AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Tribunal

In the Matter of the Arbitration	X	
	X	
-between-	X	OPINION AND AWARD
	X	
LOCAL 804, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO	X	13 300 02782-07
	X	
-and-	X	(Liam Russertt)
	X	
UNITED PARCEL SERVICE	X	

Before: Carol Wittenberg

The undersigned, having been designated by the parties, pursuant to the collective bargaining agreement, was selected to serve as Arbitrator of the dispute described below. Hearings were held on November 10, December 3 and December 10, 2008 at the offices of the American Arbitration Association in New York City. The Union was represented by Richard Guay, Esquire. The Company was represented by Peter Conrad, Esquire.

The parties had a full and fair opportunity to present evidence and oral argument. The hearing was declared closed on December 10, 2008.

The issue before the Arbitrator is:

> Whether the Company had just cause for the discharge of the Grievant, Liam Russertt? If not, what shall the remedy be?

BACKGROUND

The Company employed the Grievant, Liam Russertt, for 12 years at the time of his termination in August 2008 for his overall record. The Union contends that the Grievant was terminated in retaliation for his union activities as a Shop Steward. In particular, the Grievant filed 115 grievances over a period of approximately 14 months and signed and distributed a petition in late October 2007 to return a discharged driver to work. The Grievant filed a charge with the National Labor Relations Board, which deferred the matter to arbitration.

From the period between October 2007 and August 2008, the Grievant received five warning letters, was suspended five times and was terminated three times, the last being the Grievant's final discharge in August 2008. Specifically, the Grievant received warning letters on October 23, 2007, October 24, 2007 and November 8, 2007 for the following reasons: failure to remove an off route package; failure to carry an optimal load; and failure to follow methods during an OJS. He was warned about his performance again on January 24, 2008 and received a warning for insubordination on January 31, 2008 for his language during a meeting in which he was representing another employee concerning a performance issue.

The Grievant was suspended for one day on December 14, 2007 for failure to follow methods and procedures by leaving a package on his vehicle that should have been given to a Return Clerk. He was suspended for three days on January 22, 2008 for the same reason. He received a one-day suspension on February 11, 2008 for failure to maintain a level of performance established during an OJS. He received a three-day suspension for the same reason on February 18, 2008 and a five-day suspension on February 21, 2008 for his performance.

The Grievant was terminated on February 28, 2008 for performance related issues. He was terminated again on April 17, 2008 for his overall record, including attendance. His final termination was issued on August 19, 2008. The basis for the Grievant's discipline and discharge for performance related issues stems from an OJS conducted by On Car Supervisor Victor Kelly.

District Manager Joe Reimo testified that the Flushing Center in Maspeth, Queens was a poor performing facility, which was one of the reasons for his assignment there. Bob Walsh was the Center Manager from July 2007 to May 2008. During Walsh's tenure, four or five drivers were given OJS rides in an effort to improve their performance and another driver was discharged for performance issues. Reimo

testified that he selected the Grievant for an OJS because Russertt was one of the "least best" drivers in the center. Walsh testified that he suggested to Reimo that he bring in a supervisor from outside the center to do the OJS because Walsh did not have confidence in his center supervision.

Reimo testified that the purpose of an OJS is to evaluate a driver's methods and procedures and to establish a performance standard or SPORH, stops per on road hour. Once that standard is set, a driver is expected to maintain the standard over time and is evaluated on the basis of his SPORH to determine whether he is giving "a fair day's work for a fair day's pay," which is required under the contract. In evaluating a driver, the Company also reviews a driver's "overallowed" hours or the number of overtime hours beyond eight hours per day. According to Reimo, the Grievant had high "overallowed" hours and his performance was well below his SPORH.

Reimo testified that after requesting that Kelly be transferred into his Division, he asked the On Car Supervisor to do the Grievant's OJS. He selected Kelly for this assignment because he was an experienced supervisor who had been successful doing OJS rides and training drivers. Kelly was transferred to the Maspeth Center in Flushing, Queens one week prior to conducting the

Grievant's OJS. Kelly was asked by Reimo to make himself aware of the Grievant's route prior to doing an OJS on Russertt.

The week that Kelly transferred into Maspeth, the Grievant was on vacation. Therefore, Kelly rode the route while a substitute driver, who was familiar with the Grievant's route, delivered and picked up packages. According to Kelly, the substitute driver knew the route well and was able to average approximately 15 stops per hour.

Kelly's testimony concerning the OJS on the Grievant is as follows: there were problems with the Grievant's ride on November 7, 2007, including the following: Russertt was instructed to park closer five times; he failed to follow a smooth car routine 32 times; he had to be instructed to plan ahead 14 times; he was instructed to make an optimum carry seven times and the procedure was demonstrated by Kelly twice; he failed to have a brisk pace 35 times; he failed to call out UPS at the stop 41 times; he had excessive customer contact time 20 times; his key was not ready on six occasions; and he failed to move out without delay 13 times.

According to Kelly, the Grievant acted like he was a new driver on November 7. Kelly stated that Russertt

"seemed to be lost." On that day, the Grievant made 95 stops and did nine pick ups and had an average SPORH of 12.2 pick ups her hour. The OJS results on November 7 were higher than his base pickups of 11.3 on October 20 and 9.6 on October 27, 2007.

Kelly reported no problems with the Grievant's OJS on either November 8 or November 9, 2007. He testified that on those dates, the Grievant performed his job like an experienced driver. According to Kelly, the Grievant did not complain about his load on any of the three days and Kelly believed that Russertt's load was normal. Russertt mentioned to Kelly that his regular loader was not at the center to load his truck on day two. Nevertheless, the Grievant accomplished 15.4 stops her hour on November 8 and made 15.9 stops per hour on November 9, 2007.

The Grievant's average SPORH for the three-day period was 14.5. Kelly opined that if the Grievant had performed as well on November 7 as he did on the following two days, his SPORH for the three days would have averaged 15.3 stops per hour. As a result of his performance on his OJS, the Grievant's paid hours on November 7 were 9.13 as opposed to eight hours on both November 8 and November 9, 2007.

Kelly had one other interaction with the Grievant following the November OJS. On December 6, 2007 Kelly did

an audit of the Grievant's package car and found two packages that should have been given to the Return Clerk because they had bad addresses. Kelly reported his observation to Center Manager Bob Walsh.

Reimo testified that his objective in selecting the Grievant for an OJS was to improve his performance. He stated that he was not motivated to select the Grievant for an OJS because of his status as a Shop Steward and that he did not retaliate against the Grievant because of his union activity. According to Reimo, a driver lacks consistency in performance because he does not follow the Company's methods and procedures. When confronted with performance issues, the Grievant told Reimo that he was doing the best he could.

Reimo signed off on all five of the Grievant's suspensions between December 2007 and February 18, 2008. Reimo testified that on each occasion, the Union invoked Article 7. Reimo also issued the Grievant's first discharge letter dated February 28, 2008 for "failure to maintain demonstrated level of performance." According to Reimo, the Grievant had every opportunity to correct his performance, but failed to do so. Reimo testified that he was disappointed that the Grievant's behavior did not change, because in every other situation he has handled

over the past 20 years, he never had to discharge a driver for performance. Every other driver with whom Reimo worked had improved his peformance - changed his behavior.

Reimo testified that the Grievant failed to maintain his average SPORH of 14.5 on even one day between November 12 and January 24, 2008; that the Grievant attained an average of 13 or above on only two days and had an average of 12 or below on 31 days. The Grievant worked 13 days between January 24 and February 11, 2008 and attained an average of 13 or more on one of those days.

Between February 11 and February 18, 208, the Grievant worked four days, three of which he averaged under 12 SPORH. The Grievant averaged 13.64 stops per hour on February 18, 2008, but only after receiving a three-day suspension that morning. Reimo testified that, based on the Grievant's performance problems, he acted consistent with Company procedure by escalating to a three-day suspension. Reimo also testified that the Grievant's performance level of February 18 didn't last. When there was no improvement after five days, the Company issued the Grievant a five-day suspension.

According to both Reimo and Walsh, the Grievant's discipline was not motivated by his status as a Shop

Steward. The Grievant, who filed approximately 115 grievances during his time as Shop Steward, filed 30 of those grievances during Walsh's tenure. According to Walsh, however, there was nothing unique about either the number of grievances filed or the nature of Russertt's grievances, most of which involved allegations of supervisors performing bargaining unit work. Walsh testified that he had worked with other Shop Stewards over the years who filed an equivalent number of grievances.

With regard to the Grievant's performance, Walsh testified that there were only two other drivers in the center who were disciplined for performance. In those cases, the drivers' SPORH was between 3.5 and 4 stops per hour less than their standard. Walsh stated that other than these two drivers, no one other than the Grievant had a SPORH of 1 to 1.5 stops per hour below their standard.

Further, both Reimo and Walsh testified that the Grievant made it clear, both in his own disciplinary meetings as well as meetings in which he represented other drivers for performance issues that the Union did not recognize the Company's right to hold a driver to any specific level of performance, a position Reimo claims was never articulated to him by any other union representative during his tenure at UPS. Reimo stated that he has been

involved in the discipline of drivers for performance for the past 24 years.

Reimo denied that the petition the Grievant filed concerning the discharge of another driver had any effect on his decision to OJS Russertt or to discipline him. Specifically, Reimo denied that he told the Grievant that he was "pissed off" by his petition, claiming that he doesn't use that term. Instead, Reimo testified that he had conversations with Business Agent Anthony Donato immediately following the driver's discharge and had advised the Business Agent of his decision to reinstate the driver following a suspension before the Grievant approached him on November 9, 2007 to discuss the petition.

The Grievant was discharged for a second time on April 17, 2008, although there is no letter commemorating the Grievant's April 17, 2008 discharge for his "overall performance and not maintaining O.J.S." However, there is a letter for the Grievant's final discharge dated August 19 2008 for the same reasons. Division Manager Mike Ferony signed the August 19, 2008 letter, the Grievant's final discharge.

The Grievant, Liam Russertt, testified to the events leading up to his three discharges as follows: he was elected Shop Steward on May 11, 2006. Since that time, the

Grievant has filed approximately 115 grievances, 65 of them dealing with supervisors allegedly performing bargaining unit work. In addition, the Grievant signed and distributed a petition on both October 17 and October 22, 2007 on behalf of another driver to persuade the Company to reinstate the driver following his discharge. Approximately 100 drivers signed the petition. It is the Grievant's position that the discipline the Company assessed against him, including his three discharges, was in retaliation for his protected union activity.

On October 22, 2007, the Grievant handed the petition to Walsh, requesting that it be forwarded to Joe Reimo. The Grievant was aware at the time that the Union had 10 days in which to file for arbitration. The Grievant did not advise his Business Agent, Tony Donato, of the petition and did not inquire as to whether the Union planned to file for arbitration.

The Grievant spoke with Reimo on or about November 9, 2007 to ask if he had considered reinstating the discharged employee. According to the Grievant, Reimo said that he had considered it, but the petition had "pissed him off" and he had not yet come to a decision. The Grievant testified that he was aware that the driver was reinstated.

The Grievant was given two methods and procedures warnings on October 23, and October 24, 2007 for not removing a missed package from his package car at the end of his shift. He claimed that he was following the Company's written procedure at the time. The Grievant went on vacation at the end of October, beginning of November and returned to work on November 7th, the first day of a three-day OJS. According to Russertt, his load was extremely light in both load and weight on both November 8 and 9, 2007 due, in part, to two other drivers being assigned to deliver part of his load. The load on November 8 was so light that the Grievant remarked to Kelly, "I could do cartwheels in this truck," a comment to which Kelly agreed. According to the Grievant, he complained to the Company about the lightness of his load on November 8-9, 2007.

With regard to Kelly's write up of the November 7, 2007 OJS, the Grievant stated as follows: Kelly never told him to park closer to the curb; he did not tell the Grievant to walk at a brisk pace 35 times (Kelly never defined or demonstrated a brisk pace); Kelly did instruct him to call out UPS when he stopped at the UPS store instead of saying hello to the UPS employee in the store; and Kelly also tried to instruct the Grievant on how to

carry an optimal load, but dropped boxes during his demonstration. The Grievant's SPORH for this OJS was 14.5, a significant increase from his previous SPORH of 12.0,which he received following an OJS in September 2006 by his direct supervisor, Kevin Powell.

The Grievant testified that he had a tape recorder with him on the three days of his OJS. He used the recorder on both November 8 and November 9, 2007, but did not use the recorder on November 7th. According to the Grievant, his comment about being able to do cartwheels in his truck was recorded on tape.*

*Counsel for the Grievant asked to play a portion of the November 8, 2007 tape to corroborate the Grievant's testimony. The Company objected to hearing the tape on the basis that the Grievant had not told UPS of the existence of tapes nor made them available to the Company during the course of the grievance procedure or during preparation for arbitration, where parties normally exchange documents and other relevant material. The Arbitrator ruled that the tapes would be admissible, but only after the Company had had an opportunity to review them. After consulting with the Grievant, Union counsel advised the Arbitrator and the Company that it did not wish to rely upon or submit any of the tapes in evidence and would rely, instead, on the Grievant's testimony.

The Grievant received warnings and suspensions in January, February and March both for methods and procedures violations as well as performance. The Grievant testified that although Company records indicate that he received a three-day suspension on January 22, 2008, it was his understanding that the suspension was reduced to a warning letter, a claim Reimo denied.

The Grievant stated that the discipline was so rapid that he did not have time to improve. Moreover, his SPORH was significantly higher than what he was expected to achieve in 2006. In addition to methods and performance, Russertt was given a warning letter for insubordination on January 31, 2008 stemming from a heated conversation he had with Walsh where the Grievant was acting in his role as Shop Steward. The Grievant acknowledged that in that meeting, he told the Company that he did not believe that it had the right to require a driver to perform at a certain SPORH. Instead, the Grievant views a driver's SPORH as a standard to be sought but not one to which a driver is required to attain. This is because every day is different and conditions on the road may vary.

On February 8, 2008 the Grievant had an injury history review in which Reimo participated. According to the Grievant, Reimo told him that he didn't like the way he

presented himself as a Shop Steward; that his grievances were bullshit; and that he wasn't giving Walsh a fair shake. Russertt told Reimo that he didn't like the way Reimo acted as a District Manager and the conversation between the two men became heated. The Grievant testified that although he was aware of being given warnings and suspension, he did not receive the disciplinary letters the Company allegedly sent until preparing for his arbitration.

February 28, 2008 was the date of the Grievant's first discharge for his failure to maintain his demonstrated level of performance of 14.5 SPORH. On March 24, 2008 the Grievant was placed on a 72-hour notice for a methods and procedures violation for failing to scan a delivery. On April 3, 2008 the 72 hour notice was resolved and no further discipline was taken for the methods and procedures issue. However, the Grievant was placed on a 72-hour notice of discharge for his overall record, including failure to follow instructions, failure to follow methods and procedures, poor performance and attendance issues. He was discharged again on April 17, 2008. The Union invoked Article 7 after each discharge and the Grievant remained at work and on the payroll.

The record indicates that on April 30, 2008 the Grievant was advised of his improved performance, having

achieved a 13.5 SPORH the previous day. However, the Grievant was spoken to again about his performance on June 2, June 4 and June 16, 2008. The Grievant maintained that the Company changed his route, taking stops off his car and, thus, affecting his performance. Manager John Woods gave the Grievant a new OJS on June 17 through June 19, 2008, after which he had a SPORH of 13.71. According to the Company, the Grievant claimed that he had no problem with the 13.71 average expectation of his performance, although he testified that his load was lighter as it is during summer months. Nevertheless, on June 26, 2008 the Grievant was spoken with for failing to maintain his new SPORH, working over 11 paid hours on one day.

On August 14, 2008 the Grievant was again discharged for performance. He was discharged again on August 19, 2008 for his overall record. At the time, the Grievant's average SPORH was 11.5. During the week of September 6, 2008, the Grievant averaged 10.54 stops. When questioned about his performance, the Grievant stated repeatedly that he was doing his best.

The Grievant testified that he could not understand why discipline was progressing so quickly or why he was discharged repeatedly. With regard to being discharged for his "overall record," the Grievant testified that he was

unaware of any other employee being discharged for his overall record and stated that he did not understand the meaning of the term.

POSITION OF THE COMPANY

The Company disputes the Union's claim that the Grievant's activity as a Shop Steward affected its decision to discipline and discharge him. The Company contends that the Grievant's filing of grievances and submission of a petition in support of a terminated driver were not of sufficient moment to affect the Company or cause it to retaliate against the Grievant.

Although the Company acknowledges that the filing of a petition was unusual, it insists that discussions with the Union Business Agent were already underway to reinstate the discharged driver. The Company relies on the testimony of Joseph Reimo who stated that the Grievant's petition did not affect his decision to reinstate the driver; that he already was in discussions with the Union Business Agent to return the driver to work; and that the petition did not factor in his decision-making to discipline the Grievant for performance and methods issues.

The Company contends, moreover, that the filing of the petition was not protected activity because it was outside

the confines of the collective bargaining agreement. The Company argues that because the petition was independent of the grievance process, it does not fall under the protection of the NLRB.

With regard to the grievances filed by Russertt, the Company points out that most pre-dated Walsh coming to the Center; that Walsh testified that the number of grievances was not unique; that many of the grievances were duplicative; and that none of the grievances were of such importance as to cause the Company to take action against the Grievant for acting in his capacity as Shop Steward. The Company asserts that most of the grievances, namely, those claiming that supervisors were performing bargaining unit work in violation of the Agreement, were routine matters.

The Company points out that the Grievant's first warning letter came 16 months after he was elected Shop Steward and filed his first grievance. The Company argues, therefore, that there is no nexus between the grievances Russertt filed and his discipline. Rather, the Company contends that the Grievant was disciplined and discharged for failing to meet performance standards and follow methods and procedures.

With regard to performance, the Company points out that the Grievant doesn't dispute the statistics, which establish his performance history. Further, the Company asserts that it has the right to try to improve a driver's performance, including holding a driver to his SPORH.

The Company acknowledges that the Grievant's discipline progressed more rapidly than others, but claims that is because Russertt's performance showed no improvement. The Company relies on progressive discipline to correct an employee's performance and claims that when the Grievant failed to maintain a satisfactory performance level, it had the right to accelerate discipline.

Further, the Company contends that the Grievant was clear and direct about his belief that he could not be held to any performance standards. Under the circumstances, the Company claims that there came a time when it became futile to continue to try to correct the Grievant's performance through progressive discipline. At that point, the Company claims that it had just cause for discharge.

The Company points out that a Shop Steward does not have protection against legitimate discipline. In this case, the Company asserts that it took disciplinary action against the Grievant on the basis of his overall record, including his performance and not in retaliation for his

union activity. The Company asks the Arbitrator to deny the grievance in its entirety and to sustain the discharge.

POSITION OF THE UNION

The Union contends that all of the disciplinary actions the Company took against the Grievant were in retaliation for his union activity. The Union points out that discipline followed the Grievant's election as Shop Steward, his filing of grievances and his submission of a petition to return a discharged driver to work. The Union contends that there is no other plausible explanation for why the Grievant would be given two OJS rides within months or be warned, suspended and discharged repeatedly.

With regard to his performance, the Union asserts that the Grievant maintained 90 per cent of his original SPORH of 12.0 that he was given following an OJS in 2006. It argues that had the Company relied upon the 2006 standard, there would have been no basis for discipline. Instead, once Center Manager Bob Walsh came to Flushing, the Grievant was repeatedly disciplined and discharged, in retaliation first for his filing numerous grievances and ultimately for filing a petition in support of a discharged driver. The Union points out that the Grievant's conduct as a Shop Steward was at odds from the previous shop

steward who didn't file any grievances during his tenure. The Union asserts that Walsh objected to Russertt's continuous filing of grievances and retaliated against him by giving him an OJS.

The Union points out that Walsh testified that he requested that Reimo get an outside supervisor to give the Grievant an OJS instead of relying on the supervisor who gave Russertt a ride in 2006. The Union contends that Walsh wanted an outsider because he didn't want to have to rely upon the 12.0 SPORH.

The Union asserts that Kelly came to the Center for the purpose of giving the Grievant an OJS to obtain a higher SPORH. The Union questions why else Kelly would have remained in the Center for only six to eight weeks and points out that the Supervisor didn't OJS any other driver in Flushing during his tenure there. The Union contends that Kelly, who knew Reimo, was on a mission to raise the Grievant's SPORH; that he altered the Grievant's load on November 8 and 9; and acknowledged on the second day of the OJS that the Grievant's load was so light that he could do cartwheels in his truck.

The Union contends that the decision to OJS the Grievant was triggered when Russertt obtained nearly 100 signatures on a petition to return a discharged driver to

work. The Union asserts that despite Reimo's denial, the Manager was outraged by the petition and retaliated against the Shop Steward who organized the drivers to challenge Reimo's actions. The Union asks the Arbitrator to credit the Grievant's testimony that Reimo told him the petition "pissed him off." Although the Union acknowledges that the driver was eventually reinstated, it points out that he was not returned to work until several weeks after his discharge.

The Union points out that following the submission of the petition, the Grievant's discipline cascaded; and that the Grievant was issued warning letters, suspensions and three discharges within months. The Union contends that the discipline against the Grievant was unparalleled and establishes that the Company was determined to rid itself of Russertt in retaliation for his activities as a Shop Steward. The Union claims that there is simply no other explanation for the Company's actions.

In sum, the Union asserts that the Grievant did nothing more than try to live up to his role as Shop Steward and to support the drivers in the Center who needed his representation. The Union claims that Russertt was retaliated against for his actions as a Shop Steward and asks that the grievance be granted in all respects.

OPINION

The issue before the Arbitrator is whether there is just cause for Liam Russertt's discharge. The Union claims that the Grievant's discharge was the result of his protected activity as a Shop Steward and not his record and performance as a driver. Upon careful review of the record, the Arbitrator finds that the Company had just cause to discharge the Grievant. Moreover, the Arbitrator concludes that the Grievant's discharge was not motivated by a desire to retaliate against him for his union activity. My reasons follow.

At the outset, the Company knew of the Grievant's role as Shop Steward in the Maspeth Center. Indeed, the Grievant was elected in May 2006 and acted in his role as Shop Steward when he submitted approximately 115 grievances between May 2006 and his discharge in August 2008, 30 of which were filed during Walsh's tenure as Center Manager.

The Arbitrator concludes, however, that Russertt's grievance filings played no role in his discipline. The Arbitrator reaches this conclusion for the following reasons. One, the Grievant's first discipline, in the form of a warning letter, came five months after he was elected Shop Steward and after numerous grievances had already been filed. Two, there is nothing unusual about the grievances

Russertt filed. In fact, 65 of the 115 grievances deal with the issue of whether supervisors were performing bargaining unit work in violation of the contract. That issue is not unique to Maspeth. In fact, these grievances and others were bundled together and arbitrated as a group in October 2008. Three, the Arbitrator accepts Walsh's testimony that both the number and type of grievances Russertt filed during his tenure were unremarkable.

The Union also contends that the Grievant's filing of a petition in support of a discharged driver triggered the Grievant's discipline in October 2007. The Grievant in his role as Shop Steward obtained approximately 100 signatures on the petition, which he submitted to Walsh with a request that he forward the petition to Reimo. There is no evidence that Walsh ever responded to the petition, except to assure the Grievant that he would forward it as requested. Reimo acknowledged that he received the petition and that the Grievant approached him on November 9, 2007 to discuss the issue of the driver's discharge.

The problem with the Union's reliance on the petition as a trigger to discipline, other than Reimo's denial that it affected his decision, is that the driver's discharge was already resolved when Russertt and Reimo spoke on November 9th. It is undisputed that Business Agent Anthony

Donato was in discussions with Reimo immediately after the driver's discharge to seek his reinstatement. It is also unrebutted that at the time the Grievant approached Reimo to discuss the matter, Reimo had already decided to reinstate the driver following a suspension. In fact, the driver was returned to work.

The Union contends that the petition was unusual and that Reimo was "pissed off" that the Grievant obtained 100 signatures from drivers to challenge a discharge. The Arbitrator finds that there were two unusual things about the Grievant's filing of the petition, both of which speak more about Russertt than about Reimo. One, the Grievant appeared to have little understanding of the charges against the driver upon which the Company relied when it discharged him. Two, the Grievant submitted the petition without filing a grievance or even checking to determine whether the Union had already filed for arbitration. Given that Reimo did not seek out the Grievant to discuss the petition and given that Reimo had already decided to return the driver to work, the Arbitrator finds that the Grievant's petition was a benign act on Russertt's part and supports the Company's assertion that the Grievant's petition was not a motivating factor in convincing Reimo to either OJS the Grievant or to discipline him.

The Union contends that Reimo's involvement in the Grievant's discipline was unusual. However, the Arbitrator takes notice that it is usually a Division Manager who attends 72-hour notice hearings involving the suspension or discharge of an employee.

Assuming arguendo, however, that the Company was motivated, at least in part, by the Grievant's union activities, the Grievant's overall record establishes that the Company would have taken the same disciplinary action even in the absence of the Grievant's union activities, including having filed the petition. First, the Grievant violated Company methods and procedures for which he was disciplined repeatedly. Second, the Grievant continuously failed to maintain his established standard of performance. Third, the discipline was progressive, moving from warning letters to suspensions to multiple discharges.

In so finding, the Arbitrator does not credit the Grievant's testimony that he was unaware that he had a three-day suspension. The record indicates that the Grievant was given a three-day suspension on January 22, 2008 and that the Union invoked Article 7, which allows for discipline to be held in abeyance until the matter is decided in arbitration. It would make no sense for the Union to invoke Article 7 at the end of the 72-hour hearing

if the discipline had been reduced from a suspension to a warning letter.

The Arbitrator turns next to whether the Company acted properly when it selected the Grievant for an OJS. The record does not support the conclusion that the Grievant was singled out for an OJS. Instead, there were four or five drivers selected for OJS rides during Walsh's tenure. There is evidence that the Maspeth Center was not performing well and recognition that driver performance is an essential aspect of a center's success. Moreover, there is unrebutted testimony that the Grievant was one of the "lease best" drivers in the center. The combination of the Grievant's low SPORH and high "overallowed" hours served as a legitimate basis to select the Grievant for an OJS.

The Grievant was given two OJS rides, one in November 2007 and another in June 2008. After his November 2007 OJS, the Grievant had a SPORH of 14.5 while his June 2008 OJS resulted in a SPORH of 13.71. A review of the Grievant's performance establishes the following: that between November 2007 and June 2008, he averaged 11.56 stops per on road hour. This average is approximately three stops below his 2007 SPORH and more than two stops below his 2008 SPORH. Therefore, even if the Arbitrator measures the Grievant's performance against his lower 2008

SPORH, a standard the Grievant did not contest, his performance was significantly below that of other drivers in the center. This conclusion is based on Walsh's testimony that except for two other drivers who have been disciplined for their performance, no other drivers in the center fall more than 1 to 1.5 stops per on road hour below their SPORH. The Grievant's performance, which remained constant even after his 2008 OJS, was far below the norm.

Although the Arbitrator has not addressed the November 2007 OJS conducted by Kelly or the 14.5 SPORH as a basis for establishing just cause, the Arbitrator has considered the Grievant's testimony about the three-day OJS and Kelly's role in the process. The Arbitrator is not persuaded that Kelly acted improperly in conducting the Grievant's OJS. First, there is no persuasive evidence that Kelly tampered with the Grievant's load on either November 8 or November 9, 2007. Second, there is no corroboration for the Grievant's statement that other drivers were assigned part of his load or that his third floor stops were removed from his truck. Three, there is unrebutted testimony that another driver familiar with the Grievant's route was able to make 15 stops per on road hour on the three days that Kelly observed him on the route.

Instead, the Arbitrator credits Kelly's testimony that the Grievant behaved like a new driver on November 7, 2007, requiring Kelly to instruct Russertt on numerous methods and procedures. Kelly's credibility is supported by his lack of criticism of the Grievant's methods on the last two days of the OJS. Furthermore, it is suspect that the Grievant, who testified that he carried a tape recorder with him on all three days of his OJS, made no attempt to tape any of his conversations with Kelly on November 7th.

The Union's contention that the Grievant should have been evaluated on the basis of his 2006 SPORH is misplaced. A number of factors can change a driver's route, requiring a new evaluation or OJS. Furthermore, the Company has the right to give a driver an OJS to evaluate his methods and procedures in reviewing and assessing a driver's performance.

The Grievant contends that the Company does not have the right to hold a driver accountable for any particular level of performance. According to the Grievant, every day is different and conditions on the road vary. Although the Arbitrator acknowledges that conditions may vary from day to day, over time a driver's performance should fall within a predictable range. What is disturbing in this case is that, except for November 8-9, 2007, the Grievant had no

explanation for either his low SPORH or his high "overallowed" hours. This is important because the Grievant did not contest his 2008 SPORH of 13.71. He didn't make any claim, as he did about the Kelly OJS, that the supervisor lightened his load, that other drivers delivered part of his load or that he was not required to make deliveries on high floors.

Instead, the Grievant relies upon his interpretation of the collective bargaining agreement that the lack of a specific clause giving the Company the express right to discipline a driver for failure to maintain a satisfactory level of performance means that UPS cannot discipline a driver for not maintaining his SPORH. The Grievant's interpretation of the contract is misplaced. It goes without saying that not all rights and understandings are expressed within the four corners of a collective bargaining agreement. There are practices, including those favoring the Union, that become binding over time despite the fact that they are not incorporated into the contract. In addition, there are certain rights that are reserved to management to run its business as long as the Company's actions do not conflict either with specific contract clauses or undermine the spirit of the contract.

Furthermore, the Grievant's position on this matter is nonsensical. He admits that the Company has the right to demand a "fair day's work for a fair day's pay." He acknowledges that a SPORH is a standard to which a driver should attempt to attain. Nevertheless, it is his position that the Company has no right to enforce any particular performance standard. Under the Grievant's theory, the Company would be left with no ability to reach legitimate performance goals in order to enable it to effectively compete for business.

Therefore, it is not the Grievant's performance and methods violations standing alone that provide the Company with just cause for discharge. It is that the Grievant is incorrigible. By denying the Company's right to hold him accountable for any level of performance and by either failing or refusing to improve his methods and performance, the Grievant has provided the Company with just cause for his discharge. The Company is correct when it says that in the spring and summer of 2008, it became clear that further discipline would have no effect on the Grievant's performance or conduct and that progressive discipline was not achieving its goal of correction. Under these circumstances, an employer has the right to sever the employment relationship.

The Grievant claims that discipline was so rapid that he had no opportunity to improve. Interestingly, the Grievant's statement implies that he understood the need for improvement. Nevertheless, although the Grievant's discipline may have moved rather rapidly, he had ample opportunity to improve over the ten months between his first warning and his final discharge.

The Grievant made one final argument, namely, that he had never heard of a driver being discharged for his overall record. This Arbitrator has been a member of the Local 804/UPS panel for the past twenty years and has seen numerous discharges based on an employee's overall record. Accordingly, the Grievant's claim that discharging him for his overall record was unique and must have been based on his role as a Shop Steward is unsupported by the record.

In sum, the Grievant's overall record, including both methods violations and performance problems, together with Russertt's refusal to accept his obligation as a driver to perform at an acceptable standard, justifies his discharge. The Union contends that there is no plausible explanation for the Grievant's discipline and discharge except retaliation for his protected union activity. The record argues otherwise. There is more than ample evidence supporting the Company's decision to OJS the Grievant and

to discipline and discharge him. Accordingly, his discharge is sustained.

AWARD

The grievance is denied. The Company had just cause for the discharge of Liam Russertt.

Dated: December 30, 2008

Carol Wittenberg

STATE OF NEW YORK
ss:
COUNTY OF NEW YORK

I, CAROL WITTENBERG, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

10/30/08
(Date)

(Signature)