29541

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
between:	*	Grievant: J. Bowman
United States Postal Service	*	Post Office: Nashville, TN
and	*	USPS Case No: C06N-4C-D 11219738
National Association of Letter Carriers, AFL, CIO	*	NALC Case No: B4-01104-11

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Eric Conklin

For the Union: Chris Verville

Place of Hearing: Postal Facility, Nashville, TN

Date of Hearing: July 19, 2011

Date of Award: August 10, 2011

Relevant Contract Provision: Article 16.7

Contract Year: 2006

Type of Grievance: Discipline

Award Summary:

The Grievant was involved in a Light Transport Vehicle rollaway accident. Management issued an Emergency Placement charging the Grievant with failure to follow safety regulations and violating the zero tolerance policy. First, the evidence shows the actions of the Agency in this case were premature. Secondly, the Agency failed to provide the Grievant/Union with a formal charge. Since the Emergency Placement was found to be improper, the second issue raised in this case becomes moot. The grievance is sustained and the Grievant shall be made whole.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 19 July 2011 at the postal facility located in Nashville, TN, beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier at a Nashville, TN Postal facility, the Belle Meade Delivery Unit.

On 29 March 2011, the Grievant's light transport vehicle was involved in a rollaway accident during the course of route delivery that day. As a result, the Grievant received the following Letter, labeled, EMERGENCY PLACEMENT IN AN OFF-DUTY STATUS:

> **"You are hereby notified that effective March 29, 2011, you were placed in an non-duty, non-pay status under the provisions of Article 16, Section 7, of the National Agreement. The reason for this action is your failure to follow safety regulations and the zero tolerance policy.**
>
> **You are placed in this Emergency off-Duty Status (without pay) under the provisions of Article 16, Section 7, of the national Agreement, which states in part as follows:**

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 intoxication (use of drugs or alcohol), pilferage, or 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, loss of mail or funds, or where the employee may be injurious of self or others.

You shall remain on the rolls (non pay status) until further notice.

You are further advised that you are prohibited from interfering with the day-today operation of this postal facility and will not be allowed unescorted on the workroom floor.

If this action is overturned on appeal, back pay may be allowed, unless otherwise specified in the appropriate award or decision, ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained in the ELM, Section 436.

You have a right to file a grievance under the Grievance Arbitration procedures set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice.

A copy of this notice is also being sent to you by priority mail, confirmation of delivery." (emphasis in original)

The above letter was signed by a Supervisor, Customer Services.

The Union's version of events contrasted with that of Management. Additionally, a secondary issue evolved regarding whether or not Management made every reasonable effort to assign

the Grievant to non driving duties following the alleged incident. Obviously, the Parties were unable to resolve their differences regarding either matter.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an impasse on each of the respective issues on 23 June 2011. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the submission of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package
3. Joint Contract Administration Manual

EMPLOYER'S POSITION:

The Service believes the evidence will show the presence of just cause for the Emergency Placement in this case.

According to Management, it is alleged the Grievant failed to observe the mandatory dismount procedures outlined in a USPS "Zero Tolerance" policy letter and Handbook M-41.

It is the contention of the Agency there are four distinct and separate actions designed and implemented to prevent an unattended vehicle from moving without an operator.

According to the Service, roll-away accidents are among the most serious encountered in the USPS. Fortunately, Management points out, that, in the instant case, there were no injuries, only property damage.

The Employer explains the vehicle was inspected at the scene and found to be in safe working operation. The Employer also mentions that a further inspection at the Vehicle Maintenance Facility yielded similar findings.

Even though the Union pointed out an issue with the vehicle, the Service points out this does not mitigate the fact that if all the proper dismount procedures had been followed, this accident would not have resulted the way it did.

According to the Employer, this record will show that the driving privileges of the Grievant have neither been suspended and/or revoked. It is the argument of Management that all arguments in that regard are not supported by the evidence and have no merit.

It is the position of the United States Postal Service that the Grievant violated Postal Policy and that the Emergency Placement was contractually sanctioned by the Parties Agreement under Article 3 of Joint Exhibit 1.

On that basis, Management respectfully requests that the instant grievance be denied in its entirety.

UNION'S POSITION:

It is the contention of the Union that the burden of proof in this case rests with the Employer.

The Union is prepared to show through contract provisions, testimony and tangible evidence that the Service has failed to meet the burden that would justify the Grievant being placed off the clock in a non-duty and non-pay status. In addition, the Union asserts the Employer failed to conduct a proper investigation and immediately put the Grievant out on Emergency Placement in spite of the fact that she answered all the supervisor's questions affirmatively. The Union also insists the Employer did not spell out the charges in the letter given to the Grievant. In support of their case the Union relies on a

precedent setting arbitration decision authored by Arbitrator Mittenthal. Accordingly, the Union believes the disciplinary action is procedurally defective.

The Union also maintains that the Service violated Step 4 Decision (M-1289) where the Parties at the National Level agreed to the following: Management has the right to articulate guidelines to its employees regarding their responsibility concerning issues relating to safety.

However, according to the Union, the Parties also mutually agreed that local accident policies, guidelines and procedures may not be inconsistent or in conflict with the National Agreement.

It is the argument of the Union that the discipline imposed for cited safety rule violations must meet the just cause provisions of Article 16. Furthermore, it is the contention of the Union that administrative action with respect to safety violations must be consistent with Articles 14 and 29.

The Union also suggests that Management in the Tennessee District has indeed established a local rollaway policy that is inconsistent with the Step 4 decision.

The Union insists the evidence will show where Management has failed in their obligations to apply the just cause principles as provided in Article 16.

It is the claim of the Union that the evidence will also show that Management has failed in their obligations under Article 29 by refusing to make every reasonable effort to reassign the Grievant to non-driving duties.

The Union asks the instant grievance be sustained in its entirety.

THE ISSUES:

1. Did Management violate Article 16, 19 of the National Agreement and Section 115 of the M-39 Handbook, when they placed the grievant on Emergency placement in off duty status on 03/29/2011 alleging failure to follow safety regulations and zero tolerance policy? If so, what is the appropriate remedy?

2. Did Management violate Article 14 and 29 of the National Agreement when they failed to make every reasonable effort to assign the grievant to non driving duties after they

suspended/revoked her driving privileges? If so what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16
DISCIPLINE PROCEDURE

SECTION 7. Emergency Procedure

DISCUSSION AND FINDINGS:

This case involves an issue of Emergency Placement. The Parties were certainly not in sync regarding the events leading up to this Article 16.7 action. Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may not be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous, however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning. Initial allegations must be proven, clearly and convincingly, through the preponderance of the evidence.

And that same just cause language, outlined in Article 16.1, carries forward to Article 16.7, the Emergency Placement provision, albeit, less demanding.

The Employer, in support of their Emergency Placement, references a **1990 National Award** authored by **Arbitrator Richard Mittenthal, Case Number H4N-3U-C 58637.** The Union also relied on the Mittenthal decision.

Arbitrator Mittenthal points out the Employee is entitled to a written notice of charges within a reasonable period of time following the date of displacement. This will be discussed later in this decision. That National Award also provides the following in relation to the just cause requirements with respect to the provisions of Section 7:

> "By the same token, "just cause" may depend to some extent upon the nature of the particular disciplinary right being exercised. Section 7 grants Management the right to place an employee "immediately" on a non-duty, non-pay status because of an "allegation of certain misconduct (or because his retention "may" have certain harmful consequences). "Just cause" takes on a different cast in these circumstances. The level of proof required to justify this kind of "immediate…" action may be something less than would be required had Management suspended the employee under Section 4 or 5 where then thirty days advance written notice of the suspension is given. To rule otherwise, to rule that the same level of proof is necessary in all suspension situations, would as a practical matter diminish Management's right to take "immediate…" action."

Article 16.1 requires that all discipline meet a just cause standard. The criteria varies from case to case, but, in most circumstances, just cause is met via the preponderance of evidence rule.

However, as I've stated in many other cases involving Article 16.7, Arbitrator Mittenthal sets forth a less stringent gauge, something less than the preponderance of evidence. Nonetheless, the Employer is required to show their Emergency Placement decision, made on the facts of the case available at the time of their decision, was reasonable. And in this case, my findings are based solely on the facts and circumstances, available to the Employer at the specific time the Emergency Placement took place.

And with that in mind, each Emergency Placement rests on its own set of facts and circumstances. Since this case does involve discipline, the Employer retains the burden to show just cause for the Emergency Placement.

The Article 16.7 language allows the Employer to immediately place an Employee in a non-pay, off-duty status, when allegations meet certain criteria. And that standard must show the conclusions reached by Management, at that time, with the information available, was with reason and not arbitrary or capricious.

However, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances. Furthermore the purpose and intent of the Section 7 Emergency Procedure allows the Employer to make an immediate, but reasonable response, based on the evidence available to them, at that given snapshot of time.

First, Management must show that allegations were real based on an analysis of the information available at that specific point in time. There have been cases wherein Employees were absolved of all charges, but the Emergency Placement stood. It's just a matter of whether or not the evidence, available at the time of issuance, shows the Emergency Placement was

reasonable and justified, based on the circumstances appearing at that given time.

There was a lot of evidence introduced in this matter. Interesting was the fact the Employer presented a plethora of evidence to show that Management made the right decision in this matter. The Union also produced evidence to dispute Management's claims.

However, the written record in this matter clearly and rightfully challenges the Employer's own position. It is clear, by even the context of the Emergency Placement Letter cited above, dated 29 March 2011, and the unchallenged Joint Exhibit 2, indicating that the accident occurred on or about 12:25 pm on that same date.

That Letter was dated and mailed to the Grievant that very same day. The Letter itself even states it was mailed via Priority Mail.

Aside from all the evidence introduced at the hearing, this documentation provides one very clear admission to me.

The Grievant was placed on Emergency Placement solely as a result of the accident. Period. There was absolutely little or

no investigation. That is clear by the evidence introduced by the Employer, via Joint Exhibit 2 @ Page 19, which states:

> "Acting Vehicle Maintenance Facility Supervisor (VMF) Supervisor, Robert Montgomery's statement dated March 30, 2011, includes the following regarding the vehicle recovery and testing that took place at the accident scene:
>
> On March 29, 2011 our VMF was contacted with a call for recovering a roll away vehicle, I, Robert Montgomery, sent my mechanic Joel Lawson to Darden Ave…
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> …Once on the street, Mr. Lawson and the supervisor accompanied by the safety officer, did an on the spot operations check of the vehicle. My mechanic demonstrated that with the key out of the locking cylinder and in hand, the steering wheel was locked in place and could not move. The gear shift lever also could not be moved from the park position. He also tested the vehicle's parking brake and determined that the brake held the vehicle properly and prevented the truck from moving, even while the vehicle was in gear…"

It is very clear that any evidence was merely an afterthought. The record shows the statement was dated 30 March 2011 yet the Emergency Placement had already been decided on 29 March 2011. And given the time of the accident at approximately 12:30 and the fact that the Emergency Placement Letter, in order to be mailed by that same 29 March date, had to be completed prior to 5:30/6:00 to make the evening dispatch, there wasn't much time left for any type of reasonable investigation to have occurred.

And I am of the considered opinion, that even though my personal criteria has been that "snapshot" of time given emergency placement, in this case, I do not believe that Management had a reasonable opportunity to take a good picture of the facts of this matter.

Part of the basis of finding is the fact the 29 March Emergency Placement Letter fails to make a single reference to the rollaway.

Quite frankly, other than surmise, there was absolutely no link in that Emergency Placement Letter, of the Grievant to the rollaway. In fact, there was absolutely no reference whatsoever, to the rollaway, in the Emergency Placement Letter.

Also significant is the fact the Grievant testified she was returning from a delivery when the vehicle started to move. I was convinced that had the parking brake not been set, the vehicle would have begun moving down the hill immediately after the Grievant exited the vehicle. And I would believe that any type of investigation would certainly lead to a similar conclusion.

But all of this only leads to the conclusion of a clear lack of investigation by the Employer prior to issuing an Emergency Placement.

Following further contemplation of this entire matter, the undersigned is of the considered opinion there was certainly a rush to judgment in this case. And the convincing evidence in all of this was the time frame that sits on this record.

The accident happened at 12:30 pm. The investigating supervisor, traveled from the office to the accident scene, took a variety of pictures, interviewed the mechanic, talked to the grievant, verbally informed the grievant of an emergency placement, then, after all of that, made it back to the office and wrote a letter to the Grievant, that included none of the above, and that Letter met the dispatch that day.

Joint Exhibit 2, Page 117, indicates the Emergency Placement Letter was received by the Grievant at 11:53 AM on 03/30/2011. I am of the considered opinion, that in order for all of this to happen, within that short time frame, allowed very little time for any investigation, let alone consideration of the facts to take place.

The supervisor, who allegedly considered all the facts in this case and issued the subsequent Emergency Placement Letter clearly failed to consider all of the facts in this matter.

Even if all the facts were to the detriment of the Grievant which I doubt, the time frame of what happened in this case clearly prejudiced the Grievant in this matter.

And confirming this rush to judgment was the fact the Supervisor, Customer Services, clearly failed to include any detail, whatsoever, in that 29 March 2011 Emergency Placement Letter.

Each case is different. This wasn't a matter of bodily harm by an individual or a threat to either another Employee or anyone else for that matter. And given the circumstances of this case, I am of the considered opinion that it was clearly a hurried decision and the Emergency Placement was clearly in error.

As I've previously stated in numerous other decisions, the emergency placement in any case must be shown to have been justified with the facts available at that particular "snapshot" in time. And in this case, when that "snapshot" was taken, it was clear the Employer simply based their decision in total,

that a runaway had occurred. I was convinced that nothing else was even considered by the supervisor. Instead I believe the Supervisor was convinced of the Grievant's guilt as soon as he had learned of the rollaway that day.

And I was convinced of this by, among other things mentioned above, the fact the Emergency Placement Letter failed to reference any specifics whatsoever which was certainly telling. More importantly, albeit controlling, is the fact that it contradicts with the opinion of Arbitrator Mittenthal, which states:

> **"… the fact that no "advance written notice" is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has a right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management's action. Indeed, Section 7 speaks of the employee remaining on non-duty, non-pay status "until disposition of the case has been had." That "disposition" could hardly be possible without formal notice to the employee so that he has an opportunity to tell Management his side of the story. Fundamental fairness requires no less."**

I carefully reviewed the entire Joint 2 package and was unable to find any content that would satisfy the Mittenthal requirement cited above. The generic content of the 29 March

2011 document did not satisfy that requisite requirement. The Grievant was never made formally made aware of the charges.

For the 29 March document was only general in nature and made no specific reference to any of the charges that were presented in detail at the hearing. The Grievant was never provided a formal written detail of the charges. In fact, the only charge that shows on the record in this case is that of the alleged **"failure to follow safety regulations and the zero tolerance policy."** I would not expect anyone to put together a defense to such a broad charge.

The Employer takes the position that the Grievant should have been very well aware of the charges against her. However, Arbitrator Mittenthal sees it differently. And his precedent setting decision has survived several sessions of negotiation. Most significant is the fact that it just makes common sense.

When the Employer issues an Emergency Placement, oftentimes, it's done on the spur of the moment. That is the entire purpose of Article 16.7. However, at some point in time, within a reasonable time frame of that spur of the moment decision, the Employee is contractually entitled to a detailed written explanation of the charges. If for no other reason,

this forces the Employer to memorialize the charges and allow the Grievant/Union to counter a defense.

This matter was found to be procedurally defective on two separate and distinct counts. First, I am of the considered opinion, the Supervisor failed to perform a proper investigation. The fact the Grievant was involved in a rollaway accident, in and of itself, does not constitute immediate guilt and fault.

Secondly, the Employer failed to provide the Grievant/Union a formal charge. The "failure to follow safety regulations and the zero tolerance policy" fails to meet the requisite requirements of Article 16.7. Had the recommended process been followed by the Employer, the Supervisor should/would have certainly reconsidered the initial decision to deploy an Emergency Placement in the first place.

Therefore, based on the reasoning set forth above, the Emergency Placement of 29 March 2011 is found to be without merit. And with that, the second issue becomes moot.

The Grievant shall be made whole in every respect.

AWARD

The grievance is sustained and the Grievant shall be made whole.

August 10, 2011
Fayette County, PA