

Regular Arbitration

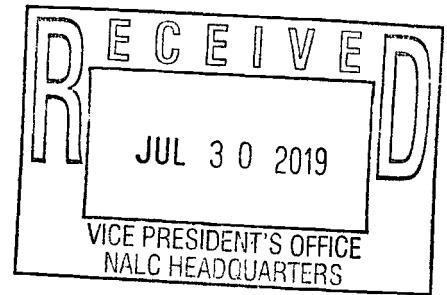
In the Matter of the Arbitration)	
)	
between)	Grievant: Dixon
)	
United States Postal Service)	Post Office: Ft. Lauderdale, FL
)	
and)	USPS Case No: G16N-4G-C 18318958
)	
National Association of Letter Carriers, AFL-CIO)	DRT No: 09-450555
)	NALC Case No: F18829

Before: Roberta J. Bahakel, J.D., Arbitrator

Appearances:

For the U.S. Postal Service:	Mr. Alex Sanchez
For the Union:	Mr. Jerrel Kinloch
Place of Hearing:	Ft. Lauderdale, FL
Date of Hearing:	May 30, 2019

Award:	
Date of Award:	June 24, 2019



Panel:	Region 9/Southern
--------	-------------------

Award Summary:

The grievance is sustained. The Letter of Demand for \$7,494.16 is hereby set aside and the Grievant is found not to be liable to the Postal service for damage to the Oakland Park east exit gate on November 30, 2017.

Roberta J. Bahakel

 Roberta J. Bahakel

Lynne Pendleton, NALC
National Business Agent

JUL 2 2019

Region 9
RECEIVED

BACKGROUND

The Grievant, Mr. Dixon, is a letter carrier in Ft. Lauderdale, FL. On November 30, 2017 he left work at the Oakland Park office in Ft. Lauderdale by a gate on the east side. The Grievant testified that when he came to the gate it was open, so he proceeded on through without stopping. The gate, which slides open and closed, closed while the Grievant was driving through, striking the rear quarter panel behind the rear wheel well of the Grievant's truck. The Grievant testified that he heard a noise and looked back to see the gate retreating after hitting his truck. He continued home without reporting the incident to Management. After Management investigated the damage to the gate the Grievant was subsequently disciplined for leaving the scene of an accident. Several months later, on June 28, 2018, the Grievant received a Letter of Demand in the amount of \$7,494.16 for the cost of the replacement of the gate. This grievance is only in regard to the Letter of Demand issued to the Grievant.

ISSUE

Did Management violate Article 19 and 28 of the National Agreement by issuing Kwame Dixon a Letter of Demand (LOD) - Bargaining Unit Employees dated June 28, 2018, in the amount of \$7,494.16? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 28

EMPLOYER CLAIMS

The parties agree that continued public confidence in the Postal Service requires the proper care and handling of the USPS property, postal funds and the mails. In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefor.

Section 3. Damage to USPS Property and Vehicles

An employee shall be financially liable for any loss or damage to property of the Employer including leased property and vehicles only when the loss or damage was the result of the willful or deliberate misconduct of such employee.

DISCUSSION

I have reviewed the testimony and evidence presented at the hearing and considered the written closings submitted by the parties, the last of which was received on June 7, 2019. No argument has been raised regarding the arbitrability of this matter, therefore it is properly before me for decision.

The Union contends that the Grievant should not be held responsible for the damage to the Postal Service's gate and that the Letter of Demand for \$ 7,494.16 should be set aside. The Union argues that the provisions of Article 28 only hold an employee financially responsible for loss or damage to postal property in cases where the damage was the result of willful or deliberate misconduct by the employee and in this case the Grievant's actions did not rise to that level. The Union contends that the Grievant was leaving work like any other day and when he saw that the gate was open, he drove on through. The Union argues that the evidence showed that the gate closed on the rear portion of the Grievant's truck and there was no evidence that the gate was beginning to close before the Grievant drove through. There was nothing willful or deliberate about his actions that would support the issuance of a Letter of Demand under Article 28.

Management contends that the Grievant's actions were willful and deliberate in that he failed to stop at the gate before exiting and that he speedily drove through the gate. Management contends that it is likely that the gate was already beginning to close and that the Grievant tried to beat the gate, but it struck his truck before he was all the way through the opening. Management also contends that if the Grievant was not at fault then he would have reported the incident immediately after it happened instead of leaving the scene and never reporting the incident.

The testimony and evidence presented at the hearing showed only that the Grievant's truck was struck by the gate as he was going through. The video of the gate area played at the hearing does not show the gate and its movements or give any indication as to whether the gate had started to close before the Grievant began to drive through it. There is also nothing that shows the gate actually hitting the Grievant's vehicle. All that is visible on the video is the Grievant driving through the gate without stopping.

Article 28 sets out the parties agreement that an employee will be liable for damage to postal service property only when the employee's actions are the result of willful or deliberate misconduct. Management argues that the fact that the Grievant did not 1) stop at the gate and 2) report the incident to Management infers willful or deliberate misconduct on his part, thereby causing him to be responsible for the cost of the repair/replacement of the gate, while the Union argues that driving through an open gate is not sufficient to meet the willful and deliberate misconduct provisions of Article 28.

The parties submitted citations from previous arbitrations where the language of Article 28, Section 3 was discussed and interpreted. Arbitrator Nicholas Zumas explained his interpretation of the phrase "willful or deliberate misconduct" as it applies to Article 28.3 more than 30 years ago. He stated:

"A willful or deliberate act is commonly defined as one that is done intentionally, knowingly and purposefully, without justifiable excuse. This is distinguished from an act that is done carelessly, heedlessly or inadvertently."

Arbitrator Stephen Wolf opined in 2002 that :

"The standard of "willful and deliberate misconduct" has been frequently addressed in arbitration ... These cases, in the main, find that committing of a negligent act that causes damage plainly does not, without more, trigger Article 28, Section 3. ... the act that caused the ... damage must have been shown to be "so unreasonable as to go beyond simple negligence."

Willful and deliberate misconduct falls under the umbrella of negligence. Generally negligence can be divided into subcategories with ascending levels of culpability: ordinary negligence; gross negligence; and willful, wanton or reckless conduct. Ordinary negligence is often referred to as the “reasonable person” standard, which requires individuals to conduct themselves as a reasonably careful person would under like circumstances. Ordinary negligence occurs when someone does something that a reasonably careful person would not do under similar circumstances, or fails to do something a reasonably careful person would do. Gross negligence requires conduct substantially higher in magnitude than ordinary negligence. It can be defined as a heedless violation of the rights of others, amounting to indifference or carelessness so far as the rights of others are concerned. The third type of negligence -- willful, wanton or reckless conduct, is just a shade below actual intent or deliberate behavior. Establishing that an action is willful, wanton, or reckless involves showing with a high degree of likelihood that substantial harm will result to another. In my determination two things distinguish willful, wanton, or reckless conduct from ordinary or gross negligence. First, the individual must knowingly or intentionally disregard an unreasonable risk and second, the risk must entail a high degree of probability that it will cause substantial harm.

The parties in Article 28 set the standard of willful and deliberate misconduct as the determining factor in whether an employee shall be financially liable for any loss or damage to property of the Employer. The burden is on Management to show that the Grievant’s actions meet that standard when it seeks to collect for damages to its property.

The evidence presented at the hearing establishes only that the Grievant did not stop before passing through the gate. The Grievant testified that he did not stop at the gate because it was open when he arrived. While Management contends that the Grievant saw the gate begin to close and was trying to beat the gate, no evidence was submitted to support this contention. Nor was there evidence presented to indicate that the Grievant’s speed was greater than any other of the vehicles shown on the video. The photos of the damage to the Grievant’s truck established that the Grievant’s vehicle had almost completely passed through the gate before it was struck. Management argues that the Grievant’s failure to stop and report the accident is evidence of his guilt in attempting to beat the gate. Without other evidence to

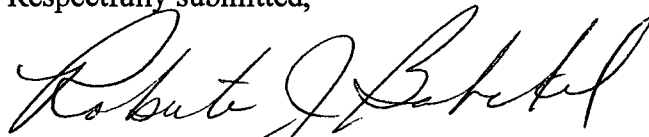
corroborate Management's contentions, there is insufficient evidence to infer the Grievant's guilt or to establish that the Grievant's actions constituted willful or deliberate misconduct as opposed to mere negligence. After reviewing the evidence presented it is my determination that Management was not able to show that the Grievant's actions rose to the level of willful or deliberate misconduct as set out in Article 28.3.

DECISION

The grievance is sustained. The Letter of Demand for \$7,494.16 is hereby set aside and the Grievant is found not to be liable to the Postal service for damage to the Oakland Park east exit gate on November 30, 2017.

Done this 24 day of June, 2019.

Respectfully submitted,



Roberta J. Bahakel,
Arbitrator