C-34761

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration:	Grievant: B. Harris
Between	Post Office: New Orleans, LA
UNITED STATES POSTAL SERVICE	**USPS CASE #'s: G16N-4G-D 20045927**
and	**DRT 08-486394**
NATIONAL ASSOCIATION OF LETTER CARRIERS	**NALC CASE #: 19652614**

BEFORE: JEFFREY W. JACOBS, ARBITRATOR

For the U.S. Postal Service:	James D'Aquin, Labor Relations Specialist
For the Union:	Corey Walton, Local Business Agent
Place of hearing:	390 West Esplanade, Kenner, LA
Date of hearing:	June 18, 2020
Date of Award:	June 24, 2020
Relevant Contract provision:	Article 15, 16, 17, 19 and 31
Type of grievance	Notice of Removal

AWARD SUMMARY

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to her former position as a CCA within 10 business days of this award with full back pay and contractual benefits subject to and reduced by the 14-day suspension set forth herein. Back pay is to be mitigated by any wages, salaries earned or government wage replacement benefits paid in the interim. The grievant and the union shall provide to the Service any and all documentation necessary to properly calculate the back-pay award herein.

There was insufficient evidence of a violation of Article 17 or 31 on this record.

Dated: June 24, 2020

Jeffrey W. Jacobs, Arbitrator

ISSUES

Did Local management violate Articles 16 and 19 of the National Agreement when they issued Letter carrier Branisha Harris a Notice of Removal? If so, what shall the appropriate remedy be?

Did Local management violate Article 17 and 31 of the National Agreement when they failed to provide the Union with information requested? If so, what shall the appropriate remedy be?

RELEVANT CONTRACT PROVISIONS

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 16.8

Review of Discipline

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

Concurrence is a specific contract requirement to the issuance of a suspension or discharge. It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before suspension or removal may be imposed, however, the discipline must be reviewed and concurred in by a manager, who is a higher level than the initiating, or issuing, supervisor. This act of review and concurrence must take place prior to the issuance of the discipline. While there is no requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so he/she may be questioned if there is a concern that appropriate concurrence did not take place.

Article 41.3.P

The employer shall promptly notify the local Union president of any job-related vehicle accidents involving city letter carriers

ELM SECTIONS

ELM 665.13
ELM 814.2
ELM 831.332
M-41 SECTION 112.4 & 812.1

FACTUAL BACKGROUND

The facts of this case insofar as they related to the motor vehicle accident, MVA, that occurred on November 11, 2019 were straightforward. On that day, the grievant was operating her postal vehicle and stopped at an intersection in the New Orleans, LA area. She had a stop sign, but cross traffic did not. She pulled into the intersection and struck another vehicle causing considerable damage to both vehicles. The record contained photographs taken at the scene that showed extensive damage to the front of the postal vehicle and the other vehicle. Both vehicles had to be towed from the scene. There was also evidence of bodily injury to both the grievant and to at least some of the occupants of the other vehicle, some of whom were young children.

The police reports were reviewed and showed that the grievant was considered at fault for this MVA and was ticketed for failure to stop at the stop sign. There were no other citations issued to the grievant, but the other driver was issued a ticket for failure to have a driver's license.[1] On this record, it was clear that the grievant failed to safely pull out from that intersection and her actions caused the MVA.

[1] There was some indication that the grievant may have said that she was looking at her cell phone at the time of the collision. However, there was no direct evidence of this and no citations for that sort of infraction were issued by the police. It was also not referenced in the NOR itself. Thus, that reference to looking at the cell phone was not given any evidentiary weight and was not considered part of this matter.

The grievant is a short term CCA and had been with the USPS since approximately June 2019 and had received training on the safe and proper operation of her postal vehicle. The overall evidence showed that her actions that day were not intentional and were simply due to a failure to maintain a watch for oncoming traffic.

The grievant was present, but did not testify at this hearing. The union argued that her testimony was not necessary since the Service bears the burden of proof on all issues.

The grievant immediately called two of her managers after the MVA and reported it to them. The evidence showed though that the manager did not contact the union as required by Article 41 set forth above, but did contact upper level managers within a few minutes of learning of the accident. It should be noted too that the date of the accident fell on Veteran's Day, a national holiday and most people at the USPS were not at work. The grievant was delivering Amazon packages that day even though it was normal non-work day for most people.

There was no evidence that the manager tried to contact the union until the following day even though she was able to reach her supervisors and did have the union president's contact information.

The manager did not fill out the Form 1769 herself since she was relatively new to the job and felt she needed the assistance of another more experienced manager, a Mr. Bastoe. He then filled out the Form 1769. It was dated November 14, 2019 and contains an entry in response to a question is to whether the accident was serious, "no." There is also an entry that the grievant should be "provided training/instruction." The I & I had not been done at that point though and no decision as to discipline had been made at the time the Form 1769 was completed. Mr. Bastoe did not testify at this hearing so it was not possible to know why he made those entries even though the photos of the MVA were available at the time the 1769 was done.

As discussed below, the investigative process went forward unusually quickly on these facts. The investigative interview, I & I was done on November 19, 2019, even though the police report was not received until the following day.

The request for discipline, which is required before any discipline can issue, was done on November 19, 2019 and the NOR was issued on November 22, 2019. The NOR was signed by Mr. Ashworth, who also did not testify at this hearing. There was an indication of review and concurrence on the NOR as well, but the person who concurred in the discipline did not testify either.[2]

Mr. Ashworth, who authored the NOR and whose statements are listed below, appeared on behalf of the Service at the Informal A step of the grievance procedure. However, as discussed below, the NOR language was clear that he had already considered other possible results short of removal and had dismissed those and further indicated that "no lesser penalty would sufficiently address the seriousness of your behavior." There was no resolution at Informal A.

At Formal A the union made requests for certain information and addressed several procedural due process issues, discussed below. There was considerable dispute about whether the requested information was given to the union. The evidence did show that the photos were provided to the union; there were no witness statements taken at the scene (which the union assailed due to the failure to notify it of the MVA until the day after when the vehicles were all moved and witnesses gone from the scene), and that any of the information the Service had was made available to the union.

On this record, while there was clearly not compliance with Article 41.3.P there was insufficient evidence to establish that management failed to give the union the requested information in its formal request.

The grievances were timely filed and processed through the grievance steps to arbitration. It is against that general factual backdrop that the analysis of the matter proceeds.

[2] It was somewhat curious that neither the issuing official who signed the NOR, nor the concurring official nor Ms. Baste who filled out and signed the 1769 were called to testify. That alone did not constitute a fatal error, but undermined the need to meet management's burden of proof, especially in a removal case.

POSITIONS OF THE PARTIES

POSTAL SERVICE POSITION

The Postal Service, Service or USPS, took the position that there was just cause for the NOR in this case. In support of that position the Service made the following contentions:

1. The Service focused largely on the events of the MVA and of the grievant's fault in causing the collision and minimized the due process issues raised by the union in this matter.

2. The Service pointed to the police report and the overall events of the MVA and asserted that it was clear that whether due to inattention, looking at her cell phone or other factors causing distraction, the grievant failed to yield to the other driver when she pulled away from a stop sign and struck a passing vehicle.

3. The Service also noted that despite what the Form 1769 might say, this was by no means a "minor" accident or a mere fender bender. Both vehicles were so badly damaged that they had to be towed from the scene. The impact was so severe that the air bags deployed. There were injuries to the occupants of both vehicles, including some children in the other vehicle.

4. The Service also asserted that the mere fact that the other driver didn't have a valid driver's license does not erase or mitigate the grievant's actions in this case. She caused the accident and was cited for failure to stop at the stop sign. Thus, whether she stopped at some point or not, the grievant caused a severe collision and caused injuries to herself and to others.

5. The Service also argued that the grievant and the union have tried to blame others for the accident; making statements such as that the other driver seemed to want to cause the accident and that the other vehicle "came out of nowhere" or that it must have been in a blind spot. The Service raised the rhetorical question as to why a person without a license would want to get into an accident? Further, blind spot or not, the operator of a postal vehicle must take every precaution to watch for oncoming traffic and operate her vehicle safely; which she obviously failed to do.

6. The Service also noted that it was Veteran's Day and that the union president was not working that day. It was thus not a violation of Article 41 to wait until the following day to notify the union of the MVA. There were photos taken that were later given to the union. Here was thus no prejudice shown as the result of the delay and nothing more the union was deprived of to do their investigation.

7. The grievant acknowledged at her I & I the duty to safely operate her vehicle. She acknowledged the safety rules and her responsibility to follow those and of her failure to see the other driver.

8. The Service also alleged that the union was given everything it asked for. There were not witness statements taken at the scene and the managers followed proper procedure.

9. The Service also noted that the manager got to the scene of the accident as fast as she could, after notifying her superiors of the incident and that there was no unreasonable delay in responding. Further, that the decision to ask another manager to assist her in filling out the 1769 was not a fatal error, but merely a prudent decision to get a more experienced and knowledgeable manager to do it right. The Service characterized this as harmless error at most that did not prejudice or adversely affect the union's rights or the grievant's due process rights in any way on this record.

10. The Service also asserted at there was no failure of due process nor any "rush to judgment; as the union contended. There is no contractual restriction on how quickly the investigative process can be completed. While the process went quickly, there was a proper and thorough investigation and proper review and concurrence by a higher manager who concurred in the decision to remove the grievant.

11. The Service noted that as a CCA the grievant is not contractually entitled to progressive discipline and that even though she has no prior discipline, the grievant is a very short-term employee with no "bank of good will" on which to draw to mitigate the penalty. She caused a serious accident due to her failure to operate her vehicle safely and her managers no longer trust her to be safe in order to protect the public, other employees and the mail.

12. The Service cited *USPS AND NALC*, G06N-4-D 13069761 (Roberts 2013) who upheld a removal and opinion that once guilt of an infraction is found, the arbitrator has no power to change the penalty. Slip op at page 9 where he ruled that he was "stripped of any authority to modify the penalty, regardless of any mitigating circumstances that may apply. The authority of the undersigned is clearly limited to deciding whether or not just cause is present."

13. He was also faced with a similar allegation of failure to notify the union pursuant to Article 41, and noted that the union president was not a work that day. Slip op page 11. He determined too that the failure to notify the union president was also not a fatal error and that nothing more could have been done to change the facts even if there had been earlier notice. The Service argued that the same things occurred here and that the presence of the union president on scene on November 11, 2019 would not have changed the facts of the accident no would it have altered the union's defenses. There was no prejudice as the result of notify the union president the following day once he returned to work.

14. In *USPS AND NALC*, C11N 4C-D 15259631 (August 2015) where the arbitrator noted that progressive discipline does not apply to CCA's and further upheld a removal to "eliminate the possibility of future liability." Here, the grievant caused a serious accident which will expose the Service to liability for property damage and potentially serious bodily injury to the occupants of the other vehicle. In order to assure the grievant will not cause future calamities it is reasonable that she be removed to eliminate that future possibility. There too, there was evidence of injury to a child – here it was multiple children.

15. The essence of the Service's position was thus that the grievant's misconduct caused a very serious accident and that her managers have lost trust in her to follow safety rules and regulations and be attentive and not cause future accidents. The Service also minimized the claimed due process violations and asserted that they were either not shown at all or that they were not prejudicial to the union's case.

The Service seeks an award denying the grievance in its entirety and upholding the decision to issue the Notice of Removal to the grievant.

UNION'S POSITION

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

1. The union characterized the MVA as an unfortunate accident that was unavoidable. The union argued that the definition of "accident" is something that is unintentional and unexpected. The union argued that the grievant took every precaution, but that due to circumstances beyond her control the collision occurred. There is no way the Service can prove that her actions were intentional.

2. The union raised several due process issues that it claimed undermined the Service's case. First the manager failed to comply with Article 41.3.P and did not promptly notify the union president of the MVA even though she was able to reach her own supervisors that same day. This deprived the union of the opportunity to go to the scene as well and conduct its own investigation. The union noted that it was well over an hour before the manager even got to the scene and the union president could have been there far earlier if only he had been notified. The union never even knew about the accident until the grievant's I & I. This was far to late and prejudiced the union's ability to defend this case.

3. The union also noted that the Form 1769 was not filled out by the manager who was on scene and who took the pictures of the accident and the vehicles involved. That person was not even called to the hearing yet in the Form 1769, the accident is not listed as "serious," yet the Service contended throughout this process that the accident was so severe that it warranted removal. Further, the only remedial action listed is retraining. There is no indication that the grievant should be removed or even disciplined for this incident.

4. The union also contended that the Service failed to give it crucial information needed to defend the removal action and thus deprived the grievant of due process rights. The union argued that the failure to provide information is a fatal flaw pursuant to Articles 17 and 31.

5. The union pointed to the provisions of Article 16 and the requirement that discipline be corrective, not punitive. The union asserted that it is clear from the NOR that the manager signing it had no intention of ever reducing the removal to a lesser form of discipline. In the NOR the issuing official indicated that there was no conceivable way a lesser form of discipline could be considered yet that same official was the Informal A representative. This "wasted" a full grievance step and turned the whole process into a charade, similar to the decision in *USPS AND NALC*, S8N-3P-D 17652 (Britton 1981). This, in the union's eyes shows that the grievant was effectively "fired" the moment the MVA happened, as far as management was concerned and shows that its actions were truly punitive.

6. The union also pointed to page 29-2 of the JCAM and argued that the mere fact of an accident does not automatically result in removal or even discipline. Each case must be examined on its own facts – here the grievant did stop and was watching for traffic, but a vehicle came out of her blind spot and the collision occurred.

7. The union also noted that at no point did anyone ever investigate the blind spot on that vehicle to determine if there is a flaw in the design of the new ProMaster vehicles. Had there been an inquiry into that it might have changed the entire tenor of this case. the union was also deprived of the opportunity to check out that blind spot allegation as well.

8. The union made much of the absence of the supervisor who actually signed the NOR and that he was never there to be cross examined or to justify why he imposed the industrial death penalty of removal. Neither was the person who actually signed the Form 1769. The union asserted that it would have been instructive to have had those individuals there, but the Service failed to even call them. This shows that they might well be hiding something or that they would not be able to justify their positions in removing the grievant.

9. The union also noted what it called the extraordinary rush to judgment on this case and intimated that the timing of all of this – being such a short time between the incident, the I & I, the receipt of the police report, the completion of the Form 1769, the need to send everything to labor, to get the review and concurrence and the issuance of the NOR – all in just a few days, shows the punitive nature of this action.

10. Finally, the removal was simply too harsh and even though there is no requirement of progressive discipline, the grievant has no prior discipline at all, discipline must be corrective. There are certainly corrective actions that could be taken - such as retraining – just as the 1769 indicated. Removal is simply excessive.

11. The union distinguished the cases cited by the Service. In the Roberts decision it was clear that the grievant had prior issues and that the MVA in that case was not his first one. That alone distinguishes it from this case, since the grievant has no prior incidents or discipline. In Arbitrator August's decision cited by the Service she found that the grievant "***knew***" how to avoid the accident and that there must therefore have been an element of gross negligence or intentionality to the events there. There was no such evidence here.

12. The union also asserted that arbitrators must have the power to review and mitigate the penalty imposed by management as showing the language of Article 16 and the JCAM. See also, *USPS AND NALC*, NC-E-5841-D (Dash 1977), requiring that the arbitrator must examine the facts of each case to determine the appropriate result.

13. The union noted several other cases in support of its position. In *USPS and NALC*, E16N-4E-D 19135480 (Jacobs 2018) the arbitrator overturned a removal where the carrier had allowed her vehicle to roll forward and hit a garage door causing some damage to the door and the vehicle.

14. In *USPS and NALC*, E16N-4E-D 18197448 (Jacobs 2018) the removal of a short-term carrier was also overturned where he had inadvertently backed into a fence, hooked it with this bumped and drove a few feet dragging the fence with the vehicle. He was reinstated with a 14-day suspension.

15. In *USPS AND APWU*, C1C-4F-D 31565 (Cohen 1984) the arbitrator outlined the contractual requirement that discipline must be corrective in nature and that for it to be corrective it must be progressive. The arbitrator noted that the grievant's supervisor had effectively predetermined that progressive discipline would be useless. The arbitrator stated flatly that the manager did not have that discretion and must attempt to issue corrective discipline.

16. The union argued here that there was no evidence of the grievant's incorrigibility – she has no prior discipline at all and no incidents involving damage to her vehicle or postal property. There is thus no reason that corrective discipline could not be effective here.

17. In *USPS AND NALC*, C16N-4C-D 18383572 (August 2018) the arbitrator reduced a removal to a 7-day suspension and opined that even though CCA's are not contractually entitled to progressive discipline they are entitled to corrective discipline. The union reiterated its same contention as in the Cohen award above.

The union seeks an award reinstating the grievant with full back pay and contractual benefits and expunging the NOR from the grievant's record and making her whole in all ways.

MEMORANDUM

The grievant is a CCA and there was no evidence of any prior live discipline on her record. There were, as noted, few disputed facts regarding what happened on November 11, 2019. The procedural issues became the focus of the case on a factual basis. What remains is to analyze those facts to determine if there was just cause for the removal.

THE NOVEMBER 11, 2019 INCIDENT

The record is clear and showed that the grievant caused the accident that day. Whether there was a blind spot or not, she had the duty to watch for oncoming traffic and pulled out from a stop sign again whether she stopped for it initially or not is not the question and struck an oncoming vehicle hard enough that it caused severe damage to both vehicles. Air bags deployed, both vehicles were inoperable and several people were taken to the hospital by ambulance. The grievant herself was injured in the accident.

The union focused largely on due process issues, some of which were found to be supported; others not, but the fact cannot be ignored here that the grievant caused a severe accident resulting in considerable property damage and bodily injury.

Having said that though, the provisions of the JCAM at page 29-2 cited above, hold true – the mere fact of an accident of this nature does not necessarily equal removal or even discipline.

THE FORM 1769

On this record it was not determined to be a fatal error to have another manager fill out or at least assist in filling out the form. Why the grievant's actual manager did not sign it and, more to the point, why Mr. Bastoe was not called as a witness, was not made clear. The lack of explanation for some of the answers that were the focus of considerable discussion at the hearing undermined the Service's case here. There was no explanation for why there was an indication that the accident was not serious and that the grievant should be retrained.

On this record though, while those issues remained unclear, it was clear that the Form 1769 itself was done begore the I & I and before the police report was received by the Service. On this record these issues were considered harmless error and did not prejudice the union or the grievant's due process rights.

FAILURE TO CONTACT THE UNION AS REQUIRED BY ARTICLE 41

Article 41.3.P is clear and requires "prompt" notification to the union of an MVA such as the one involved here. There is no definition of the term "prompt" in that language, and it was clear that the union could have been notified, just as the two upper level managers were, even though it was Veteran's Day.

The clear purpose in notification is so the union can be on scene as well, take statements of its own, take its own photos and conduct its own investigation.

There was no actual showing of prejudice on this record, but it must be stated clearly that the manager failed to comply with this provision of the National Agreement. As Arbitrator Roberts noted, in his decision cited by the Service, there was no actual showing of prejudice or that anything would have been different had the union president been on the scene that day. The grievant clearly caused the accident and was ticketed by police for failure to stop.

This determination should not in any way be taken as minimizing the clear requirement that prompt notification be done as required by Article 41 – which must mean here that notification to the union could and should have been done no later than notification to the upper level managers. This failure could well have caused a fatal error in the Service's case had the facts been different. On this record though it was not shown to be the case. The next time though it might very well be a different story.

CLAIMED ARTICLE 17 AND 31 VIOLATIONS

There was insufficient evidence of a failure to provide information to the union here – again with some consternation about the failure to notify the union of the MVA as discussed immediately above.

There was also insufficient evidence of what the union asked for that it did not receive or who whatever that information was prejudicial their case. Accordingly, the evidence did not support the claimed Article 17 and 31 violations here.

THE INFORMAL A STEP ISSUE

This was troubling. The NOR written by Mr. Ashworth shows clearly that he would not consider any lesser form of discipline than removal, yet he was the Informal A representative. One might well query how that scenario played out in light of the general agreement set forth in the National Agreement and JCAM to settle grievances at the lowest possible step. It was in fact the very sort of charade that Arbitrator Britton alluded too.

This frankly should not have happened and did to some degree demonstrate the punitive nature of this action. Furthermore, there was no evidence that the grievant could not be corrected or that is somehow incorrigible. While the facts of the MVA cannot be sidestepped or ignored on this record, this was a factor considered in the ultimate determination of what to do here.

THE CASES CITED BY THE PARTIES

Each case must be decided on its own unique facts. However, the cases cited were instructive but shows that an accident in and of itself does not automatically result in removal. The August decision cited by the union supported this view. There is also the notion that discipline must be corrective unless there is evidence that the grievant cannot or refuses to be corrected. There was no evidence of that here. What happened was unfortunate and the result of inattentiveness by the grievant, blind spot or not – but did not demonstrate that she cannot be corrected through the use of discipline and/or retraining.

The cases cited by the Service did not provide the support it sought for the removal. The Roberts decision was reviewed, especially in the portion of the decisions that seems to indicate that an arbitrator has no authority to modify the penalty irrespective of any mitigating circumstances that may be present.

Frankly, that is simply wrong. Arbitrators clearly have an inherent power to modify penalties based on the overall facts and circumstances and any mitigating factors that may be present. It is a well-established and longstanding inherent power of a labor arbitrator to fashion remedies based on the overall record and to modify penalties based on the facts of each unique case.

The JCAM language in interpreting Article 16 fully supports this notion as well. One of the mandated considerations is whether the penalty imposed is corrective or punitive. That virtually by definition, requires a review of the penalty and the evidence in any individual case. It is completely possible that an employee could well be found to have committed an infraction as charged, but that the penalty imposed for it deemed excessive or harsh or punitive, thus requiring the arbitrator to exercise the inherent power granted by the parties' agreement to mitigate the penalty.

Further, to belabor the point the agreed upon issue as stated by the Step B teams posts the question, "What shall the appropriate remedy be?" That alone gives the arbitrator the power to mitigate the penalty.

Finally, while citations to the inherent power to fashion remedies could go on for many pages, it is important to note that the US Supreme Court in the Trilogy cases in 1960 recognized this as one of the basic and inherent powers of arbitrators. See, e.g. *US Steelworkers v Warrior and Gulf*, 363 U.S. 574 (1960).[3]

It is apparent from the language of Article 16 and the JCAM discussion of just cause that these mirror the "7 tests" discussed by Arbitrator Carroll Daugherty in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966). Professor Daugherty notes that a negative answer to any of these questions may well mean that there is insufficient cause for the discipline imposed. A full discussion of these in this regard is unnecessary, but the last of them is crucial and is as follows:

> 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?

Clearly, an arbitrator has the power to mitigate the penalty under both traditional arbitration concepts as well as under the National Agreement and JCAM. Here, the penalty was determined to be both unduly harsh and inconsistent with the clear provisions of the JCAM at 29-2 regarding motor vehicle accidents. The parties agreed that the mere fact of an accident does not automatically warrant suspension or even the automatic application of discipline.

The other distinguishing feature of the Roberts decision is that there was evidence of a prior MVA with that same employee. Likewise, in the August decision cited by the Service the arbitrator noted that the grievant "***knew***" what should have been done to avoid the accident. (Emphasis in original). Here the accident was the result of negligence, but was clearly not the result of intentional or such gross negligence that removal must follow.[4]

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[3] Citations to the notion that labor arbitrators have the power to fashion remedies and mitigate disciplinary penalties could literally go on for many pages. In the interest of brevity, that need not be done here. Suffice to say that the notion that an arbitrator has, but one job to determine whether the employee is or is not guilty as charged and nothing more is incorrect. See also, *Paperworkers v Misco*, 484 U.S. 29 (1987). Elkouri and Elkouri, *How Arbitration Works*, 6th Ed at pages 960-961 And St. Antoine, *The Common Law of the Workplace*, Section 10.23. All of these commentators as well as a virtual plethora of arbitral decisions, all hold to the basic and inherent power of an arbitrator to mitigate a penalty in the absence of a clear contractual limitation to do so or a last chance agreement doing that, none of which are present here.

[4] In the August case, a CCA hit a 5-year-old child and dragged him some 19 feet causing serious, but fortunately not fatal injuries. Here, obviously, the accident could have been far worse, but there was no actual evidence of the nature and extent of the injuries to any of the other persons involved. As a side note though, the extent of damage and injuries is one factor to consider and does not by itself govern the result. Accidents can almost always "be worse." The question is whether the employee's actions, their record and the overall evidence warrant the discipline issued in any particular case.

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.[5]

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[5] 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.

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 is clear from the cases that arbitrators routinely review penalties to determine whether the degree of discipline fits the infraction. See discussion of the Daugherty 7 tests set forth above.

It is clear that a discussion of the penalty is both appropriate and even mandated by the terms of the JCAM and Article 16. Here, while there were some potentially serious due process concerns, that did factor into this decision, but one cannot also ignore the clear fact of the MVA, the grievant's role in it and that the police held her responsible and ticketed her for failure to properly stop at a stop sign.

Several options were considered. As noted, removal was considered far too harsh and punitive to be upheld. Reinstatement with full back pay and contractual benefits was also considered and given some thought due to the procedure missteps that occurred here, but was rejected due to the MVA.

Reinstatement without back pay or contractual benefits was also considered, but rejected both due to the overall record of the MVA and of the procedural error committed here.

There is always some speculation inherent in fashioning an appropriate penalty and, as some commentators have observed, it is generally not for an arbitrator to simply guess at the appropriate remedy as that is generally managements responsibility. Here though, given that the grievant has no prior discipline, a far lesser form of discipline was considered appropriate. A Letter of Warning was not considered appropriate due to the seriousness of the MVA itself and of the need to be cautious when operating a large postal vehicle. On this record, at the end of the day, the most appropriate penalty for the actions and the other issues in this was to order reinstatement with back pay, but subject to a 14-day disciplinary suspension for the MVA.[6]

[6]I was mindful of the fact that in E16N-4E-D 18197448 a 14-day suspension was issued and that in E16N-4E-D 19135480 a 7-day suspension was issued for what were far less severe incidents. There though, there were not the procedural due process problems that were present here. Had the Service been more attentive to the due process requirements the result here might well have been different, although removal would still have been considered too harsh given the overall record. There was insufficient evidence that management adhered to the requirements of Article 41.3.P or Article 15 and 16, and that while none of those would have changed the facts of the MVA, it could possibly have changed management's perception of the entire case. That is speculative to be sure, but galvanizes the requirement to adhere to agreed upon procedural requirements that are part of the parties' contractual requirements.

Accordingly, the grievant is to be reinstated within 10 business days of this award with full back pay and contractual benefits subject to and reduced by a 14-day suspension. Back pay is to be mitigated by any wages, salaries earned or government wage replacement benefits paid in the interim. The grievant and the union are to provide the Service with all appropriate documentation to properly calculate the back-pay award.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to her former position as a CCA within 10 business days of this award with full back pay and contractual benefits subject to and reduced by the 14-day suspension set forth herein. Back pay is to be mitigated by any wages, salaries earned or government wage replacement benefits paid in the interim. The grievant and the union shall provide to the Service any and all documentation necessary to properly calculate the back-pay award herein.

There was insufficient evidence of a violation of Article 17 or 31 on this record.

Dated: June 24, 2020

Jeffrey W. Jacobs, Arbitrator