C#17884

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: K. Richardson

POST OFFICE: Greenwood, MS

CASE NO: USPS #H94N-4H-D 97089476

NALC #~~012379~~ 12739

BEFORE: I. B. Helburn ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Annette M. Poole

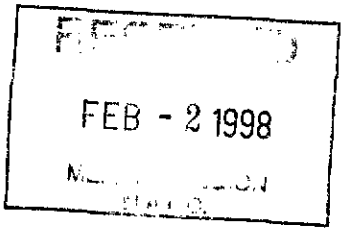
For the Union: Joe M. Erber

Place of Hearing: Greenwood, MS

Date of Hearing: January 23, 1998

AWARD: The grievant was not removed for just cause. She is to be reinstated with the removal reduced to a seven-day suspension. With the exception of the suspension period, the grievant is to receive back pay, including interest, and allowances to make her whole for those hours she would have worked until the end of her term but for the removal. Money earned during the relevant period is to be subtracted from back pay owed by the Postal Service so that this is a make-whole remedy only. The arbitrator will retain jurisdiction over the matter for the sole purpose of resolving problems which may arise in the implementation of the remedy.

Date of Award: January 30, 1998



SOUTHERN REGION REGULAR ARBITRATION

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE
Greenwood, Mississippi

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 1080

OPINION AND AWARD

OF THE

ARBITRATOR

USPS No. H94N-4H-D 97089476
NATC GTS No. 012739
K. Richardson

APPEARANCES

For the Postal Service:

Annette M. Poole;	Labor Relations Specialist
Sam Sago;	Supervisor, Customer Service
Willie Lewis;	Postmaster

For the Union:

Joe M. Erber;	Local Business Agent
Kimberly Richardson;	Grievant

PERTINENT NATIONAL AGREEMENT PROVISION (JX-1)[1]

APPENDIX C

NALC Transitional Employee Arbitration Award

11. Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual.

    Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the

[1] JX, MX and UX refer respectively to Joint, Management and Union Exhibits. The use of * * * denotes omitted language.

concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge.

* * *

BACKGROUND

Kimberly Richardson, the grievant, is a Transitional Employee (TE) who had been employed as a letter carrier for five years and four months when she was removed for an at-fault accident, for which it was stipulated that she was properly charged. Three full-time regular (FTR) employees had received seven-day suspensions for at-fault accidents.

After investigating Richardson's accident, Sam Sago, her immediate supervisor, submitted a Disciplinary Action Request (DAR) for a seven-day suspension. Willie Lewis, then Postmaster, concurred. When the request came to District Labor Relations, a Mr. Woodall called and informed Sago and Lewis of the TE provisions which did not require corrective discipline. Consequently Sago, with Lewis' concurrence, changed the suspension to a removal request. Both testified that they thought removal was appropriate in light of the accident. Both also testified that prior to Woodall's call they had been unaware of the TE provision which did not require corrective discipline, although Lewis had been to joint training about Appendix C and Sago said that he had had training on the National Agreement.

On April 4, 1997, Sago issued a Notice of Removal to Richardson. The Notice stated in part:

> **YOU ARE CHARGED WITH UNSATISFACTORY PERFORMANCE:** Specifically, on Thursday, March 13, 1997, at approximately 2:15 p.m., while in the performance of your duties as a city letter carrier you were involved in a vehicle accident. Investigation reveals the accident occurred due to your failure to operate your vehicle in a safe manner. While delivering mail on 1st Ave North and moving from 201 to 205 driving south on the left side of the street, you ran over a cinder block. The block was then slid for some distance under your vehicle. As a result, the Postal vehicle sustained approximately $300.00 in unnecessary damage. When questioned regarding the accident, you stated that you did not see the cinder block your vehicle ran up onto, and that dismounting is authorized on this part of the route. Your explanation is unacceptable, for, as dismounting is acceptable, driving down the wrong side of the street is not. Further, State law prohibits

> driving on the wrong side of public roadways. Also, while I am not charging you with your prior accidents, they must be considered in that they indicate you are having difficulty working safely. Your inattention to safety rules and regulations jeopardizes your personal safety as well as others which will not be tolerated (JX-2).

Richardson testified that when he issued the Notice, Sago told her, "Sorry, its out of my control," although she acknowledged that he could have meant several different things by the remark. Sago did not recall making the comment.

The removal was grieved on April 17, 1997, denied at Step 1 by Sago and at Step 2 by Lewis, although there was no Step 2 meeting. After the Step 3 denial, the grievance was moved to arbitration and assigned to the undersigned regional panel arbitrator. The case was heard in Greenwood, MS on January 23, 1998. The parties stipulated that the matter was properly before the arbitrator. Witnesses were sequestered, affirmed before testifying and cross examined. Documentary and testimonial evidence was received. The grievant was present throughout and testified in her own behalf. The record was closed following oral summation and the submission of prior awards.

ISSUE

The stipulated issue is:

Was the grievant removed for just cause?

POSTAL SERVICE POSITION

For reasons noted below, the Postal Service believes that the removal was for just cause and that the grievance should be denied.

1. The Union has stipulated that the grievant was guilty of the charge.

2. The grievant was not the victim of disparate treatment. Other employees who were given suspensions following accidents were full-time regulars and thus not similarly situated.

3. Sago and Lewis testified that, after being informed of the TE arbitration award, they felt that removal was the appropriate response to Richardson's preventable accident.

Thus the change in the disciplinary action request from a suspension to removal does not show that the grievant's due process rights were violated.

4. Three regional awards were introduced in support of the Postal Service contentions.

UNION POSITION

For reasons noted below, the Union asserts that the removal was not for just cause and thus the grievance should be sustained and Richardson reinstated with back pay and interest.

1. Sago and Lewis testified that the suspension first requested was fair and equitable, yet they changed the request to a removal after being told of the TE arbitration award. Testimony shows that they were influenced in their recommendation. Sago commented that the matter was out of his control and told a Union steward that "we felt it was the right thing to do."

2. A seven-day suspension would have been appropriate as other employees involved in at-fault accidents received seven-day suspensions. Richardson thus received disparate treatment.

3. Lewis had been to joint training on the TE Agreement, in which all of Appendix C was covered. He and Sago cannot use as an excuse the fact that they did not know better when proposing the initial suspension. Furthermore, there is no requirement that removal be the only disciplinary action taken against TEs.

4. Lewis testified that it was his decision that the removal was appropriate. Therefore, his Step 1 designee would not have had the authority to resolve the grievance, as required by Article 15. Due process was thus lacking.

5. Richardson had worked as a TE for over five years when she was removed. She would not have been continually reappointed if she had not been a good employee. There was work for her when she was removed.

6. The Union submitted 11 regional awards and an excerpt from Elkouri and Elkouri, How Arbitration Works, in support of its contentions.

DISCUSSION

Appendix C of the National Agreement does two things where TE discipline is concerned. First, its sets the standard for discipline as just cause. Second, it removes one traditional element of just cause, the concern with progressive or corrective discipline. Put another way, in a case where the Postal Service has proven the allegation against a TE and where there are no due process concerns, the Service has the right to remove the TE for the smallest infraction, even if such an infraction would bring only a written warning to a career employee. For that reason, the Union's argument of disparate treatment in Richardson's case, and the five supporting regional awards, are unpersuasive. The awards did not concern TEs, but rather pertain to career employees, to whom Article 16.1 applies. The employees in the Greenwood Post Office who had been given seven-day suspensions for at-fault accidents were also career employees and thus under the dictates of Article 16.1. Thus it is not appropriate to compare those three to the grievant where discipline is concerned. Richardson cannot be viewed as the victim of disparate treatment.

The Union stipulated that the charges were true, thus no discussion of the charges and the evidence of wrongdoing is necessary. This leaves consideration of due process and, more specifically, of the arguments that proper concurrence for the DAR was not obtained and that the Step 1 designee did not have the authority to resolve the grievance. The first argument involves Article 16 while the second involves Article 15.

In his award in case no. F90N-4F-D 94017185 (1994) Arbitrator James T. Barker concluded that "with the exception of the 30-day notice requirement of Article 16, the provisions of Article 16 are not applicable to transitional employees." He based the conclusion on the differences in language accompanying Articles 15 and 16. The former noted that "The preceding Article, Article 15, shall apply to Transitional Employees; additional provisions regarding Article 15 and Transitional Employees can be found in Appendix C." The latter simply stated, "Additional provisions regarding the removal of Transitional Employees can be found in Appendix C" (JX-1). Arbitrator Barker was also influenced by the awards of Arbitrators Mittenthal and Baldovin, which were in accord with his reasoning.

After significant thought, and possibly because I do not have the benefit of the Mittenthal and Baldovin awards, I must respectfully disagree with Arbitrator Barker. His award and the two others submitted by the Postal Service establish that TEs are to be given the 30-day notice called for in Article 16.5. Richardson received 30-days of pay, although the District Office had to inform the Greenwood Post Office of this requirement. Thus it is obvious that at least one section of Article 16 applies to TEs.

If the 30-day notice applies, it is inconceivable to me that the parties intended for Articles 16.6, Indefinite Suspension—Crime Situation, and 16.7, Emergency Procedure, not to apply to TEs but to apply only to career employees. This would strip the Postal Service, its employees and customers of potential vital protection. And, if Article 16.6 and 16.7 are to apply, I can see no reason why Article 16.8, Review of Discipline, would not apply. Furthermore, even the language "Additional provisions regarding the removal of Transitional Employees can be found in Appendix C" indicates provisions in addition to those in Article 16.

Thus the question becomes one of whether there was "command influence" and improper concurrence. If I were convinced that Sago and Lewis had known initially that Richardson was not contractually entitled to progressive discipline, that they decided on the seven-day suspension despite that knowledge and then changed the DAR because of a directive from Woodall, I would quickly rule that Article 16.8 had been violated because Woodall, in effect, would have proposed and concurred in the removal request. But because Richardson was initially wrongfully taken off the clock and then put back on with a pay adjustment at the direction of the District Office, I conclude that Sago and Lewis were, indeed, unaware of Appendix C until it was made known to them by Woodall. I accept their testimony that while they were influenced by this new understanding of the contract, they retained the final authority to request and concur with the removal. Here the Postal Service gets the benefit of the doubt and the concurrence is deemed proper.

Finally, there is the question of Sago's ability to settle the grievance at Step 1. Article 15.2, Step 1, which clearly applies to TEs, requires an aggrieved employee to discuss the matter at Step 1 with the immediate supervisor who "shall have authority to settle the grievance" (JX-1). Richardson testified that when Sago issued the Notice of

Removal he said "Sorry, it is out of my control."[2] Sago did not recall saying those or similar words, but he also testified that he might have made such a comment. That is hardly a denial. Nor does he remember making a similar remark at Step 1. Sago did note that the words "7-day suspension" in the DAR had been lined through and replaced with the word "removal" by Woodall, with Sago's authorization and Lewis' concurrence.

Despite Richardson's self interest in this matter, I accept her testimony as truthful, in part because there was no strong denial. Because the District Office clearly influenced, even if they did not dictate, the final decision to remove, the grievant's words ring true. This is not a case where there is an assumption without supporting evidence that the supervisor had no authority to settle at Step 1. Rather, this is a case where for all practical purposes the supervisor said that he had no authority to settle. In other words, it was "out of his hands."

As noted by Arbitrator J. Reese Johnston, Jr. in case no. G94N-4G-D 97075419/97062253 (1997) an employee's due process rights are severely violated when Management's Step 1 or Step 2 designee does not have the authority to settle the grievance. The award of Arbitrator Reese , as well as that of Arbitrator Barker in case no. F90N-4F-D 95031737 (1995) are consistent with a long line of awards in similar cases. The language of Appendix C, Paragraph 11, read alone, seems to indicate that the finding of "no authority to settle" is irrelevant to the award since the grievant stipulated to guilt. However, Appendix C cannot be read alone. The language which applies Article 15 to TEs would be meaningless if the provisions of Article 15 were to be excluded from consideration of just cause. Thus it is appropriate that questions such as the authority to settle a grievance be applied to TE removals as well as to the removals of career employees. In this case, Sabo's lack of authority to settle the grievance at Step 1 has made the removal improper because of the breach of the grievant's due process.

AWARD

The grievant was not removed for just cause. She is to be reinstated with the removal reduced to a seven-day suspension. With the exception of the suspension

[2] From the arbitrator's notes.

period, the grievant is to receive back pay, including interest, and allowances to make her whole for those hours she would have worked until reinstatement or the end of her term, whichever comes first. Money earned during the relevant period is to be subtracted from back pay owed by the Postal Service so that this is a make-whole remedy only. The arbitrator will retain jurisdiction over the matter for the sole purpose of resolving problems which may arise in implementation of the remedy.

I. B. Helburn, Arbitrator

Austin, Texas
January 30, 1998