the accident and that based on the facts of the case, and the circumstantial nature of the evidence, see slip op at page 9, there was no proof that the accident was the grievant's fault. The union argued here that even though the grievant has admitted fault, fatigue is a factor that should be considered, especially given the violation of Article 8 and applicable sections of the ELM, cited above.

25. In a case in involving a vehicle roll away, in *USPS AND NALC,* C06N-4C-D 12097464 (Roberts 2012) the arbitrator overturned a removal even though the grievant had failed to observe proper safety rules for curbing his wheels to prevent the roll away that occurred. Ruling that discipline must be corrective, and that removal in that case was not, he overturned the removal and reinstated the employee subject to a 3-day suspension.

26. The union also noted that in many of the cases where some discipline was issued, it was clear that in those cases the employees either had prior discipline or had had prior rollaways. Here there was no evidence of that at all; the grievant had a completely clean record and no indication of any similar kinds of infractions despite making literally thousands of deliveries where she has to exit and enter her vehicle. The union asserted that the expectation of perfection even though these carriers work extended hours in inclement weather, and where the hours they work are in many cases in violation of Article 8 is unreasonable. Here in light of the grievant's one-time lapse, in judgment, due to fatigue and other factors, coupled with the due process violations committed here, i.e. lack of adequate concurrence and lack of authority in violation of Article 16.8, the discipline should be dismissed in its entirety.

The union seeks an award reducing the discipline to a Letter or Warning with a retention of one year on the grievant's record. The union also requests an award sustaining the grievance, ordering that the grievant be reinstated to her former position as a CCA and that she be made whole for all lost wages, benefits and contractual entitlements, including, but not limited to seniority, annual leave, and overtime based on the average hours worked by CCA's at the Eagle River Post Office and any other remedy deemed appropriate to the arbitrator.

DISCUSSION

As noted, there were no disputes about the material facts of the case and the grievant candidly acknowledged that she made an error that caused the accident. The union also raised a number of due process related defenses to the case that will now be addressed.

LACK OF CONCURRENCE

The union asserted that there was a lack of meaningful concurrence as required by article 16 and that the concurring official, who did testify at this hearing, did not thoroughly review the entire file before concurring with the decision to remove the grievant.

The testimony here was somewhat troubling in that there was a phone call between the initiating and the concurring official, which is in itself not a fatal error. There was only the most cursory review of the file though by the concurring official. On this record though even though the concurring official did what might be termed the bare minimum review of the file, given the clear evidence of the grievant's admission, there was a sufficient review of the evidence in the file that there as not a fatal lack of concurrence.

Obviously, each such case will vary depending in the facts. Had there for example been a significant factual dispute over what actually happened the review here might well have fallen short. However, on this record, there was enough of a review of the relevant information, coupled with the phone call that did occur, that there was sufficient evidence of concurrence.

LACK OF AUTHORITY AT THE INFORMAL A STEP

This too was a bit troubling and gave the undersigned considerable pause. Generally, it is not a good idea to have a subordinate employee review the decision of a higher level one. There are certainly many cases where that had resulted in discipline being overturned,

Two things though mitigated in favor of the Service's assertion that this was not a fatal error either. First there was some evidence that the immediate supervisor, who did not sign the NOR, had relevant information about the case and even did one of the I & I's. It was clear that he knew most if not all of the relevant facts anyway.

There was also some evidence that he might well have had the authority to settle or resolve the grievance at the Informal A step, as noted above at case file pages 352-353. He indicated that he would consider lesser discipline although it was not completely clear what having the Postmaster "point something out to him," might have meant.

It was clear from these facts that the immediate supervisor – who did not testify at this hearing and himself is now apparently facing proposed removal for other matters, did not simply pass this up the chain, as some have done in the cases cited above, where this issue was raised.

Also, there was some confusion over whether the immediate supervisor was really available. It was clear that he was perhaps on duty, but the Postmaster testified that she needed to sign the NOR due to various issues with the immediate supervisor's attendance and availability. On different facts, this might well have been a greater problem, but given the evidence here, having the Postmaster sign it was not a fatal error.

Second, it was interesting that several of these awards, even those that found violations of Article 16, did not overturn the removal in their entirety. The Clarke award overturned the removal, but reinstated the grievant without back pay. Arbitrator Landau also found that there was a violation of Article 16 where the person from management who appeared at Step 1 did not have the authority to settle the case yet the employee was reinstated within 30 days.

Thus, while in most cases, having a lower level employee act at Step I/Informal A, review the discipline imposed by a higher level authority, here there was again sufficient evidence to "get over the hurdle" raised by the union regarding whether the person at Informal A had sufficient authority to resolve the grievance.

CORRECTIVE VERSUS PUNITIVE DISCIPLINE

One of the basic tenets of discipline in the National Agreement under Article 16 and the JCAM is that the discipline must be corrective and not punitive. Here there was some merit to the union's arguments.

The Service argued that rollaways are so serious that they must be regarded as cardinal offenses, warranting removal for a first offense irrespective of an employee's prior history, length of service or disciplinary record. The Service further argued that the prior policies relied upon by the union are now outdated and that more recent pronouncements have overridden those and that the newer policies call for very severe discipline, including removal, for truck rollaways, even where there is no bodily harm.

The Service also asserted that there certainly could have been here, especially if the grievant had been driving a different vehicle, requiring her to walk in front of the vehicle to work the key pad to get the door open. It was merely fortunate that she was not pinned by the truck as it rolled forward. The Service argued that the only way to prevent this is to issue a removal.

The evidence both did not support that there is some new policy that calls for removal no matter what nor was there evidence that the grievant is somehow incorrigible and could not correct her behavior. In fact, as noted, the evidence was to the contrary on both counts. The policies do not appear to have been promulgated or published to the knowledge of the union or the employees. There was insufficient evidence to establish that the policy relied upon by the Service in support of this removal was made known to the grievant or the union.

More to the point, the grievant was both forthright and absolutely clear that she follows all of the steps to secure her vehicle, but on this one day she simply was so tired and rushed that she "zoned out" and left her vehicle without even putting it in park. There was no question on this record that the grievant is an excellent employee who is dedicated to the mission of the US Postal Service and committed to her responsibilities to adhere to safe practices.

Here it was abundantly clear that the grievant both made a mistake, that it was a lapse in judgment likely caused due to being rushed, fatigued and tired from the long hours and the weather. To be clear, the claim of being fatigued and cold does not in any way excuse what happened. Neither does it provide any valid claim that one should simply shrug off an error like this. Letter carriers, especially those working in December are frequently required to work long hours. They are also expected to work in all sorts of weather, whether it is freezing cold in places like Anchorage or Minneapolis, or hot in places like Houston or Phoenix. It was clear on this record that the grievant was tired, having worked excessive hours in the days just prior to this incident and that it was cold outside – some 15-19 degrees above zero.[3] However, that fact does not also carry with it the uncompromising expectation that employees who do work more than the hours called for in Article 8 or who work in extreme weather conditions have to be perfect. While there may be consequences to actions like this, they do not always have to result in removal on the first such incident.

It was more than abundantly clear that the grievant is certainly correctible and that the removal here can be appropriately characterized as punitive, even though the Postmaster was more than complimentary about the grievant's overall record and the positive attitude and work ethic she brings to work every day.

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[3] There are certainly places that get much colder than that, but the grievant claimed that she was not used to such cold temperatures. She was from the Pacific Northwest though, so that claim did not carry as much weight as other defenses. The claim of being tired due to the requirement of working well in excess of the hours provided for in Article 8 was of some significance here however.

THE APPROPRIATE REMEDY ON THIS UNIQUE RECORD

The remaining question is what to do here. It was apparent from a review of the cases cited by the parties that arbitrators are not blind to the infractions that have occurred. They have also applied the concept of corrective discipline and the need to show that the penalty fits the infraction to reduce, but not in all cases eliminate, the discipline. Each case must, of course, be examined on its own unique facts. The cases cited were of some value in that it was apparent that in many of those, the arbitrators reviewed the penalties and made independent determinations of the appropriate penalty.

The Service argued essentially that once a violation has been established, it is virtually incumbent upon the arbitrator to follow the disciplinary decision and not disturb it. Indeed, it has been said that leniency is the province of the employer, not the arbitrator.[4]

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[4] Elkouri cited Arbitrator McCoy as follows: "Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation, and imposes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is not justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may only be slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the function of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary actions are proved – in other words, where there has been an abuse of discretion." See, *Stockham Pipe and Fittings Company*, 1 LA 160, 162 (McCoy 1945) (quoted with approval by *American Olean Title Company*, 107 LA 338, 339 (Welch 1996)); see also, *Kansas City Area Transportation Authority,* 127 LA 1196, 1206 (Wayland 2009) ("In discipline and discharge cases, arbitrators have generally acknowledged that they should not substitute their judgment for that of management as to the appropriate penalty unless they can find that the penalty imposed was arbitrary, capricious, or discriminatory."), and Elkouri & Elkouri, *How Arbitration Work*, at 348 (6th Ed. Supp. 2008) ("In exercising this authority, arbitrators do not dispense their own brand of industrial justice...").

However, Elkouri cited that same arbitrator McCoy and commented that "it is said to be axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." Arbitrator McCoy explained that "offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of improper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc. which will not call for discharge for the first offense (and usually not even for a second or third offense), but for some milder penalty aimed at correction." Elkouri 5th Ed at page 916.

I was mindful of this longstanding precedent, yet, as noted above, one of the main roles of arbitrators is to determine the appropriate penalty where there are grounds for it. There were thus adequate grounds for a review of the penalty given the entire record to warrant a lesser penalty than outright discharge. It was also shown that while this was a serious misjudgment on the grievant's part, she has indicated that she understands that what she did was wrong and would never repeat it. On that score, she was both consistent and credible.

As noted below, some deference should be given to management's authority to mete out what it feels is appropriate discipline in a given case. Still though, the notion of just cause requires a review of the penalty and, under this National Agreement, a review of whether the discipline is corrective versus punitive. It was clear from the cases cited by the union that arbitrators routinely review the penalties to determine whether the degree of discipline fits the infraction.

One of the well-established 7-tests of discipline established many years ago by Arbitrator Daugherty in *Grief Bros. Cooperage*, 42 LA 555 (1964) and *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966), is indeed "Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his Service with the Company?"[5]

It is also clear that under these parties' agreement and the long history of disciplinary decisions between them, many of which the undersigned is familiar with, it is clear that the notion of corrective versus punitive discipline is a part of the relationship and must be reviewed in order to adequately complete the analysis of whether there is "just cause" for discipline. Here the overall record showed that the penalty issued was not corrective, despite clear evidence that the grievant is certainly correctible.

The union recognized that some discipline might be appropriate. The requested remedy is for a letter of warning. That was considered, but determined to not be appropriate here due to the rollaway and the damage, with the potential for worse damage in a slightly different scenario.

Vehicle rollways are serious infractions, but, on this record, given all the factors present here, the most appropriate penalty, consistent with the above cited arbitral awards, and upon a review of the evidence on this record as a whole, is to order the grievant be reinstated to her former position as a CCA, with back pay and accrued contractual benefits, subject to a 7-day unpaid suspension.

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[5] It is clear too that in the JCAM, these tests are reiterated in some detail one of which is "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?"

Some thought was given to other results and it was noted that in at least one case the arbitrator imposed a 3-day penalty for the infraction there. That on this record seemed somewhat arbitrary in that the progressive disciplinary steps where loss of time suspensions is involved starts with a 7-day suspension. Clearly, the infraction here, albeit a negligent one and one that was not in any way intentional, was more serious than a simple letter of warning. Thus, on this unique record, a 7-day suspension is appropriate.

The intent of this award is thus that, subject to the 7-day unpaid suspension, the grievant is to be made whole for all lost wages, benefits and contractual entitlements, including, but not limited to seniority, annual leave, and overtime based on the average hours worked by CCA's at the Eagle River Post Office. Back pay is to be reduced by any wages, salaries or government wage replacement benefits received in the interim. As noted, the grievant and the union are to provide any appropriate documentation to verify the back-pay award.

AWARD

The grievance is thus SUSTAINED IN PART AND DENIED IN PART for the reasons set forth herein as follows: The grievant is to be reinstated to her former position as a CCA within 10 calendar days of this award with all back pay and contractual benefits reinstated, as set forth above, subject to a 7-day unpaid suspension, as set forth herein. Back pay is to be mitigated by any wages, salary or government wage replacement benefits paid during the interim. The grievant and the union are to provide any appropriate documentation to verify the back-pay award.

Dated: September 18, 2019

Jeffrey W. Jacobs, arbitrator