

REGIONAL ARBITRATION PANEL

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In the Matter of Arbitration)	Grievant: White
Between)	
United States Postal Service)	Post Office: Harvey, LA
And)	
National Association of Letter Carriers)	USPS No.: G16N-4G-D 19411230
	Union No.: 124HARV022

BEFORE: Glenda M. August, Arbitrator

APPEARANCES:

For the U.S. Postal Service Shandrika B. Jones

For the National Association of Letter Carriers Corey Walton

Place of Hearing: 701 Loyola Ave., New Orleans, LA 70113

Date of Hearing: July 24, 2020

Date of Award: August 23, 2020

Relevant Contract Provision: Articles 15, 16 & 19

Contract Year: 2016 - 2019

Type of Grievance: Discipline

AWARD: The grievance is sustained. The Notice of Removal, dated August 19, 2019, shall be immediately rescinded and expunged from all employee records. The Grievant shall be returned to duty and made whole for all lost wages and benefits. Management shall cease and desist from withholding or delaying information, as well as other violations of Articles 17 and/or 31, and timely respond to all properly completed Requests for Information submitted by the Union.

Glenda M. August

 Glenda M. August
 Arbitrator

I. ISSUE (s)

1. Was the Notice of Removal dated November 19, 2019 issued to City Carrier Assistant Kendrick White on August 24, 2019 for "Continuous Unacceptable Attendance" for Just Cause in accordance with Articles 5, 16 and/or 19 of the National Agreement including Section 115 of the M-39 Handbook, and if no, what should the remedy be?
2. Did Management violate Articles 15, 17 and/or 31 of the National Agreement when they failed to provide the information requested by the union steward in violation of past B Team Decision and Arbitration Decision G11N-4G-D 15151845 124-205-15 which directed management to cease and desist failing to provide information relevant to a grievance, and if so, what should the remedy be?
3. Did Management violate Articles 15.2A (a), (b), (c) and 15.3A of the National Agreement when they failed to meet at the Informal A Level of the dispute Resolution Process (DRP) in violation of past Step B Decisions and Arbitration Decision G11N-4G-C 16455341/124-576-16 dated April 24, 2017 and Step 4 Settlement M-01492 which directed Management to cease and desist failing to meet at the Informal A Level, and if so, what should the remedy be?

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

ARTICLE 17
REPRESENTATION

Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

ARTICLE 31
UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information. Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or designee. All other requests for information shall be directed by the National President of the Union to the Vice President, Labor Relations. Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended. (The preceding Article, Article 31, shall apply to City Carrier Assistant Employees.)

III. FACTS

The Grievant in the case at bar is a City Carrier Assistant stationed at the Harvey, Louisiana Post Office. Management issued the Grievant a Notice of Removal (NOR) dated August 19, 2019, where he was charged with "Continuous Unacceptable Attendance". The Service initially maintained that the instant grievance was defective based on it being untimely appealed at Formal A and thus was inarbitrable. Management's Step B Representative, in their Explanation of Impasse, determined that the grievance was timely filed at Formal Step A, as received on September 6, 2019.

This DRT member acknowledged that the Notice of Removal was mailed and delivered to the Grievant on August 24, 2019, and the Union had until September 7, 2019 to meet at Informal Step A. The DRT Management member further maintained that the Union by-passed the Informal

A Level, in violation of Article 15, when they appealed directly to Formal A on September 6, 2019, one day early, thus the grievance is procedurally defective and not properly before the Arbitrator.

The Union appealed the instant grievance alleging that Management did not have “just cause” to issue the NOR. They further alleged that Management violated the Grievant’s due process rights when they failed to conduct a thorough investigation into the matter and failed to provide information requested by the Union. The case is before this Arbitrator for decision on Arbitrability and the Merits if found arbitrable, pursuant to the 2016-2019 National Agreement between the United States Postal Service and NALC.

IV. MANAGEMENT’S CONTENTIONS

Management raised the issue of arbitrability at hearing and contended that the instant grievance was not properly before the Arbitrator. According to Management, the Union by-passed the Informal A Level, in violation of Article 15, and appealed directly to Formal A on September 6, 2019, thus making the grievance procedurally defective and not properly before the Arbitrator.

The Grievant’s Supervisor testified at hearing that she wrote a letter to the Union Steward requesting that all Informal A meetings be held upon her return to work from vacation. According to the Supervisor, that letter was dated August 20, 2019 and she returned to duty on September 4, 2019. Management noted that the Union did not appeal the grievance to Formal A until September 6, 2019, after the Supervisor had already returned to duty.

The Postmaster for the Harvey, LA. Post Office also testified at hearing and he averred that the Grievant’s Supervisor requested that the Union meet at Informal A prior to appealing this grievance to the Formal A level, however, the Union refused. In his Formal A decision letter and contentions on pages 183-192 of the Joint Exhibit-2, the Postmaster asserted that it has become a standard unethical practice of the local NALC to bypass Informal A and send Forms 8190 up to step 2 and the Formal A Process, citing Management’s failure to meet at Informal A. The Postmaster alleged that the Union continues to further this practice in an effort to establish that Management is not cooperating in the process; but he contended that in the instant case, the Union Steward signed an agreement to delay *all* Informal A meetings until the Supervisor’s return from vacation (JX-2, Page 200).

Management argued that Union Steward Butler bypassed the Informal A level when filing the instant grievance. They noted that it has been thoroughly documented in Arbitration decisions

for the grievances filed by Mr. Butler for the 7-Day and 14-Day Suspensions issued to the Grievant, that they were untimely filed, had bypassed the Informal A, and thus, were time barred by Article 15.2 of the grievance-arbitration procedure. The Service held that the same is true for the case before this Arbitrator; they asserted that the Union's actions to by-pass the Informal A Step in the grievance process renders the grievance procedurally defective and it should be denied as inarbitrable.

Based on the merits of the case, Management argued that there was "just cause" to issue the Notice of Removal dated August 20, 2019 to the Grievant based on his continued unacceptable attendance. The Service maintained that the Grievant has been a non-career City Carrier Assistant at the Harvey Post Office since 2017, and his continuous unacceptable attendance and repeated failure to report for duty as scheduled, required disciplinary action. Management lists eight (8) instances of unscheduled absences in the Notice of Removal (NOR) issued to the Grievant. They asserted that although not required in the case of a CCA, the Service issued progressive discipline in an attempt to correct the Grievant's unacceptable attendance. Additionally, according to Management, the Grievant was given an opportunity to defend himself prior to the issuance of the NOR, as an Investigative Interview was held on August 6, 2020, with the Grievant and his Union Representative present. The Service maintained that during the II, the Grievant acknowledged his attendance deficiencies and simply answered "I don't recall".

It was the position of Management, that National Arbitrator Snow opined in case number C-05983 that management's investigation should do two things; give the employee the right to explain or respond to the charges, and provide an independent investigation by Management. Here, stated Management, that is exactly what occurred. The Service held that they considered all the facts of the investigation, including the employee's side of the story, before arriving at the decision to issue the Removal. Management contended that the evidence of record and testimony at hearing confirmed that a thorough investigation occurred. Further, according to Management, there was no due process violation on the part of the Service, and they noted, the National Agreement and Joint Contract Administration Manual (JCAM) do not provide a specific time frame for issuance of the disciplinary action. The Service maintained that the JCAM states in Article 16 (under Just Cause) that "Disciplinary actions should be taken as promptly as possible, after the offense has been committed". In this case, the Service argued, the Grievant had been

forewarned, via service talks, discussions and prior disciplinary actions that continued violations would be met with further and more progressive action up to and including Removal.

Management disputed the Union's argument that "just cause" did not exist to issue the Removal. They contended that Article 16 of the National Agreement and JCAM established the standards which must apply to any discipline or discharge, and further contended that the Service has met their burden to prove "just cause" existed in the instant case. It was the Service's position that rules exist within the Postal Service which require employees maintain regular attendance, and they argued that the Grievant was well aware of the rules. Specifically, Management contended that the ELM Section 511.43 stated, "***Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences,***" and they noted that Section 665.41 of the ELM provided that "***Employees are required to be regular in attendance. Failure to be regular in attendance may result in disciplinary action, including removal from the Postal Service***". The Service cited service talks, discussions and prior disciplinary action issued to the Grievant, where he was placed on notice that his attendance deficiencies must improve. Management maintained that the cited rules are reasonable rules which were established to effectively and efficiently run postal service operations; they further maintained that the Service's rules to report to work as scheduled is reasonable and directly related to business efficiency, the daily operation of their business and the performance expected of postal employees.

It was Management's position that the rules are consistently and equitably enforced as they contended that the evidence and testimony provided demonstrated that these rules have been applied fairly and without discrimination. The Service argued that the Union failed to prove or show an employee with the same record as the Grievant where no action was taken. Management reiterated that they provided clear evidence that an investigation took place which included the Grievant's opportunity at his "day in court". They asserted that following their investigation they determined that Removal was appropriate and was reasonably related to the Grievant's infractions based on the seriousness of his past record. The Service maintained that they were progressive in administering discipline and Management exercised reasonable judgment in determining the next level of action should be termination, since the Letter of Warning, 7-Day Suspension and 14-Day Suspension previously issued to the Grievant failed to correct his attendance deficiencies.

According to Management, the disciplinary action taken was done so in a timely manner since the Grievant's last absence occurred on August 3, 2019, the Investigative Interview was conducted on August 6, 2019 and the NOR was dated August 19, 2019, approximately 16 days later. Additionally, contended Management, the action taken was determined to be the only avenue to correct the Grievant's attendance issues, after prior actions failed to provide the appropriate results. The Service argued that this action was not punitive, but a result of Management's prior efforts to correct the Grievant's deficiencies which had been exhausted and indicated that the Grievant could not be rehabilitated.

In conclusion, the Service maintained that they had every right to expect their employees to be regular in attendance and report to work as scheduled. Management argued that the parties agreed in Article 3 that Management would have the "exclusive" right to take disciplinary action when needed to maintain the efficiency of the operations entrusted to it. The Service contended that the Union in this case made many arguments but failed to provide evidence to support and failed to dispute the charges made against the Grievant. Management asserted that the Grievant made absolutely no effort to retain his position with the Postal Service. They noted that EAP counseling was afforded to the Grievant, to no avail, and argued that during the II on August 6, 2019, the Grievant admitted that his FMLA case had been denied. Thus, Management contended, the Grievant was properly charged and his absences were properly annotated on PS Form 3972. As such, the Service requested that this Arbitrator decide the instant case based on the facts and evidence provided and deny the grievance in its entirety.

V. UNION'S CONTENTIONS

The Union contended that Management in the instant case, violated the due-process rights of the Grievant when they failed to provide the information requested by the Union. The Union further contended that withholding the information seriously affected their ability to defend the Grievant and this violation should result in a fatal flaw to the Notice of Removal (NOR) issued to the Grievant in this case.

The Union further contended that the NOR, dated August 19, 2019, was received by the Grievant on August 24, 2019. According to the Union, they submitted a Request for Information (JX-2, Page 46) to Management on August 28, 2019, and the local Steward notified Management

on August 29, 2019, of the need to meet at Informal A no later than August 31, 2019, (JX-2, Page 49). The Union maintained that when a meeting did not occur at Informal A, they appealed the grievance, via facsimile, to Harvey Postmaster Ponson on September 6, 2019. They noted that on September 10, 2019, Mr. Ponson requested to remand the instant grievance, as well as six other grievances, back to Informal A (JX-2, Page 84). It was the Union's contention that on September 11, 2019, NALC Branch 124 President, Steven P. Ancar, accepted Mr. Ponson's request to remand the instant grievance, along with the six other grievances, but stipulated that the remand request would be accepted only if his letter to the Postmaster served as an official 14-day extension to refile the listed grievances (JX-2, Page 85). The Union asserted that on September 11, 2019, Postmaster Ponson responded with his own letter notifying NALC Branch 124 President Ancar that instead of remanding the grievances, he was scheduling a Formal A Meeting on the seven grievances, which included the grievance in the case at bar, for Friday, of the same week.

It was the position of the Union that after notifying Management of the need to schedule an Informal A meeting on the instant grievance, the Service failed to meet, thus the Union notified the Service's Formal A Representative by appeal to Formal A on September 6, 2019. They noted that it was Postmaster Ponson who requested to remand a total of seven (7) grievances to Informal A, including the instant case, and the Union agreed. The Union asserted that it was Management who failed to agree to a 14-day extension to re-file those grievances; they noted that Management's Formal A Representative (Ponson) then scheduled the Formal A meeting and the Union met with Management on Friday, September 13, 2019. According to the Union, the grievance was timely filed, but it was Management who failed to act in good faith. The Union cited the National Agreement at Article 15.3.C where it states, "Failure of the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure. It was the Union's contention that there was no procedural error on their part regarding the timely filing of the grievance in the case at bar; it was their argument that they had no option but to meet with Management at Formal Step A on September 13, 2019, since Management failed to schedule and meet at Informal A.

It was the Union's position that the errors in this case came in the form of due process, where Management violated the Grievant's due process rights when they failed to provide the

information requested by the Union so that they could mount a defense in this removal case. The Union offered arbitral support for their contention that the “just cause” standard embodies the principal of procedural due process and cited one case that was more than four decades old. They noted that all of the cases cited showed the importance of the employee’s right to due process and that right has stood the test of time. It was the Union assertion that Management in the instant case failed to provide information that was requested by the Union in accordance with the National Agreement. They referred to page 17-6 of the JCAM where the parties have agreed to the following language:

Right to Information.

The NALC’s rights to information relevant to collective bargaining and to contract administration are set forth in Article 31. This section states stewards’ specific rights to review and obtain documents, files and other records, in addition to the right to interview a grievant, supervisors and witnesses. Steward requests to review and obtain documents should state how the request is relevant to the handling of a grievance or potential grievance. Management should respond to questions and to requests for documents in a cooperative and timely manner. When a relevant request is made, management should provide for review and/or produce the requested documentation as soon as is reasonably possible. A steward has a right to obtain supervisors’ personal notes of discussions held with individual employees in accordance with Article 16.2 if the notes have been made part of the employee’s Official Personnel Folder or if they are necessary to processing a grievance or determining whether a grievance exists (National Arbitrator Mittenthal, H8N-3W-C 20711, February 16, 1982, C-03230; Step 4, NC-S-10618, October 8, 1978, M00106; and Step 4, G90N-4G-C 93050025, February 23, 1994, M01190).

The Union further cited the parties’ agreement in the JCAM, page 31-2:

Information. Article 31.3 provides that the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or to continue the processing of a grievance. It also recognizes the union’s legal right to employer information under the National Labor Relations Act. Examples of the types of information covered by this provision include:

- attendance records
- payroll records
- documents in an employee’s official personnel file
- internal USPS instructions and memorandums
- disciplinary records

- route inspection records
- patron complaints
- handbooks and manuals
- photographs
- reports and studies
- seniority lists
- overtime desired and work assignment lists
- bidding records
- wage and salary records
- training manuals
- Postal Inspection Service Investigative Memoranda (IM)
- Office of Inspector General Report of Investigation (ROI)

To obtain employer information the union need only give a reasonable description of what it needs and make a reasonable claim that the information is needed to enforce or administer the contract. The union must have a reason for seeking the information—it cannot conduct a “fishing expedition” into Postal Service records.

Settlements and arbitration awards have addressed the union’s entitlement to information in certain specific areas. For example, the union has a right to any and all information which the employer has relied upon to support its position in a grievance (Step 4, H1C-3U-C 6106, November 5, 1982, M-00316). Note that the union also has an obligation to provide the Postal Service with information it relies upon in a grievance (Article 15). The union is also entitled to medical records necessary to investigate or process a grievance, even without an employee’s authorization, as provided for in Handbook AS-353, Guide Page 31-2 NALC-USPS Joint Contract Administration Manual - July 2014 to Privacy, the Freedom of Information Act, and Records Management and by Articles 17 and 31 of the National Agreement.

The Union maintained that they requested very specific information in order to defend the Grievant against this removal action. The Union further maintained that this issue was raised and adopted by the Step B Team; they noted that their Formal Step A Representative made a three-page contention regarding Management’s failure to provide the requested information. According to the Union, although Management’s Formal A Representative initialed all 3 pages of that contention, he never provided any rebuttal.

The case file included the Union’s Request for Information, dated August 28, 2019, which they noted was also initialed by Management’s Formal Step A Representative, yet they further noted that the case file is absent any of the information requested. The Union cited this Arbitrator in case number G16N-4G-D 18396827, dated April 20, 2019 where I concluded:

The information was not provided to the Union until the day of the Formal A Meeting which certainly, at best, would hinder the Union's ability to prepare for the Formal A and establish its contentions based on the evidence available.

The Union asserted that Management in the case at bar failed to provide the Union's requested information at any step of the grievance procedure. They argued that this was a fatal flaw to Management's removal action. It was the Union contention that before any discipline can be allowed, Management must prove that the Letter Carrier actually engaged in the conduct with which charged. According to the Union, that proof must be in the form of evidence because arguments, assumptions, guesses, conjectures, allegations, or speculations are not evidence, and the instant grievance should be dismissed based on Management's due process errors.

Regarding the merits of the case, the Union argued that Management failed to establish that "just cause" existed to issue the Notice of Removal to the Grievant. They asserted that it is well established in arbitral history that the Employer has the burden of proof in disciplinary all matters. They further argued that Management has the responsibility to meet *all* of the requirements of the just cause tenets outline in the six sub-questions listed in the JCAM under Article 16. They contended that the Service did not meet that burden in this case.

It was the position of the Union that Management's actions in the instant case were punitive and not corrective in nature. The Union asserted that a review of the 3972s included in the grievance file demonstrates that Management failed to provide attendance reviews and noted that the 3972s provided are blank under the "Attendance Related Actions & Dates, as well as under the "Reviewing Supervisor's Comments, Signature & Dates. According to the Union, it is the Supervisor's responsibility to review an employee's attendance with him/her and notate the information on the PS Form 3972. They noted that the eRMS program does not relieve Management of the responsibility to maintain the PS Form 3972.s in accordance with the Binding Step 4 Pre-Arbitration Settlement, Q98N-4Q-C 01051141 (M-01468) which states:

The RMD/eRMS is a computer program. It does not constitute a new rule, regulation or policy, nor does it change or modify existing leave and attendance rules and regulations. When requested in accordance with Articles 17.3 and 31.3, relevant RMD/eRMS records will be provided to local shop stewards.

It was the Union's position that Management, in the Notice of Removal, charged the Grievant with a violation of ELM 511.43, Employee responsibilities, however, they argued that

Management has responsibilities as well as noted in the same chapter of the ELM yet conveniently skipped the section ELM 511.42 which states:

Management Responsibilities:

To control unscheduled absences, postal officials:

- a. Inform employees of leave regulations
- b. Discuss attendance records with individual employees when warranted.
- c. Maintain and review PS Form 3972. Absence Analysis, and PS Form 3971.

The Union further argued that the grievance file is absent any PS Forms 3971, therefore there was no proof that the grievant was aware he was being charged unscheduled absences for being late. They cited the F-21 Handbook at Section 142.31 and 142.35 which the Union contended provided Management with the guidelines necessary for completing and maintaining PS Forms 3971 as well as the procedures governing employee call ins. The Union contended that without the forms 3971 which they requested but did not receive from Management, there is no evidence to prove that the Grievant was aware that he was being charged with AWOL, prior to the investigative interview.

The Union also questioned the NOR citing .08 minutes late on the date of August 3, 2019, for the Grievant. They noted that the ELM Section 432.461 provides that there is a Five-Minute Leeway Rule which states in pertinent part that **“a deviation may be allowed from the scheduled time for each clock ring up to 0.08 hour (5 minutes).”** The Union argued that the AWOL late charge on August 3, 2019 is for 5 minutes, and Management should have made every effort to correct this situation, before citing a violation which was within the leeway period. It was further argued by the Union that the Service could not establish “just cause” in this case because the Removal was punitive in nature. They contended that the Service robbed the Grievant of his due process rights when Management failed to provide the Union with the information they requested on August 28, 2019.

The Union asserted that there was no doubt in the instant case that, in the absence of due process, the instant grievance should be sustained, without any consideration of the substantive merits. Based on the evidence of record and testimony at hearing, the Union requested that the grievance be sustained in its entirety and their requested remedy be awarded.

VI. DISCUSSION AND OPINION

NALC-USPS JOINT CONTRACT ADMINISTRATION MANUAL

JCAM-(Page15-2) 15.2--- Section 2. Grievance Procedure—Steps Informal Step A (a)

(a) Any employee who feels aggrieved **must discuss the grievance with the employee's immediate supervisor within fourteen (14) days** of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. **This constitutes the Informal Step A filing date.**

15.3.C

C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (**including mutually agreed to extension periods**) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

Warning. Article 15.3.C can easily be misunderstood. It does not mean that grievances are automatically appealed if management fails to issue a timely decision. Rather, if management fails to issue a timely decision (**unless the parties mutually agree to an extension**) the union must appeal the case to the next step within the prescribed time limits if it wishes to pursue the grievance. In cases where management fails to issue a timely decision, the time limits for appeal to the next step are counted from the date management's decision was due.

Article 16 **Discipline Procedure**

16.1

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

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. It 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? If so, was the employee aware of the rule?** Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or "We posted that rule ten years ago." You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

- **Is the rule a reasonable rule?** Management must make sure rules are reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee.

- **Is the rule consistently and equitably enforced?** A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor. Consistently overlooking employee infractions and then disciplining without warning is improper. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one.

- **Was a thorough investigation completed?** Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

- **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?** The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues five-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a thirty-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used.

An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

- **Was the disciplinary action taken in a timely manner?** Disciplinary actions should be taken as promptly as possible after the offense has been committed.

ARTICLE 17

REPRESENTATION

Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

ARTICLE 31

UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information. Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or designee. All other requests for information shall be directed by the National President of the Union to the Vice President, Labor Relations. Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended. (The preceding Article, Article 31, shall apply to City Carrier Assistant Employees.)

The parties' dispute in this case centers around a Notice of Removal (NOR), dated August 19, 2019, which was issued to the Grievant, a City Carrier Assistant (CCA) at the Harvey, LA. Post Office. The NOR charged the Grievant with Continuous Unacceptable Attendance based on eight (8) cited infractions of unscheduled absences from work including AWOL and AWOL Late. The Service maintained that the disciplinary action issued progressed to Removal based the Grievant's previous disciplinary history which included a LOW, 7-Day and 14-Day Suspensions, as cited in the NOR. Further, Management maintained that the prior disciplinary action did nothing

to rehabilitate the Grievant and he continued to incur attendance deficiencies which left them no option then to terminate this employee.

According to Management, this grievance is not properly before the Arbitrator and should be deemed not arbitrable since it was not timely filed. The Service argued that the Union bypassed the Informal A Step of the grievance process and filed the case at bar directly to Formal A on September 6, 2019. The Union disputes that argument and counters with their version of the timeline for the grievance process, and provided evidence in the case file of their request for information filed on August 28, 2019, and another request to meet at Informal A by August 31, 2019. Neither request was fulfilled and the Union subsequently appealed to Formal Step A in an effort to protect the Grievant's filing and appeal rights.

Management argued that the Union was notified by the Grievant's Supervisor that she would be on vacation and unavailable beginning August 20, 2019 and all Informal A meetings would be held on her return. According to Management, the Supervisor returned on September 4, 2019, however the Union contended that the notice was open-ended and was not specific to the instant grievance. The Union further argued that they submitted their request for information (RFI) and their request to meet and file the instant grievance at Informal A, to the replacement Supervisor, and thus Management should have responded to that request, even in the absence of the assigned Supervisor. Based on the evidence of record (JX-2, Page 200), there was a Notice submitted to the NALC Shop Steward on August 20, 2019, which stated:

Effective August 20, 2019, All Informal A's will be handled upon my return.
Thanks in Advance

LaTanya Dede (Supervisor)

The notice was dated and signed by the local Union Steward, however there was nothing further communicated. There was no indication of what Informal A's were pending and no indication that the instant grievance was included. Management averred that the assigned Supervisor (Dede) returned to work on September 4, 2019. There was no Informal A meeting held, as requested by the Union by the August 31, 2019, deadline. Thus, the Union appealed the grievance to Formal Step A on September 6, 2019, in accordance with the provisions of the JCAM, Article 15.3C:

15.3.C

C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (**including mutually agreed to extension periods**) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

Warning. Article 15.3.C can easily be misunderstood. It does not mean that grievances are automatically appealed if management fails to issue a timely decision. Rather, if management fails to issue a timely decision (**unless the parties mutually agree to an extension**) the union must appeal the case to the next step within the prescribed time limits if it wishes to pursue the grievance. In cases where management fails to issue a timely decision, the time limits for appeal to the next step are counted from the date management's decision was due.

This provision actually warns the Union that it is necessary for them to actually appeal the case to the next step within the prescribed time limits to preserve the grievance. The actions of the local Union, based on this collective bargaining language, seems to have been the appropriate action, especially in the case of removal. Some of the other pending grievances might have waited on the return of the Supervisor, which was unknown since her return date was not noted on the Notice to delay all Informal A meetings; but I agree that the stakes were too high in the case of a Removal action, to risk not meeting the time limits prescribed in the agreement between the parties.

Although Management initially disputed the timely filing of the grievance at Formal A, Management's Step B Representative, fully explained the timely receipt of the NOR and filing of the grievance appeal to Formal Step A via facsimile on September 6, 2019 and agreed it was timely appealed to Formal Step A. This Management Representative argued that despite the timely appeal to Formal A, the grievance was procedurally defective because the Union by-passed the Informal A step. The Union countered and maintained that it was Management who failed to meet at Informal A, following requests from the Union to do so.

Following receipt of the Formal A appeal, on September 10, 2019, Management's Formal A Designee, Mr. Aaron Ponson, Sr, the Postmaster at Harvey, LA., sent a request to the NALC Branch 124 President (JX-2, Page 205) requesting that the instant grievance, along with six other grievances, be remanded to the Informal A step. In his September 11, 2019, letter to Postmaster Ponson, (JX-2, Page 206) the Branch 124 President, Mr. Steven P. Ancar, agreed to remand the grievances but requested to have a 14-day extension to re-file the grievances; instead Management, in a letter dated the same day, September 11, 2019 (JX-2, Page 207) set the Formal A meeting for

the following Friday, September 13, 2019. The parties met on the instant grievance and Mr. Ponson denied the grievance, which the Union appealed to Step B.

Management's Step B team member argued that the grievance should be denied as procedurally defective because the Union violated Article 15 when they bypassed Informal Step A in the grievance process. The Union attempted to meet at Informal A as supported by the evidence found in the grievance file (JX-2, Page 49); they again agreed to remand the instant grievance to Informal A on September 11, 2019, in their reply to Postmaster Ponson. The evidence does not support a finding that it was the Union who by-passed the Informal A step of the grievance process. Postmaster Ponson, by acknowledgement of the Formal A appeal and by requesting remand to Informal A further acknowledged the acceptance of the grievance for disposition. The communication between the parties which are included in the case file, clearly show that there are issues in the local bargaining relationship which need to be addressed; however, for the purposes of the instant grievance, there is no evidence to indicate that the correct grievance procedure was followed. The appeal to Formal A, in the absence of the assigned supervisor, after notifying the replacement supervisor for the need to meet at Informal A, can only be seen as an effort to protect the Grievant as he was facing the ultimate disciplinary action, which is Removal. The question of arbitrability raised by Management at Arbitration, based on the alleged procedural error by the Union is denied. The grievance is found to be arbitrable.

The Union raised contractual issues in addition to the issue of "just cause" for the disciplinary action in this case. The first issue was whether or not Management violated Articles 15, 17 and/or 31 of the National Agreement when the Service failed to provide the information requested by the Union Steward, in violation of previous Step B Team Decisions and Arbitration Decision G11N-4g-C 15151845/124-205-15 which directed Management to cease and desist failing to provide information relevant to a grievance. The Union further alleged that Management violated Articles 15.2 and 15.3 when they, in fact, failed to meet at the Informal A Level of the grievance process in violation of prior Step B and Arbitration decisions included in the grievance file. These issues were raised in addition to the Union's arguments that the Notice of Removal dated August 19, 2019, was issued without "just cause".

Central to the Union's case is the procedural due process violation alleged when Management withheld information that the Union deemed necessary to mount a defense for the

Grievant. The Union relied on the arbitral opinion of Arbitrator William E. Renfro in case number NC-W-15, 975-D, dated April 9, 1979, where he stated in pertinent part:

A review of recent arbitral awards in disciplinary cases reveals a growing consensus among arbitrators that a just cause standard, to which discipline is contractually required to conform, embodies the principle of procedural due process...Rather, arbitrators have recognized that particular due process concerns are implicitly addressed by the parties in negotiating employee rights to grieve disciplinary action; and, are inherent in any contractual provision requiring an employer to establish just cause for disciplining or discharging employees.

Thus, it can be seen that due process is not a mere technical requirement; it is an integral part of the just [cause] clause that the parties have agreed upon. For an arbitrator, in construing a just cause clause, particularly where discharge is involved, to reach a determination without considering whether due process has been afforded a Grievant is to invite the very labor unrest the parties hoped to avoid in including such a clause in their collective bargaining agreement. (Osborn & Ulland, Inc., and Retail Store Employees Union, Local, 77-ARB II (Michael Beck).)

Arbitrator Renfro went on to discuss other sources in his discussion of procedural due process and noted the discussion in CCH's Current Comment and CCH Analysis, §58,572.-5 which held that "Failure to afford an accused man his full rights under the law will invalidate the entire proceedings against him", as witnessed by many Supreme Court decisions. It is not strange, then, to find the idea of procedural due process well established in the field of industrial and labor relations dealing with discipline."

The Union oftentimes raises the issue of failure to provide information, however, more often than not it is the delay of information which is at the core of the allegation. In the instant case, we have a Request for Information which the Union presented as evidence, and was included in the case file, yet Management did not rebut the fact that the information was not provided. Also, there was no indication that the information was provided to the Union at any level subsequent to Informal A. Management at Formal A acknowledged the request, by his initials on the form, but the information requested was not provided to the Union or made part of the grievance file. The JCAM at Article 31.3 clearly provides clear and unambiguous language regarding Requests for Information submitted by the Union and their right to receive that information.

Information.

Article 31.3 provides that **the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or to continue the processing of a grievance.** It also recognizes the union's legal right to employer information under the National Labor Relations Act.

Particularly where the grievance being processed is one of disciplinary removal, and where the stakes are very high, it is imperative that all requested information be provided so that the Grievant has the best opportunity at a defense. Without assuring the accused man (in this case the Grievant) his full rights under the law, it invalidates the entire proceedings against him. The fact circumstances in the instant case shows that Management failed to rebut the Union's allegation that the Request for Information was not satisfied. The evidence of record further demonstrated that the Service failed to provide the requested information, thus, this Arbitrator *cannot* be assured that the Grievant was provided his full rights under the Collective Bargaining Agreement.

The Joint Contract Administration Manual (JCAM) at Article 16, requires that "*no employee may be disciplined or discharged, except for just cause*", the JCAM explains that prior to the issuance of discipline, Management must review the elements of "just cause" and be able to satisfy all questions, which were established by Arbitrators reviewing disciplinary actions, to decide if Management did indeed prove that there was a need to take action, as well as prove that action was necessary at the level imposed. The Service's failure to provide the information requested by the Union and its absence from the grievance file, not only denied the Grievant's ability to mount a defense, but by doing so, Management failed to provide the evidence necessary to prove that just cause existed. To uphold a Removal, the ultimate disciplinary action, the Employer must prove by clear and convincing evidence, that the Grievant was guilty as charged.

Prior disciplinary action can be used to assist in determining the appropriate level of discipline necessary, but it cannot be used to determine guilt. Simply proving that an employee has had an attendance problem in the past is insufficient to support termination. An employer must satisfy all questions of just cause, including that a thorough investigation was conducted. The grievance file lacks the evidence necessary to prove that fact, particularly without the inclusion of

the PS Forms 3971s and other documents requested by the Union. The Union's arguments regarding the lack of Supervisor input on the forms 3972s also has merit, but must be reviewed in the context of their inability to fully prepare their defense due to the lack of information provided.

The Union relied on arbitral opinion to support their position in this case; one case submitted by the Union was reviewed by Arbitrator Louise B. Wolitz. In case number G11N-4G-D 16010412, Arbitrator Wolitz found that Management failed to meet their burden of proof that just cause existed to Remove the Grievant and that the Service withheld information from the Union. She further concluded:

By denying the union the necessary information to conduct a proper investigation and denying the grievant a chance to face his accuser, management has denied the grievant his due process rights. The Union cannot fairly represent the grievant to the best of their ability nor put forth a proper defense without access to the information relied upon by management in their decision to remove the grievant. The Union asserted this at the Formal A meeting, as can be seen in their contentions (Joint Exhibit 2, pages 13-14). Management did not dispute the union's contentions at Formal A, so they should be considered undisputed facts by the arbitrator.

Likewise, in the instant case, Management did not dispute the Union arguments that their Request for Information was not satisfied, and the evidence of record supports this contention. There can be no other assumption than that the Union in this case cannot fairly represent the Grievant or put on a proper defense. As concluded by the Supreme Court and cited by Arbitrator Renfro in the aforementioned cited decision, "Failure to afford an accused man his full rights under the law will invalidate the entire proceedings against him"; the same applies to the Grievant's rights under the collective bargaining agreement. Management's violation of Article 17 and 31 denied the Grievant due process, thus invalidating the Removal.

Based on the evidence of record and the fact circumstances in the instant case, the grievance is sustained. The Notice of Removal, dated August 19, 2019, which was issued to the Grievant, shall be immediately rescinded and expunged from all employee records. The Grievant shall be returned to duty and made whole for all lost wages and benefits. Management shall cease and desist from withholding or delaying information, and other violations of Articles 17 and/or 31, and timely respond to all properly completed Requests for Information submitted by the Union.

AWARD

The grievance is sustained. The Notice of Removal, dated August 19, 2019, shall be immediately rescinded and expunged from all employee records. The Grievant shall be returned to duty and made whole for all lost wages and benefits. Management shall cease and desist from withholding or delaying information, as well as other violations of Articles 17 and/or 31, and timely respond to all properly completed Requests for Information submitted by the Union.

Glenda M. August

GLENDAM. AUGUST
Arbitrator

August 23, 2020

New Iberia, LA