C-24822

REGULAR ARBITRATION

In the Matter of Arbitration Under the Labor Agreement Between:	) GRIEVANT: L Hill-Childress
UNITED STATES POSTAL SERVICE The Employer or Service	) POST OFFICE: B-C Station, Cleveland, OH
-And-	) MANAGEMENT CASE No: C01N4CD03121003
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO The Union or NALC	) UNION CASE No: BR030322; DRT 11-042490) ND 2771

BEFORE: NICHOLAS DUDA JR., ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:
Tia Hicks
Labor Relations Specialist
2200 Orange Avenue, Rm 220
Cleveland, Ohio 44101-9401

For the NALC:
Todd Brew
Arbitration Advocate
2012 West 25th Street, #705
Cleveland, Ohio 44113

Place of Hearing: Cleveland, Ohio
Date of Hearing: September 10, 2003
Contractual Violation Alleged: Article 16, Section 7

AWARD

The Service has not shown by a preponderance of the evidence that Grievant's alleged actions violated safety rule or regulations or presented such threat of injury to herself or others that immediate off-duty status (without pay) was justified.

The Service is directed to rescind the action and make Grievant whole for the period she was on off-duty status under the April 8, 2003 letter.

Nicholas Duda Jr., Arbitrator
November 28, 2003

NATURE OF THE CASE

On April 8, 2003 Acting Supervisor Donald Flak was making street observations of Carriers delivering mail. Twice he observed Grievant. After the second observation he confronted her on the sidewalk, demanded and received her keys and had her driven back to the station, where she waited until given a written notice by Flak of her "Placement in Off-duty Status." She left and then initiated the subject grievance. After the grievance was not resolved in the grievance procedure the Union appealed to arbitration. This Opinion and Award decides the issues in the subject case.

THE ARBITRATION HEARING

The Parties jointly submitted the case file and other documents, and each Party then presented an oral argument. Before presentation of testimony and documentary evidence the Parties jointly requested a site visitation with the Arbitrator. One vehicle, containing the advocates, Grievant, Supervisor Flak and the Arbitrator traveled the same traffic pattern and stops made by Grievant and Supervisor Flak on April 8, 2003. At each stop Mr. Flak and Grievant testified. Later, back at the hearing room Supervisor Flak and Station Manager Howard offered more testimony for the Service. For the Union, Steward Drucker and Vice President Bill Barnes testified about processing the subject grievance and discipline of other Carriers for alleged "safety offenses."

After closing arguments both Parties submitted arbitration citations.

GRIEVANCE CASE FILE

April 8, 2003 Letter to Grievant from Supervisor Donald Flak

. . .

...you are...in an off-duty status (without pay) effective Tuesday, April 8, 2003 at 12:30 p.m., and will continue in this status until you are advised otherwise.

The reasons for this off-duty action are:

On April 8, 2003 at approximately 11:31 a.m., you were observed not wearing your seat belt and making a U-turn in the middle of St. Claire and Addison. This action is being taken in accordance with Article 16, Section 7 of the National Agreement which states: 'An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves...failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, or where the Employee may be injurious to self or others.' Your actions are being investigated and you will be advised when the investigation is complete.

You have a right to file a grievance...within fourteen days of your receipt of this notice.

. . .

May 16, 2003 USPS/NALC Joint Step A Grievance Form

. . .

Issue Statement

Violation Article 16. Inappropriate application of 16.7. See attached documents.

Union's Contentions

...Acting Supervisor Donald Flak alleges that Grievant mad a U-turn on St. Claire Avenue while not wearing a seat belt. Mrs. Hill denies both allegations....

...According to Ohio Law U-turns are permissible when there is no posted sign in the area.

. . .

...If the action is discipline for alleged misconduct, then Mgmt. Is subject to a Just

Cause Test. ...Just Cause...is divided into 6 sub-questions:

Is there a rule? No.

Is the rule a reasonable rule? No.

Is the rule consistently and equitably enforced?

Was a through investigation completed? No.

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? No.

Was the disciplinary action taken in a timely manner? No.

There are no specific rules or regulations concerning U-turns. Was the severity of the discipline reasonably related to the infraction and in line with that usually administered? No, there was no infraction. Was the disciplinary action taken in a timely manner? No.

Station Mgmts Actions are in violation of Article 16.7. This is not why the provision was created. Mgmts actions are also disparate as well as harassing. A 4584 dated 4/8/03 alleges a carrier had exited the vehicle while still running. The employee was not disciplined nor put in a emergency placement status. Mrs. Hill also has no record of any accidents. No employee...had been placed in a non-duty non-pay status for an alleged safety violation. Grievant's door was closed and she was wearing her seat belt....

...Mr. Donald Flak has nothing to corroborate his allegations, other than the 4584 filled out by him.

. . .

Joint Step A--Denial of Grievance

. . .

Reasons for Decision

Ms. Hill-Childress...is a danger to herself and others and she violated safety rules and regulations and this falls under the emergency procedure.

. . .

Management's Position
Management did not cause or make Ms. Hill perform serious safety violations on March 26, and April 8, 2003. Emergency placement was the correct thing to do.

June 10, 2003 Step B Decision

. . .

The NALC...contends that management used the Emergency Placement to the grievant, Ms. Childress, without just cause.

The Emergency Placement dated April 8, 2003 states that the action was taken in accord with Article 16, section 7 of the National Agreement....

Though the Postal Service may act immediately in allowing them to place a carrier in this status, the Joint Contract Administration Manual (JCAM) under Article 16 of the N/A suggests that actions of alleged misconduct must meet the criteria of 'just cause.'

Under the principles of 'just cause' certain basic considerations must apply before issuing discipline.

. . .

The Carrier is a Regular Full-time employee with seventeen years of carrier service and her accident record with the Postal Service shows one industrial accident (1-99) in the past five years and no vehicle accidents.

The union requests a remedy of rescinding the Emergency Placement in Off-Duty Status dated April 8, 2003 and making the grievant whole.

The USPS...contends.... Grievant, a sixteen-year letter carrier has repeatedly violated Postal rules and regulations, and it is because of her continued disregard for these rules and regulations that the Agency was forced to place her on an emergency off-duty status. (underline by Arbitrator)

On March 26, 2003 the grievant was observed by Acting Supervisor Flak traveling west on Linwood Ave. riding with the driver's door opened and not wearing her seat belt. Not only are these flagrant violations of Postal rules and regulations, but wearing a seat belt is a law in the State of Ohio. Handbook M-41...states: 812.1 Seatbelts must be worn and vehicle doors kept closed at all times the vehicle is in motion.

The grievant continued, turning north onto East 55th St. and stopped at the traffic light at East 55th St. and Payne Avenue without using her turn signal; another violation.

When questioned...the grievant chose not to respond....

On April 8, 2003, at approximately 11:31 AM, the grievant was observed making a U-turn in the intersection of Addison and St. Clair Avenue and again not wearing her seatbelt....

. . .

Supervisor Flak then informed the grievant that because of the repeated serious safety violations, she would not be permitted to continue operating the LLV and would be transported back to the unit. After returning to the unit, the grievant was informed that she was being placed on emergency placement, pending investigation. (underline by arbitrator)

. . .

...the grievant's prior disciplinary record was considered prior to taking this action:

- Removal dated January 8, 2002, that was reduced....for Failure to Maintain a Regular Work Schedule and Absent Without Official Leave.
- Removal dated July 12, 2001, reduced to a 45-Day...for Absent Without Official Leave.
- 21-Day Suspension dated February 29, 2000 for Failure to Maintain a Regular Work Schedule and Absent Without Official Leave.
- 21-Day Suspension dated November 10, 1999 for Failure to Maintain a Regular Work Schedule and Absent Without Official Leave.
- 14-Day Suspension dated June 6, 1999 for Failure to Maintain a Regular Work Schedule and Absent Without Official Leave.
- 14-Day Suspension dated October 14, 1998 for Failure to Follow safety Rules and Regulations, Failure to Work in a Safe Manner, and Failoure to Follow Instructions.
- 7-Day Suspension dated August 6, 1998 for Failure to Maintain a Regular

Work Schedule and Absent Without Official Leave.

- Letter of Warning issued June 29, 1998 for Failure to Maintain a Regular Work Schedule and Absent Without Official Leave, Failure to Follow Instructions, and Unauthorized Extension of Work Hours.

It was stated in the grievant's Last Chance Settlement Agreement, that 'grievant must abide by **all** postal rules, regulations, and policies. Violation of the rules and regulations will result in grievant's removal from the Postal Service.' The grievant failed to adhere to the terms of this agreement, again forcing the Postal Service to take corrective action.

. . .

Based on the grievant's pattern of progressive discipline and the direct violation of the Last Chance Settlement Agreement, the grievant has demonstrated her lack of desire to improve her behavior. Management was thereby forced to seek more severe discipline.

The USPS Team member requests the Emergency Placement be upheld.

POSITIONS OF THE PARTIES AT ARBITRATION

POSTAL SERVICE POSITION

...this case is about carelessness and a total disregard for postal safety regulations. ...the grievant was placed on emergency placement in accordance with the provisions of Article 16.7 of the national Agreement. ...Section 16.7 Emergency Procedure of the National Agreement...clearly states...'an employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves failure to observe safety rules and regulations or where the employee may injurious to self or others.'

On March 26, 2003 the grievant was observed driving with her door open and not wearing a seat belt. And on April 8, 2003 the grievant was observed again without wearing a seat belt and making a u-turn in the middle of a business intersection; not only jeopardizing the safety of herself but also others. ...City Carriers handbook M-41 section 812.3 states, 'seatbelts must be worn at all time the vehicle is in motion.'...

. . .

> ...the Postal Service has a duty to its employees and the public to work and drive postal vehicles in a safe manner. ...We respectfully request that you award this emergency placement and the grievance be denied.

Grievant was placed "off the clock" for safety violations. Because she was not disciplined, the rules about discipline do not apply.

On March 26, 2003—only two weeks before the subject incidents on April 8, 2003—Grievant had been driving with her door open and without wearing her seat belt. She had previous discipline for various violations, including safety violations. It is bad public relations for the Postal Service for the public to see a Carrier not following safety rules.

NALC CLOSING STATEMENT

Management has not shown jut cause to place Grievant off duty immediately on April 8, 2003 and continuing until June 30, 2003, to handle the threat of injury to Grievant or others because she allegedly did not wear her seat belt and made a U-turn on April 8th. No one at B.C. Station was ever placed off-duty under Section 16.7 for safety violations.

THE ISSUE STIPULATED BY THE STEP B TEAM

Was the Emergency Placement [of Grievant] in Off-Duty Status (without pay) dated April 8, 2003 for failure to observe safety rules and regulations issued for just cause? And if [not] what is the appropriate remedy?

ANALYSIS

FINDINGS OF FACT

Grievant became a full-time Letter Carrier on July 5, 1986. During the period covered in this case she was stationed at B-C Station. In the period from June 29, 1998 to January 8, 2002 she was issued a letter of warning, five extended suspensions and two removals ultimately reduced to 45-day suspensions, and she was given a "Last Chance Agreement on November 15, 2002. All eight of the disciplines charged various attendance violations; one of them also charged "Failure to Work in a Safe Manner, " not involving driving a motor vehicle.

Acting Supervisor Flak became a Letter Carrier on November 12, 1994. During the period from October 1997 until September 2001 he delivered mail at B-C Station and was acquainted with Grievant. He left B-C for a year. When he returned in September 2001 he was made an Acting Supervisor. He was familiar with many of the 65 routes and 85 Letter Carriers. One of his frequent duties was street observation of Carriers. After each observation he completed a P.S. Form 4584. The form requires the observer to identify the Carrier observed, the location, time and type of vehicle and to specify any "driving practices to be improved." On the form the driver's immediate supervisor is to indicate the "action taken" in respect to each observation.

Mr. Flak performed street observation of Carriers on March 26, 2003. On his observation for Grievant on that day he checked "Fasten seatbelt and/or close door" and "signal at least 100 feet in advance." He also wrote the following "comments."

> Carrier was traveling W. on Linwood with door open and no seat belt on. Carrier turned right on E. 55th Street with no turn signal. While stopped 5 cars back carrier then closed door but never put seat belt on.

Under "action taken" Mr. Flak wrote "progressive discipline." There is no written record shown in arbitration mentioning any discipline for the March 26, 2003 incident.

Mr Flak was again performing street observation of Carriers on April 8, 2003. From 11:03 to 11:05 AM he observed Carrier "T.W." On a Form 4584 Mr. Flak noted T.W.

> ...pulled into customer driveway, exited vehicle while still running and left unsecure to complete delivery. Carrier walked to and turned off LLV when I drove up.

For action taken Mr. Flak wrote "P.D.I. [pre-discipline investigation], progressive discipline."

Mr. Flak's next observation was of Carrier "J.B" from 11:09 to 11:10 AM.

Under comments on the Form 4584 Mr. Flak reported " Carrier observed talking on cell phone while traveling south on E. 55th near Utica-Hough" Under "action taken" Mr. Flak wrote "PDI, progressive discipline."

The next observation was of Grievant between 11:24 and 11:25 AM at East 62nd Street and St. Clair. Mr. Flak checked "During this observation the Carrier exhibited safe and professional driving practices and is to be commended. Under "action taken" Mr. Flak wrote "commended."

About six minutes later Mr. Flak was parked in his vehicle on Addison at the end of an alley or small street intersecting Addison about 100 feet south of the intersection of St. Claire and Addison. Mr. Flak was writing his observation of Grievant at 11:24-11:25 when his attention was attracted to a Postal Service LLV making a U-turn in the St. Claire-Addison Intersection. Mr. Flak had to turn his head quickly to see the vehicle make the U-turn from East to West on St. Claire. He immediately drove to the intersection, making a left turn and drove west 100-200 feet to where Grievant's vehicle was parked. Driving to the intersection, making the left turn, and

reaching Grievant's empty LLV could only have taken Mr. Flak a minute or two. Grievant had already gone into a store or bakery. Mr. Flak left the LLV and sought Grievant in the store but could not find he,r so he returned to where her vehicle had been parked only to find it gone. He drove to where Grievant had next parked. When she returned to the vehicle Mr. Flak took her keys to the LLV and had her driven back to the station where she waited a half hour and did not leave until the letter notifying her of her emergency placement was typed and issued to her. She left B-C Station never to return.

After Grievant left Mr. Flak wrote an observation, which included:

> While on Addison looking north writing a 4584 I observed the Carrier traveling East on St. Claire, not wearing a seat belt. Carrier proceeded to complete a U-turn in the intersection of Addison/St. Claire.

Under "Action Taken" Mr. Flak wrote: "progressive discipline." He also marked the "driving practices to be improved" as "Fasten seat belt and/or close door."

During the next five days Mr. Flak researched postal rules and regulations but could not find any covering U-turns. The only City of Cleveland ordinances on that subject are in the Union's Step B Position.

On April 17, 2003 Steward Drucker met with Supervisor Flak in informal Step A. Mr. Drucker cited excerpts from the J-Cam and a decision by Arbitrator Mittenthal to support his claim of inappropriate use of Section 16.7 of the Contract and no just cause. When resolution was not achieved the Union sent the grievance to Formal Step A where it was denied on May 16, 2003, at least five weeks after the incident date. The Step B Team impassed the case on June 10, 2003. The grievance was appealed to arbitration on June 18, 2003.

For reasons not explained at arbitration, Grievant continued on off-duty status (without

pay) until June 30, 2003. By that date Grievant had been given a pre-discipline interview regarding the incident on April 8, 2003 for which a Notice of Proposed Removal was then issued. A grievance in protest of the removal was impassed by the Step B Team on or about June 30, 2003. This Arbitrator was told that after that Step B decision Grievant was removed without ever having been returned to duty status (with pay).

EVALUATION

Grievant was placed off-duty without pay from April 8, 2003 until she was removed on or about June 30, 2003. To justify such action, which is challenged in the subject grievance, the Service is required to show three elements, each by a preponderance of the evidence. The three elements are:

1. "On April 8, 2003 at approximately 11:31 a.m., you were not wearing your seat belt and making a U-turn in the middle of St. Claire and Addison," and

2. The failure and/or act violated a "safety rule or regulation," and

3. It presented such a threat of injury to Grievant or others that the Service was justified in using the Emergency procedures in Sections 3, 4 or 5 of Article 16 of the Labor Agreement.

As mentioned above, the Arbitrator visited the area of the St. Claire/Addison Intersection and drove the routes Grievant and Mr. Flak testified to having driven. St. Claire is a major east-west road. Addison is a relatively narrow north-south street that intersects St. Claire at a right angle. There is a traffic light at the intersection. The day of the hearing on September 10, 2003 we visited the site of the April 8, 2003 incident. Our visit to the site was at about 11:30 a.m., also the time of day of the incident in question. Both Grievant and Mr. Flak said the amount of traffic on

both streets was about the same on both dates.

Does a preponderance of the evidence show Grievant was not wearing a seat belt?

An observer of a car entering the intersection might see it in the intersection for from five to seven seconds. If an LLV drove directly across the intersection, determining whether the driver was wearing a seat belt would be difficult from a distance of 80-100 feet. Perception would be effected by the amount of sunshine and whether the window was open—points not considered at the hearing. Observing details of an LLV making a 180 degree turn would be much more difficult. It would be like seeing an LLV rotate on a round table. Unless the observer noticed the car exactly when it entered the intersection there would be little time to see a detail like whether the driver was wearing a seat belt, especially if the vehicle made a U-turn in the intersection.

The evidence about whether Grievant was wearing a seat belt is contradictory. Mr. Flak says she was not; Grievant claims she was. With the challenges to Mr. Flak's perception presented by the situation--he observed Grievant in the moving LLV, from 100 feet away, for only a few seconds, after a chance notice of it in the intersection--his observation that he did not see her wearing a seat belt is not persuasive. There is not a preponderance of evidence to prove that Grievant was not wearing a seat belt.

Did Grievant make the U-turn, alleged by Mr. Flak?

Here again, their testimony is contradictory. He claims she made a U-turn; she claims a left turn North on Addison. Of course, she was in the LLV, whereas he was 80-100 feet South of the intersection. However, her greater opportunity to observe is not a realistic factor. Even from one hundred feet away, distinguishing a U-turn from a left turn was not difficult for Mr. Flak.

There was a crucial difference in their testimony. Grievant says that her deliveries on the

South side of St. Claire ended at Addison; she was to then deliver the north side beginning at Addison. Grievant had a choice. She could make a U-turn or drive onto Addison, turn around and return to the intersection and head west. Grievant took the Arbitrator north on Addison, which was slow and congested for one-half mile until she pointed out a parking area where she claims to have turned south to return to the intersection. That side trip took five to seven minutes. However, Flak had reached Grievant's first stop on the north side of St. Claire within one to two minutes after her vehicle first appeared in the intersection. When Mr. Flak reached her vehicle she was already delivering.

The Arbitrator pointed out to the site visitation group the distance and time involved in her "left turn." Perhaps for that reason, she gave no further testimony in the hearing room. We find that Grievant made a U-turn n the St. Claire/Addison Intersection, as described by Mr. Flak.

Did Grievant violate a safety rule or regulation?

Inasmuch as we do not find that Grievant was not wearing a seat belt, it follows it has not been proven that she violated the seat belt requirement.

We were not shown a postal rule or regulation that expressly prohibits a U-turn. A postal rule does require a Carrier to obey local regulations when driving a postal vehicle. However, there was no showing that any local authority determined that Grievant had violated Cleveland Ordinance 431.12, the only law mentioned by the Service. Furthermore, the Service did not even attempt to show Grievant's U-turn had violated Subsections (a) or (c) of the ordinance. For example, the Service did not attempt to show that Grievant could not "be seen within 300 feet by the driver of any other vehicle approaching...." Similarly the Service did not attempt to show that Grievant's U-turn could not "be made with reasonable safety to other users of the Street." Therefore, we find

there was no showing Grievant's U-turn violated a safety rule or regulation.

Has the Service Shown that not wearing a seat belt and/or making a U-turn under conditions existing on April 8, 2003 presented such a threat of injury to Grievant or others that the Service was justified in using the emergency procedure?

The Union argues that emergency placement has never been used at B-C Station. This is not a situation where past practice applies. Each situation depends on the facts. We note that Mr. Flak simply wrote an observation on April 8, 2003 when he observed Carrier "T.W. pull into customer driveway, exited vehicle while still running and left unsecure to complete delivery." For that violation, which obviously may have been an immediate hazard, Mr. Flack recommended "PDI, progressive discipline." The Service submitted a decision by the undersigned Arbitrator upholding use of emergency placement under Section 16.7 in such a situation

On seeing Grievant from a distance making a U-turn, Mr. Flak immediately decided to place Grievant in an emergency placement without any consideration of the conditions. Later he wrote an observation describing his action to be taken as "progressive discipline."

Not using a seat belt does not in and of itself present a threat of harm. It is intended to minimize risk of injury to the driver if the vehicle is involved in an accident. Making a U-turn could present a risk of injury depending on the situation, but as evident in the ordinance cited by the Service, making a U-turn does not per se constitute imminent danger.

These actions, as well as others (e.g. talking on cell phone while driving or leaving a vehicle with the motor running) might warrant a pre-disciplinary investigation, which could lead to discipline under Sections 3, 4 or 5 of Article 16, just as the pre-disciplinary investigation of the April 8, 2000 conduct resulted in a Notice of Proposed Removal. However, the actions under

those sections give the employee just cause protections. For example, they require an investigation in which Grievant is presumed innocent until the fact finding determines otherwise and an express statement of charges in advance, which the employee can address. Here the Emergency Placement Letter implied that Grievant had violated "safety rules and regulations," but it did not specify any until the Step B decision, almost two months later. Except in a true emergency situation, the Service must state its specific charge and give the employee an opportunity to defend herself while still on the clock.

It behooved the Service to show, which it did not even attempt, that Grievant's actions presented such an imminent threat that she had to be taken off the clock immediately and denied the rights normally attendant even in a discharge action. In a given case, even if off-duty placement is appropriate, the Service must act promptly to reach a resolution. There was no prompt resolution here. Grievant remained off the clock for almost three months--from April 8, 2003 until she was removed on June 30.

AWARD

The Service has not shown by a preponderance of the evidence that Grievant's alleged actions violated safety rules or regulations or presented such an imminent threat of injury to herself or others that immediate off-duty status (without pay) was justified.

The Service is directed to rescind the action and make Grievant whole for the period she was on off-duty status under the April 8, 2003 letter.