

Defenses to Accident Related Discipline

Part 1 of 2 parts

By Paul Price, Regional Administrative Assistant

March 1996

No one likes to be in an accident. There is the initial fright followed by extra stress and often an injury. Then, as if the accident wasn't bad enough, now management is disciplining carriers regardless of the circumstances. The worse the District's safety record, the quicker and more severe the discipline.

Too often we know of a danger and do not correct the problem. Put the responsibility on management and make them fix our dangerous circumstances. If we can demonstrate management was aware of a condition and did not remedy that certain condition, we have a great argument to overturn discipline. Write up hazardous conditions on Form 1767 (Report of Hazard, Unsafe Condition or Practice) and keep a copy to protect yourself because management is issuing discipline for any cause and not "JUST CAUSE" as afforded under Article 16.

The purpose of this article is to list the basics in defending discipline issued for accidents, either industrial or vehicle. Using the correct procedures and arguments in defending against discipline can make the difference for a successful defense. And remember, these arguments need to be articulated in the grievance and cited in the actual moving papers of the grievance.

The discipline will stand or fall as the notice is written. "Failure to follow instructions" is simply too vague for a rule violation and arbitrators, along with Postal Service managers Ulsaker and Maldonado, have held a specific safety rule violation needs to have occurred.

Management shoulders the 'Burden of Proof.' To be successful in upholding discipline they have to demonstrate that a known work rule was violated that warrants discipline.

Postal management did not always behave in the current over-reactive style. Assistant Postmaster General Carl Ulsaker in April 7, 1980, wrote *"Accidents or compensation claims even when in a manager's view excessive are not in themselves an appropriate basis for discipline. What must be cited in any such disciplinary action are the actions of the employee in a specific situation which are violations of a Postal Service safety rule or regulation."*

This management directive is still citeable and in effect. Ulsaker reiterated the policy one year later on May 15, 1981, he wrote *"In a safety connected disciplinary situation, the actions of a manager, supervisor, or employee which violate Postal Service safety rules or regulations must be cited. Such disciplinary actions are independent of whether or not an accident is involved."*

Ray Maldonado, Senior Labor Relations Specialist for the Western Area, in July 1993 informed all

Western Area Districts that *"As in all cases regarding discipline, and particularly safety related discipline the burden of proof is on management. . . . It is insufficient to simply charge an employee with failure to work in a safe manner with no specifics. We must specifically identify what `unsafe act' was committed. Much of the evidence presented at Step 3 involving safety related discipline simply demonstrates an accident occurred. In many cases there was little evidence of a thorough investigation which would possibly reveal an unsafe act. Many cases do not specifically identify what an employee did wrong or that the unsafe act caused the accident. . . . We cannot succeed with a blanket policy on discipline for safety related infractions except for extremely serious acts of misconduct which may warrant removal depending on the specific facts or circumstances. . . . Arbitration history has taught us that any disciplinary action demands the exercise of responsible judgment so that employees will not be penalized out of proportion to the offense." . . . Discipline such as suspensions or removals should only be requested after responsible determination has been made that a less severe penalty would not suffice."*

Maldonado also informs management that prior to discipline, the specific identification of an unsafe act which contributed to the accident needs to be found. He also points out to labor representatives that they need to consider if an adequate or effective lesser penalty could be applied. Maldonado orders that the clarity for which the employee was on notice of any safety rules violated needs to be apparent.

He finalizes the letter by stating the obvious: *"It is important to remember that we cannot charge an employee with working in an unsafe manner unless we can specifically identify an unsafe act."*

However, at the NBA's office, we still see discipline coming from the field that simply says that the grievant was involved in an accident or they failed to be safe, or "failed to follow instructions," but no specifics are ever identified. Failure to cite a specific rule infraction should be stressed early on in the steps of any grievance. The following are the issues the Union should stress in our defence of the case.

CASE OUTLINE

1. Did management show 'just cause' for their disciplinary action? Does the discipline meet the seven tests of `just cause'? If you are unfamiliar with the `just cause' criteria please do not hesitate to request this from your branch President or our office.
2. Was a specific rule violated?
3. Did the Service take mitigating factors into account or is discipline automatic?
4. Did management present clear evidence (proof) that the grievant acted in an unsafe manner?
5. Did management investigate the accident properly and timely, was there a disciplinary investigatory interview?

6. Was the discipline progressive, non disparate, and timely?
7. Did management take the position that the grievant was a unsafe driver and revoke grievant's driving privileges?
8. Did the service issue discipline to discourage accident reporting?
9. Was remedial driver training conducted?
10. Is the penalty punitive?

This is the first of a two part article and will deal with only items 1-5 from the points listed above.

A. WHAT SPECIFIC RULE WAS VIOLATED? (The following are excerpts from ALERT:)

C#08071, Sobel, "Discipline is appropriate only when an employee violates a safety rule or practice. Barring such a determination of rule violation discipline cannot be imposed under the just cause standard."

C#12808, Baldovin, 1993, ". . . Throughout the processing of this grievance, at steps 2 & 3 the Postal Service refers to Grievant's inability to perform his duties in a safe accident free manner. Yet, Grievant has never been disciplined for violation of any safety rules, regulations or procedures."

C#09594, Sobel, 1989, ". . . Four of the eleven accidents did not involved medical attention and the grievant took no time off for his `injuries.' Had the grievant not conformed to instructions by reporting the incidents . . . the Employer would not have been able even to enumerate them as accidents in its litany."

B. WAS A COMPLETE AND FAIR INVESTIGATION OF THE ACCIDENT CONDUCTED?

Relevant handbooks and manuals incorporated through Article 19 of the National Agreement need to be reviewed and inconsistencies noted in the grievance. The question should always be asked, "Was there a complete investigation? EL 801, Supervisor's Safety Handbook, Section 232.3, obligates management to conduct a "complete report" as to who, what, where, when, how and why." Arbitrators agree with the EL 801, C#10785, Eaton, 1991, "In not being interviewed prior to the issuance of the Removal Notice, the Grievant was deprived on his due process rights. . . .On the key charge, Supervisor Jackson stated that he concluded that an unsafe act had occurred based simply on the Grievant's past performance. . . . Postal Service regulations require that a specific act or rule be cited as having been violated where discipline is assessed for a safety violation. . . . It is undisputed that the Grievant was injured. He was not injured as the result of an unsafe act, only as a result of an unfortunate occurrence. . . ."

EL 801, Section 250 lists "corrective measures" enforcement of safety rules (otherwise known as

discipline) as the 6th option available to correct an unsafe act. The thorough steward will read Chapter 1 and 2, along with Appendix A of the EL 801 to find management violations in reporting and correcting the problem.

Accident Forms 1700, 1769, along with instructions, and SF 91, complete with Form 4586 need to be scrutinized for errors or a specific safety rule infraction. These forms should also be included inside the grievance for our reference. If 3rd parties or property damage is involved, request Form SF95 and 2198 along with Form 4564 or 4564A. The 1769, if filled out correctly sometimes points to mitigating factors such as What was the weather like? questions 14; Lighting conditions, question 20; Road and surface conditions which might contribute are questions 21 and 22; Circumstances leading to or playing a part in the accident number 23-26; Any unsafe factors or actions? question # 47 and 48; Is a Safety analysis on file, question number 60; Preventative Action Code, question number 61 lists 15 other corrective action besides discipline, why rely on only discipline?; The 1769 asks, under question # 8, if a on-site investigation was preformed.

Form 1700 has spaces for narrative answers, what did the investigating officer find? Ice? Blocked vision? Other hazards noted? Possible vehicle malfunctions? All good defenses.

C. WAS THE ACCIDENT INVESTIGATION AND THE DISCIPLINARY INVESTIGATION COMPLETED TIMELY?

The 1769 and other accident reports need to be completed in a certain time frame indicated on the reports themselves. If management fails to investigate or fill these forms out timely, how can they then argue that the infraction was so egregious that discipline needs to be taken if management wasn't serious enough to complete their reports correctly. In the grievance point out when the accident and disciplinary investigation took place, Arbitrators have held to be accurate and fair they both should be conducted in a timely manner.

C# 10785, Eaton, 1991, "While the Postal Service argues

that failure to conduct a timely and thorough investigation could not harm the Grievant in this dispute, the evidence is to the contrary. We cannot know exactly what the cause of the Grievant's reinjury was for the reason that the matter was not investigated in a timely and thorough manner, and no accurate determination was made while the facts were fresh and all participants present."

Form 1769 on page one under "submission procedures" reads "The supervisor must complete this form within 24 hours" and "The local office must retain a copy of all reports in that office for a 5-year period." Please guarantee that the previously listed forms are included in each grievance.

Handbook EL 827, Driver Selection Training, Testing and Licensing, (1989) is now replaced by the Drivers Selection Orientation Familiarization and Certificate Program (January 1993). However, we still want to argue that additional corrective training, as outlined in EL 827 Section 350 and 360, is the

"corrective" approach and discipline is simply punitive and in violation of Article 16.

Other articles violated that need to be listed in the grievance are Articles 3, 5, 14, 16, and 19.

In my next article I will go into depth on arbitration rationale to justify discipline for accidents, as well as highlight case points 6-10.

Prior to meeting with management at Step 1 or 2, the steward or Step 2 designee needs to review the ALERT manual sent out by the NBA office. Specifically pages 314 through 338. This is the best source document for defending discipline based on accidents.

If your branch does not have these pages of the ALERT, please request them from our office.

Defenses to Accident Related Discipline

Part 2 of 2 Part Article

By Paul Price, Regional Administrative Assistant

June 1996

In the March NBA Newsletter I wrote the first part of this two part article.

The amount of discipline related to accidents is slightly lower thanks to the weather improving. However, the number of grievances received in our office is still unacceptably high. Thus the reason for this article.

This type of discipline serves very little, if any, corrective purpose and simply applies more stress on a managers budget. Carriers and stewards are filing grievances and attending interviews instead of delivering mail, but we're paid by the hour so fill out your statements and grievance forms thoroughly and correctly, as well as take enough time to avoid the accident in the first place.

If discipline is issued, follow the case outline below:

CASE OUTLINE

1. Did management show `just cause' for their disciplinary action? Does the discipline meet the seven tests of `just cause'? If you are unfamiliar with the `just cause' criteria please do not hesitate to request this from your branch President or our office.
2. Was a specific rule violated?
3. Did the Service take mitigating factors into account or is discipline automatic?
4. Did management present clear evidence (proof) that the grievant acted in an unsafe manner?
5. Did management investigate the accident properly and timely, was there a disciplinary investigatory interview?
6. Was the discipline progressive, non disparate, and timely?
7. Did management take the position that the grievant was an unsafe driver and revoke grievant's driving privileges?

8. Did the service issue discipline to discourage accident reporting?

9. Was remedial driver training conducted?

10. Is the penalty punitive?

In the March article I covered the first 5 elements listed above, in this article the last 5 will be covered. Keep these two thoughts in mind during the case preparation.

#1 - in order to meet the just cause provisions any discipline must be corrective and not punitive.

#2 - In order to justify discipline for an unsafe act, an unsafe act has to be specified.

Ray Maldonado, Senior Labor Relations Specialist in a July 1993, letter said "*It is important to remember that we (management) cannot charge an employee with working in an unsafe manner unless we can specifically identify an unsafe act.*"

6. PROGRESSIVE, NON DISPARATE AND TIMELY DISCIPLINE.

Discipline under just cause calls for the employee to be forewarned of the penalty for a safety violation.

The forewarning normally comes by way of an official discussion with the employee. Management should have instructed the employee that under no uncertain terms that if they perform this particular infraction they can be disciplined. The discipline will usually begin with a letter of warning.

Further, similar violations call for a **progression** in discipline, i.e., a second LOW or short suspension, if violated again a longer suspension, and if violated again maybe a 30 day suspension or removal. As Western Area Regional Arbitrator Levak wrote in C#6299, "Another principle applicable to this is that the degree of progressive discipline must be reasonable. . . For example, it is a reasonably well-established practice within the Western Region for a 7-day suspension to be followed by no more than a 14-day, or at the most, a 30-day suspension. The arbitrator knows of no grounds upheld by Western Region arbitrators where a removal has followed a 7-day suspension."

For progressive discipline to be implemented correctly the offenses have to be similar. Management in this area attempts to list any misconduct under "Failure to Follow Instructions." While management is required to identify a specific safety rule infraction they are also obligated to specify the offense.

Arbitrator Levak in C#6299 wrote, ". . . it must be remembered that some sort of connection can always be established. For example, virtually every type of infraction within the Service is covered by some handbook or manual. So the Service can always argue that the infraction is always related to a failure to follow instructions. Similarly, virtually every discipline act is the result of either intentional misfeasance

or non-feasance (carelessness or negligence). So the Service can always argue that every act of misfeasance is akin to a failure to follow instructions, and every act of nonfeasance is the result of a safety violation, which in turn may be construed as a failure to follow instructions relating to safety. Such a general connection does not satisfy the last stated principle; a connection between types of offenses must be more than remote."

In **non-disparate** treatment, management must apply its rules and penalties evenly. Supervisor's Guide to Handling Grievances EL 921 states, "*If a rule is worthwhile, it is worth enforcing, but be sure that it is applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules. Consistently overlooking employee infractions and then disciplining without warning is one issue.*"

Arbitrators have ruled the discipline needs to be **issued timely** so as to prove management's sincerity and to demonstrate to the employee the Service is serious in correcting the employees behavior.

C#1261, Arbiter Schedler writes, ". . . In the usual grievance a delay in presenting charges can mean the loss of evidence to an aggrieved. Memories fade with the passage of time, witnesses become difficult to locate so as to reconstruct the events in question. . . a delay in presenting charges damages an employee's right to prepare to defend himself against the charges and that is where I disagree with the procedures the Employer followed."

C#7106, Arbiter Howard writes, ". . .it is an essential aspect of industrial due process that discipline be administered reasonably prompt after commission of the offense which prompted the discipline. . . a delay in the imposition of discipline clearly leads the employee into a false sense of security that his conduct is acceptable to the Service. Thus, the corrective nature of the disciplinary process becomes unnecessarily blunted."

7. DID MANAGEMENT REVOKE THE GRIEVANT'S DRIVING PRIVILEGES?

All too often a manager will suspend driving privileges for some unexplained reason (see #8 below) even after the grievant has finished their route or even driven for days after the accident. Why the new heightened concern? Good argument! Arbitrators apply EL 827.

Arbitrator Rentfro in C#11901 states, "The Service has asserted that . . ., it determined that Grievant was an unsafe driver and revoked her OF-346. However, the Arbitrator finds that the evidence presented by the Service is clearly inadequate to support its decision to revoke Grievant's license. The Service should have applied the criteria set out in Section 463.4 of the EL-827 to determine whether or not revocation was appropriate under the circumstances."

The EL 827 463.4 states, "Decisions to suspend or revoke driving privileges are made after investigation

and determination as to whether the driver was at fault (whether the driver's actions were the primary cause of the accident), the driver's degree of error, past driving and discipline records, and/or the severity of the accident. The quality or absence of prior training in a particular driving activity should be considered as well, and the employee's inability to meet USPS physical standards at the time of an accident is also a factor to be considered."

8. DID THE SERVICE DISCIPLINE TO DISCOURAGE THE FILING OF AN ACCIDENT REPORT OR CLAIM?

The answer to this is "almost every time." Everyone needs to remember supervisors, managers, postmasters and Districts as well as the Area are graded on the number of accidents under its or their control. Because of the new cluster ratings or supervisor pay rate, the discouragement of accidents (or reports) will only increase. Find your units and District's ratings or rankings and argue this point. While supervisors don't care, an arbitrator will. Please include flash reports, etc.

9. WAS REMEDIAL (OR CORRECTIVE) TRAINING CONDUCTED? THE EL 827 SECTION 350 AND 360 REQUIRES REMEDIAL TRAINING FOR EACH PREVENTABLE ACCIDENT.

EL 827 350 "Refresher Driving Training." Refresher driver training is strongly encouraged for all licensed drivers. . . The refresher driver training may be mandated by the Division or by the local MSC. Such training may be provided on an as-needed basis.

EL 827 360. Improvement Driver Training. All drivers (including rural carriers and rural carrier reliefs) must receive improvement driver training following a preventable vehicle accident . . . or, when warranted, based on observations of driving practices that are in need of improvement. . . To be most effective, improvement driver training should be within 10 calendar days of the accident or observation of unsafe driving habit since the events of the occurrence will be more accurately remembered by the driver.

EL 801 also encourages corrective remedial training. Always argue the Service is acting in a punitive nature if they go right to discipline instead of training - after all everyone could use refresher training but be forewarned training is budget inhibitive.

10. WAS THE DISCIPLINE ACTION PUNITIVE?

We discussed progression under point #6, and progressive and punitive are related. The requirement of Article 16 for discipline not to be punitive calls for the punishment to fit the crime.

Does a mailbox lid that springs open warrant a suspension? Absolutely not! And if it does, the safe and prudent carrier will follow management's alleged safety concern. Write those boxes up! Each and every one. Put management on written verifiable notice with 1767s or 8143s, that the box is unsafe or does not meet box regulation requirements listed in Postal Bulletin 4/27/95.

Take the time to write those boxes up because if you don't you might be losing one to two weeks of pay. Management will argue you deserve the discipline because you're paid to be safe and paid to write hazards up.

Discipline for safety related accidents is on the rise - cover yourself and teach every carrier to do the same.

Management can't have it both ways. It's either management pay raise initiated speed or management pay raise required safety. And remember, failure to abide by every normal safety precaution may cost you your paycheck.

Discipline is on the rise so be careful, and apply these basics in defending safety related discipline.