UNITED STATES POSTAL SERVICE®

Date Received at Step B *(MM/DD/YYYY)*

USPS-NALC Joint Step A Grievance Form

INFORMAL STEP A — NALC Shop Steward Completes This Section *(See instructions on page 2.)*

1. Grievant's Name *(Last, first, middle initial)*		2. Grievant's Telephone No. *(Include area code)*
Worker, Hard		(000) 000-0000
3. Seniority Date *(MM/DD/YYYY)*	4 Status *(Check one)*	5. Grievant's Employee Identification Number (EIN)
04/21/2018	☑ FT ☐ FTF ☐ PTR ☐ PTF ☐ CCA	00000000
6. District, Installation, Work Unit, ZIP Code®		7. Finance No.
TN, Anytown, Anywhere, 00000		47-6155

8. NALC Branch No.	9. NALC Grievance No.	10. Incident Date *(MM/DD/YYYY)*	11. Date Discussed With Supervisor *(Filing date)*
		07/01/2020	July 15, 2020

12a Companion MSPB Appeal? ☐ Yes ☐ No	12b. Companion EEO Appeal? ☐ Yes ☐ No
13a. Supervisor's Printed Name, Initials, and Telephone No.	13b. Steward's Printed Name, Initials, and Telephone No.
Big Dummy, ,(000) 000-0000	Bad Ass, ,(000) 000-0000

FORMAL STEP A — Formal Step A Parties Complete This Section *(See instructions on page 2.)*

14. USPS Grievance No.: Obtain prior to Formal Step A meeting.

15. Issue Statement: Provide contract provision(s) and frame the issue(s).

16. Undisputed Facts: List and attach **all** supporting documents. Use additional paper if necessary. Attachments? ☐ No ☐ Yes Number ____

17. **UNION'S** full, detailed statement of disputed facts and contentions: List and attach **all** supporting documents. Use additional paper if necessary. Attachments? ☐ No ☐ Yes Number ____

18. **MANAGEMENT'S** full, detailed statement of disputed facts and contentions: List and attach **all** supporting documents. Use additional paper if necessary. Attachments? ☐ No ☐ Yes Number ____

19a. Union Representative: Enter the remedy requested by the union.

19b. Settlement Offer: List any settlement offers by either party on page 3.

20. Disposition (*Check one)* ☐ Resolved ☐ Withdrawn ☐ Not Resolved Date of Formal Step A Meeting *(MM/DD/YYYY)*

21a. USPS Representative's Name	21b. Telephone No. *(Include area code)*
21c. USPS Representative's Signature	21d. Date *(MM/DD/YYYY)*
22a. NALC Representative's Name	22b. Telephone No. *(Include area code)*
22c. NALC Representative's Signature	22d. Date *(MM/DD/YYYY)*

UNITED STATES POSTAL SERVICE

July 1, 2020

Hard Worker
EIN: 00000000

City Carrier

Anytown, TN 00000

SUBJECT: Letter of Warning

This official Letter of Warning is being issued to you for the following reason:

CHARGE: FAILURE TO BE REGULAR IN ATTENDANCE

A review of your attendance record from January 1, 2020, to May 15, 2020, indicates that you have been absent from your official duties on the dates listed below.

DATE	NUMBER OF HOURS	TYPE OF LEAVE
01/21/2020	8	SL
05/02/2020	8	SL
05/03/2020	8	SL
05/04/2020	8	SL
05/05/2020	8	SL

On May 23, 2020, you were given an investigative interview, affording you an opportunity to respond to your actions. During the interview you failed to justify your failure to be regular in attendance. Therefore, you are charged as stated above,

Your actions are in violation of the following pertinent sections of the *Employee & Labor Relations Manual* (ELM):

665.4 Attendance
665.41 Requirement of Regular Attendance
Employees are required to be regular in attendance. Failure to be regular in attendance may result in disciplinary action, including removal from the Postal Service.

It is hoped that this official Letter of Warning will serve to impress upon you the seriousness of your actions and that future discipline will not be necessary. If you are having difficulties which I may not be aware of or if you need additional assistance or instructions for improving your performance, please call on me, or

you may consult with other supervisors, and we will assist you where possible. However, I must warn you that future deficiencies will result in more severe disciplinary action being taken against you. Such actions may include suspensions, reduction in grade and/or pay, or removal from the Postal Service.

SL-8 SL-8

Big Dummy Date
Manager, Customer Services

Hard Worker Date: July 1, 2020

Received by
(Indicates Receipt Only) Time: 8:17 AM

Cc: eOPF
Labor Relations
POOM

Patient Copy

Made-Up Doctors Office

Work Note

Hard Worker
05/02/2020

Hard Worker was seen in our office today. He is incapacitated for work duties until 05/08/2020.

Richard B. Short PA
RShort
(888) 555-3425

UNITED STATES POSTAL SERVICE

Date: 1-31-2020

MEMORANDUM FOR: Manager, Labor Relations
3032 Anytown Parkway
Anytown, USA 00000-0000

SUBJECT: **REQUEST FOR APPROPRIATE ACTION**

EMPLOYEE'S NAME: ***Hard Worker*** OFF DAYS: ***Sat/Sun***

CRAFT DESIGNATION: ***City Carrier*** EIN: ***00000009***

OFFICE NAME and ADDRESS including zip: ***Anywhere Station 00000***

This employee has shown a deficiency in their: ***Attendance.***

Request that appropriate action be administered to this employee based on the following:

(A) Investigative interview held? ***Yes*** Date: ***1-27-2020***

(B) Prior discussion(s)? ***Yes*** Discussion Date(s): ***9/30/2019***

(C) List other disciplinary actions still active (**attach copy**): ***None on file.***

(D) Narrative attached? ***Yes***

(E) Documentation attached? ***Yes***

Big Dummy — Supervisor Printed Name

Letter of Warning — Recommended Action

Big Dummy — Supervisor Signature

1.31.20 — Date

HIGHER LEVEL CONCURRENCE

Manager or Designee Printed Name

Recommended Action

Manager Signature

On May 23, 2020 an investigative interview was conducted with Hard Worker regarding his attendance. Union steward Bad Ass was requested to represent him. Mr. Worker has had 5 absences in five months. He stated in the interview that he was ill on all of the five occurrences.

I am requesting a Letter of Warning be issued to Mr. Hard Worker to impress upon him the importance of being at work regularly and avoiding unscheduled absences as stated in the ELM - 511.43 Employee Responsibilities.

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

Big Dummy
Manager Customer Services
Anywhere Station

Big Dummy

1.31.2020

UNITED STATES POSTAL SERVICE

Leave Year 2020 ***Absence Analysis***

Employee's Name	*EIN*	*Pay Location*
WORKER, HARD	*00000000*	*001-DEFAULT*

Instructions: Using the codes below, and the hours involved, post current and previous quarters. Precede with letter 'F' when absence is recorded as Family And Medical Leave Act (FMLA) and with 'U' when absence is recorded as unscheduled on PS Form 3971. Post additional quarters if circumstances warrant. This form may also be used on an ongoing basis. On page 2 of this form, the employee's supervisor records attendance-related actions; such as review of attandance,commendations, restricted sick leave, Letters of Warning and suspensions. A running total of FMLA hours used may be kept on page 2 of this form.

Absent from Schedule OT	*AOT**	Court Leave	*CL*	Military Leave	*ML*
Absent Without Leave	*AWOL**	Emergency Annual Leave	*EAL**	Sick Leave	*SL*
Annual Leave	*AL*	Family Medical Leave Act	*F**	Sick Leave/Dependent Care	*SLDC**
Annual Leave in Lieu of Holiday Leave	*HAL**	Holiday Leave	*H*	Unscheduled Absence	*U**
Annual Leave in Lieu of Sick Leave	*SAL**	Late Reporting	*L**		
Administrative Leave	*ADL*	Leave Without Pay	*LWOP*		
Continuation of Pay	*COP*	LWOP in Lieu of Sick Leave	*SWOP**		

*Note: These are not separate leave categories, but a distinction is made for the purposes of analysis and tracking.

Pay Period			***Week 1***							***Week 2***						
No.	*From*	*To*	*Sat*	*Sun*	*Mon*	*Tue*	*Wed*	*Thur*	*Fri*	*Sat*	*Sun*	*Mon*	*Tue*	*Wed*	*Thur*	*Fri*
02	Jan.05	Jan.18	05 SDO	06 SDO	07	08	09	10	11	12 SDO	13 SDO	14	15	16	17	18
03	Jan.19	Feb.01	19 SDO	20 SDO	21 uSL- 8	22	23	24	25	26 SDO	27 SDO	28	29	30	31	01 AL- 8
04	Feb.02	Feb.15	02 SDO	03 SDO	04	05	06	07	08	09 SDO	10 SDO	11	12	13	14	15
05	Feb.16	Mar.01	16 SDO	17 SDO	18 H- 8	19	20	21	22	23 SDO	24 SDO	25	26	27	28	01
06	Mar.02	Mar.15	02 SDO	03 SDO	04	05	06	07	08	09 SDO	10 SDO	11	12	13	14	15
07	Mar.16	Mar.29	16 SDO	17 SDO	18	19	20	21	22	23 SDO	24 SDO	25	26	27	28	29
08	Mar.30	Apr.12	30 SDO	31 SDO	01	02	03	04	05	06 SDO	07 SDO	08	09	10	11	12 AL- 8
09	Apr.13	Apr.26	13 SDO	14 SDO	15 AL- 8	16 AL- 8	17 AL- 8	18 AL- 8	19 AL- 8	20 SDO	21 SDO	22	23	24	25	26
10	Apr.27	May.10	27 SDO	28 SDO	29	30	01	02 SL-6	03 SL-8	04 SDO	05 SDO	06 SL-8	07 SL-8	08	09	10
11	May.11	May.24	11 SDO	12 SDO	13	14	15	16	17	18 SDO	19 SDO	20	21	22	23	24
12	May.25	Jun.07	25 SDO	26 SDO	27 H- 8	28	29	30	31	01 SDO	02 SDO	03	04	05	06	07
13	Jun.08	Jun.21	08 SDO	09 SDO	10	11	12	13	14	15 SDO	16 SDO	17	18	19	20	21
14	Jun.22	Jul.05	22 SDO	23 SDO	24	25	26	27	28	29 SDO	30 SDO	01	02	03	04 H- 8	05
15	Jul.06	Jul.19	06 SDO	07 SDO	08	09	10	11	12	13 SDO	14 SDO	15	16	17	18	19
16	Jul.20	Aug.02	20 SDO	21 SDO	22	23	24	25	26	27 SDO	28 SDO	29	30	31	01	02

Employee's Name
WORKER, HARD

Note: The Eagan DDE System (via D385) provides employees' entered on duty date, work hours in the last 26 pay periods, and current leave balances, including FMLA and Sick Leave for Dependent Care.

Pay Period			Week 1							Week 2						
No.	From	To	Sat	Sun	Mon	Tue	Wed	Thur	Fri	Sat	Sun	Mon	Tue	Wed	Thur	Fri
17	Aug.03	Aug.16	03 SDO	04 SDO	05	06	07	08	09	10 SDO	11 SDO	12	13	14	15	16
18	Aug.17	Aug.30	17 SDO	18 SDO	19	20	21	22	23	24 SDO	25 SDO	26	27	28	29	30
19	Aug.31	Sep.13	31 SDO	01 SDO	02 H- 8	03	04	05	06	07 SDO	08 SDO	09	10	11	12	13
20	Sep.14	Sep.27	14 SDO	15 SDO	16	17	18	19	20	21 SDO	22 SDO	23	24	25	26	27
21	Sep.28	Oct.11	28 SDO	29 SDO	30	01	02	03	04	05 SDO	06 SDO	07	08	09	10	11
22	Oct.12	Oct.25	12 SDO	13 SDO	14 H- 8	15	16	17	18	19 SDO	20 SDO	21	22	23	24	25
23	Oct.26	Nov.08	26 SDO	27 SDO	28	29	30	31	01	02 SDO	03 SDO	04	05	06	07	08
24	Nov.09	Nov.22	09 SDO	10 SDO	11 H- 8	12	13	14	15	16 SDO	17 SDO	18	19	20	21	22
25	Nov.23	Dec.06	23 SDO	24 SDO	25	26	27	28 H- 8	29	30 SDO	01 SDO	02	03	04	05	06
26	Dec.07	Dec.20	07 SDO	08 SDO	09	10	11	12	13	14 SDO	15 SDO	16	17	18	19	20
01	Dec.21	Jan.03	21 SDO	22 SDO	23	24	25 H- 8	26	27	28 SDO	29 SDO	30	31	01 H- 8	02	03

Attendance Related Actions & Dates (See Instructions)	Reviewing Supervisor's Comments, Signature & Date	
	Jan.	
	Feb.	
	March	
	April	
	May	
	June	
	July	
	Aug.	
	Sept.	
	Oct.	
	Nov.	
	Dec.	

Attendance

Date: MAY 23, 2020 **Time:** 8:00 AM

Employee: HARD WORKER

EIN: 00000000

Union Rep: BAD ASS

MGMT Rep: BIG DUMMY

Other Attendees: NONE

Question #1

Do you understand that this is an investigative interview and the answers you give will help determine what action, if any, will be taken, up to and including removal from the Postal Service as per Section 665.6 of the Employee and Labor Relations Manual, also known as the ELM?

665.6 Disciplinary Action

Postal officials may take appropriate disciplinary measures to correct violations of the regulations referred to in 665

Answer #1

I UNDERSTAND THAT THIS IS AN INVESTIGATIVE INTERVIEW BUT THIS IS THE FIRST I AM EVER HEARING OF WHATEVER YOU SAID ABOUT LABOR RELATIONS.

I WANT TO SPEAK WITH MY STEWARD BEFORE THIS GOES ANY FURTHER.

BIG DUMMY: YOU CAN SPEAK TO YOUR STEWARD AFTER WE ARE DONE HERE!

Question #2

Are you aware that you are required to cooperate in a postal investigation, per Section 665.3 of the ELM?

665.3 Cooperation in Investigations

Employees must cooperate in any postal investigation, including Office of Inspector General investigations.

Answer #2

AGAIN, I DON'T KNOW ANYTHING ABOUT WHAT YOU ARE REFERENCING.

Question #3

Are you aware that you are required to uphold the policies and regulations of the Postal Service, per Section 665.11 of the ELM?

665.11 Loyalty

Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service.

Answer #3

I DON'T KNOW ANYTHING ABOUT THAT. THIS IS THE FIRST TIME YOU OR ANYONE ELSE HAS SAID ANYTHING LIKE THIS TO ME.

Question #4

Are you aware that you are expected to discharge your duties conscientiously and effectively, per Section 665.13 of the ELM?

665.13 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

Answer #4

I DON'T KNOW ANYTHING ABOUT WHAT YOU ARE REFERENCING, HOWEVER, I DO WORK CONSCIENTIOUSLY AND EFFECTIVELY. IN FACT, YOU TOLD ME JUST YESTERDAY THAT THE STATION WOULD NOT BE ABLE TO GET THE MAIL DELIVERED WITHOUT ME AND THANKED ME FOR BEING HERE AND WORKING SO HARD, DID YOU NOT?

BIG DUMMY: I ASK THE QUESTIONS. YOU ANSWER THE QUESTIONS. THAT'S HOW THIS WORKS!

BAD ASS: YOU ASKED THE QUESTION. HE ANSWERED THE QUESTION AND THEN ASKED YOU A QUESTION. NOW YOU CAN ANSWER HIS QUESTION.

BIG DUMMY: THIS IS MY INTERVIEW. I'M NOT ANSWERING QUESTIONS AND YOU ARE BEING DISRUPTIVE TO MY INTERVIEW.

BAD ASS: LET'S MOVE ALONG BIG DUMMY. YOU ONLY GET PAID BECAUSE OF THE WORK WE DO, AND WE HAVE PLENTY OF WORK TO GET DONE.

Question #5

Are you aware that you are expected to obey the instructions of your Supervisors, per Section 665.15 of the ELM as well as Section 112.21 of the M-41 Handbook, which is the City Delivery Carrier Duties and Responsibilities?

ELM - 665.15 Obedience to Orders

Employees must obey the instructions of their supervisors. If an employee has ***reason to question the propriety of a supervisor's order, the individual must*** *nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels*

M-41 - 112.21 Obey the instructions of your manager.

Answer #5

I DON'T KNOW ANYTHING ABOUT THESE BOOKS YOU KEEP REFERENCING AND YOU KNOW YOU HAVE NEVER SAID ANYTHING ABOUT THEM TO ME. I DO KNOW THAT I AM SUPPOSED TO DO WHAT I AM TOLD THOUGH.

DID YOU TELL ME TO DO SOMETHING THAT I DID NOT DO?

BIG DUMMY: I AM ASKING THE QUESTIONS.

BAD ASS: HE CAN ASK QUESTIONS AS WELL. YOU NEED TO ANSWER HIS QUESTIONS JUST AS HE IS TO ANSWER YOUR QUESTIONS.

BIG DUMMY: YOU ARE HERE BECAUSE I ALLOWED YOU TO BE HERE. YOU ARE TO SIT THERE, KEEP YOUR MOUTH CLOSED AND TAKE NOTES.

BAD ASS: YOU SURE THAT'S WHAT YOU WANT?

BIG DUMMY: I WON'T TELL YOU AGAIN, SHUT YOUR MOUTH!

Question #6

Are you aware that an unscheduled absence, as defined by Section 511.41 of the ELM, is defined as any absence from work that is not requested and approved in advance?

511.4 Unscheduled Absence

511.41 Definition

Unscheduled absences are any absences from work that are not requested and approved in advance.

Answer #6

I DON'T KNOW ANYTHING ABOUT THAT.

Question #7

Are you aware that you are to maintain your assigned schedule and make every effort to avoid unscheduled absences, per Section 511.43 of the ELM, as well as report for work promptly as scheduled, per Section 112.22 of the M-41?

ELM - 511.43 Employee Responsibilities

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

M-41 - 112.22 - Report for work promptly as scheduled.

Answer #7

WHY DO YOU CONTINUE TO ASK ME ABOUT THESE BOOKS? I DON'T KNOW ANYTHING ABOUT THEM AND NOONE INCLUDING YOU HAS EVER SAID ANYTHING ABOUT THEM TO ME. HAVE YOU EVER SAID ANYTHING ABOUT ANY OF THIS STUFF YOU ARE TALKING ABOUT TO ME?

Question #8

Are you aware you are expected to be regular in attendance, per Section 665.41 of the ELM?

665.41 Requirement of Regular Attendance

Employees are required to be regular in attendance. Failure to be regular in attendance may result in disciplinary action, including removal from the Postal Service.

Answer #8

WHAT ARE YOU TALKING ABOUT? I DON'T KNOW ANYTHING ABOUT THAT BOOK BUT I COME TO WORK EVERY DAY EVEN WHEN I AM SICK. YOU TOLD ME A COUPLE MONTHS AGO NOT TO COME IN IF I AM SICK SO I STAYED HOME WHEN I HAD THE FLU AND I GAVE YOU THE INFORMATION FROM THE DOCTOR. DIDN'T YOU TELL ME TO STAY HOME? WHAT IS GOING ON HERE?

BAD ASS: CALM DOWN HARD WORKER.

BIG DUMMY: YA, YOU NEED TO CALM YOURSELF DOWN RIGHT NOW!

BAD ASS: YOU NEED TO STAY ON POINT BIG DUMMY. I'M FRUSTRATED JUST LIKE HE IS, YOU ARE TRYING TO SET HIM UP FOR DISCIPLINE AFTER INSTRUCTING HIM TO REMAIN AT HOME. YOU JUST DON'T WANT TO ADMIT TO YOUR BOSS THAT YOU ARE THE ONE THAT TOLD HIM TO STAY HOME.

BIG DUMMY: THAT'S IT! I'VE ALREADY WARNED YOU! GET THE HELL OUTTA MY OFFICE!

BAD ASS: OKAY, IM NOT LEAVING BUT I'LL BE A SILENT OBSERVER IF THAT'S WHAT YOU WANT.

BIG DUMMY: THAT'S FINE BUT DON'T TALK ANYMORE.

Question #9

A review of you recent attendance record has revealed various deficiencies and inconsistencies, and I would like to address the same with you at this time.

Date	Amount (Hours/Units)	Leave Type	Scheduled or Unscheduled
1/21/2020	8	SL	USL
5/2/2020	8	SL	USL
5/3/2020	8	SL	USL
5/4/2020	8	SL	USL
5/5/2020	8	SL	USL

Having reviewed these absences with you, do you understand why I would consider your recent attendance record deficient and inconsistent?

Answer #9

NOT AT ALL. MY ATTENDANCE IS NOT DEFICIENT OR INCONSISTENT IN ANY WAY. YOU ARE THE ONE THAT TOLD ME TO STAY HOME. DIDN'T YOU TELL ME TO STAY HOME?

BIG DUMMY: JUST ANSWER THE QUESTIONS!

Question #10

Having reviewed these absences with you, would you consider your recent attendance record acceptable?

Answer #10

I JUST ANSWERED THIS QUESTION. MY ATTENDANCE IS ACCEPTABLE!

Question #11

Can you explain to me in your own words the reasons for the deficiencies and inconsistencies in your attendance record for each of the dates that are listed above? (Each date must be answered for separate)

Answer #11

I DON'T HAVE ANY DEFICIENCIES OR INCONSISTENCIES IN MY ATTENDANCE RECORD!

Question #12

Can you explain to me in your own words what you feel you would need to do to correct these deficiencies and inconsistencies in the future?

Answer #12

THERE IS NOTHING THAT NEEDS TO BE CORRECTED. YOU ARE THE ONE WHO TOLD ME TO STAY AT HOME. WHY WON'T YOU ADMIT THAT YOU TOLD ME TO STAY HOME?

BIG DUMMY: I DON'T ANSWER YOUR QUESTIONS!

Question #13

Has your attendance previously been addressed with you by a Manager or Supervisor, and on any of those occasions was a Union Steward present?

Answer #13

BAD ASS: HOLD ON. IF YOU HAD AN ATTENDANCE REVIEW OR AN ARTICLE 16.2 DISCUSSION WITH HARD WORKER, AND THAT'S A GIGANTIC "IF", THERE WOULD NOT BE A UNION STEWARD PRESENT. WHY ARE YOU TRYING TO SET HARD WORKER UP? HE IS, AFTER ALL, A HARD WORKER!

BIG DUMMY: HE HAS HAD HIS ATTENDANCE PREVIOUSLY ADDRESSED. HE HAD A LETTER OF WARNING FOR ATTENDANCE FOR ATTENDANCE NOT TOO LONG AGO. THAT'S WHY HE IS GONNA GET A SUSPENSION THIS TIME.

BAD ASS: DID YOU REVIEW HIS ATTENDANCE WITH HIM AND EXPLAIN THAT HIS ATTENDANCE WAS UNACCEPTABLE PRIOR TO THIS INTERVIEW?

BIG DUMMY: I'M NOT ANSWERING YOUR QUESTIONS!

Question #14

Are you aware of the Employee Assistance Program (EAP)?

Answer #14

YES

Question #15

Would you like information for EAP?

Employee Assistance Program (EAP)
Local Number
www.EAP4YOU.com

Answer #15

YES

Question #16

Is there anything else you would like to add, or feel I should know at this point?

Answer #16

BAD ASS: YOU SAID SOMETHING ABOUT BEING REGULAR IN ATTENDANCE. CAN YOU EXPLAIN TO HARD WORKER WHAT “REGULAR” MEANS PLEASE?

BIG DUMMY: IT MEANS REGULAR.

BAD ASS: OK. REGULAR TO ME MEANS MORE OFTEN THAN NOT. IS THAT WHAT YOU ARE TELLING HARD WORKER, MORE OFTEN THAN NOT?

BIG DUMMY: NO! IT MEANS THAT HE IS SUPPOSED TO BE HERE WHEN HE IS SCHEDULED.

BAD ASS: OH, OK. YOU MEAN HE IS SUPPOSED TO BE PERFECT IN ATTENDANCE.

BIG DUMMY: WE ARE DONE HERE! GET OUT OF MY OFFICE AND GET BACK TO WORK!

UNITED STATES POSTAL SERVICE

January 27, 2020

SUBJECT: Letter of Warning

In accordance with Article 16, section 3, of the Collective Bargaining Agreement, this official Letter of Warning is being issued to you for the following reason:

CHARGE: FAILURE TO BE IN REGULAR ATTENDANCE

A review of your attendance record from December 28, 2019 to January 22, 2020, indicates that you have been absent from your official duties on the dates listed below. This record reveals a lack of dependability in maintaining your work schedule.

DATE	NUMBER OF HOURS	TYPE OF LEAVE
12/28/2019	8	Sick Leave
01/015/2020	8	Sick Leave
01/21-22/2020	16	Sick Leave

On January 27, 2020 you were given an investigative interview, affording you an opportunity to respond to you actions. During the interview you failed to justify your failure to be regular in attendance. Therefore you are charged as stated above.

Your actions, as described above, are in violation of the following sections of the Employee & Labor Relations Manual (ELM):

665.41 Requirement of Regular Attendance
Employees are required to be regular in attendance. Failure to be regular in attendance may result in disciplinary action, including removal from the Postal Service.

511.43 Employee Responsibilities
Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

This action is taken to impress on you the importance of being in regular attendance and to correct your work deficiencies and demonstrate adherence to postal regulations. Failure to meet the above stated or other legitimate work expectations may result in further discipline action, up to and including removal/discharge from the Postal Service.

You have the right to file a grievance under the Grievance/Arbitration procedure set forth in Article 15, Section 2 of the National Agreement within fourteen (14) days of your receipt of this notice

Benedict Arnold

2/10/2020
Date

Hard Worker

2-11-20
Date

Time: 3:53 PM

cc:
eOPF
Labor Relations
Postmaster
ACO
file

INFORMAL STEP A RESOLUTION FORM

GRIEVANT NAME: **HARD WORKER**

GRIEVANCE NUMBER: **00176-2020**

STATION/POST OFFICE: **ANYTOWN / USA**

DATE OF DECISION: **FEBRUARY 19, 2020**

The issue of this grievance pertains to:

1. **DID MANAGEMENT VIOLATE ARTICLE 16 OF THE COLLECTIVE BARGAINING AGREEMENT WHEN THEY ISSUED THE GRIEVANT, HARD WORKER, A LETTER OF WARNING ALLEGING "FAILURE TO BE IN REGULAR ATTENDANCE" DATED JANUARY 27, 2020 ON FEBRUARY 11, 2020? IF SO, WHAT IS THE APPROPRIATE REMEDY?**

As a result of an Informal Step A meeting of the Dispute Resolution Process we the parties agree to the following resolution of this grievance:

1. **MANAGEMENT WILL IMMEDIATELY RESCIND AND REMOVE THIS LETTER OF WARNING FROM ALL SYSTEMS, DATABASES, FILES AND RECORDS.**
2. **MANAGEMENT WILL NOT RELY UPON THE LETTER OF WARNING IN ANY FUTURE DISCIPLINARY ACTION.**

Bad Ass

NALC REPRESENTATIVE

BAD ASS

Benedict Arnold

USPS REPRESENTATIVE

BENEDICT ARNOLD

Honoring Advance Commitments For Annual Leave. Article 10.4.D requires management to honor annual leave approved in advance, in nearly all circumstances.

Emergency Annual Leave. In an emergency, a carrier need not obtain advance approval for leave, but must notify management as soon as possible about the emergency and the expected duration of the absence. The carrier must submit PS Form 3971 and explain the reason for the absence to the supervisor as soon as possible (ELM Section 512.411-12).

10.5 Section 5. Sick Leave

The Employer agrees to continue the administration of the present sick leave program, which shall include the following specific items:

A. Credit employees with sick leave as earned.

B. Charge to annual leave or leave without pay (at employee's option) approved absence for which employee has insufficient sick leave.

C. Employee becoming ill while on annual leave may have leave charged to sick leave upon request.

D. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

Sick Leave. Article 10.5 provides for the continuation of the sick leave program, whose detailed regulations are contained in ELM Section 513. Section 513.1 defines sick leave as leave which "insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment."

Sick Leave Accrual. Full-time and part-time employees accrue sick leave as shown in ELM Section 513.21:

513.21 Accrual Chart

Employee Category	Time Accrued
a. Full-time employees	4 hours for each full biweekly pay period—i.e., 13 days (104 hours) per 26-period leave year.
b. Part-time employees	1 hour for each unit of 20 hours in pay status up to 104 hours (13 days) per 26-period leave year.

Sick leave is credited at the end of each pay period and can accumulate without any limitation of yearly carryover amounts (ELM Section 513.221).

ARTICLE 16 DISCIPLINE PROCEDURE

16.1 **Section 1. Principles**

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Just Cause Principle

The principle that any discipline must be for "just cause" establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the just cause provision requires a fair and provable justification for discipline.

Just cause is a term of art created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

- **Is there a rule?** If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or "We posted that rule ten years ago." You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.
- **Is the rule a reasonable rule?** Management must make sure rules are reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the

enforcement is a critical factor. Consistently overlooking employee infractions and then disciplining without warning is improper. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one.

- **Was a thorough investigation completed?** Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

- **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?** The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues five-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

- **Was the disciplinary action taken in a timely manner?** Disciplinary actions should be taken as promptly as possible after the offense has been committed.

Corrective Rather than Punitive

The requirement that discipline be corrective rather than punitive is an essential element of the just cause principle. In short, it means that for most offenses management must issue discipline in a progressive fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge). The basis of this

Just cause for the discipline of City Carrier Assistant (CCAs) is addressed in Appendix B, 3. Other Provisions, Section E – Article 16 of the 2019 National Agreement. This section is reprinted on page 16-12 of the JCAM.

Unadjudicated Discipline. The parties agree that arbitrators may not consider unadjudicated discipline cited in a disciplinary notice when determining the propriety of that disciplinary notice. When removal cases are scheduled for a hearing before the underlying discipline has been adjudicated, an arbitrator may grant a continuance of a hearing on the removal case pending resolution of the unadjudicated discipline (National Arbitrator Snow, E94N-4E-D 96075418, April 19, 1999, C-19372).

Examples of Behavior. Article 16.1 states several examples of misconduct which may constitute just cause for discipline. Some managers have mistakenly believed that because these behaviors are specifically listed in the contract, any discipline of employees for such behaviors is automatically for just cause. The parties agree these behaviors are intended as examples only. Management must still meet the requisite burden of proof, e.g. prove that the behavior took place, that it was intentional, that the degree of discipline imposed was corrective rather than punitive, and so forth. Principles of just cause apply to these specific examples of misconduct as well as to any other conduct for which management issues discipline.

Remedies. The last sentence of Article 16.1 establishes the principle that discipline may be overturned in the grievance/arbitration procedure and that remedies may be provided to the aggrieved employee—"reinstatement and restitution, including back pay." If union and management representatives settle a discipline grievance, the extent of remedies for improper discipline is determined as part of the settlement. If a case is pursued to arbitration, the arbitrator states the remedy in the award.

Back Pay. The regulations concerning back pay are found in the ELM Section 436. The parties agree that, while all grievance settlements or arbitration awards providing for a monetary remedy should be promptly paid, the following Memorandum of Understanding applies only to those back pay claims covered by the ELM Section 436.

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Re: Article 15—ELM 436—Back Pay

The following applies solely to back pay claims covered by Section 436 of the

Documents in Support of Claim. An employee not paid within sixty (60) days of submission of the required documentation will receive an advance, if requested by the employee, equivalent to seventy (70) percent of the approved adjustment. If a disagreement exists over the amount due, the advance will be set at seventy (70) percent of the sum not in dispute.

(The preceding Memorandum of Understanding, Article 15 - ELM 436 - Back Pay, applies to NALC City Carrier Assistant Employees.)

The following Memorandum of Understanding provides that where an arbitration award specifies that an employee is entitled to back pay in a case involving disciplinary suspension or removal, the Postal Service must pay interest on the back pay at the Federal Judgment Rate.

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE AND
THE JOINT BARGAINING COMMITTEE
(American Postal Workers Union, AFL-CIO, and
National Association of Letter Carriers, AFL-CIO)

Re: Interest on Back Pay

Where an arbitration award specifies that an employee is entitled to back pay in a case involving disciplinary suspension or removal, the Employer shall pay interest on such back pay at the Federal Judgment Rate. This shall apply to cases heard in arbitration after the effective date of the 1990 Agreement.

(The preceding Memorandum of Understanding, Interest on Back Pay, applies to NALC City Carrier Assistant Employees.)

16.2

Section 2. Discussion
For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Although included in Article 16, a "discussion" is non-disciplinary and thus is not grievable. Discussions are conducted in private between a supervisor and an employee.

Both the supervisor and the employee may keep a record of the discussion for personal use. However, these are not to be considered official

Discussions cannot be cited as elements of an employee's past record in any future disciplinary action. Discussions may be used (when they are relevant and timely) only to establish that an employee has been made aware of some particular obligation or responsibility.

16.3 Section 3. Letter of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

Letters of warning are official discipline and should be treated seriously. They may be cited as elements of prior discipline in subsequent disciplinary actions subject to the two year restriction discussed in Article 16.10. Arbitrator Fasser held in NB-E 5724, February 23, 1977 (C-02968), that a letter of warning which fails to advise the recipient of grievance appeal rights is procedurally deficient.

16.4 Section 4. Suspensions of 14 Days or Less

In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended. A suspended employee will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions shall, however, be considered to be of the same degree of seriousness and satisfy the same corrective steps in the pattern of progressive discipline as the time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past discipline in subsequent discipline in accordance with Article 16.10.

Employees issued discipline involving suspensions of fourteen days or less will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions are of the same degree of seriousness and satisfy the same requirements to be corrective progressive discipline as time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past record in subsequent discipline in accordance with Article 16.10.

Suspensions issued under the provisions of Article 16.4 must advise the recipient of grievance appeal rights.

The Postal Service has agreed that letters of warning must be used instead of suspensions of less than five work (not calendar) days. If suspensions of five days or more are reduced unilaterally, it must be to a letter of warning rather than to a suspension of four days or less. The only exception is in cases where a suspension of less than five days is the

16.5 **Section 5. Suspensions of More Than 14 Days or Discharge**

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Letter carriers must be given thirty days advance written notice prior to serving a suspension of more than fourteen days or discharge. During the notice period they must remain either on the job or on the clock at the option of the Postal Service. The only exceptions are for crime or emergency situations as provided for in Article 16.6 and 16.7.

Removals are also subject to the Dispute Resolution Process Memorandum which provides in part:

> Removal actions, subject to the thirty (30) day notification period in Article 16.5 of the National Agreement, will be deferred until after the Step B decision has been rendered, or fourteen (14) days after the appeal is received at Step B, whichever comes first, except for those removals involving allegations of crime, violence, or intoxication or cases where retaining the employee on duty may result in damage to postal property, loss of mails, or funds, or where the employee may be injurious to self or others, pursuant to Article 16.6 and 16.7.

Thus, when an Article 16.5 removal action is deferred, the employee remains either on the job or on the clock until after the Step B decision has been rendered, or fourteen days after the appeal is received at Step B, whichever comes first. This is true even if it results in the employee remaining on the job or on the clock for longer than the thirty days provided for in Article 16.5.

This same deferral rule applies to CCAs as shown in Appendix B, 3. Other Provisions, Section E, Article 16 – Discipline Procedure. However, this

16.6.A **Section 6. Indefinite Suspensions—Crime Situation**

A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

16.6.B B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

16.6.C C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B above.

16.6.D D. The Employer may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 5 of this Article.

Article 16.6, which deals with indefinite suspensions in crime situations, provides the following:

- The full thirty-day notice is not required in such cases. (See also Article 16.5.)
- Just cause of an indefinite suspension is grievable. An arbitrator has the authority to reinstate and make whole. In NC-NAT 8580, September 29, 1978 (C-03216), National Arbitrator Garrett wrote that an indefinite suspension is:

  > reviewable in arbitration to the same extent as any other suspension to determine whether 'just cause' for the disciplinary action has been shown. Such a review in arbitration necessarily involves considering at least (a) the presence or absence of 'reasonable cause' to believe the employee guilty of the crime alleged, and (b) whether such a relationship exists between the alleged crime and the employee's job in the USPS to warrant suspension.

- If the Postal Service returns an employee who was on an indefinite suspension to duty, the employee is automatically entitled to back pay for all but the first seventy days of pay. The indefinite suspen-

- During an indefinite suspension, the Employer can take final action to remove the employee. Such removals must be for just cause and are subject to Article 16.5, like any other removal.

16.7 **Section 7. Emergency Procedure**

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 to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

The purpose of Article 16.7 is to allow the Postal Service to act immediately to place an employee in an off-duty status in the specified emergency situations.

Written Notice. Management is not required to provide advance written notice prior to taking such emergency action. However, an employee placed on emergency off-duty status is entitled to written charges within a reasonable period of time. In H4N-3U-C 58637, August 3, 1990 (C-10146), National Arbitrator Mittenthal wrote as follows:

> 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 the 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.

What Test Must Management Satisfy? Usually employees are placed on emergency non-duty status for alleged misconduct. However, the provisions of this section are broad enough to allow management to invoke the emergency procedures in situations that do not involve misconduct, such as if an employee does not recognize that he or she is having an adverse reaction to medication. The test that management must satisfy to justify actions taken under Article 16.7 depends upon the nature of the emergency. In H4N-3U-C 58637, August 3, 1990 (C-10146), National Arbitrator Mittenthal wrote as follows:

"just cause" test. To quote from Section 1, "No employee may be disciplined...except for just cause." If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the "just cause" standard is not applicable. Management then need only show "reasonable cause" (or "reasonable belief") a test which is easier to satisfy.

One important caveat should be noted. "Just cause" is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a "preponderance of the evidence" rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that "just cause" can be calibrated differently on the basis of the nature of the alleged misconduct.

The same Article 16.7 provisions that apply to career letter carriers apply to CCAs as shown in Appendix B, 3. Other Provisions, Section E. Article 16 – Discipline Procedure.

Separate Grievances. If, subsequent to an emergency suspension, management suspends the employee for more than thirty (30) days or discharges the employee, the emergency action taken under this section should be grieved separately from the later disciplinary action.

16.8 Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

Concurrence is a specific contract requirement to the issuance of a suspension or a discharge. It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, however, the discipline must be reviewed and concurred with by a manager who is a higher level than the initiating, or issuing, supervisor. This act of review and concurrence must take place prior to the issuance of the discipline. While there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a dis-

For additional information on the Review of Discipline section, see National Arbitration Eischen, E95R-4E-D-01027978, December 3, 2002, C-23828. (Note that this is a NRLCA case. The NRLCA's Review of Discipline is in their Article 16.6 and requires written concurrence.)

16.9 Section 9. Veterans' Preference

A preference eligible is not hereunder deprived of whatever rights of appeal are applicable under the Veterans' Preference Act. If the employee appeals under the Veterans' Preference Act, however, the time limits for appeal to arbitration and the normal contractual arbitration scheduling procedures are not to be delayed as a consequence of that appeal; if there is an MSPB appeal pending as of the date the arbitration is scheduled by the parties, the grievant waives access to the grievance-arbitration procedure beyond Step B.

MSPB Dual Filings. The Veterans' Preference Act guarantees preference eligible employees certain special rights concerning their job security. (Federal law defines a preference eligible veteran at Title 5 United States Code Section 2108; see EL-312, Section 483). A preference eligible employee may file both a grievance and an MSPB appeal on a removal or suspension of more than fourteen days. However, Article 16.9 provides that an employee who exercises appeal rights under the Veterans' Preference Act waives access to arbitration when they have an MSPB appeal pending as of the date the grievance is scheduled for arbitration by the parties. The date of the arbitration scheduling letter is considered "the date the arbitration is scheduled by the parties" for the purposes of Article 16.9.

This language has been modified to reflect the parties' agreement that an employee should receive a hearing on the merits of an adverse action. It supercedes the 1988 Memorandum of Understanding on Article 16.9. While a preference eligible city letter carrier may appeal certain adverse actions to the MSPB, as well as file a grievance on the same action, the employee is not entitled to a hearing on the merits in both forums. This provision is designed to prevent the Postal Service from having to defend the same adverse action in an MSPB hearing as well as in an arbitration hearing. If a city letter carrier has an MSPB appeal pending on or after the date the arbitration scheduling letter is dated, the employee waives the right to arbitration.

The parties agree that the union will be permitted to reactivate an employee's previously waived right to an arbitration hearing if that employee's appeal to the MSPB did not result in a decision on the merits of the adverse action, or the employee withdraws the MSPB appeal prior to a decision on the merits being made. It is understood that this agree-

backpay liability should include the period between the time the right to arbitration was waived by the employee and the time the Union reactivated the arbitration appeal.

EEO and EEO/MSPB Mixed Cases—Dual Filings. Article 16.9 does not bar the arbitration of a grievance where a grievant has asserted the same claim in an Equal Employment Opportunity (EEO) complaint. Nor does it apply where a preference eligible grievant has appealed the same matter through the EEOC and then to the MSPB under the mixed case federal regulations (National Arbitrator Snow, D90N-4D-D 95003945, April 24, 1997, C-16650).

16.10 Section 10. Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

(Additional discipline procedure provisions regarding City Carrier Assistant Employees are found in Appendix B.).

The purpose of Article 16.10 is to protect employees from having their past records considered when they have shown over a two-year period that they performed their job without incurring any further disciplinary action.

Additional information on the retention and disposal of discipline records may be found in Handbook AS-353 (National Prearbitration, Q94N-4Q-C-96044119, March 2, 2004, M-01511).

The Step 4 settlement H4N-5G-D 7167, January 5, 1989 (M-00889), provides the following:

> A notice of discipline which is subsequently fully rescinded, whether by settlement, arbitration award, or independent management action, shall be deemed not to have been "initiated" for purposes of Article 16, Section 10, and may not be cited or considered in any subsequent disciplinary action.

Last Chance Agreements (LCA) are not records of disciplinary action. LCAs are not covered by the provisions of Article 16.10. If an LCA contains a reference to a disciplinary record that exceeds the limitation in Article 16.10, the following instruction from Arbitrator Briggs in case D98N-4D-D 00114765, January 15, 2002 (C-22941), is to be followed:

CCAs. Appendix B, 3. Other Provisions, Section E – Article 16 of the 2019 National Agreement addresses access to the grievance procedure for separated or disciplined CCAs.

APPENDIX B

Appendix B is the reprinting of Section I of the 2013 Das Award, the creation of a new non-career employee category. Provisions of the Das Award that were modified in the 2019 National Agreement are indicated in bold. Those provisions that are reflected in another part of the National Agreement or Joint Contract Administration Manual are not reprinted herein.

3. OTHER PROVISIONS

E. Article 16 - Discipline Procedure

CCAs may be separated for lack of work at any time before the end of their term. Separations for lack of work shall be by inverse relative standing in the installation. Such separation of the CCA(s) with the lowest relative standing is not grievable except where it is alleged that the separation is pretextual. CCAs separated for lack of work before the end of their term will be given preference for reappointment ahead of other CCAs with less relative standing in the installation, provided the need for hiring arises within 18 months of their separation.

CCAs may be disciplined or removed within the term of their appointment for just cause and any such discipline or removal will be subject to the grievance arbitration procedure, provided that within the immediately preceding six months, the employee has completed ninety (90) work days, or has been employed for 120 calendar days (whichever comes first) of their initial appointment. A CCA who has previously satisfied the 90/120 day requirement either as a CCA or transitional employee (with an appointment made after September 29, 2007), will have access to the grievance procedure without regard to his/her length of service as a CCA. Further, while in any such grievance the concept of progressive discipline will not apply, discipline should be corrective in nature, rather than punitive.

CCAs may be immediately placed in an off-duty status under the circumstances covered by Article 16.7. If the CCA completed the requisite period and has access to the grievance procedure pursuant to the previous paragraph, the requirements regarding notice, justification and the employee's ability to protest such action are the same as that for career employees under Article 16.7

In the case of removal for cause within the term of an appointment, a CCA shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement.

Removal actions, subject to the thirty day notification period in Article 16.5 of the National Agreement, will be deferred until after the Step B decision has been rendered, or fourteen days after the appeal is received at Step B, whichever comes first, except for those removals involving allegations of crime, violence or intoxication or cases where

Discipline issued to a CCA may not be considered or cited in determining whether to issue discipline to the CCA employee after his or her conversion to career status.

ARTICLE 17 REPRESENTATION

17.1

Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

Contractual Authorization for Stewards. Although shop stewards are union representatives and NALC officials chosen according to NALC rules, stewards are also given important rights and responsibilities by the National Labor Relations Act and by the National Agreement. The contract authorizes stewards to represent carriers in the investigation, presentation, and adjustment of grievances, and requires the employer to cooperate with stewards in various ways as they accomplish their grievance-handling jobs. The specific steward rights and responsibilities set forth in Article 17.3 and 17.4 are supplemented in other parts of the National Agreement, including:

- Article 6.C.4 (superseniority in layoff or reduction in force)
- Article 15 (grievance handling)
- Article 27 (employee claims)
- Article 31.3 (right to information)
- Article 41.3.H (right to use telephones)

17.2.A

Section 2. Appointment of Stewards

A. The Union will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of the Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula hereinafter set forth.

Employees in the same craft per tour or station

Up to 49	1 steward
50 to 99	2 stewards
100 to 199	3 stewards
200 to 499	5 stewards
500 or more	5 stewards plus additional steward for each

Steward Certification. Article 17.2.A obligates the NALC to certify each steward and alternate to the employer in writing. Once certified, the steward represents employees in a specific work location. The steward from Station A, for example, must investigate any grievance occurring at his or her location, even the grievance of a carrier who is detailed temporarily from Station B and whose grievance arose at Station A. This is true even if the Station A steward must travel to interview the grievant in Station B, as provided in Article 17.3 (Step 4, NC-C-8435, October 6, 1977, M-00455).

CCAs can serve as union stewards. The provisions of Article 17 apply to CCAs.

17.2.B B. At an installation, the Union may designate in writing to the Employer one Union representative actively employed at that installation to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance. The activities of such Union representative shall be in lieu of a steward designated under the formula in Section 2.A and shall be in accordance with Section 3. Payment, when applicable, shall be in accordance with Section 4.

17.2.C C. To provide steward service to installations with twenty or less craft employees where the Union has not certified a steward, a Union representative certified to the Employer in writing and compensated by the Union may perform the duties of a steward.

17.2.D D. At the option of the Union, representatives not on the Employer's payroll shall be entitled to perform the functions of a steward or chief steward, provided such representatives are certified in writing to the Employer at the area level and providing such representatives act in lieu of stewards designated under the provisions of 2.A or 2.B above.

Acting as Steward. Article 17.2 establishes four alternate ways individuals may be certified as stewards as circumstances warrant.

- **Article 17.2.B** The union may, on an exception basis, designate in writing one union representative actively employed at that installation to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific issue to determine whether to file a grievance. The designation must be in writing at the installation level and applies to the specific grievance or specific issue only; the designation does not carry over. The individual designated will act in lieu of a steward designated under the formula in Section 2.A and is paid in accordance with Section 4. For the purposes of this section, full-time union officials are considered to be actively employed (Prearbitration Settlement, H94N-4H-C 96084996,

- **Article 17.2.C** In offices with twenty or less total craft employees which have no steward certified under Article 17.2.A, the union may certify a representative who is compensated by the union.
- **Article 17.2.D** The union may certify a representative not on the employer's payroll to perform the functions of a steward or chief steward. Such representatives must be certified in writing to the appropriate Area office and will act in lieu of stewards designated under the provisions of Article 17.2.A or Article 17.2.B.

  Representatives certified by the union pursuant to Article 17.2.D may be anyone who is not on the employer's official time. This would include, for example, employees from another installation (Prearbitration Settlement, H8N-2B-C 12054, May 26, 1982, M-00233) and former employees (Step 4, H4C-1M-C 2986, April 29, 1987, M-00798).

17.2.E E. A steward may be designated to represent more than one craft, or to act as a steward in a craft other than his/her own, whenever the Union or Unions involved so agree, and notify the Employer in writing. Any steward designations across craft lines must be in accordance with the formula set forth in Section 2.A above.

17.3 Section 3. Rights of Stewards

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.

In the event the duties require the steward leave the work area and enter another area within the installation or post office, the steward must also receive permission from the supervisor from the other area he/she wishes to enter and such request shall not be unreasonably denied.

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

While serving as a steward or chief steward, an employee may not be involuntarily transferred to another tour, to another station or branch of the particular post office or to another independent post office or installation unless there is no job for which the employee is qualified on such tour, or in such station or branch, or post office.

If an employee requests a steward or Union representative to be pres-

17.4 **Section 4. Payment of Stewards**

The Employer will authorize payment only under the following conditions:

Grievances—Informal and Formal Step A: The aggrieved and one Union steward (only as permitted under the formula in Section 2.A) for time actually spent in grievance handling, including investigation and meetings with the Employer. The Employer will also compensate a steward for the time reasonably necessary to write a grievance. In addition, the Employer will compensate any witnesses for the time required to attend a Formal Step A meeting.

Meetings called by the Employer for information exchange and other conditions designated by the Employer concerning contract application.

Employer authorized payment as outlined above will be granted at the applicable straight time rate, providing the time spent is a part of the employee's or steward's (only as provided for under the formula in Section 2.A) regular work day.

The Postal Service will compensate the Union's primary Step B representatives at their appropriate rate of pay on a no loss, no gain basis. Activated back up Step B representatives will be compensated on the same basis for time actually spent as Step B representatives.

Steward Rights. Article 17, Sections 3 and 4 establish several steward rights:

- The right to investigate and adjust grievances and problems that may become grievances;
- The right to paid time to conduct those activities;
- The right to obtain management information;
- Superseniority concerning being involuntarily transferred;
- An employee's right to steward representation during an Inspection Service interrogation.

Steward Rights—Activities Included. A steward may conduct a broad range of activities related to the investigation and adjustment of grievances and of problems that may become grievances. These activities include the right to review relevant documents, files and records, as well as interviewing a potential grievant, supervisors, and witnesses. Specific settlements and arbitration decisions have established that a steward has the right to do (among other things) the following:

- Complete grievance forms and write appeals on the clock (see below);

- Interview supervisors (Step 4, H7N-3Q-C 31599, May 20, 1991, M-00988);
- Interview postal inspectors (Management Letter, N8-N-0224, March 10, 1981, M-00225);
- Review relevant documents (Step 4, H4N-3W-C 27743, May 1, 1987, M-00837);
- Review an employee's Official Personnel Folder when relevant (Step 4, NC-E 2263, August 18, 1976, M-00104);
- Write the union statement of corrections and additions to the Formal Step A decision (Step 4, A8-S-0309, December 7, 1979, M-01145);
- Interview Office of Inspector General [OIG] Agents.

A steward has the right to conduct all such activities on the clock (see below).

Right to Steward Time on the Clock. Although a steward must ask for supervisory permission to leave his or her work area or enter another one to pursue a grievance or potential grievance, management cannot unreasonably deny requests for paid grievance-handling time.

Management may not determine in advance how much time a steward reasonably needs to investigate a grievance (National Arbitrator Garrett, MB-NAT-562/MB-NAT-936, January 19, 1977, C-00427). Rather, the determination of how much time is considered reasonable is dependent on the issue involved and the amount of information needed for investigation purposes (Step 4, NC-S-2655, October 20, 1976, M-00671).

Steward time to discuss a grievance may not be denied solely because a steward is in overtime status (Prearbitration Settlement, W4N-5C-C 41287, September 13, 1988, M-00857). It is the responsibility of the union and management to decide mutually when the steward will be allowed, subject to business conditions, an opportunity to investigate and adjust grievances (Step 4, N-S-2777, April 5, 1973, M-00332).

If management delays a steward from investigating a grievance, it should inform the steward of the reasons for the delay and when time will be available. Likewise, the steward has an obligation to request additional time and give the reasons why it is needed (Step 4, NC-C-16045, November 22, 1978, M-00127).

An employee must be given reasonable time to consult with his or her steward, and such reasonable time may not be measured by a predetermined factor (Step 4, H1C-3W-C 44345, May 9, 1985, M-00303).

of travel time or expenses in connection with attendance at a Formal Step A meeting (Step 4, N8-S-0330, June 18, 1980, M-00716). Nor does the National Agreement require the payment of a steward who accompanies an employee to a medical facility for a fitness-for-duty examination (Step 4 Settlement, NC-N-12792, December 13, 1978, M-00647).

The appropriate remedy in a case where management has unreasonably denied a steward time on the clock is an order or agreement to cease and desist, plus payment to the steward for the time spent processing the grievance off-the-clock which should have been paid time.

Right to Information. The NALC's rights to information relevant to collective bargaining and to contract administration are set forth in Article 31. This section states stewards' specific rights to review and obtain documents, files and other records, in addition to the right to interview a grievant, supervisors, and witnesses.

Steward requests to review and obtain documents should state how the request is relevant to the handling of a grievance or potential grievance. Management should respond to questions and to requests for documents in a cooperative and timely manner. When a relevant request is made, management should provide for review and/or produce the requested documentation as soon as is reasonably possible.

A steward has a right to obtain supervisors' personal notes of discussions held with individual employees in accordance with Article 16.2 if the notes have been made part of the employee's Official Personnel Folder or if they are necessary to processing a grievance or determining whether a grievance exists (National Arbitrator Mittenthal, H8N-3W-C 20711, February 16, 1982, C-03230; Step 4, NC-S-10618, October 8, 1978, M-00106; and Step 4, G90N-4G-C 93050025, February 23, 1994, M-01190).

Weingarten Rights

Federal labor law, in what is known as the Weingarten rule, gives each employee the right to representation during any investigatory interview which he or she reasonably believes may lead to discipline (*NLRB v. J. Weingarten, U.S. Supreme Court, 1975*).

The Weingarten rule does not apply to other types of meetings, such as:

- **Discussions.** Article 16.2 provides that "for minor offenses by an employee ... discussions ... shall be held in private between the employee and the supervisor. Such discussions are not discipline and are not grievable." So an employee does not have Weingarten representation rights during an official discussion (National Arbitrator Aaron, H1T-1E-C 6521, July 6, 1983, C-03769).

The Weingarten rule applies only when the meeting is an investigatory interview, when management is searching for facts and trying to determine the employee's guilt or decide whether or not to impose discipline. The rule does not apply when management calls in a carrier for the purpose of issuing disciplinary action (e.g. handing the carrier a letter of warning).

An employee has Weingarten representation rights only where he or she reasonably believes that discipline could result from the investigatory interview. Whether or not an employee's belief is reasonable depends on the circumstances of each case. Some cases are obvious, such as when a supervisor asks an employee whether he discarded deliverable mail.

The steward cannot exercise Weingarten rights on the employee's behalf. And unlike Miranda rights, which apply in criminal matters, the employer is not required to inform the employee of the Weingarten right to representation.

Employees also have the right under Weingarten to a pre-interview consultation with a steward. Federal Courts have extended this right to pre-meeting consultations to cover Inspection Service interrogations (*U.S. Postal Service v. NLRB, D.C. Cir. 1992,* M-01092).

In a Weingarten interview the employee has the right to a steward's assistance—not just a silent presence. The employer would violate the employee's Weingarten rights if it refused to allow the representative to speak or tried to restrict the steward to the role of a passive observer.

Although ELM Section 665.3 requires all postal employees to cooperate with postal investigations, the carrier still has the right under Weingarten to have a steward present before answering questions in this situation. The carrier may respond that he or she will answer questions once a steward is provided.

Superseniority in Transfers

The contract contains special provisions protecting steward positions from transfer or reassignment. These special steward rights are known as superseniority. The steward superseniority provision is contained in the second to last paragraph of Article 17.3. That language protects stewards from being transferred from a facility or tour where letter carriers are working—unless there is no other city letter carrier job left.

National Arbitrator Britton ruled in H4N-5C-C 17075, November 28, 1988 (C-08504), that Article 17.3 bars both temporary and permanent reassignments of stewards, and that the prohibition applies even if there are no vacant job assignments. In other words, superseniority rights must be observed even if it requires an involuntary transfer of another, more senior carrier, whether full-time or part-time (Step 4, H1N-2B-C

The steward's superseniority rights override the excessing provisions of Article 12, Principles of Seniority, Posting, and Reassignments. NALC stewards are always the last letter carriers to be excessed from a section, the craft or an installation, regardless of their seniority or their full-time or part-time status.

17.5 **Section 5. Labor-Management Committee Meetings**

A. The Union through its designated agents shall be entitled at the national, area, and local levels, and at such other intermediate levels as may be appropriate, to participate in regularly scheduled Joint Labor-Management Committee meetings for the purpose of discussing, exploring, and considering with management matters of mutual concern; provided neither party shall attempt to change, add to or vary the terms of this Collective Bargaining Agreement.

B. All other national level committees established pursuant to the terms of this Agreement shall function as subcommittees of the national level Labor-Management Committee.

C. Meetings at the national and area (except as to the Christmas operation) levels will not be compensated by the Employer. The Employer will compensate one designated representative from the Union for actual time spent in the meeting at the applicable straight time rate, providing the time spent in such meetings is a part of the employee's regular scheduled work day.

17.6 **Section 6. Union Participation in New Employee Orientation**

During the course of any employment orientation program for new employees, a representative of the Union representing the craft to which the new employees are assigned shall be provided ample opportunity to address such new employees, provided that this provision does not preclude the Employer from addressing employees concerning the same subject.

Health benefit enrollment information and forms will not be provided during orientation until such time as a representative of the Union has had an opportunity to address such new employees.

New Employee Orientation. During new letter carrier orientation, a representative of the NALC shall be provided ample opportunity to address the new employees while they are on the clock.

Management must permit new employees to complete Standard Form (SF) 1187 during new employee orientation time (Step 4, H4N-4J-C 2536, August 29, 1985, M-00317). Article 17 does not preclude management from being present during the union's new employee orientation (Step 4, H1C-5D-C 21764, December 17, 1984, M-00084).

The union is to be provided ample opportunity to address all newly hired CCAs as part of the hiring/new employee orientation process.

those CCAs that went through the full orientation process as transitional employees.

The union will also be provided an opportunity to discuss and address the NALC Health Benefit Plans available to career employees, pursuant to Article 17.6, when a CCA becomes a career employee.

17.7.A **Section 7. Checkoff**

A. In conformity with Section 2 of the Act, 39 U.S.C. 1205, without cost to the Union, the Employer shall deduct and remit to the Union the regular and periodic Union dues from the pay of employees who are members of the Union, provided that the Employer has received a written assignment which shall be irrevocable for a period of not more than one year, from each employee on whose account such deductions are to be made. The Employer agrees to remit to the Union all deductions to which it is entitled fourteen (14) days after the end of the pay period for which such deductions are made. Deductions shall be in such amounts as are designated to the Employer in writing by the Union.

17.7.B B. The authorization of such deductions shall be in the following form:

UNITED STATES POSTAL SERVICE
AUTHORIZATION FOR DEDUCTION
OF UNION DUES

I hereby assign to the National Association of Letter Carriers, AFL-CIO, from any salary or wages earned or to be earned by me as your employee (in my present or any future employment by you) such regular and periodic membership dues as the Union may certify as due and owing from me, as may be established from time to time by said Union. I authorize and direct you to deduct such amounts from my pay and to remit same to said Union at such times and in such manner as may be agreed upon between you and the Union at any time while this authorization is in effect, which includes a $8.00 yearly subscription to the Postal Record as part of the membership dues.

Notice: Contributions or gifts to the National Association of Letter Carriers, AFL-CIO are not tax deductible as charitable contributions for Federal income tax purposes. However, they may be tax deductible under other provisions of the Internal Revenue Code.

This assignment, authorization and direction shall be irrevocable for a period of one (1) year from the date of delivery hereof to you, and I agree and direct that this assignment, authorization and direction shall be automatically renewed, and shall be irrevocable for successive periods of one (1) year, unless written notice is given by me to you and the Union not more than twenty (20) days and not less than ten (l0) days prior to the expiration of each period of one (1) year.

(Form to be revised to conform to Postal Service Machine Requirements as on SF 1187.)

17.7.C C. Notwithstanding the foregoing, employees' dues deduction authorizations (Standard Form 1187) which are presently on file with the Employer on behalf of the Union shall continue to be honored and given full force and effect by the Employer unless and until revoked in accordance with their terms.

17.7.D D. The Employer agrees that it will continue in effect, but without cost to employees, its existing program of payroll deductions at the request and on behalf of employees for remittance to financial institutions including credit unions. In addition the Employer agrees without cost to the employee to make payroll deductions on behalf of such organization or organizations as the Union shall designate to receive funds to provide group automobile insurance and/or homeowners/tenant liability insurance for employees, provided only one insurance carrier is selected to provide such coverage.

(The preceding Article, Article 17, shall apply to City Carrier Assistant Employees.)

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

Re: Article 17.7.D Payroll Deductions/Allotments

No later than January 4, 2008, the Postal Service will increase the maximum allotments in the existing program by providing one additional allotment for the use of NALC bargaining unit employees.

Date: September 11, 2007

ARTICLE 19 HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to CCA employees only to the extent consistent with other rights and characteristics of CCA employees provided for in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks, manuals and published regulations as they relate to CCA employees pursuant to the same standards and procedures found in Article 19 of the National Agreement.

[see Memo, page **214**]

This Memo is located o JCAM pag 19-2 and 1

Handbooks and Manuals. Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement. Changes to handbook and manual provisions directly relating to wages, hours, or working conditions may be made by management at the national level and may not be inconsistent with the National Agreement. A challenge that such changes are inconsistent with the National Agreement or are not fair, reasonable, or equitable may be made only by the NALC at the national level.

A memorandum included in the 2019 National Agreement establishes a process for the parties to communicate with each other at the national level regarding changes to handbooks, manuals, and published regulations that directly relate to wages, hours, or working conditions. The

unnecessary appeals to arbitration and clearly identify and narrow the issue(s) in cases that are appealed to arbitration under Article 19.

Local Policies. Locally developed policies may not vary from nationally established handbook and manual provisions (National Arbitrator Aaron, H1N-NAC-C-3, February 27, 1984, C-04162). Additionally, locally developed forms must be approved consistent with the Administrative Support Manual (ASM) and may not conflict with nationally developed forms found in handbooks and manuals.

National Arbitrator Garrett held in MB-NAT-562, January 19, 1977 (C-00427), that "the development of a new form locally to deal with stewards' absences from assigned duties on union business—as a substitute for a national form embodied in an existing manual (and thus in conflict with that manual)—thus falls within the second paragraph of Article 19. Since the procedure there set forth has not been invoked by the Postal Service, it would follow that the form must be withdrawn."

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

Re: Article 19

1. When the Postal Service provides the Union with proposed changes in handbooks, manuals, or published regulations pursuant to Article 19 of the National Agreement, the Postal Service will furnish a final draft copy of the revisions and a document that identifies the changes being made from the existing handbook, manual, or published regulation. When the handbook, manual, or published regulation is available in electronic form, the Postal Service will provide, in addition to a hard copy, an electronic version of the final draft copy clearly indicating the changes and another unmarked final draft copy of the changed provision with the changes incorporated.

2. The document that identifies the changes will indicate language that has been added, deleted, or moved, and the new location of language moved. Normally, the changes will be identified by striking through deleted language, underlining new language, and placing brackets around language that is moved, with the new location indicated. If another method of identifying the changes is used, the method will be clearly explained, and must include a means to identify which language is added, deleted, and moved, as well as the new location of any language moved.

3. When notified of a change(s) to handbooks, manuals, and published regulations, pursuant to Article 19 of the National Agreement, the Union will be notified of the purpose and anticipated impact of the change(s) on city letter carrier bargaining unit employees.

5. Within sixty (60) days of the Union's receipt of the notice of proposed change(s), the Union will notify the Postal Service in writing of any change(s) it believes is directly related to wages, hours, or working conditions and not fair, reasonable or equitable and/or in conflict with the National Agreement. The Union may request a meeting on the change(s) at issue.

6. The Postal Service will provide the Union with a written response addressing each issue raised by the Union, pursuant to paragraph 5, within thirty (30) days of receipt, provided the Union identifies the issue(s) within sixty (60) days of the Union's receipt of the notice of proposed change(s).

7. If the Union, after receipt of the Postal Service's written response, believes the proposed change(s) violates the National Agreement, it may submit the issue to arbitration within sixty (60) days of receipt of the notice of proposed change or thirty (30) days after the Union receives the Postal Service's written response, whichever is later. If the Postal Service fails to provide a response to the Union pursuant to paragraph 6, the Union may submit the issue(s) to arbitration provided it does so within thirty (30) days after the Postal Service's response was due. The Union's appeal shall specify the change(s) it believes is not fair, reasonable or equitable and/or in conflict with the National Agreement, and shall state the basis for the appeal.

8. If modifications are made to the final draft copy as a result of meetings with employee organizations, the Postal Service will provide NALC with a revised final draft copy clearly indicating only the change(s) which is different from the final draft copy.

9. When the changes discussed in paragraph 8 are incorporated into the final version of a handbook, manual, publication, or published regulation, and there is not an additional change(s) which would require notice under Article 19, the Union will be provided a courtesy copy. In such case, a new Article 19 notice period is not necessary.

10. Lastly, in any case in which the Postal Service has affirmatively represented that there is no change(s) that directly relates to wages, hours, or working conditions pursuant to Article 19 of the National Agreement, time limits for an Article 19 appeal will not be used by the Postal Service as a procedural argument if the Union determines afterwards that there has been a change to wages, hours, or working conditions.

Nothing contained in this memorandum modifies the Postal Service's right to publish a change(s) in a handbook, manual or published regulation, sixty (60) days after notification to the Union.

Date: January 10, 2013

GERALD COHEN 7/19/82 Won
Removal - Attendance

IN ARBITRATION

3543 (C1C-4A-D)

000239

UNITED STATES POSTAL SERVICE,	Case No. C1C-4A-D 3843;
and	Arbitrator's File 82-58-778;
AMERICAN POSTAL WORKERS UNION, DENISE BURNS, Grievant.	Date of Hearing: June 22, 1982, Chicago, IL

LOCAL ARBITRATION

JUL 21 1982

APPEARANCES

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O P I N I O N

Issue

Was Grievant removed from the Postal Service for just cause?

Facts

On January 13, 1982, Grievant was issued a Notice of Removal which stated:

"You are hereby notified you will be removed from the Postal Service on February 22, 1982. The reason for this removal action is:

'Failure to Meet the Attendance Requirements of your Position.'

A review of your attendance record from September 25, 1981 until January 7, 1982 revealed that you have been absent from your scheduled tour of duty on November 11, 1981 8 hours and from January 4, 1982 to January 6, 1982 for 16 hours. A total of 24 hours leave. On December 17, 1981 you were late 17 minutes and on December 18, 1981 you were late 9 minutes.

This action is a result of a Step 2 decision dated September 25, 1981, which reduced a proposed removal to a 14 day suspension. This agreed upon action contained the provision that you must maintain a perfect attendance record for 120 days managements just cause would be removal.

A further stipulation of this agreement was that the Union could not grieve the management action of removal if you failed to maintain a perfect attendance record for a period of 120 days."

The "Step 2 decision dated September 25, 1981" mentioned in the Notice of Removal read as follows:

"My Step 2 decision dated September 14, 1981, which denied the grievance is being modified as follows:

Notice of Removal will be rescinded and a 14 day suspension will be the agreeable discipline with the following additions:

1. Grievant must maintain a perfect attendance record for 120 days, starting from return date of suspension.

2. If Grievant fails to maintain perfect attendance for 120 days, Management's just cause will be removal.

3. The Union will not grieve the Management action of removal for failing to meet item 1 in this agreement.

There will be no back salary reimbursement due to recission of removal."

A letter of Grievant dated "10/3/81" confirming the settlement read as follows:

"STEP 2 DECISION -
And Last Chance Agreement ...

As a result of a Step 2 Decision the removal notice issued to you on 7/27/81 is rescinded and the following agreement is made in lieu of your removal from the Postal Service:

1. You will serve a fourteen (14) days suspension starting on 10/6/81 at 0800 hours. You are to return to duty on 10/20/81 at 0800 hours.

2. You must maintain a perfect attendance record for 120 days starting from your return from the above suspension. Failure to maintain a perfect record on your part will result in your removal from the Postal Service for just cause.
3. There will be no back pay reimbursement for any time lost by you because of the original removal notice.

4. This agreement is to be considered a last chance effort to help you improve your record.

This agreement and/or any of the final results of it, up to and including your removal from the Postal Service, will not be grieved on your part or the union.

This action is taken without prejudice to the U. S. Postal Service position in this grievance or any similar grievance. It is agreed by all parties to this grievance that this is a final and complete settlement of this matter."

The supervisor who issued the Letter of Removal stated that he had become Grievant's supervisor on November 14, 1981, and he was aware of the agreement which Grievant had with the

Postal Service. He knew that she was required to maintain perfect attendance for 120 days. He had spoken with her concerning it, because he was interested in her living up to the agreement. Grievant told him that she would do her best to abide by the agreement.

Grievant had had some instances of late arrival and early departure during the 120 days in question, but the supervisor had ignored these. However, Grievant had taken some unscheduled absences which had violated her agreement with the Postal Service. Evidence disclosed that Grievant had been absent from work on November 11, 1981, and on two other occasions. The Letter of Removal was issued as a result.

Grievant's supervisor was asked on cross-examination if he believed that Grievant should be given any leeway in her attendance, and his reply was "No".

The first witness for Grievant was a licensed practical nurse employed by Grievant's doctor. She testified that Grievant had been in to see the doctor about January 4, 1982, and had been diagnosed as having acute follecular tonsillitis. The nurse had administered a shot of penicillin of 600,000 units, and Grievant was given prescriptions for Erythromycin and an oral expectorant. According to the information which Grievant gave to the doctor, she had been working in a very cold area. The doctor had advised her to take several days off work to allow

the infection to clear up.

Grievant produced a number of witnesses who worked in the same facility as Grievant and on the same tour. All of the witnesses testified that in the winter beginning at the end of 1981 and into early 1982, the facility was so cold and drafty that the employees working there wore coats, scarves and gloves at their work stations. The weather conditions were bitterly cold, and there was no heat in the building.

Some of these witnesses also testified that there were very heavy snow conditions on a number of occasions during the winter, which caused many employees to be either late or absent.

One of Grievant's witnesses testified that she was the driver of Grievant's car pool. The witness stated that on at least one occasion she had started from her house, which was some distance from the Postal facility at O'Hare Field, in relatively good weather, but the weather grew increasingly worse as they neared the facility which resulted in heavy traffic jams, causing them to be late for work.

Grievant testified that her absence of November 11, 1981, occurred as a result of her purse being snatched as she waited for public transportation to take her to work. She called the police, who arrived after some delay, and they took her to the nearest police station to make a report. After making the report, Grievant called a family member to come for her. By the time the family

member arrived, it was close to noon, and Grievant stated that she was so unnerved by all that had happened that she did not go to work. There were still approximately four hours left of the workday.

Grievant testified that her absence early in January, 1982, was due to her having contracted tonsillitis. She was very ill, and had to have medical attention. She stated that her illness resulted from the working conditions at the airmail facility at O'Hare Airport. She said that for almost the whole winter beginning at the end of 1981, the airmail facility was unheated. It was necessary for employees to work in gloves, scarves, hats and coats while they worked.

Grievant stated that she was aware of her last-chance settlement, and she wanted to save her job. She had hoped to work for 120 days without any absences, but sickness prevented her from doing so.

Discussion and Opinion

The Postal Service argues that in order for it to operate efficiently, it is necessary that it have employees who attend work regularly. Regulations require that employees be regular in attendance.

The Postal Service contends that Grievant's employment record shows anything but regularity in attendance, and she was discharged as a result. The Postal Service points out that, prior

to this discharge, and in an attempt to accommodate Grievant and to salvage her as an employee, the Postal Service entered into an agreement with her setting aside a previous discharge provided she maintained perfect attendance for only 120 days. The Postal Service urges that this shows its compassion for Grievant. Grievant's failure, however, to abide by this agreement is an indication of her disregard for her obligation to the Postal Service, and justifies her discharge.

The Postal Service further argues that Grievant and her Union were not coerced in any way into entering into the settlement agreement. It was done freely and with knowledge of its requirements. In summation, the Postal Service argues that, in view of Grievant's past record and her failure to abide by her agreement, her grievance should be dismissed as without merit.

It is the position of Grievant and the Union that the National Agreement still requires that discharge be only for just cause, no matter what the parties have agreed to, and that "just cause" is still an issue for an arbitrator to decide.

Grievant states that the requirement that a person be perfect in attendance is not recognized as a requirement in the National Agreement. All employees are entitled to sick leave on occasion. They are also entitled on occasion to take leave without pay. In short, Grievant contends that absences due to mitigating factors are possible, as previous case decisions have

shown. The Union cites a number of cases in which mitigating factors have been used to excuse what would otherwise be unacceptable absences.

In short, the Union argues that there is no hard and fast rule on what constitutes irregular attendance sufficient to justify discharge.

The Union contends that it is clear in this grievance that Grievant's absences should have been excused by the Postal Service and not considered grounds for discharge. The purse snatching was something entirely beyond her control, and it is understandable that it would be so unnerving that she would be unable to work that day.

In addition, Grievant's absences due to illness were documented beyond doubt. As a matter of fact, Grievant's tonsillitis was caused by working conditions, and could almost be considered the same as an on-the-job injury. Work conditions were so bad that a number of employees remembered them and recounted them.

So far as one of Grievant's tardies is concerned, the facts showed that when Grievant and her driver started for work, conditions were not so bad as to alert them that any extra precautions were necessary. The answer to the Postal Service's argument that Grievant should have lived closer to her work station is that not everyone can live next door to where they work.

In summation, the Union and Grievant argue that the

evidence is clear that Grievant's record in the 120-day period after her original settlement was not so bad as to warrant her discharge.

It is obvious that the parties have not taken Grievant's last-chance settlement of September 25, 1981, literally. One of the provisions of that agreement is that Grievant would not grieve a subsequent discharge for failure to maintain a perfect attendance record during the 120-day period. She has grieved her discharge, and the Postal Service does not contend that she has no right to file a grievance. Obviously, her agreement not to grieve is unenforceable because the National Agreement gives her the right to grieve.

Similarly, a provision in an agreement setting forth what constitutes just cause for dismissal is also unenforceable, because the final decision as to what constitutes just cause for discharge must be left to an arbitrator. Otherwise, a grievant's right to arbitrate would be effectively terminated. If the parties could determine what is "just cause", then all an arbitrator could do would be to rubber-stamp the agreement. That is not the intention of the National Agreement. The National Agreement reserves to the arbitration process the eventual resolution of disputes. What constitutes just cause is one such dispute.

Turning, then, to the issue of just cause in this grievance, it is clear that Grievant's discharge was not for just cause.

Were it not for the last-chance settlement involved here, every absence that Grievant had in the period in question would have been accepted as reasonable, and Grievant would not have been criticized for them.

Perfection in attendance has always been recognized as a goal to be striven for. But lack of perfection is not recognized as grounds for discharge. It is an impossible expectation that an ordinary mortal will attain perfection in anything, and lack of perfection is accepted as a part of every-day life. If lack of perfection should reach a certain point, of course, it might be a basis for discipline. But lack of perfection itself is not grounds for discharge.

Such is the case here. To impose upon Grievant the requirement of perfection at the risk of discharge is to require her to live up to a standard which is almost impossible to keep, and which neither the National Agreement nor the Handbooks and Manuals require. Therefore, her discharge was not for just cause.

The grievance is sustained, and Grievant is ordered reinstated with back pay. The Postal Service is entitled to credit for any earnings or other income which Grievant may have received up to the time of her reinstatement. The Arbitrator will retain jurisdiction to compute back pay should the need arise.

The costs are assessed equally.

Dated this 19th day of July, 1982.

Gerald Cohen

GERALD COHEN
Arbitrator
722 Chestnut Street
St. Louis, MO 63101
(314) 231-2020.

LETTER OF DEMAND

REGISTERED ARTICLE

C# 02968 X

NB-E-5724

Fasser 2-23-77

In the Matter of Arbitration Between:

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case No. NB-E-5724
Robert Kurtz
Phildelphia, PA

Issued: February 23, 1977

Background

This case involves an employer claim against Letter Carrier Robert Kurtz for his failure to deliver and account for registered article #3366397. There was no record taken of the hearing. The parties filed timely post-hearing briefs.

The Grievant, Robert Kurtz, was a part-time flexible letter carrier at the William Penn Station of the Philadelphia Pennsylvania Post Office. On April 23, 1974 he was assigned to route #639. Route #639 is essentially a business route which includes a number of jewelry establishments. The route is known in the William Penn Station as the "Jewel Route." The Grievant cased his mail that morning and picked up his registered articles

from the key table. Registered articles are handled in the following manner at the William Penn Station. When a carrier completes the casing of the mail for his route he calls his number to the Accountable Mail Clerk at the key table. If the clerk has prepared the accountable items for that route he calls the carrier to the table, gives the accountables to the carrier and requires that he acknowledge receipt of each accountable item by signing for it on an appropriate form (Form 3867). The carrier then returns to his case, prepares a receipt (Form 3849) for each accountable item and fuses it into his mail for delivery. In this way he can readily determine that an accountable item is destined for a particular customer when a receipt appears among that customer's mail. Accountables are placed in the bottom of the bag under the regular mail. As the receipts appear, the carrier delivers the accountable item to the appropriate customer and the customer acknowledges delivery by signing the receipt and returning the receipt to the carrier. When the carrier returns to the Post Office, he produces the receipts and reconciles them with the listing that he had signed out for earlier in the day. He does this in the presence of the Accountable Mail Clerk and if there is a complete reconciliation the clerk clears him of his liability for those accountables. In this case

Kurtz could not produce a receipt for one of the items listed on his Form 3867.

In this situation Kurtz had cased his mail and told the accountable mail clerk that he was prepared to receive his accountables. When the clerk was ready for Kurtz he called him. Kurtz picked up his accountables, signed out for them and returned to his case where he filled out and cased a receipt for each accountable item. He placed the accountables in the bottom of his satchel according to instructions and swept his case, bundled the mail, and put it in his satchel on top of the accountable items.

Having completed his work in the office he prepared to go out on the street. Before leaving he set his satchel on the floor near his case, threw his coat over it and went to the washroom. When he returned from the washroom he noticed nothing amiss, picked up his satchel and left for his route.

As the Grievant delivered his route he would finger the mail for each upcoming address. Approaching 111 South 8th Street he came across a receipt for registered parcel No. 3366397 addressed to the LaPais Jewelry Company. His procedure was to then look to his accountables in the bottom of his satchel for that parcel. Normally he would deliver the parcel and present the receipt to the addressee or his representative for signature. However, at this point

he discovered that parcel No. 3366397 was missing. He completed his deliveries and then retraced his route in an attempt to determine whether or not he had delivered the parcel to some other address in error. He was unsuccessful and he returned to his station.

Contentions

The Union claims that the Grievant exercised reasonable care in the handling of parcel No. 3366397 as required by Article XXVIII - Employer Claims which reads in pertinent part:

> ARTICLE XXVIII - EMPLOYER CLAIMS
>
> The parties agree that continued public confidence in the Postal Service requires the proper care and handling of the U.S.P.S. property, postal funds, and the mails. In advance of any money demand upon an employee for any reason, he must be informed in writing and the demand must include the reasons therefor.
>
> x x x x x x x
>
> Section 2. Loss or Damage of the Mails. An employee is responsible for the protection of the mails entrusted to him. Such employee shall not be financially liable for any loss, rifling, damage, wrong delivery of or depredation on, the mails or failure to collect or remit C.O.D. funds unless the employee failed to exercise reasonable care.

The parcel was stolen, says the Union, either when Kurtz left his case to sweep his mail from the center racks or when he went to the washroom. It insists that he

exercised reasonable care of the mail by delivering his route in a manner so as to keep his satchel in front of him as he walked. To establish proof of theft the Union points to the discharge of M. for pilfering the mail and established that M. was on the floor the morning of April 23, 1974. The Union claims that any carrier at the William Penn Station must leave his satchel unattended under certain circumstances in order to properly perform his duties. Therefore, it claims, it is unreasonable for Management to require the carrier to be responsible for the mail when he must leave the area without it.

The Union also claims that the failure of the Grievant to protest the 5-9-75 Letter of Warning was related to the Supervisor's remark "not to worry" when the loss was first reported. Further, it says, the letter was improper in that it was not in accordance with instructions issued by Senior Assistant Postmaster General Brown. The Union produced the following instruction from Brown:

November 7, 1973

MEMORANDUM TO: Assistant Regional Postmasters General Employee and Labor Relations
SUBJECT: Letters of Warning
FROM: Darrell Brown

Article XVI - Discipline Procedure of the 1973 National Agreement sets forth the basic principle that discipline must be

corrective in nature rather than punitive. Our objective is to correct employees, not to punish or harass them. During the negotiations, the Employer emphasized its commitment to this philosophy and made it clear that letters of warning would be used in appropriate circumstances since they are legitimate disciplinary tools. It is USPS policy, effective immediately, that letters of warning be used in lieu of suspensions of less than five (5) days. There will be circumstances, of course, in which the offense is so grave that suspension or even discharge will be required without any previous letter of warning.

Managers must remember that for minor offenses, counselling in private should be employed. If letters of warning are used, they should contain the following:

1. A statement identifying the letter as an official letter of warning, including sufficient detail (names, dates, times, occasions -- not generalities) as to the deficiency or misconduct that the recipient will know what he is being charged with;

2. A statement that further disciplinary action may result if correction is not achieved;

3. Previous discussion and/or counselling which has gone unheeded, if pertinent to the current infraction;

4. Information as to the employee's right to appeal the issuance of the letter of warning through the grievance procedure. (Underscoring added)

The Letter of Warning dated several months later is as follows:

DATE: May 9, 1974
SUBJECT: LETTER OF WARNING
TO: Mr. Robert K. Kurtz
P/T Flex Carrier
473 40 4399
William Penn Annex
Badge #7063

This official letter of warning is being issued for the express purpose of advising you of the following serious deficiency in your record which must be corrected immediately:

You failed to account for registered article #3366397 on Tuesday, April 23, 1974.

A copy of this letter of warning will be retained in your personnel folder for two years. If there is any repetition of the offense or you fail in any other manner to meet the requirements of your position more severe disciplinary action will be taken.

You are reminded that in accordance with present regulations employees who fail to meet the essential requirements of their position may have their periodic step increase withheld.

If you have any objection to the imposition of the above cited warning against your record, you may protest it in writing to the Postmaster within five days. Your protest will be reviewed on its merits by an authority different from the one that took the action and you will be advised of the decision reached.

BY: s/ John F. Lavello
SUPERVISOR'S SIGNATURE

5/14/74
DATE

s/ Robert K. Kurtz
SIGNATURE

s/
WITNESS

cc: Personnel, OPF
File
2/72

Management claims that Kurtz took responsibility for the parcel when he signed out for it at the key table. It maintains that he is constrained to handle the mail with care and the loss is his since the mail was entrusted to his care. The failure of the Grievant to protest the Letter of Warning, says Management, is proof that he recognized that he was responsible for the safe keeping of the accountable item. Management does not accuse the Grievant of stealing the parcel. It does not know how the parcel was lost but, in Management's view, the loss must be attributable to the Grievant's error and he is, therefore, liable for the monetary loss suffered by the Postal Service.

Findings

Article XXVII provides that a Carrier must exercise "reasonable care." It is not enough that a Carrier state that he exercised reasonable care since there is no manner in which the veracity of that statement can be substantiated. Under the present circumstances the Carrier must demonstrate that he was unable to exercise reasonable care due to factors outside his control.

In the case of Kurtz each of the possibilities raised by the Union must be explored. First, Kurtz demonstrated

that he delivered his route holding his satchel in front of him as he walked and fingered the mail. While this is a commendable and a useful precaution it serves only as self-protection for the carrier and does not relieve him from liability for loss on the basis of taking reasonable care. Carrying the satchel in front of him, then, does not demonstrate that the carrier was for some reason unable to exercise reasonable care.

Other possibilities brought forth by the Union bear more heavily on factors outside the control of the Grievant. The carrier is issued his accountables an hour before he leaves the office. During that time he is required to leave his case to go to mail racks in the center of a large room to sweep mail for his route from racks that are constantly being worked by clerks. If the carrier has already obtained his accountables, he must leave them unattended at his case while he sweeps mail from the central racks. There was no evidence that there is a procedure in effect enabling a carrier to protect his accountables during this time. On another point it was stated by the Union and not denied by Management that carriers are not permitted to take their satchels into the washroom. The normal practice is for a carrier to leave his satchel at his case or outside the washroom when he uses the washroom for a period of five or six minutes prior to his leaving for the street. Kurtz

claims that his satchel was left unattended on April 23, 1974 under these exact circumstances.

The Grievant testified that he and a Union Steward promptly discussed the matter with a Supervisor (now retired and unavailable to testify) who is alleged to have told them, "Don't worry about it" and, "I am not at liberty to tell you anything, just don't worry." Management made no attempt to deny the allegation nor did it confirm the Union's statement. Another carrier, M., was apprehended on June 8, 1974 and discharged on June 21, 1974 for theft of the mail. The Union maintains that since M. was on the floor at the time Kurtz's bag was unattended, it is reasonable to conclude that M. purloined the package. The Postal Service states that if M. would have gone near Kurtz's bag, other carriers working cases nearby would have noticed his presence. There is no evidence that M. was seen in the vicinity of Kurtz's case. In any event, says Management, M. was discharged because he stole mail that was entrusted to him.

The connection between the presence of M. on the day of the Grievant's loss and the loss is much too tenuous to reasonably assume that M. pilfered Item No. 3366397. According to reliable testimony of the Union witnesses, it is possible that the statement of the Supervisor "not to worry" was in error and subsequent events could not link M. to the loss of parcel No. 3366397.

Management's contention that Kurtz's failure to grieve the Warning Letter of May 9, 1974 limits his defense concerning the Letter of Demand dated March 25, 1975 is without merit. The Warning Letter was not properly constructed as directed by Senior Assistant Postmaster General Brown and even if it were the Warning Letter must be considered a part of the total Management action against the Grievant. The Grievant, therefore, did not waive his right to grieve the Letter of Demand when he failed to protest the Warning Letter.

The practice of leaving the satchel when sweeping the clerk's racks or when using the washroom puts the carrier at risk. He must either entrust his satchel to another carrier or take it with him. It doesn't make sense to sweep the center racks carrying a satchel and taking the satchel into the washroom is against regulations. Certainly the integrity of fellow carriers is not generally open to question. However, M. was a fellow carrier and he was discharged for stealing mail. The carriers in the William Penn Station must gamble each time they leave their cases as they must do in order to perform their duties.

The ultimate issue in this case is by no means free from doubt. There are cogent arguments suggesting

that the Grievant should not be held liable for this specific loss. On the other hand there are even stronger factual considerations indicating a lack of due care on the part of Kurtz.

Thus, the hard fact is that he noticed nothing amiss with his satchel when he returned to his case on the morning of April 23. It is undenied that the other carriers noticed nothing unusual about, nor any stranger near, Kurtz's satchel while he was in the washroom. This indicated that the parcel was lost outside the Post Office. Finally, Kurtz could not demonstrate that some factor outside his control caused him to lose the parcel even though he claims that he exercised reasonable care. Given these critical facts, the conclusion is clear that Grievant Kurtz properly was held responsible for the loss in issue.

Award

The Grievance is denied.

Paul J. Fasser, Jr.
Associate Impartial Chairman

Approved:

Sylvester Garrett
Impartial Chairman

C 3231

UNITED STATES POSTAL SERVICE	Case No. NC-NAT-16,285
and	ISSUED: November 19, 1979
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BACKGROUND

In this National Level grievance the NALC seeks a ruling on the following stated issues: 1

> "Whether, under the 1975 or 1978 National Agreements, USPS may properly impose discipline upon employees for 'excessive absenteeism' or 'failure to maintain a regular schedule' even though the absences upon which those charges are based, are instances where
> (1) the employee was granted approved sick leave;
> (2) the employee was on continuation of pay due to a traumatic on-the-job injury; or
> (3) the employee was on OWCP approved workmen's compensation."

This case represents the culmination of a basic disagreement between the parties which initially took form in an April 5, 1977 letter of the then NALC President, Joseph Vacca, 2

to the then Senior Assistant Postmaster General - Employee and Labor Relations, James Conway. The letter read--

> "It has come to my attention that Postal Service Management in the Central Region, Northeast Region and Southern Region has embarked upon a shockingly disgraceful program of 'absenteeism control' whereby they have taken the position that it is, under our National Agreement, permissible to discipline and even discharge employees for legitimate use of annually earned or accrued sick leave on the grounds that an employee who uses all such leave is not 'maintaining a regular work schedule.' Examples of this program are attached to this letter for your information and review.
>
> "NALC stringently disagrees that such programs are permissible under Articles III, X and XVI of our National Agreement and Federal Statutes guaranteeing postal employees the right to earned and accumulated sick leave. Therefore, I hereby request that you inform me whether or not Postal Service Management at the National level agrees with the interpretation of the National Agreement evidenced by the Central, Northeast, and Southern Region directives attached hereto.
>
> "Should you inform me that National Postal Management agrees with that interpretation of our contract, I shall be forced to conclude that there exists 'a dispute between

> "'the Union and the Employer as to the interpretation of (the National) Agreement' within the meaning of Article XV, Section 2, last paragraph, and initiate, hereby, a grievance at the National level over that dispute and request an immediate Step 4 discussion to attempt to resolve the same."

Vacca's letter enclosed copies of three USPS internal 3
Management directives which had come to the attention of the NALC. Two were of limited application only, being signed respectively by the Postmaster at Marblehead, Massachusetts and the Sectional Center Manager/Postmaster at Jacksonville, Florida. The third directive, however, applied throughout the Central Region, having been issued by the Regional Director for Employee and Labor Relations, David Charters, in a major effort to reduce excessive absenteeism in that Region.

An attempt to summarize the Charters memorandum here 4
might be misleading in depicting its essential nature. Its full text was:

> "POLICY ON ABSENTEEISM CONTROL
>
> "1.) In all cases of discipline regarding the absentee problem the charges to use is 'failure to maintain a regular work schedule.' This can be modified by adding terminology such as, absenteeism, tardiness, failure to report off and AWOL. This basis of this discipline is that an employee has a basic responsibility to the Postal Service to be at work. The failure to be at work for whatever reason may result in disciplinary action against an employee.

"'I wish to stress that the fact that an employee is sick and receives sick leave benefits, does not relieve that employee from this basic responsibility. If an employee is absent with such frequency, as to interfere with scheduling, productivity, etc., then that employee may be disciplined.'

"2.) It will be necessary for you to meet with your union representatives to make sure that the policy is understood by them. You should point out, for example, that we do not treat an employee who has been a good employee for 19 years then has a heart attack, the same way we treat an employee who has been trouble for a term of employment of three or four years. You should stress to the Unions that we will be fair and reasonable, but that we will enforce the proper discipline in absentee cases.

"3.) Establish a system wherein the employee may be warned and counseled, then a letter of warning, five or seven day suspension, ten or fourteen day suspension, discharged. While there is no nationally specified progression of discipline, it is my determination that the above meets the minimum requirement of the concept of progressive discipline. This shows an impartial person, such as an arbitrator, that we have taken certain steps to correct deficiencies, none of the lower steps have done their job and that we have had to take increasingly severe action in an effort to correct the problem.

"The concept of progressive discipline is a necessary and essential element in winning cases in arbitration.

"4.) While the Central Region, has set goals, the following are the objectives that you should keep in mind.

"First of all, an employee earns 13 days of sick leave a year. If an employee uses all his sick leave (13 days) that means he is off at least 5% of the time is wholly unsatisfactory to us nor does it allow the employee to build up any protection for himself in the future. Therefore, you should examine very closely any employee presently absent 5% or more of the time. I would imagine that these employees in all probability need immediate attention.

"The next category you should look at are those employees absent 3% or more of the time. If we can get our rate down to 3% with the problem employees, then our total employee rates will be very satisfactory and well under the goals set for you.

"5.) LWOP should be used sparingly. It appears to me that many times we grant LWOP that may be more properly charged to AWOL. Also, there is no requirment for the Postal Service to give LWOP for prime time vacation. If an employee uses all his annual leave prior to his vacation period, it is up to the Postmaster to look at the facts of the situation to determine whether or not to give the employee time off. You should notify the unions of this also.

"The use of LWOP by itself generally indicates some failure of an employee to maintain his work schedule. You should have your managers look at all employees using LWOP and determine why they are using it and if they are into the progressive disciplinary procedure as yet.

"In order to accomplish the necessary analysis and required control required by the Central Region, I will need a report on an Accounting Period basis consisting of the following:

'Total number of hours sick leave used in the MSC office and MSC by bargaining unit and by non-bargaining unit employees and number of employees using leave. I will need the same information in regard to LWOP. Further, include number of counselings, letters of warning, suspensions given for failure to maintain work schedule offenses within your MSC.'"

The Senior Assistant Postmaster General made no formal reply to the Vacca letter, but informal discussions between the parties took place over ensuing months. Late in 1977 the USPS gave all four of the Postal Worker Unions copies of revised leave provisions to be included in a proposed new Employee and Labor Relations Manual, as required under Article XIX of the 1975 National Agreement. The revised provisions were made effective early in 1978, pursuant to Article XIX, after the parties had been unable to agree upon a date when they might be discussed. Then the new leave provisions ultimately were considered in detail during the 1978 negotiations, 5

and in the end the Unions apparently had no disagreement with the language appearing in the new Manual, as revised, on the subject of "Leave," commencing with Part 510 in Chapter 5.

These provisions are silent, however, in respect to 6
the issues stated in the April 5, 1977 Vacca letter. It also was clear throughout the negotiations that the parties remained in disagreement on these matters, with the Union free to press them into arbitration if desired. On October 19, 1978 Vacca finally wrote Assistant Postmaster General, Labor Relations, James Gildea noting that there had been no formal reply to his April 5, 1977 letter and certifying the resultant dispute for hearing by the Impartial Chairman. On October 27, 1978 William Henry, of the Labor Relations Department, replied to the Vacca letter on behalf of Gildea. The concluding paragraph of Henry's letter read--

> "Employees reporting for duty as scheduled is critical to an effective and efficient operation. The responsibility for maintaining an acceptable attendance record rests with each and every employee. Regular attendance and entitlement to paid leave are two separate and distinct things. When an employee submits a request to use paid leave to cover an absence, the individual is simply claiming a benefit granted by the contract. While granting such a request may excuse the absence for pay purposes, it does not negate the fact of the absence or the fact that excessive absences impinge upon the effective and efficient operation of the Postal Service. In such circumstances, the employer can rightfully be expected to take the necessary corrective measures to assure that the efficiency of the Service is properly maintained."

Since the NALC found this statement of the USPS posi- 7
tion to be unsatisfactory, the matter ultimately proceeded to arbitration on January 9, 1979. Briefs thereafter were filed as of March 22, 1979.

The Presentations

1. NALC

Basically, the NALC holds that, under Article XVI of the National Agreement, there can be no "just cause" for any discipline based on an employee absence from work on some form of approved leave--whether it be sick leave, annual leave, leave without pay, or leave while recuperating from on-the-job injury. The imposition of discipline in any such situation would deprive employees of their right to enjoy leave benefits protected by Article X of the National Agreement, as well as under applicable Federal law. 8

Once sick leave has been approved, therefore, the USPS cannot thereafter complain that efficiency was impaired because of the employee's absence on such leave. In this respect, the NALC greatly stresses that, in early 1978, the Bureau of Policies and Standards of the U.S. Civil Service Commission issued a policy directive to the FEAA stating-- 9

> "Given an agency's authority to deny leave under many circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."

The Civil Service Commission Policy, as thus stated, is controlling in respect to all USPS preference eligible veterans who elect to appeal the imposition of discipline under Civil Service procedures rather than under the grievance procedure established in the National Agreement. In the NALC view, 10

it is absurd to have two different disciplinary policies applicable to USPS employees working under the same Agreement, depending on whether or not an employee happens to be a preference eligible veteran. In its judgment, therefore, the USPS now should be required to embrace the CSC policy.

The NALC also emphasizes the obvious incongruity of trying to apply "corrective" discipline to discourage an employee from being injured or becoming ill. Under Article XVI all discipline must be corrective in nature, not punitive. In the case of employees on OWCP approved workmen's compensation (or continuation of pay status because of on-the-job injury), these are benefits to which employees are entitled by Federal law. The NALC concludes that the disputed USPS policies thus ignore the fact that, under Article III of the National Agreement, the USPS is obliged to honor all applicable laws. 11

2. The USPS

The Service denies at the outset that it ever seeks to discipline an employee for the "use of leave benefits provided by the Office of Workers Compensation Program." It also asserts that the NALC has failed to provide any example of discipline because an employee "was on continuation of pay due to a traumatic on-the-job injury." Thus in its view the only issue before the Impartial Chairman is-- 12

> "Does the Postal Service's discipline or discharge of employees for failing to maintain a regular work schedule in instances where the use of sick leave has been approved for such absences constitute a violation of the National Agreement?"

As to this stated issue, the Service relies on the proposition that: "It is a well established principal of arbitral labor law that excessive absenteeism, even though due to illness beyond the control of the employee, may result in disciplinary action, including termination of employment." Numerous quotations from arbitrator's opinions are provided in support of this basic USPS position. Of the greatest significance, for present purposes, are several dozen opinions by various USPS arbitrators including Gamser, Holly, Casselman, Cushman, Cohen, Di Leone, Larson, Epstein, Jensen, Moberly, Krimsley, Fasser, Myers, Rubin, Scearce, Seitz, Warns, and Willingham. 13

All of these opinions, in the USPS view, support the broad proposition--as stated by the Elkouri's, in "How Arbitration Works" (3rd Ed., 1973) at pages 545-546--to the effect that-- 14

> "The right to terminate the employees for excessive absences, even where they are due to illness, is generally recognized by arbitrators."

More pertinent language, for USPS purposes, appears in an Opinion by Arbitrator Cushman in Case AC-S-9936-D, involving the APWU (decided June 6, 1977). Cushman wrote:

> "The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has the right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons.

* * * * * *

"This Arbitrator is sympathetic to employees whose absenteeism is due to illness, and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. (USPS, /Vera D. Bugg/ AB-S-6-102-D.) The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He is simply being terminated for irregularity and undependability of attendance. Such situations are really not disciplinary in nature..."

(Underscoring added.)

In addition to relying on the cited opinions of numerous USPS arbitrators, the USPS suggests that the NALC now seeks to obtain, through arbitration, a concession which it failed to secure in the 1978 negotiations, when the parties had full opportunity to discuss the leave provisions in Chapter 5 of the new Employee and Labor Relations Manual. During the 1978 negotiations, indeed, the NALC specifically, but unsuccessfully, sought to prohibit the use of approved sick leave for disciplinary purposes. 15

Finally the Service deems the contrary Civil Service Commission policy on the issue to be irrelevant, stressing that the CSC "has no authority over adverse actions taken against postal employees who are not preference eligibles...." On this score, it quotes the following from a decision by Arbitrator Moberly: 16

> "Of course, this Arbitrator is bound by the collective bargaining agreement rather than the holdings of the Civil Service Commission. Under this agreement, as it has been interpreted in the past, the Postal Service is justified in removing employees under the circumstances here. No comment is made herein with respect to the rights of similarly-situated employees under other laws, rules or regulations. The Arbitrator is interpreting the collective bargaining agreement, and nothing more."

Finally, the Service urges that the policy announced by the CSC's Bureau of Policies and Standards is not necessarily the CSC's "final decision" on the matter, since not as yet been considered by the CSC Appeals Review Board.

FINDINGS

1. Scope of the Issue

17 The USPS brief sees no real issue here in respect to the imposition of discipline where an employee is absent (1) on continuation of pay due to a traumatic on-the-job injury, or (2) on OWCP - approved Workers Compensation. The USPS, says the brief, does not discipline employees for use of leave benefits provided by the Office of Workers Compensation Program (OWCP). The NALC has presented no evidence to the contrary. Nothing in the memoranda from the Central Region, Marblehead, or Jacksonville specifically states that discipline should be imposed on employees for absences on OWCP approved Workmen's Compensation or on continuation of pay due to traumatic on-the-job injury. Given the assurances embodied in the USPS brief, therefore, the present analysis is limited to considering whether the imposition of discipline because of absences on approved sick leave may involve violation of the National Agreement.

18 According to the NALC an employee's absence from work on approved sick leave never may provide a proper basis for discipline or termination of an employee's services. It believes this position to be supported fully by the Civil Service Commission policy, as quoted earlier.

19 The USPS apparently does not claim that all sick leave absences may provide a basis for discipline. It does hold, however, that where such absences result in failure to be "regular in attendance" this may subject the employee to disciplinary action. For this purpose, it holds the CSC policy statement to be irrelevant.

While it is difficult to deal meaningfully with such broad interpretive questions, in the absence of detailed facts in specific grievances to define an issue, this is not unusual in national level grievances. There are clear areas of disagreement and confusion in the present case, moreover, which seem susceptible to clarification through this Opinion. 20

2. Earlier Opinions by USPS Regional Arbitrators

It is instructive at the outset to analyze some of the major earlier decisions by Regional Arbitrators. The record includes two dozen Regional decisions as well as an advisory Opinion by National Level Arbitrator Howard Gamser. All but one of the Regional decisions are cited by the USPS to support the view that an employee may be disciplined for failure to maintain a regular work schedule because of absences on approved sick leave. 21

The most significant Regional case, for present purposes, was decided in the Southern Region December 17, 1975 by Fred Holly, a highly respected and eminently qualified arbitrator, in Case AB-S-6102-D (herein called the Bugg Case). There the grievant had a little over 3 years of service when discharged in late 1974. Within two months of being hired she had established an unsatisfactory attendance record, which was called to her attention by two separate supervisors. After five months of employment, she again was told to improve her attendance record. About a month later she was warned by letter that her attendance was unsatisfactory and was placed on restricted sick leave. Ultimately, she was sent to a USPS designated physician for an examination to determine her fitness for duty because of a continued poor attendance record. On February 18, 1974 the physician reported that she was able to perform her job from the medical standpoint. Three months 22

later she again was warned about continuing absenteeism. In September of 1974 an analysis of her attendance record over recent months was prepared. This resulted in the decision to discharge. During her last 7½ months of employment she had been absent more than one third of her scheduled hours. There is no suggestion in Holly's Opinion that the grievant was suffering from any single, identifiable illness which might have been responsible for all, or most, of her repeated absences from work.

A key paragraph in the Opinion in the Bugg case 23
reads--

> "Such an excessive rate of absenteeism has been consistently held to be unacceptable and a proper cause for termination. Employers have a right to expect acceptable levels of attendance from their employees, and when such attendance is not forthcoming termination is approved even though the absences may be for valid medical reasons. This principle is so well established in arbitration that it does not demand documentation here."
>
> (Underscoring added.)

On April 28, 1976 Arbitrator Howard Myers sustained 24
a discharge in Case NB-S-6079-D where an employee had been absent repetitively over a period starting at least as far back as 1972 and running into June of 1975. During the last 18 months of his employment he missed 15% of his scheduled shifts and frequently failed to provide any documentation or medical certificate to explain his absence. This Opinion concluded with the following dicta--

"It has been well established by arbitration decisions that when an employee becomes undependable as to adequate attendance, so as to impede operations, the employer may finally discharge, regardless of what reasons cause the undependability or unfitness.

The employer has no contractual obligation to retain an employee whose services are irregular or where absences are due to disability over a long period....Regardless of causes of continuing absences, a just cause for removal exists where reasonable corrective steps have not changed a deficient performance so as to meet the established standards."

(Underscoring added.)

The next significant Opinion was issued by Arbitrator Harry Casselman on April 7, 1977 in Case AC-C-10,295-D. There the grievant was reinstated without back pay. The Arbitrator's Opinion, included the following pertinent passages-- 25

"...there is nothing in Article X, Section 4, which states, or...implies, that absences due to sick leave, whether covered by sick leave, or beyond such coverage, cannot be used as a basis of discipline when combined with other absences, or as a basis of discharge for disability without fault standing by itself, where such disability to perform on an acceptable basis is fully established by medical evidence.

* * * * * *

"It should be obvious that Management is powerless to go behind a doctor's certification of illness, unless it has independant medical or other evidence to the contrary; even if the Union were correct, which I find they are not, that the approval of each instance of sick leave is not just an approval for pay purposes, which I find it is, but also an approval of the underlying leave, this does not mean that when an employee's overall absences based on sick leave and other leave makes his continued service untenable because of its effect on the organization...discipline cannot be assessed."

(Underscoring added.)

The Bugg case was cited by Arbitrator Bernard Cushman in a May 9, 1977 decision in Case AC-S-12,796-D. There Cushman sustained a discharge where the employee had an extremely poor attendance record. His Opinion included the following-- 26

"Under all the circumstances, the Arbitrator finds that some absences attributed by the grievant to other causes were due to the grievant's own internal problems rather than the lack of management affirmative action and that her absentee record could fairly be considered by management as it stood without any substantial discount for alleged causation somehow attributable to management. This Arbitrator holds that the absentee record of the grievant was excessive and was a proper cause for removal.

"The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from their employees and that when such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. Vera D. Bugg, AB-S-6102-D.

The Union also contends that in this case discipline was not corrective but punitive on the ground that it is not progressive discipline to proceed from a five-day suspension to a discharge. In a case of excessive absenteeism progressive discipline in the form of disciplinary suspensions is inappropriate if the absenteeism genuinely arises from a physical or medical problem."

(Underscoring added.)

On June 6, 1977 Arbitrator Cushman also decided Case AC-S-9,936-D, finding just cause for a "termination." The grievant there was a ZMT Operator who had only about two years of service when discharged in August of 1976. Within only 8 months of his hire he had been counselled for excessive absenteeism, and 2 months later was placed on restricted sick leave. Thereafter he received a letter of warning, a 5-day suspension, and a 14-day suspension because of his continuing absenteeism. He did not reply to the June 25, 1976 notice of proposed removal. Between March 27 and July 2, 1976 he was absent on 68.57% of his scheduled work days. All of his absences either 27

were on approved sick leave or approved leave without pay. After again citing the Bugg Opinion, Cushman wrote--

> "This Arbitrator is sympathetic to employees whose absenteeism is due to illness and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He simply is being terminated for irregularity and undependability of attendance. Such situations are not really disciplinary in nature. And that is why this Arbitrator has stated in Case AC-S-12,796-D that in a case of excessive absenteeism if the absenteeism genuinely arises from a physical or medical problem discipline in the form of disciplinary suspensions is inappropriate."
>
> (Underscoring added.)

On September 27, 1977 Regional Arbitrator Peter Seitz 28
decided Case AC-N-16,605-D where a ZMT Operator with less than 4 years of service was discharged because of an attendance record found by the Arbitrator to be "deplorable and unfortunate," since she had worked only about 20% of her scheduled hours. The Seitz Opinion reflects a somewhat different approach from that developed in the Bugg Case and its progeny. It includes two particularly significant paragraphs:

> "The Service does not question the genuineness of the reasons given for all of these absences. It states that it has no information on which to do so. Under such circumstances, it must be assumed that the grievant was not 'at fault.' Accordingly, this is not a case in which discipline or discharge are appropriate for any wrongful conduct or behavior which breached her employment duties or the requirements of the collective agreement.
>
> Under such circumstances the case, necessarily, turns on the question whether the Service had grounds to terminate (not 'discharge') the grievant because it had reason to apprehend that, on the basis of the attendance record referred to, the grievant would not maintain a reasonable attendance record in the future. In other words, and in effect, the Service's position is that the absence record demonstrates that the grievant does not possess the physical qualifications to maintain a satisfactory attendance record in the future."
>
> (Underscoring added.)

A number of other Regional decisions were issued between September of 1977 and the hearing in the present case. All but one of these opinions included statements tending to support the present USPS position. Two of these opinions, however, dealt directly with the question of whether the CSC policy was relevant. They reached opposite conclusions. These decisions will be noted in more detail later. 29

There is, among the more recent cases, perhaps one other which merits specific mention here since it was presented by the NALC. Case NC-S-8197-D was decided by Arbitrator Cushman on February 4, 1978. Discharge for frequent and repetitive absenteeism was found proper. The Arbitrator commented-- 30

> "The Union argues, however, that all of the absences during the October 5, 1976 to April 22, 1977 period, the Charge 1 period, were stipulated to have been for approved sick leave, and therefore, may not properly be considered as a basis for removal. That argument is without merit. As stated above, this Arbitrator, in common with many other arbitrators, has held that an employer has a right to expect acceptable levels of attendance from employees and that where such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. As stated by Arbitrator Meyers in a recent case, USPS and APWU (Pamela Allen), approval of a sick leave slip means only that an employee's absence will be processed for pay purposes. A satisfactorily documented sick leave request affords no basis for supervisory disapproval, but the absences remain on the record."
>
> (Underscoring added.)

3. Significance of the Earlier Regional Opinions

The problem faced by the USPS in seeking to reduce absenteeism is not unique. A Central Region memorandum which accompanied the Charters Memorandum, quoted under Background above, nonetheless suggests that in recent years the USPS has faced a particularly serious problem of this sort. 31

Management properly may assume that most USPS employees are conscientious and not prone to abuse the sick leave program. Medical certificates understandably are not generally required to support every one or two day absence because of claimed illness. Even where medical certificates are required they may not be difficult to obtain, even by a malingerer. There is no practical way for the USPS to question their validity, moreover, except as other evidence may surface to reveal that a given employee has been malingering. 32

No doubt in light of these considerations National Level Arbitrator Gamser observed in Case AC-N-14,034 that excused sick leave cannot "be considered a grant of immunity." If USPS Management is to be able to hold absenteeism within reasonable limits over the long run, it may be important in individual cases to cite an employee's entire record of absences, including those on sick leave, in establishing proper cause for discipline. 33

Some of the problem envisioned by the NALC in the present case, moreover, may arise from unnecessarily broad generalizations embraced in some of the Regional opinions which imply that the application of discipline always will be proper when the USPS can show "excessive absences" from work. Indeed, the USPS brief quotes from the Elkouri text, "How Arbitration Works" (3rd Ed. 1973) at p. 545, a sentence to the effect that an employer has a "right" to terminate an employee for excessive 34

absences even when due to illness. Reliance on such broad and misleading generalizations may obscure the fundamental consideration that the true issue, under Article XVI of the National Agreement, is whether the employer has established "just cause" for the given discipline in the specific case. The presence or absence of "just cause" is a fact question which properly may be determined only after all relevant factors in a case have been weighed carefully. The length of the employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the types and frequency of all of the employee's absences, the nature of the diagnosis, the medical history and prognosis, the type of medical documentation, the possible availability of other suitable USPS jobs or a disability pension, the employee's personal characteristics and overall record, the presence or absence of supervisory bias, the treatment of similarly situated employees, and many other factors all may be relevant in any given case.

In short, an arbitrator cannot properly uphold the 35
imposition of discipline under Article XVI, except after conscientious analysis of all relevant evidence in the specific case. This basic consideration seems to be reflected in the advisory Opinion of National Level Arbitrator Howard Gamser in Case AC-N-14,034, decided February 2, 1978. After quoting from a Regional Arbitrator's Opinion in Case AC-S-9,936-D, (and noting that other Regional opinions had included similar language) Gamser wrote these cautionary comments--

> "In addition, the undersigned is constrained to add the following comments. Of course properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. However, neither can excused sick leave be considered as a grant of immunity to an

"employee against the employer's right to receive regular and dependable attendance and to take steps necessary to insure the existence of a reliable workforce to do the work at hand.

When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the fact that this employee's attendance record supports the conclusion that the employee is incapable of providing regular and dependable attendance without corrective action being taken. Management cannot inhibit an employee in the exercise of his contractual right to employ sick leave in the manner contemplated to cover legitimate periods of absence due to illness of other physical incapacity. Management must give every consideration to the fact that there is a sick leave program and that an employee's absence has been covered by accrued and earned sick leave or projected sick leave. Having given this consideration appropriate weight, the employer may still decide that an attendance record so erratic and undependable due to physical incapacity to do the assigned work requires that action be taken to insure that the work is covered in an efficient and reliable manner."

Given the specific facts in most of the cases before them, it occasions no surprise that many Regional Arbitrators have indicated that repetitive, excessive absenteeism--even 36

including absences on approved sick leave--may provide "just cause" for discipline or discharge. Such extreme situations are not hard to find. The facts in the original Bugg case, as well as those before Arbitrators Cushman in Case AC-S-9,936-D and Seitz in Case AC-N-16,605-D serve to illustrate this point.

It follows that there is no basis in this record for an award which would bar the Service from seeking to apply discipline to combat serious, repetitive absenteeism by individual employees, even though absences on sick leave or approved leave without pay may be involved. The Marblehead, Jacksonville, and Central Region memoranda all seem to embody instructions in furtherance of such a basic policy. Even if such memoranda include statements or implications which appear unnecessarily broad or inaccurate, it is not the function of an Arbitrator to rewrite such internal Management instructions. Should an apparent abuse arise in any future instance, the issue of "just cause" in the given case may be determined through the filing of an individual grievance. 37

4. Relevance of Civil Service Commission Policy

Article XVI, Section 3 of the National Agreement recognizes that any USPS employee who is "preference eligible" may elect to appeal the imposition of discharge, or a suspension of more than 30 days, to the Civil Service Commission instead of filing a grievance claiming violation of Article XVI. This alternative, of course, is available only to those bargaining unit employees who happen to be preference eligible. All other employees covered by the National Agreement may seek redress for discharge, or suspension of more than 30 days, only through the grievance procedure. 38

Article XVI states that discipline must be corrective in nature, not punitive, and that it may be imposed only for "just cause." The basic Civil Service policy, in contrast, apparently is that discipline may be upheld whenever it is found to be "for such cause as will promote the efficiency of the service." 39

As already indicated, the Bureau of Policies and Standards of the Civil Service Commission recently issued a policy directive to the FEAA which would apply in any case where a USPS preference eligible employee had elected to appeal a discharge or suspension of more than 30 days to the CSC. While the full text of the policy statement is not in evidence, one joint exhibit reveals, that a principal sentence reads-- 40

> "Given an agency's authority to deny leave under many circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."
>
> (Underscoring added.)

Another joint exhibit embodies a paragraph of the CSC policy statement reading-- 41

> "When an agency exercises its authority to approve leave the employee is released from his obligation to report for duty and his absence does not constitute a breach of the employer-employee relationship. As a result, an adverse action based on approved leave in

> "any amount is not normally a cause that will promote the efficiency of the service. Such an adverse action, then, should be reversed on appeal for failure to state a cause of action."
>
> (Underscoring added.)

Following implementation of this CSC pronouncement, the USPS advised all of its Regional Directors--Employee and Labor Relations: 42

> "In light of this new Commission policy, 'failure to meet position requirements' or 'undependability' based upon excessive approved absences should not be used as grounds for taking adverse actions against preference eligible employees, unless and until we are successful in reversing Commission policy through the vehicle of a motion for reopening on a 'test' case."
>
> (Underscoring added.)

The NALC reads the CSC policy statement to mean that the USPS is not entitled, under any circumstances, to impose discharge or a suspension of more than 30 days because of a preference eligible employee's absence on approved leave. In view of the above quoted portions of the policy statement this interpretation may be accepted as correct, for present purposes, in the absence of any evidence to the contrary. 43

The result is obviously incongruous. One policy applies in respect to preference eligible employees who appeal to the CSC and another governs all other bargaining unit employees and those preference eligible employees who file a grievance. The NALC argument that the new CSC policy should be applied to all employees thus has the superficial appeal of seeming to assure uniformity in the administration of discipline among all potentially involved employees. The fact is, however, that the special treatment accorded preference eligible employees is required under Section 1005-(a)-(2) of the Postal Reorganization Act and cannot be changed by the parties in collective bargaining. 44

Two Regional Arbitrators already have had an opportunity to consider whether the CSC policy statement should be embraced for purposes of applying the "just cause" test under Article XVI to employees who file grievances under Article XV rather than appealing to the CSC. The NALC was involved in both of these cases and both involved preference eligible employees. 45

In NC-S-14,301-D, decided September 25, 1978, Arbitrator Robert Moberly sustained a discharge where the employee had been absent from work frequently on approved sick leave, or on leave without pay. Moberly's Opinion noted the conflict between the CSC policy statement and the earlier rulings by Regional USPS arbitrators. He concluded that he was "bound by the collective bargaining agreement rather than the holdings of the Civil Service Commission," since--"The Arbitrator is interpreting the collective bargaining agreements, and nothing more." 46

A different view emerged in NC-C-5949-D, decided in December of 1978. There Arbitrator Peter Di Leone indicated that, but for the CSC policy directive, he would have sustained the discharge under review. He then wrote-- 47

> "Pursuant to Article III of the 1975 National Agreement this Arbitrator must view the action of the Employer in the light of applicable law and regulations. The Federal Ruling issued in accordance with the responsibilities Congress has imposed upon the Employer by law is such an applicable regulation governing the Employer's action here.
>
> Therefore, since Biggs' discharge was based on a record of approved leaves of absences from February 1, 1975, when he injured his knee, to December 7, 1975, when he was discharged, the action of the Employer must be set aside."

Neither of these Regional Cases represents a precedent for purposes of a National Level interpretive case. Indeed, it would be unfair to suggest that either arbitrator--in the absence of the detailed presentations in the present record--was in any position to develop an authoritative opinion on the subject. 48

In the absence of any helpful precedent it is pertinent to note that under Article XVI two fundamental considerations must control in every discipline case-- 49

(1) No discipline may be upheld unless shown to have been imposed for "just cause," and 50

(2) Whether "just cause" exists requires a fact determination on the basis of all relevant evidence in each individual case. 51

It follows that neither a Regional nor National Level Arbitrator may presume to enunciate or establish any broad general rule contemplating that the imposition of discipline 52

always will either be upheld, or be set aside, in any given category of case. Nor can the pronouncement of the CSC Bureau of Policies and Standards now be accorded such a status by this Arbitrator. To do so would be, in effect, to amend Article XVI.

On the other hand, it is not uncommon for arbitrators, 53
when faced with difficult "just cause" cases, to consider how other arbitrators or authorities have dealt with like problems. Many of the various Regional Arbitrators cited by the USPS in the present case have relied upon opinions expressed by arbitrators in other relationships. Some of the Regional Arbitrators also have relied upon the Elkouri generalization which has been quoted in the USPS brief.

In these circumstances there is no way that this Arbi- 54
trator now could characterize the CSC policy statement as "irrelevant" in respect to a just cause issue under Article XVI. In view of its applicability, in respect to preference eligible USPS employees, it obviously must be accorded at least the kind of consideration as has been accorded to generalizations of other arbitrators, or writers, outside of this bargaining relationship. Beyond that the precise weight or significance to be accorded the new CSC policy, in light of all of the evidence in any given case, should remain a matter of judgment on the part of the arbitrator to whom the case has been entrusted for decision.

Finally, perhaps, it should be observed that any 55
attempt to enunciate an inflexible rule for dealing with every "just cause" issue in a given type of case is a risky business, at best, in view of the multitude of variables which may be present in individual cases. Thus there can be no clear certainty that the present CSC policy statement will remain forever in its present form without any refinement, clarification, or modification.

Conclusions

The following conclusions may be stated on the basis of the presentations in this National Level grievance: 56

1. Whether the USPS properly may impose discipline upon an employee for "excessive absenteeism," or "failure to maintain a regular schedule," when the absences on which the charges are based include absences on approved sick leave, must be determined on a case-by-case basis under the provisions of Article XVI; 57

2. Whether or not the USPS can establish just cause for the imposition of discipline, based wholly or in part upon absenteeism arising from absences on approved leave, is a question of fact to be determined in light of all relevant evidence in the given case; 58

3. The CSC policy statement is not of controlling significance in deciding a "just cause" issue under Article XVI, even though the grievant may be preference eligible; 59

4. The CSC policy statement is relevant in respect to a "just cause" issue under Article XVI, in a case involving absences on approved leave; 60

5. The weight to be given the CSC policy statement, in evaluating a just cause issue under all of the evidence in any such case, lies in the discretion of the arbitrator. 61

AWARD

No formal Award is required in view of the nature of this case. It may be deemed to be closed on the basis of the foregoing opinion. 62

Sylvester Garrett,
Arbitrator

C# 07610

BEFORE THOMAS F. LEVAK, ARBITRATOR
REGULAR WESTERN REGIONAL PANEL

In the Matter of the Arbitration Between:	DISPUTES AND GRIEVANCES CONCERNING REMOVAL AND EMERGENCY SUSPENSION FOR MISTREATMENT OF MAIL
U. S. POSTAL SERVICE THE "SERVICE"	
(Bakersfield, CA.)	
and	ARBITRATOR'S OPINION AND AWARD
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO THE "UNION"	W4N-5N-D 40950 W4N-5N-D 40951 W4N-5N-D 41967 W4N-5N-D 41968
(E. Gifford, Grievant)	

These matters first came for hearing before the Arbitrator on October 20, 1987, at the offices of the Service, Bakersfield, California. The Service was represented by S.Jane Main. The Union was represented by Dale P. Hart. At the commencement of the proceedings, the parties stipulated that the issue to be resolved by the Arbitrator was whether the removal and emergency suspensions were for just cause and in accordance with the National Agreement; and if not, what would the appropriate remedy be?

On October 28, 1987, the Arbitrator rendered his Interim Award Regarding the Service's Denial of Opportunity To Interview Postal Inspector Jeff Scobba. A second day of hearing was scheduled for and held on December 1, 1987. At the commencement of the proceedings, the Union notified the Arbitrator that it had withdrawn the Emergency Suspension grievances, and then moved the Arbitration for an order and award setting aside the removal of the Grievant for the reason that the Service (1) had failed to provide requested copies of the mail involved in this case, and (2) refused to comply with its demand that the Service produce the notes taken by Postal Inspector Jeff Scobba relative to these cases.

The Arbitrator received into evidence: (1) a formal written request for information from the Union to Scobba dated October 21, 1987, which requested any and all information used to determine that the removal was for just cause and necessary, "specifically, but not limited to Kern Shopper Cards and all notes taken during interview of Jan 7th, 1987"; (2) a letter of response from Postal Inspector Charles E. Raymond, dated October 30, 1987, which enclosed photocopies of two of the approximately 135 valid address cards, and refused the Union's request for case notes for the reason that to do so might jeopardize an ongoing

investigation; (3) a letter dated November 10, 1987, from the Union to Raymond restating its demand for the notes, and asking for a specific reason for the denial, including any rule or regulation relied upon; (4) a November 20, 1987 letter from Hart to Main, reiterating the Union's demand, and asserting that the Service's failure to provide the requested materials denied the Grievant's right to due process; and, (5) a November 25, 1987 letter from Main to Hart stating that the request for notes would not be honored for the reason that an ongoing case might be compromised.

The Union argued: (1) that the Service's continuing refusal to provide all of the cards - which were in its possession, and its refusal to provide it Scobba's notes violated the Grievant's due process rights under the just cause clause of the National Agreement; (2) that the Service had never cited any specific rule or regulation relied upon; and, (3) that the Service had never specified the type of ongoing case - whether criminal or disciplinary - that might be jeopardized.

The Service responded: (1) that the Service had relied only upon the Investigative Memorandum and not the notes or the actual mail; (2) and that since the Union had been provided everything that the Service had relied upon, the Union's request should be denied; and (3) the Postal Inspectors involved had discussed the matter with their superiors, who instructed them not to provide the notes. The Service did not cite any Handbook or Manual provision, or any law, regulation or general rule, in support of its position; nor did it explain the nature of the ongoing investigation.

The Arbitrator informed the parties that his feeling was that the Union's motion was well-taken. With regard to the 135 pieces of mail, he noted that the mail was available and that there was no real reason for not producing it. After a short recess, the Service ultimately agreed and produced the mail. The Service also informed the Arbitrator that it was seeking further telephone advice regarding the notes.

With regard to the notes, the Arbitrator explained that the most fundamental due process right was the right to a hearing at which an accused is able to confront and cross-examine his accuser. The Arbitrator noted that where, as here, the sole evidence against a removed grievant is provided by a Postal Inspector, that a meaningful cross-examination necessarily encompasses use of the Inspector's notes. The Arbitrator elaborated by noting that information favorable to the Grievant, but not the Service, might be found in the notes; and that the notes could also properly be used to impeach the Inspector, an impeachment almost impossible without the notes. The Arbitrator also informed the Service that to that point it had merely stated its position, but had advanced no specific laws, rules, regulations or general authority in support of its position. Finally, the Arbitrator noted that the mere existence of some undisclosed ongoing case was not grounds for refusing to provide

the notes, and he noted that in a criminal case such disclosures must be made when directed under penalty of dismissal of a complaint.

After some further discussion, at 11:00 a.m., the Arbitrator called a second recess and advised the Service that unless the Service agreed to produce the notes by 12:00 p.m., the Arbitrator would grant the Union's motion. The Arbitrator advised the Service to seek further advice with regard to its position.

At 12:00 p.m. the proceedings reconvened. The Service stated that it would not produce the notes. The only reasons given were: (1) that it had not seen the notes nor relied upon them in issuing the removal; and (2) that the Arbitrator should simply hear the evidence presented and give whatever weight to that evidence as he might deem appropriate. The Arbitrator stated that the Union's motion was thereupon granted, and that the Grievant was to be immediately reinstated with full back pay. The Service then asked that its formal objection be recorded. The objection was noted and the hearing adjourned.

In memorializing his decision, the Arbitrator wishes the record to reflect the following:

First, National Agreement Article 16 requires that removal be for just cause. The Arbitrator construes and interprets just cause to include the due process requirement that a removed grievant have the right, through the Union, to effectively examine and cross examine her accuser; that notes taken by a Service manager or by a Postal Inspector relative to a removal are crucial to such an effective examination; and, that the denial of those notes therefore denies a grievant her rights under Article 16.

Second, where the Service utilizes Postal Inspectors to conduct an investigation in a removal case, it cannot be allowed to simply assert the defense that it relied only upon the formal Investigative Memorandum. The term "statement of facts relied upon," as used in the National Agreement, cannot be construed so narrowly. A Postal Inspector, in a discipline case, acts as the agent of the Service, and the Union is entitled to examine and explore all the facts within the knowledge of the Inspector, not just those favorable to the Service. In short, a Postal Inspector is to be treated as any other witness, and the Service's position is therefore contrary to the National Agreement.

Third, it must be stressed that in the instant case, the only evidence relied upon is that obtained by the Postal Inspectors; the Service itself conducted no independent investigation, and had no independent evidence of its own to submit. Had such independent evidence been offered, the Arbitrator would not have sustained the Union's motion, but instead would have stricken the Postal Inspector's Investigative

Memorandum and dissallowed the Postal Inspector's testimony, allowing the Service to attempt to prove its case through other evidence.

Fourth, The Arbitrator's decision is supported by general case authority. See, e.g., Elkouri & Elkouri, How Arbitration Works,,"Right of Cross-Examination," BNA 4th Ed., at p. 316, where it is noted that an arbitrator will not accept an offer of evidence if it is conditioned upon nondisclosure to the other party, and that like reasoning applies to employer reliance on allegedly confidential records not available as proof. See also, 5 C.F.R. 1201.64, relating to the production of witness statements in Merit System Protection Board proceedings. In general, the failure to produce such statements upon request, and prior to cross-examination, results in the striking of the direct testimony. The Arbitrator cites these examples only for illustrative purposes, not as binding authority. His decision is rooted in his interpretation of the just cause clause and the National Agreement.

Fifth, the Arbitrator also wishes to note that his decision was not made in a vacuum. The testimony of two Union witnesses, supported by video tape evidence, created an inference either that the Postal Inspector's Investigative Memorandum may have been in error or incomplete in significant areas. The Union was entitled to pursue possible support for that inference in the notes of the Inspector.

Sixth, the Arbitrator again notes that the Service never cited any Handbook or Manual provisions, laws, case law authority, regulations, general principles, or even general rules of evidence, in support of its position. More specifically, it cited no special laws, regulations, principles or rules relating to the Postal Inspection Service. Neither did it disclose even the bare nature of the purported ongoing investigation, or how perusal and use of the notes in this case might jeopardize that investigation. The Service cannot claim it did not have the opportunity to prepare and present argument and authorities. This dispute was placed at issue well in advance of the December 1 hearing, and the Union's written request to the Service that it state regulations and rules in support of its position was made in its November 10 letter.

AWARD

The removal of the Grievant was not for just cause under Article 16 and was not in compliance with the National Agreement. The grievance is sustained.

The Grievant is reinstated to her former position, without loss of seniority or benefits, and with full back pay.

The Arbitrator retains jurisdiction of this case solely for the purpose of resolving any disagreement concerning the amount of back pay due the Grievant.

DATED this 3rd day of November, 1987.

Thomas F. Levak, Arbitrator.

C# 14470

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	Alfreda Parker
between	Wheeling, Illinois
UNITED STATES POSTAL SERVICE	Case No. J90N-4J-D 95031311
and	NALC Case No.
NATIONAL ASSOCIATION OF LETTER CARRIERS	

BEFORE: Robert W. McAllister

APPEARANCES:

For the U. S. Postal Service: Colleen R. Kelly

For the Union: Neal Tisdale

PLACE OF HEARING: 250 West Dundee Road
Wheeling, Illinois

DATE OF HEARING: April 12, 1995

AWARD:

The above analysis requires a finding Management's actions with respect to holding the Grievant responsible for two (2) attendance related incidents that pre date the August 11, 1994, settlement agreement were arbitrary and not preserved by the terms of the settlement. The Grievant's actual record of three (3) tardies and two (2) unscheduled absences in an almost four month period does not support a removal. Accordingly, it is found that the Postal Service did not have just cause to issue the Grievant a Notice of Removal. She is to be reinstated with full back pay less interim earnings and benefits, and with no loss of seniority.

DATE OF AWARD: May 17, 1995

I. FACTS

Alfreda Parker, the Grievant, is a full-time letter carrier assigned to the Wheeling, Illinois, post office with seniority since June 8, 1989. On December 19, 1994, the Grievant was issued a Notice of Removal for failure to maintain a regular schedule. The notice cited seven (7) unscheduled absences [four (4) tardies and three (3) absences] between July 26 and December 19, 1994.

II. ISSUE

Did the Postal Service have just cause to issue the Grievant a Notice of Removal? If not, what is the remedy?

III. RELEVANT CONTRACT PROVISIONS

Article 16	Discipline Procedure
Article 19	Handbooks and Manuals

IV. POSITION OF THE POSTAL SERVICE

The Postal Service points out this six year employee has had numerous discussions dealing with her attendance. The Postal Service stresses Postmaster Terry Cardwell initiated an "amnesty" in 1993 in order to give all employees a fresh start. Notwithstanding, the Postal Service contends the Grievant was unable to improve her attendance and within a less than a two (2) year period received a Letter of Warning (LOW), a seven (7) day suspension and fourteen (14) day suspension for irregular attendance.

According to the Postal Service, the Grievant entered into a "Last Chance" settlement on August 11, 1994, following a removal notice issued on July 14, 1994. The Postal Service acknowledges the last chance settlement may not be one that is normally seen, but nonetheless, it was intended to be a strong warning about the consequences of her poor attendance. The Postal Service maintains the Grievant did not have to sign the settlement, but did so.

Now, the Postal Service notes the Grievant for the first time claims she was coerced into signing the document.

The Postal Service argues Supervisor Jose Santa had reached the "end of the rope," and the Grievant simply had to improve. The Postal Service contends the removal was issued because the Grievant's attendance had not improved despite numerous discussions and written warnings. The Postal Service avers improvement is the responsibility of the Grievant. Moreover, the Postal Service insists the record shows the Grievant was well aware of what Management expected from her. The Postal Service believes the medical documentation provided by the Grievant is self-serving. According to the Postal Service, the absences were unscheduled, notwithstanding documentation.

The Postal Service insists the Grievant was removed because she could not be consistently regular in attendance. The Postal Service submits that a basic principle of employment is to come to work as scheduled. The Postal Service states the Grievant did not, and her removal should be upheld.

V. POSITION OF THE UNION

The Union emphasizes Management witnesses stated there are no mitigating circumstances when an employee's absence is unscheduled even if the employee is sick. The Union points out the Grievant suffers from a bi-polar condition and had a right to use her accumulated sick leave.

The Union charges the last chance agreement signed by the Grievant is not worth the paper on which it is written. The Union claims it has no clarity and does not express a specific intent. The Union contends that, as written, this document does not deserve to be given any weight. The Union questions what the Grievant was supposed to live up to under the last chance settlement. The Union points out the Grievant sought help through the Employee

Assistance Program (EAP). Yet, Management refused to consider her medical situation. The Union maintains Management's refusal to consider the medical documentation presented to it renders her medical condition irrelevant, thus placing the Grievant in a no win situation.

VI. DISCUSSION

Postmaster Terry Cardwell testified that if an employee incurs an unscheduled absence, that absence will be used against the employee in any attendance related discipline regardless of the underlying reasons for the absence. This singular viewpoint was, likewise, expressed by the Manager of Customer Services, Thomas Koulentes. In response to a question from this Arbitrator, Koulentes said that once an employee incurs an unscheduled absence, it remains unscheduled and will be used in any future discipline.

Essentially, the Wheeling, Illinois, post office has unilaterally decided to embrace a no fault absenteeism policy without notice to the Union or its employees that such a system is now the case. Moreover, since Management has decided that no consideration will be given to the underlying reasons of a given absence, such a no fault system requires specific guidelines be promulgated in order for employees to be aware of what is expected of them. At a minimum, such guidelines would have to address time periods and the specific number of unscheduled absences or tardies that would trigger each step of this new disciplinary system.

This unilaterally imposed standard is in conflict with the National Agreement and the applicable Handbooks and Manuals. The decision to consider mitigating circumstances, such as injury, hospitalization, emergency, etc., is left to supervision under the National Agreement. The system used by Postmaster Cardwell prohibits any such consideration. Clearly, an individual employee's attendance record over a period of time can reach

the point that it would not be considered unreasonable for Management in that instance to reject consideration of the underlying reasons for an unscheduled absence because of a continuing pattern of excessive and chronic absenteeism.

But this is not the situation presented by the Grievant as reflected in the limited record before the Arbitrator. The Notice of Removal establishes the Grievant's current problems with attendance began with an LOW issued September 16, 1993. On February 17, 1994, the Grievant was issued a seven (7) day suspension for attendance. Then, on July 14, 1994, the Grievant was issued a Notice of Discharge for attendance. The Grievant was in fact issued a fourteen (14) day suspension on May 11, 1994, for a non-attendance matter. The removal notice ignored the Grievant's attendance between February 17 and May 2, 1994. Instead, Management "cherry picked" a period of measurement beginning May 3 and ending July 12, 1994. There is no evidence the Grievant incurred any unscheduled absences between February 17 and May 2, 1994, a period of well over two and one-half (2 1/2) months. The July 14, 1994, removal lists three (3) eight hour absences in May. It then shows no further absences. On July 7 and 12, the Grievant was late 10/100 of an hour or six minutes. This questionable removal notice was grieved. On August 11, 1994, the parties and the Grievant entered into a grievance settlement, as follows:

> This is notice that you will serve a suspension of (2) two weeks beginning Saturday, August 13, 1994, and return to duty on Saturday, August 27, 1994.
>
> This settlement is final and grievant agrees to discontinue pursuing all actions. Employee also agrees to withdraw any pending or current E.E.O. Complaints. This is a last chance agreement.
>
> As final and complete settlement of the subject grievance and without prejudice to either party's position in this or any other grievance, and with the understanding that neither party shall cite this as a precedent, the subject grievance has been

> resolved on the basis that the union has agreed to withdraw this grievance from the grievance procedure and the resolutions entered into by all parties.

Prior to entering into this settlement, the record shows Management was made aware the Grievant was hospitalized from July 30 to August 3, 1994. The Grievant was diagnosed as having a bi-polar disorder that was being treated with medication (Prosac and Lithium). Postmaster Cardwell sent the Grievant to Dr. Philip Foley, a medical officer for the Postal Service, on August 5, 1994. Dr. Foley, by letter dated August 8, 1994, informed Cardwell the Grievant ". . . has been in treatment and is now suitable to return to work."

Analysis of the document loosely characterized as a "last chance" settlement reveals it to be non-specific in terms of what is expected of the Grievant in the future. The Postal Service maintains the settlement was intended to give the Grievant "one last chance to improve her attendance . . . ". Union President Michael Losurdo was called upon by the Postal Service to fill in the blanks of the non-specific, July 14, settlement. He said the Grievant's attendance was discussed. He also said the Grievant was told she had to be "regular" in attendance.

The August 11, 1994, settlement does not address the Grievant's hospitalization (Un. Ex. 1) or a 25/100 tardy on July 26, 1994. Nonetheless, Management reached back beyond the date of the August 11 settlement and cited the July 26 tardy and the Grievant's hospitalization as incidents supporting a decision to remove the Grievant. The August 11, 1994, settlement is at best a ambiguous document drawn up by Postal Management. If local Management wanted to preserve the unscheduled tardy of July 26 and the unscheduled hospitalization of the Grievant, it was incumbent upon them to do so with a clear and unambiguous statement to that effect since Management was the author of the August 11 document. But, even if local Management had

had the foresight to address the Grievant's hospitalization, their insistence upon holding her accountable for that unscheduled absence was unreasonable and not supported by the record. Clearly, local Management has failed to show the Grievant's attendance record had reached a point whereby it could be viewed as random, excessive, and chronic, thereby justifying its inclusion of the Grievant's hospitalization in the removal notice. As indicated above, if such was the case, it may very well be found reasonable for Management to no longer give consideration to the actual reason for a given absence.

Herein, however, such is not the case. More importantly, the ambiguous settlement must be construed against the authors who failed to preserve Management's right to reach back prior to the date of the settlement in any future evaluation of the Grievant's attendance.

Thus, we are faced with a record of three (3) tardies and two (2) absences, all of which were unscheduled. Supervisor Koulentes testified, "We expected some improvement." Three tardies and two unscheduled absences over close to four months may not be perfect attendance, but such a record falls far short of establishing the Grievant's attendance record was chronic and excessive.

Local Management appears to have a quick trigger when it comes to its evaluation of the Grievant's actual record. I am unfortunately unable to go behind the July 14, 1994, removal. Nevertheless, Management's use of an artificial measuring period emphasizing three (3) unscheduled absences plus two (2) six minute tardies in a two and one-half month period gives insight into the system they are attempting to impose upon unit employees. Upon signing the non-specific settlement of August 11, 1994, the record evidences no citable instances Management thereafter informed the Grievant her record was reaching a point where any further absence(s) would lead to her

discharge. Had such an effort been made, the Grievant and the Union would have been put on notice that Management intended to measure her improvement or lack thereof by using the July tardy, as well as her pre-settlement hospitalization. As it turns out, this improper reliance was not revealed until the Grievant was removed.

Moreover, there is no evidence anyone in local Management told the Grievant or any other unit employee it was administering attendance on a no fault basis or that, in Management's viewpoint, the Grievant's record had reached such a point of unreliability that it would not consider any reason, including her hospitalization, as a mitigating factor for an unscheduled absence. Instead, Management told the Grievant she had to be regular in attendance - period. As indicated above, her record between August 11 and the removal was not perfect yet it clearly does not support this removal action.

VII. AWARD

The above analysis requires a finding that Management's actions with respect to holding the Grievant responsible for two (2) attendance related incidents that pre date the August 11, 1994, settlement agreement were arbitrary and not preserved by the terms of the settlement. The Grievant's actual record of three (3) tardies and two (2) unscheduled absences in an almost four (4) month period does not support a removal. Accordingly, it is found the Postal Service did not have just cause to issue the Grievant a Notice of Removal. She is to be reinstated with full back pay less interim earnings and benefits, and with no loss of seniority.

C #16970

REGULAR ARBITRATION AWARD

In the Matter of the Arbitration	**GRIEVANT: Nancy Vaughan**
between	**POST OFFICE: Lewiston, Idaho**
UNITED STATES POSTAL SERVICE	**CASE NO: E90N-4E-D95015396** **NALC CASE NO: CF-94-16**
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BEFORE: Donald E. Olson, Jr.

APPEARANCES:

For the U.S. Postal Service: Mr. Mitchell J. Hicks, Senior Labor Relations Specialist

For the NALC: Mr. Paul L. Price, Regional Administrative Assistant Pacific Northwest Region

Place of Hearing: Lewiston, Idaho

Dates of Hearing: October 3, 1996 and March 27, 1997

AWARD: The grievance is sustained. The Employer shall rescind the Notice of Suspension issued to the Grievant on October 27, 1994, and purge copies of same from appropriate records, including the Grievant's personnel file. The Employer is directed to make the Grievant whole for any lost wages, plns interest at the Federal Judgment Rate.

Date of Award: June 24, 1997

Donald E. Olson, Jr., Arbitrator

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

This matter was conducted in accordance with Article 15 - GRIEVANCE - ARBITRATION PROCEDURE of the parties collective bargaining agreement. A hearing was held before the undersigned in Lewiston, Idaho on October 3, 1996. The hearing commenced at 9:00 a.m. and ended at 4:15 p.m. At the conclusion of the hearing day the parties requested a continuance of the hearing. The second day of hearing reconvened on March 27, 1997, commencing at 9:00 a.m. and concluding at 2:55 p.m. All witnesses testified under oath as administered by the Arbitrator. Each party was given an opportunity to examine, cross examine all witnesses, as well as present evidence in support of their respective positions. Mr. Mitchell J. Hicks, Senior Labor Relations Specialist, represented the United States Postal Service, hereinafter referred to as "the Employer". Mr. Paul Price, Regional Administrative Assistant, Pacific Northwest Region, represented the National Association of Letter Carriers, AFL-CIO, hereinafter referred to as "the Union", and Ms. Nancy M. Vaughan, hereinafter referred to as "the Grievant". The parties introduced twenty-one (21) Joint Exhibits, all of which were received. The Union introduced eleven (11) exhibits, all of which were received and made a part the record. The Employer objected to Union Exhibits 2, 4, 5, 6, 7 and 11. The Arbitrator noted the Employer's objections. The Employer introduced four (4) Exhibits, all of which were received and made a part of the record. the Union objected to Employer Exhibit No. 4. The Arbitrator noted the Union's objection. The parties were unable to stipulate to the issue(s) to be determined by the Arbitrator in this dispute. However, the parties agreed the Arbitrator could frame the issue(s) to be determined. At the conclusion of the hearing the parties requested an opportunity to file post-hearing briefs. The Arbitrator received the Employer's brief on June 14, 1997, and the Union's brief on June 18, 1997, at which time the hearing record was closed. The Arbitrator promised to render his Opinion and

Award within thirty (30) calendar days after the record had been declared closed. This Opinion and Award will serve as the final binding Opinion and Award of this Arbitrator, regarding this matter.

ISSUE

The Arbitrator frames the issue(s) as follows:

"Did the Employer have just cause pursuant to the terms of the National Agreement to issue a Notice of Suspension to the Grievant on October 27, 1994? If not, what is an appropriate remedy?

RELEVANT PROVISIONS OF THE NATIONAL AGREEMENT

* * * *

ARTICLE 3
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

* * * *

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

* * * *

ARTICLE 13
ASSIGNMENT OF ILL OR INJURED REGULAR

WORKFORCE EMPLOYEES

Section 1. Introduction

B. The U.S. Postal Service and the Union recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within the installation, after local negotiations.

* * * *

ARTICLE 15
GRIEVANCE-ARBITRATON PROCEDURE

Section 2. Grievance Procedure--Steps

Step 2:

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. . . .

(g) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. Any such statement must be included in the file as part of the grievance record in the case. . . .

(h) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed, (3) the Union corrections and additions to the Step 2 decision.

Step 3:

(b) The Grievant shall be represented at the Employer's Step 3 Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any case where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. . . .

(c) The employer's written Step 3 decision on the grievance shall be provided to the Union's Step 3 representative within fifteen (15) days after the parties have met in Step 3, unless the parties agree to extend the fifteen (15) day period. Such decision shall state the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2. . . .

Section 4. Arbitration

A. General Provisions

6. All decisions of the arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement by altered, amended, or modified by an arbitrator. . . .

* * * *

ARTICLE 16
DISCIPLINE PROCEDURE

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

* * * *

ARTICLE 19
HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21. Timekeeper's Instructions.

* * * *

BACKGROUND

The Grievant is employed as a Letter Carrier at the Lewiston, Idaho Post Office. She has been employed at that facility since October 10, 1987. On August 17, 1994 while in Spokane, Washington with a friend, she experience car trouble. They were unable to start the car. The Grievant was scheduled to report to work on August 17, 1994. The Grievant called the Employer between 2:00 a.m. and 2:30 a.m. to notify them of the problem with the car. Upon the Grievant's return to work the next day, management asked her to provide evidence that the car had been worked on. The Grievant indicated that she had no documentation to provide, since her friend fixed the car. On October 27, 1994, the Grievant received Notice of Suspension of 14 Days or Less from the Employer, which entailed a suspension of five (5) working days, beginning on November 7th at 0600 hours. The Grievant was instructed to return to work on November 14, 1994, at 0600 hours. There were two reasons given by the Employer for issuing the October 27, 1994 Notice of Suspension to the Grievant. She was charged with an Absence Without Official Leave (AWOL) for the absence from work on August 17, 1994. In addition, the Employer claimed in the second charge that she had excessive unscheduled absences for an extended period time. Prior to this notice being issued to the Grievant, the Employer had issued the Grievant a Letter of Warning for Irregular Attendance on December 30,

1993, as well as issuing the Grievant a two (2) Calendar Day Suspension for Irregular Attendance on February 17, 1994. A timely grievance was filed. A Step One meeting was held and the Employer denied the grievance on November 3, 1994. The Union appealed the grievance to Step 2 on November 11, 1994. The Employer denied the grievance on November 15, 1994, however did not furnish a written decision to the Union. The Union did not file a written statement of corrections or additions to the Employer's oral decision denying the grievance. On November 25, 1994, the Union appealed the grievance to Step 3. The Employer rendered a written decision to the Step 3 appeal on March 27, 1995. Once again, the Employer denied the grievance. The Union appealed the matter to arbitration on April lst. Arbitrator Walter Lawrence held a hearing on this matter on June 13, 1995. He decided to remand the grievance back to Step 3 of the grievance procedure in order for the parties to fully develop and further address the issues in dispute.
The parties advocates agreed with Arbitrator Lawrence's decision. At the arbitration hearing the Union raised the issue that the Employer may have violated the Family Medical Leave ACT (FMLA). Pursuant to the arbitrator's ruling the parties met on August 22, 1995 at Step 3. After the meeting had concluded, the Employer issued its Step 3 decision on September 8, 1995. The Employer denied the grievance. Once again, the Union appealed the grievance to arbitration on September 19, 1995 alleging the Employer violated Articles 16 and 19 of the National Agreement , as well as the Family Medical Leave Act.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

First, the Employer maintains it did not violate the National Agreement when it issued a seven day suspension to the Grievant on October 27, 1994. In support of that contention, the Employer asserts the Grievant has been disciplined numerous times for attendance problems. Moreover, the Employer contends it issued progressive discipline to the Grievant in an effort to correct her behavior dealing with absenteeism, prior to issuing

the suspension on October 27, 1994. Furthermore, the Employer claims it acted properly, applied applicable law and regulation, prior to issuing the suspension to the Grievant. In addition, the Employer claims the Union has attempted to raise new arguments dealing with a violation of the Grievant's rights under the Family Medical Leave Act, as well as the Darrell Brown Memo, by asserting these arguments for the first time at the arbitration hearing. As such, the Employer avows that raising these new arguments at the arbitration hearing is violative of the terms set forth in Article 15, and should not be allowed or considered by the Arbitrator. Additionally, the Employer avers if the Arbitrator allows the Union's argument dealing with the FMLA to be considered, the Grievant never gave notice of her illness in "sufficient detail" as to make it evident that the requested leave was FMLA protected. Also, the Employer argues that the Grievant's medical condition did not meet the definition of "chronic serious health condition" as defined under the FMLA. Contrary to the Union's position, the Employer contends that supervision conducted a stand-up with employees to inform them of their rights under FMLA, and that FMLA postings were posted on appropriate bulletin boards for employees to observe. In summary, the Employer asserts it has shown that the Grievant acted as charged, and requests that the grievance be denied.

POSITION OF THE UNION

The Union claims the Employer did not have just cause to issue the Grievant seven (7) calendar day suspension on October 27, 1994. Moreover, the Union argues the Employer violated Articles 3, 5, and 19 of the National Agreement, when it issued the suspension to the Grievant, and violated the Family Medical Leave Act, as well as the Darrell Brown Memo. Additionally, the Union contends the Grievant was treated in a disparate manner by the Employer. Specifically, the Union asserts there were other employees who used more sick leave in a less amount of time then the Grievant, however none of these employees were disciplined. Furthermore, the Union avows the Grievant's due process rights were violated, by the Employer's improper investigation of the facts surrounding the

Grievant's absences from work. Also, the Union avers the Grievant was subjected to double jeopardy, in that she received an "official discussion" about the AWOL charge, which resolved the matter, but the same issue was again raised in the Notice of Suspension. Again, the Union claims the discipline received by the Grievant on October 27, 1994, was not meted out by the Employer in a timely manner. Further, the Union argues the Employer failed to demonstrate the Grievant was AWOL as charged in the Notice of Suspension. Last, the Union maintains the Employer in this case failed to follow its own rules and regulations regarding leave provisions, such as ELM 515 and 513. As such, the Grievant may not be disciplined. In summary, the Union requests the Notice of Suspension be rescinded, the Grievant be made whole and the Grievant be treated properly as a limited duty employee and afforded a position she can accomplish within her medical restrictions.

DISCUSSION

This Arbitrator has carefully reviewed the record, pertinent testimony, post-hearing briefs, and cited arbitration cases.

Initially, this Arbitrator concludes the Union's claim that the Employer violated the Darrell Brown Memo has no validity or merit in this case. Indeed, the moving papers of this case have no mention of a Darrell Brown Memo alleged violation. The Union may have raised a Darrell Brown Memo violation at the original arbitration hearing on June 13, 1994 before Arbitrator Lawrence, however, the moving papers do not indicate that there was any discussion of that contention after the case had been remanded back to Step 3. Moreover, there is no mention of a Darrell Brown Memo violation in the Union's Request For Arbitration on September 19, 1995. Therefore, this Arbitrator concludes this argument was not properly raised in accordance with the provisions set forth in Article 15, and as such will be given no consideration in deciding this case. However, the Employer's contention that the Family Medical Leave Act (FMLA) was not raised in the processing of this grievance, lacks merit. The parties including Arbitrator Lawrence

entered into an agreement on or about June 13, 1995, which states in pertinent part the following: **The undersigned mutually agree that the above-referenced grievance will be remanded to Step 3 of the grievance procedure in ORDER TO FULLY DEVELOP AND FURTHER ADDRESS THE ISSUES IN DISPUTE. It is further agreed that this grievance, if not resolved, will be relitigated. . . .** (Emphasis supplied). The evidence indicates the Union on June 13, 1995 had raised at least the FMLA argument in support of their position, and that Arbitrator Lawrence remanded the case back to Step 3 to give them an opportunity to fully develop their respective contentions, and address the issues in dispute. Indeed, that is exactly what the parties did. On August 22, 1995 the Union's National Business Agent, Jim Williams, met with the Employer's representative, Porter L. Kimmel. Without doubt, the Union in this meeting once again raised the FMLA argument in support of their position. In fact, the Employer's Step 3 decision rendered on September 8, 1995 clearly supports the Union contention that FMLA was raised. In that decision, Porter L. Kimmel states in pertinent part: . . .**It is the position of management that any alleged violation of the FMLA is not arbitrable. Further, even if it were ruled arbitrable, the union has failed to demonstrate sufficient number of the dates of unscheduled absences should be excused under FMLA. Grievance denied.** (Emphasis supplied). Furthermore, the Union's Request For Arbitration dated September 19, 1995 expressly stated that the contractual violations it relied upon were Article 16, 19 and the Family Medical Leave Act. As a matter of fact, National Arbitrator Mittenthal, in Case No. *N8-W-0406*, on pages 9-10 while addressing the validity of a new contention being raised by the Postal Service at the arbitration hearing, stated: **. . . .The difficulty here is the lateness of this argument. Article XV describes in great detail what is expected of the parties in the grievance procedure. The Postal Service's Step 2 decision must make a "full statement" of its understanding of . . .the contractual provisions involved. Its Step 3 decision must include "a statement of any additional . . .contentions not previously set forth. . ."**

Its reliance on this contract provision did not surface until the arbitration hearing itself. Under such circumstances, it would be inappropriate to consider this belated Article XIII claim. (Emphasis supplied). This Arbitrator supports Arbitrator Mittenthal's reasoning. In this case, for whatever reason the Employer failed to render a Step 2 written decision, which is explicitly required in processing a grievance under the terms of Article 15. However, it is quite clear as stated above, the Union properly raised the issue of a possible violation of the Family Medical Leave Act, and the parties had an opportunity to discuss same at their Step 3 meeting on August 22, 1995. The Employer merely took the position that the FMLA was not arbitrable. Certainly, in the opinion of this Arbitrator, the Employer's claim that the Union's contentions raised at Step 3 pertaining to a FMLA violation amount to "an ambush at arbitration" cannot be countenanced. By all means, in the opinion of this Arbitrator, not only can both parties to this Agreement utilize the grievance-arbitration procedure for alleged violations of its express provisions, but the Union can also avail itself of the grievance-arbitration procedure for alleged violations of applicable law. (See Article 3 and 5 of the National Agreement). However, with all of this said, this Arbitrator does not believe the FMLA has to be considered in order to adjudicate this matter, albeit the FMLA is arbitrable.

In essence, this Arbitrator must determine if the Employer had just cause to suspend the Grievant by letter dated October 27, 1994. In the opinion of this Arbitrator, the term "just cause" clearly implies some investigation, fact-finding and weighing of the circumstances, prior to taking disciplinary action against employees. Due process mandates that an Employer is obligated to investigate **all of the circumstances**, before reaching any decision to discipline employees, and to give an employee a fair opportunity to explain his or her side of the case.(Emphasis supplied)

Generally, as in this case, this Arbitrator must determine if the Grievant absenteeism was excessive. In determining if the Employer acted reasonably in disciplining the Grievant, this Arbitrator has given consideration to the length of, and time during which

the Grievant had an alleged poor attendance record, the reasons for the absences, if any, the nature of her job, the attendance records of other employees , and whether the Employer had a clear policy relating to absenteeism, which was known to all employees and which was applied fairly and consistently. Moreover, was the Grievant warned that disciplinary action could result if her attendance record failed to improve.

By the same token, as the Employer so correctly argues, if it is to survive as a business, it needs employees who will be regular in attendance and who will work, and stay at work, when they are supposed to. Clearly, that is not an unreasonable expectation in the opinion of this Arbitrator.

However, in this case the Employer did not treat the Grievant fairly. First, the Employer charged the Grievant with being AWOL on August 17, 1994. The record is clear the Grievant called supervision in the early hours of August 17, 1994 from Spokane, Washington to report car trouble. Shortly after her return to work she was asked by management to provide copies of repair bills. The Grievant explained her friend repaired her car, so she had no repair bills to provide. To this Arbitrator that appears to be a reasonable explanation for not having repair bills. Both Branch President Chris Fey and the Grievant indicated the Grievant received an official discussion from Mr. Akers regarding this matter, and the parties left Mr. Akers office with the understanding the issue was resolved. This Arbitrator finds that testimony to be plausible. If Mr. Akers really had decided shortly after August 17, 1994, that the Grievant absence was in fact an AWOL situation, he certainly had reason to issue another Notice of Suspension to the Grievant, for Irregular Attendance. Prior to August 17, 1994, the Grievant was absent on March 30, 1994, May 12, 1994, May 13, 1994, June 22, 1994 and four (4) days in June 1994. Nonetheless, the Employer for whatever reason waited until October 27, 1994 before issuing its Notice of Suspension to the Grievant. This Arbitrator is convinced that the Employer did indeed know why the Grievant was absent from work. For example, the record indicates in late February 1994 the Grievant was offered and she accepted a limited

duty job offer, which was later rescinded by the Employer in April 1994. However, even prior to that event taking place, the Employer was put on notice that the Grievant had suffered two ankle injuries while employed carrying mail. Without doubt, Article 10, Section 5.D pertaining to sick leave and usage of same, states: **For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.** This Arbitrator must assume the Employer requested certification from the Grievant for the absences between July 23 and July 28, 1994, since she received payment for those absences. These actions by the Employer, clearly indicate to this Arbitrator that the Employer was aware of the Grievant's serious medical condition, and the her work limitations. Equally important, this Arbitrator notes the Employer's own reference material dealing with the FMLA, charges supervisors with the responsibility for designating whether or not an absence is FMLA qualified and to give notice of the designation to employees, if such employees have a serious health condition, such as the Grievant had. There is no doubt in the opinion of this Arbitrator that management knew of the Grievant's serious health condition, however, blatantly disregarded their responsibility to notify the Grievant of her FMLA rights for qualified FMLA absences. Additionally, there was no evidence in the record that the Employer after being made aware of the Grievant's medical condition, required her to provide current certification from a health care provider that the FMLA definition of a serious health condition was met. These requirements are mandated by the Employer's own regulations. However, in the instant case, the Employer did not comply with its own regulations dealing with this issue.

In the same vein, this Arbitrator is of the opinion the Employer failed to properly investigate this matter prior to issuing the October 27, 1994 Notice of Suspension to the Grievant. Moreover, there was no investigative interview held with the Grievant prior to meting out the suspension. Frankly, this Arbitrator was somewhat taken back by the testimony of Postmaster Baldus, who testified under oath that he had no idea of why the

Grievant was absent from work. Taken at face value, this admission makes the Employer's case untenable. Article 16, Section 8 of National Agreement states: **In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.** (Emphasis supplied). Obviously, if the Postmaster the individual charged with reviewing suspensions of his employees, had no idea why the Grievant was absent, this Arbitrator concludes he did not properly review the case prior to issuing the suspension.

In particular, this Arbitrator is of the opinion that Charge No. 1 given by the Employer as a reason for the Grievant's suspension is clearly stale. As a rule, it is an essential aspect of industrial due process that discipline be administered promptly after the commission of the offense which prompted the discipline. Moreover, as in this case, such a delay in the imposition of discipline clearly leads an employee into a false sense of security that his conduct is acceptable to an employer. Further, this Arbitrator was struck by the fact that albeit the Grievant was being charged with AWOL for August 17th absence, not one of the Form 3971's introduced at the hearing stated such a fact. Clearly, this is contrary to the Employer's own rules and regulations dealing with Form 3971s.

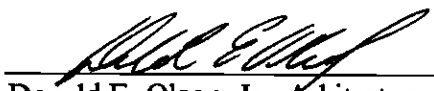
In review, this Arbitrator notes the Grievant was also treated in a disparate manner in her use of sick leave versus co-workers. During the period in dispute, the Grievant used a total of 88 hours of sick leave. On the other hand, some employees used more sick leave than the Grievant, however, the record indicates they received no discipline. For example, the record shows that Carrier Wiggens utilized 480 hours of sick leave in just a few months, while Carrier Fraker used 320 hours of sick leave and Carrier Olney used 160 hours of sick leave. The general rule is that disparate treatment such as unequal treatment for similar conduct will not be tolerated by arbitrators. This Arbitrator without reservation supports that rule.

Thus, based upon the record and for the reasons stated above, this Arbitrator concludes the Employer did not have just cause pursuant to the terms of the National Agreement to issue a Notice of Suspension to the Grievant on October 27, 1997.

AWARD

The grievance is sustained. The Employer shall rescind the Notice of Suspension issued to the Grievant on October 27, 1994, and purge copies of same from appropriate records, including the Grievant's personnel file. The Employer is directed to make the Grievant whole for any lost wages, plus interest at the Federal Judgment Rate.

Dated this 24th day of June, 1997
Tacoma, WA



Donald E. Olson, Jr., Arbitrator

C#18017

SOUTHERN REGULAR DISCIPLINE ARBITRATION PANEL

In the matter of
an arbitration between:

United States Postal Service Employer	)	
	)	Grievant: Donald Marshall
and	)	Case No. G94N-4G-D 97087319
	)	Tulsa, Oklahoma
National Association of Letter Carriers, AFL-CIO Union	)	

Before: Leonard C. Bajork, Arbitrator

Appearances:

For the Employer: O. D. Curry, Advocate

For the Union: John W. Hogue, Advocate

Place of hearing: Tulsa, Oklahoma

Date of hearing: January 22, 1998

Award: The Union's grievance is sustained.

As remedy, the Employer will immediately offer reinstatement to the Grievant. Assuming that TE carriers continue to be employed and assigned work at the Tulsa, Oklahoma postal facility, this award will stay the expiration of the remaining period of the Grievant's 359 day TE tour. On the other hand, should the Employer no longer employ and assign work to TE carriers, this award will likewise stay such remaining period for backpay purposes. Therefore and in either event, the backpay period will begin on the date immediately following the 30-day advance notice period and end upon the date of the Grievant's expired TE tour, less

interim earnings. The Employer will purge from the Grievant's file all records of this case.

Date of award: February 20, 1998

Statement of the Case:

The Union's grievance 1358-97-90 arose on February 26, 1997 at the Employer's Tulsa, Oklahoma, Southeast Station, postal facility where Mr. Donald Marshall, the Grievant had been a transitional employee (TE) Letter Carrier since 1993.

On January 24, 1997, the Grievant received a telephone call from Ms. Terry Johnson, TE Letter Carrier, asking him to bring her to work that morning at 9:00 a.m. The Grievant intended to resolve a pay issue with the Employer at this time but, instead, was assigned to finish Route 4509 in assistance to an unassigned regular carrier. He asked that the meeting on the pay issue be postponed as a result of the assignment. Subsequently, the Grievant cased and pulled down the mail. Before going to the street, the Grievant marked his departure time as 1:40 p.m. and wrote out a buck slip to such effect. He placed the buckslip on a clip board, walked to the supervisor's desk and put the board down in front of Mr. Bobby Holland, Station Manager, who was standing at the desk.

Thereafter, the Grievant delivered the route. Upon his return to the station at 7:40 p.m., the Grievant observed that no one was in the building. He then called the downtown station, as he was earlier instructed to do in such situation, in order to be cleared. As he was leaving the station parking lot, Mr. Holland drove up in his car. The Grievant asked to be checked in. Upon check-in, Mr. Holland told the Grievant that, "This was unacceptable" and added, not to come in the following day.

On January 31, the Employer issued a Notice of Removal to the Grievant, effective March 8, 1997. The grounds for removal were, "Failure to perform your duties".

Positions of the Parties:

The Employer:

The Grievant was removed for just cause. The Grievant failed to timely call the station in order to advise that he would be unable to complete his assignment before the 6:00 p.m. window. The Grievant knew of the rule to call-in but did not.

The Grievant is a TE carrier and is not, therefore, entitled to progressive discipline.

Accordingly, the Employer urges the Arbitrator to sustain its decision to remove the Grievant by denying the Union's grievance in its entirety.

The Union:

The Grievant was removed without just cause.

As procedural matters, the Employer:

1. Refused to furnish the Union with certain information upon its request.

2. In conjunction with 1. above, failed to allow the Union's Step 1 Steward sufficient time to conduct his investigation of the incident.

The Union maintains that the Employer accordingly committed harmful error and urges the Arbitrator to set the Removal aside.

Alternatively and on the case's merits, the Union contends that the Grievant was treated disparately. Finally, it maintains that the removal penalty was punitive.

The parties agreed that the issues properly before arbitration for final and binding determination are:

Was the Grievant removed for just cause?

If not, what is the proper remedy?

The parties each submitted several case authorities as support for their respective positions. Each were considered for their relevance and materiality to the issue of just cause.

Discussion and Findings:

A Question of Harmful Error

The Union included an information request within its contentions of the Step 2 appeal:

> THE UNION REQUESTS AT STEP 2 OF THE GRIEVANCE
>
> PROCEDURE TO BE PROVIDED ALL EVIDENCE THAT
>
> MANAGEMENT WILL BE USING OR RELYING ON TO PROVE
>
> THE CHARGES AGAINST THE GRIEVANT, TO INCLUDE BUT
>
> NOT LIMITED TO:
>
> -copies of carrier reports for 1/24/97
> -any documentation to prove that the grievant was made aware of the requirement to call station management by 3:30 pm, when you cannot make deliveries prior dark.

Regarding the latter, the Union stipulated at hearing that the Grievant knew of the Employer's rule to call from the route if the carrier believes that deliveries cannot be completed before the 6:00 p.m. window.

The Employer's Step 2 denial stated:

> Additionally, you have requested, on your Step 2 appeal, copies of all information/evidence that will be relied upon to prove the charges. That information, should have been requested at step 1 of the Grievance procedure. Additionally, your request is non-specific and a "catch all" and a request to be used "just in case". If you desire specific information concerning the grievance, you should make a specific request to the issuing

> supervisor letting him/her know exactly what information you desire. I am confident the information will be provided. I am willing to cooperate fully in the exchange of copies of all relevant papers or documents. A grievance is filed by the Union and not management. This is your case. If you desire information which you do not have, make the specific request and we will comply within the guidelines of the Collective Bargaining Agreement.

The Union repeated the request within its letter of additions and corrections. However, apparently to no avail.

The Employer's Step 3 denial said:

> Grievant was properly terminated in accordance with Appendix C of the NALC TE Arbitration Award.

I find that the denial is remarkable because of its brevity. It is a stark example of what happens at the top level of Article 15's grievance-arbitration procedure when a case is not first developed at the lower levels. Nothing developed, little basis for response. The Employer's Step 3 brief answer appears to be in reply to the Union's merits position on the absence of progressive discipline. It however makes no reference to the Union's repeated request for information - a request which was last included with its letter of additions and corrections.

The Employer claims that the Union's information request was too broad, without particularity, as basis for its non-disclosure. I respectfully disagree.

The Union's primary request was for the "carrier reports of 1/24/97". Presumably, these reports would have shown which carriers may have called for assistance and the Employer's response as well as who may have missed the 6:00 p.m. window. I find that its request is in fact specific and deserved. I also find that the Employer's reply to the Union's Step 2 appeal's request for information affecting its removal decision, "That information should have been requested at step 1 of the Grievance procedure", is without contractual basis and a denial of the Union's right to fairly represent and defend the Grievant. The parties'

National Agreement and applicable national awards make no distinction between transitional employees' and regular full time employees' due process protections. Here, the Employer denied the Union requested information by which to make proper appeal.

The basis of the Employer's case theory on TE removal appears to be narrowly focused on proving that the TE is guilty of the charged offense consistent with paragraph 11 of Appendix C. Yet Arbitrator Louis V. Baldovin in Case No. G90N-4G-D- 94018185 (1994) stated that such reliance "is only partially correct". Arbitrator Baldovin then went on to analyze a wholly different set of circumstances to which he applied his conclusion. No matter, that case and others like it, make the relevant point that the Employer's total just cause burden involves more than proving a TE grievant's guilt of a matter. Surely, if it means anything, it must mean that TE grievants have a right to representation and the Union a right to represent and defend them. These rights are both contractual and statutory.

It would be a mistake for the Employer to regard generally the Union's information requests as noisome, that is, an arrogant intrusion into its private decision-making province. Nor may it necessarily be true that information disclosure is tantamount to losing a case if winning and not voluntary settlement is the goal. Within the grievance side of dispute resolution, information sharing is the bedrock of voluntary settlement. With it, the parties are enabled to evaluate the potential outcome of an arbitration of a matter. Within and as a result of this fluid process of information exchange and consequent evaluation and reevaluation, grievances may be voluntarily settled. Opportunity for voluntary settlement here was lacking.

One of the Union's positions on the case's merits was the charge that the Grievant was disparately treated. I find that the Employer's denial of its information requests, in particular, the carrier reports for January 24, improperly diminished the Union's employee representative role. Without the requested information, the Union was unable to develop and advance its disparate treatment position. In this regard, the Employer's error I find was harmful insofar as it most certainly affected the case's outcome.

While I make no findings on the case's merits, the Employer's decision to remove the Grievant is set aside and the Union's make whole remedy is granted.

Leonard C. Bajork, Arbitrator

C-23831
A+B

REGULAR ARBITRATION

PACIFIC AREA

In the Matter of Arbitration Between NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, Union, -and- UNITED STATES POSTAL SERVICE SANTA CLARITA, CALIFORNIA, Employer.	CASE NOS.: F98N-4F-D 01200171; F98N-4F-D 01198261 DRT NOS.: 60337; 60338 GRIEVANT: KENNETH KRAIG DATES OF HEARING: 7/10/02 and 8/26/02 DATE OF BRIEFS: 9/12/02 HEARING LOCATION: SANTA CLARITA, CALIFORNIA ARBITRATOR'S DECISION AND AWARD

BEFORE: CLAUDE DAWSON AMES, Arbitrator

APPEARANCES:

For the Union:
Joan M. Hurst, Regional Administrative Assistant
3636 Westminster Avenue, #A
Santa Ana, CA 92703-1145

For the Employer:
Teresa L. Fleming, Labor Relations Specialist
Van Nuys District
28201 Franklin Parkway
Santa Clarita, CA 91383-9403

AWARD: The Employer had just cause to place Grievant on a Section16.7 Emergency Suspension, but not to dismiss Grievant from employment., Grievant shall be reinstated subject to the conditions more fully set forth in the Award. The Union's grievance is sustained in part and denied in part.

DATED: October 25, 2002

Claude Dawson Ames
CLAUDE DAWSON AMES, Arbitrator

I.

INTRODUCTION

This arbitration proceeding arises pursuant to the parties' current Collective Bargaining Agreement (hereinafter the "CBA") between the UNITED STATES POSTAL SERVICE (hereinafter the "Employer", "Service" or "Management"), and THE NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO (hereinafter the "NALC" or the "Union"). Pacific Area panel member Claude Dawson Ames was selected as Arbitrator to hear the dispute. Pursuant to Article 15.2 of the CBA, the decision of the Arbitrator shall be final and binding. The arbitration hearings were held on July 10, and August 26, 2002 at the Santa Clarita Post Office. Teresa L. Fleming appeared on behalf of the Employer. Joan M. Hurst appeared on behalf of the Union.

The dispute before the Arbitrator involves the emergency placement on off-duty status and proposed termination of Kenneth Kraig (hereinafter "Kraig" or the "Grievant") from his employment with the Service. Grievant was working with medically imposed work restrictions/limitations on his physical activities due to a back injury. The Service placed Kraig on off-duty status without pay following video surveillance of Grievant while on vacation trips with his family surreptiously provided by the Postal Inspection Service, and corroboration by Grievant's treating physician that the limited duty restrictions were no longer appropriate. Grievant was subsequently dismissed from employment for misrepresentation of , and failure to report a change in his physical/medical status. The Union disputes whether just cause existed for Kraig's emergency suspension and dismissal from employment.

The hearing proceeded in an orderly manner and the parties were afforded a full opportunity for the examination and cross-examination of witnesses, presentation of oral testimony and documentary evidence. All witnesses appearing for examination were duly sworn under oath by the Arbitrator. The parties agreed that the jointly consolidated matters were properly before the Arbitrator. There was no issue of substantive or procedural arbitrability. The parties elected to submit post-hearing briefs in lieu of oral closing arguments, which were received by the Arbitrator in a timely manner. The hearing was officially closed upon final receipt of the parties' post-hearing briefs.

II.

ISSUES PRESENTED

The issues presented to the Arbitrator and agreed upon between the parties are as follows:

1) Was placement of Grievant on emergency suspension on April 25, 2001, in violation of Section 16.7 of the CBA?

   If so, what is the appropriate remedy?

2) Was the Notice of Proposed Removal dated May 10, 2001, issued for just cause?

   If not, what is the appropriate remedy?

III.

RELEVANT CONTRACTUAL AND REGULATORY PROVISIONS

COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO and U.S. POSTAL SERVICE November 21, 1998-November 20, 2000

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause, such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol),

incompetence, failure to perform work as requested, violation of terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 5. Suspension of More Than 14 Days or Discharge

In the case of suspension of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until the disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit System Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 7. Emergency Procedure

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 to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action under this Section may be made the subject of a separate grievance.

ARTICLE 17 - REPRESENTATION

Section 2. Appointment of Stewards

A. The Union will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of the Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula hereinafter set forth.

B. At an installation, the Union may designate in writing to the Employer one Union officer actively employed at that installation to act as a steward to investigate, present and adjust a

specific grievance or to investigate a specific problem to determine whether to file a grievance. The activities of such Union officer shall be in lieu of a steward designated under the formula in Section 2.A and shall be in accordance with Section 3. Payment, when applicable, shall be in accordance with Section 4.

Section 3. Rights of Stewards

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

ARTICLE 31 - UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee. All other requests for information shall be directed by the National President of the Union to the Vice-President, Labor Relations.

Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended.

(The preceding Article, Article 31, shall apply to Transitional Employees)

IV.

STATEMENT OF FACTS

Grievant Kenneth Kraig has been an employee of the Service since February 16, 1973 and at the time of the grievance he was a City Carrier at the Santa Clarita Post Office on limited duty of four hours per day. In February, 1984, Grievant sustained a work-related back injury requiring surgery, which kept him off work until 1988. Grievant was again off work from 1990 to July, 2000 due to a recurrence of the back injury which placed him on total disability. Grievant resumed a four

hour per day limited duty work schedule from July 17, 2000 until April 25, 2001, when he was placed on emergency suspension by the Service. Grievant has been under the care and treatment of his primary physician, Arthur I. Garfinkel ("Garfinkel") since March 1984. Garfinkel approved Grievant's return to work in July, 2000 on a limited duty basis, subject to restrictions included in an Office of Workers Compensation Program ("OCWP") Work Capacity Evaluation Form No. 5, dated July 12, 2000. These restrictions/limitations were as follows: *Grievant is restricted to working 4 hours per day; no repetitive bending or stooping, no prolonged sitting (no more than 1 hour) or standing (no more than 2 hours), no balancing or prolonged walking (no more than 1 hour; Grievant can push, pull, and lift up to 10 lbs. for up to 4 hours; Grievant is restricted from reaching, squatting, kneeling and climbing; Grievant is restricted to twisting no more than 1 hour; Grievant can operate a vehicle for up to 1 hour; Grievant is to have a 15-minute break every 2 hours.*

In October 2000 and January 2001, Grievant took vacation trips with his family to the San Diego Zoo, Sea World and Disneyland. Grievant did not know that these trips had been provided by the Postal Inspection Service as part of an investigation (the "Investigation"), which included videotaped surveillance of his activities. An edited videotape[1] showing Grievant engaged in activities which (arguably and as admitted by Grievant) exceeded his then-current work restrictions, was shown to Garfinkel on March 22, 2001.

[1] This thirty-nine minute videotape of Grievant, ostensibly showing his activities of October 11 and 12, 2000 and January 25, 2001, is referred to by the Union as the "edited" tape, and by the Employer as the "condensed" tape. This tape will be referred to hereinafter as the "Video".

Following his review of the Video, Garfinkel concluded that Grievant had misrepresented his injury status and consequently modified his work restrictions retroactively to October 2000, with reduced limitations and increased work hours. The new work restrictions (*Grievant can lift ten pounds for eight hours a day, sit for three hours, stand and walk for six hours, simple grasping for eight hours and drive a vehicle for three hours*) and the allegation of Grievant's misrepresentation of symptoms were included in a sworn statement by Garfinkel dated April 4, 2001. The Postal Inspectors' investigation resulted in an Investigative Memorandum dated April 9, 2001. On April 25, 2001, Grievant was notified that he was placed on Emergency Suspension without pay commencing on April 26, 2001, based on the Investigative Memorandum, and subsequently notified of his proposed removal dated May 10, 2001.

V.

PROCEDURAL HISTORY

A fact-finding interview was conducted on May 1, 2001, and on May 11, 2001, Kraig received a Notice of Proposed Removal dated May 10, 2001. On June 5, 2001, Kraig was issued a "Letter of Decision" that he would be removed from the Postal Service effective June 12, 2001. The grievances (one for placement on emergency suspension and a second for the proposed removal from employment) were filed and a discussion had with the supervisor on May 30, 2001. Formal Step A Meetings were conducted on June 21, 2001 (for the emergency suspension) and June 28, 2001 (for the employment termination) wherein the grievances were not resolved. The grievances were then ppealed to and received at Step B on July 3rd (suspension) and 10th (termination), 2001 and were determined to be at an impasse by a decision of the Van Nuys District Dispute Resolution Team ("DRT") dated July 11, 2001. The grievances were then appealed to arbitration.

VI.

POSITIONS OF THE PARTIES

Employer's Position:

The Employer advanced the following arguments in support of its position that just cause existed for the Emergency Suspension and termination:

1. Grievant misrepresented the extent of his injuries resulting in more in-depth work restrictions than he actually required. It is apparent from review of the Video that Grievant misrepresented his duty status. Grievant engaged in activities that violated the majority of his work restrictions on each of the dates on the Video. Grievant was either observed or videotaped driving in excess of one hour a day, walking in excess of one hour a day, standing in excess of two hours a day, lifting in excess of ten pounds, bending and climbing. In addition, it was apparent that he engaged in all these activities without any obvious distress or pain.

2. It is clear that Grievant engaged in unacceptable conduct when he misrepresented his duty status to Dr. Garfinkel and subsequently to the Postal Service. While Grievant did still have some residual restrictions from his surgeries, he was not as disabled as he presented himself. He therefore continued to receive a benefit he was not entitled to, namely continued compensation of four hours a day from OWCP when he was able to work for up to eight hours a day. Grievant himself admits that the intent on bringing him back to work was that he would return to four hours, then six, then eight.

3. Once Grievant's misrepresentation was brought to Management's attention, Grievant was placed on Emergency Suspension as it was rightfully believed that retaining him on duty may very well have resulted in further injury. This was a very real concern based on the violation of his

work restrictions and on the fact that he could have continued to do so and/or indicated a need for even more restrictions. The penalty of removal is not in excess of the seriousness of the infraction. Misrepresentation is a most egregious offense and warrants removal. The removal of employees is regularly upheld for misrepersentation and falsification.

Union's Position:

The Union advanced the following arguments in support of its position that the Emergency Suspension and termination of employment of Grievant were without just cause:

1. Grievant was placed on Emergency Suspension on April 25, 2001 based upon a Postal Inspectors' Memorandum dated April 9, 2001, which detailed conclusions from an investigation involving surveillance of Grievant from October 2000 and January 2001. Grievant continued to work for six months after the first surveillance videos were taken without harm to himself or to others. The provisions of Article 16., Section 7., are for "immediate' action by the Employer to safeguard either the mail, customers or employees. There was absolutely no "emergent" trigger for placing the Grievant on emergency leave because not only did the Service believe that he could do more work than he was doing, but it had Garfinkel "back date" new work hours for the Grievant to October 2000. The Union maintains that the Service improperly placed the Grievant on emergency leave in violation of Article 16.7 and requests that the action be removed from Grievant's records and that he be made whole.

2. Before administering the discipline, Management must make an investigation to determine whether the employee committed the offense. Since this investigation is the employee's "day in court", it must be thorough and objective, and should afford the employee a reasonable

opportunity to defend himself against the specifically detailed charges before the discipline is initiated. The Union's requests for surveillance videotapes and inspectors' handwritten notes, from the Postal Inspector's investigation, and the opportunities to interview beforehand and question Grievant's treating physician at the arbitration hearing, were denied or frustrated. The investigative interviews conducted by Management of both Garfinkel and Grievant were a sham in which Garfinkel was asked leading questions after misrepresentations about the "condensed" surveillance tapes by the inspectors, and Grievant was merely asked to respond to accusatory questions which had predetermined his guilt.

3. Management has the burden of proof of the existence of good cause for the suspension and firing of Grievant for misrepresentation, and the Investigation is the basis of those actions. To prove misrepresentation, the Service must prove that the Grievant willfully and with intent, pretended to Garfinkel to be more disabled than his medical condition showed. The Investigation does not constitute preponderant evidence of either violation of his work restrictions (with which he is not formally charged) or misrepresentation by Grievant of his duty status. Based on the fact that the Service has failed to prove by a preponderance of evidence that Grievant "misrepresented his duty status", the Union contends that just cause for his suspension and dismissal did not exist, and requests that its grievances be sustained.

VII.

DECISION

A. Emergency Suspension

This case involves the disciplinary Emergency Suspension and Removal from employment of the Grievant for "unacceptable conduct and misrepresentation of duty status" based on charges that he exaggerated the extent of his injuries to gain unwarranted workers compensation benefits by dishonestly failing to accurately report his improved physical condition. The Service argues that Grievant's conduct shows an intent to deceive his Employer in order to prolong his limited duty work assignment and gain compensation to which he was not entitled. The misrepresentation that Grievant is charged with is actually a form of fraud. Where one party knows that the other is acting under a material mistake, and takes advantage of it without disclosing the truth of the matter, his silence may amount to fraud.[2] Indeed, fraud is a most egregious offense which merits severe discipline, because dishonesty for personal gain is reprehensible. Such intentional abuse of the truth should never go unpunished. As a consequence, not only the actual gravity of the alleged infraction committed, but the severity of the penalty demand the fullest substantive and procedural fairness in the necessary disciplinary investigation as well as clear and convincing evidence at arbitration. It is the Arbitrator's job in this case to assess the disciplinary process and the discipline imposed to determine whether just cause existed for it.

This case is far from one of first impression. To the misfortune of a genuinely disabled employee working a limited duty assignment is added the intrigue of an undercover surveillance

[2] Walsh on Equity, at page 509

investigation showing the subject in a healthier light than that perceived by his supervisors and treating physician. The Employer infers from its surveillance that the Grievant misrepresented his duty status to his doctor, to Management and to the OWCP, and, reasonably or not (or perhaps more accurately—with or without just cause), quickly acted to discipline him for the presumed misconduct.

Both parties submitted numerous arbitration decisions as case authority for their respective positions in the instant case. These arbitration decisions which were thoroughly reviewed, examine the relevant concerns in instances of Emergency Suspension followed by Removal from employment. As pointed out by Arbitrator Michael Jay Jedel (in USPS Case No. H98N-4H-D 01092533; NALC Case No. F01-067D):

> It is clear that there is a solid body of arbitral case law supporting the position of the Postal Service that Emergency Suspension and ultimate Removal are justified where the evidence establishes that a grievant misrepresents the extent of his or her physical condition, often to gain unwarranted workers' compensation benefits. In several cases, the utilization of Inspection Service surveillance, corroborating reports, and testimony, has been found clearly sufficient to prove the charge.
> (at page 9 of the Arbitrator's Decision)

However, unlike some of the proposed arbitral case authority submitted by the parties, Grievant in this case *did not*: 1) falsify documents; 2) work second jobs while collecting unwarranted compensation; 3) demonstrate fundamental dishonesty or a proven intent to deceive; 4) refuse limited duty work offers which were appropriate for his medically determined work capacity; or 5) engage in any flagrant or excessive violation of his existing work restrictions/limitations. The absence of any of these factors here, factually distinguishes this case from much of the preceding arbitral case law. The Arbitrator finds these prior decisions informative, and concurs with their respective analyses, if not their conclusions. Of particular relevance is the decision of Arbitrator

Richard Mittenthal (in Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518; USPS Case No. 846777), which points out:

> "Just cause" is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a "preponderance of the evidence" rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that "just cause" can be calibrated differently on the basis of the nature of the alleged misconduct. 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 a right to place an employee "immediately" on 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 ten or 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. No generalization by the arbitrator can provide a final resolution to this kind of problem. It should be apparent that the facts of a given case are a good deal more important than any generalization in determining whether "just cause" for discipline has been established.
> (at page 9 of the Arbitrator's Decision)

It is a logical inference that Grievant would gain from failing to reveal an improvement in his physical/injury status that would make him capable of working more than the four hours per day limit, while being paid for a full eight hours of work. Indeed, it is this inference which is the strongest argument for the presumptive conclusion that Grievant availed himself of work restrictions/limitations that were no longer medically necessary, to unjustly enrich himself with four hours of pay per day for which he did not have to work. As compelling as that argument may be, it is premised upon the summary conclusion of an actor in the controversy (Garfinkel) who based his opinion on limited evidence and hearsay upon which he was never cross-examined.

The Arbitrator's assessment of the available evidence (including several reviews of the video) is that Grievant was shown exceeding work restrictions, but not necessarily demonstrating

any culpable intent or effort to conceal an improved physical condition from the Employer. There was no direct evidence that Grievant told Garfinkel that he was unable to walk, sit, stand, drive, bend, twist, etc., for more than the work limits prescribed. Neither was there evidence that the recommended progressive increases in workday hours for Grievant were ever discussed, investigated or pursued by Garfinkel or the Service. The role of the treating physician and his opinion of Grievant's misrepresentation are central to the discipline by the Employer. Garfinkel's medical opinion in the Investigation included the non-medical conclusion that Grievant had misrepresented his physical condition or had been less than frank. Since the basis of the Employer's disciplinary action against Grievant was Garfinkel's accusation of misrepresentation, his absence from arbitration forces factual speculation about critical issues of the case, as to Grievant's representations about his own physical condition to Garfinkel. In the non-medical arena of adjudicative analysis, evidence must exist in order to prove a contested issue. Here, without the testimony of Garfinkel as to what Grievant actually said, the occurence of his alleged misrepresentation has far less support by competent evidence. The circumstances and content of Grievant's contacts with Garfinkel are necessary to identify the alleged misrepresentations with specificity. Concerning the claim that Grievant misrepresented the severity of his injury, the only one who could support and corroborate that argument was Garfinkel, and there was no testimony from him in this matter or any matter. It was the perception of Investigators and Management however, and the video shown Garfinkel, which lead to the conclusion that Grievant did not show pain, discomfort, difficulty or distress in the performance of his vacation activities as the bases for his removal. Since Grievant has not been charged with or dismissed for exerting himself while on vacation. Although the extent to which the Video accurately portrays Grievant's actual medical condition is a qestion better left to medical expert opinion, the Arbitrator is called upon to evaluate that extent, and determine whether it constitutes a legitimate basis (i.e., just cause) for the discipline.

That determination cannot be made without knowledge of what was said by both Grievant, as representations of his physical condition, and by Garfinkel, as to work and non-work medical restrictions.

The Video, referred to as the "condensed" video by its proponent, showed presumably carefully selected exerpts of Grievant walking around amusement parks, exceeding quantitative time limits on work activities, and going on rides not recommended for persons with the kind of disabling back injuries from which he allegedly suffered, all with Grievant demonstrating no apparent pain or distress..The Arbitrator must presume that the Video is the Employer's strongest evidence of Grievant's wrongdoing (which immediately raises the question of just what the "condensation" of the Video actually involved.), and as such, it shows an individual arguably acting against medical advice with respect to work limitations and arguably imprudently in his apparent disregard for posted warnings. But not necessarily in ways atypical for a person with several fused vertebrae and a disabling back problem on a family vacation. Nothing in this Video conclusively showed Grievant engaged in any rigorous or strenuous activity, or any action shown to be prohibited outside of his employment. As the Union accurately argues, the Video also did not (and could not possibly) present the full extent (including rest, eating, etc.) of the vacation days' activities. This case would be far less troubling had not the investigators represented to Garfinkel that footage of Grievant at rest had not been excluded from the Video The leap from Grievant's demonstrated, injudicious leisure activities to the presumption of intentional concealment, non-disclosure or misrepresentation of his physical capacity to work, is a step that must be firmly supported by the evidence record.

At the heart of the Employer's case is the argument that Grievant's employment with the Service is an implied agreement to live his entire life subject to the work restrictions of his job. This argument has some credible weight insofar as it is not unfair to impose an affirmative duty

upon a disabled worker to notify his employer of changes in his health status that would affect his work capability. Assuming that Grievant did, as the Employer argues, violate his work limitations while he was on vacation, does that prove that he misrepresented his duty status to Garfinkel? The evidence, that in response to a carefully edited depiction of Grievant moderatley exerting himself at amusement parks, Garfinkel opined deception by Grievant, is less than convincing that Grievant did misrepresent his duty status. In the absence of evidence that he was prohibited from walking, driving, going on amusement park rides and participating in family recreation, there is very little to argue as misconduct by Grievant. If, as it appears, Garfinkel's applicable prohibition to Grievant was "...to avoid any and all strenuous activities", then there is no evidence of Grievant violating that restriction in the Video. Garfinkel may have thought differently, but we are not privy to his thought processes. Other than his sworn statement and modification of Grievant's work restrictions after being shown the Video by the investigators, Garfinkel shared only two additonal pieces of information. In correspondence from his office manager to Grievant dated August 14, 2002, he states:

> The restrictions and limitations listed on the July 17, 2000 Work Capacity Evaluation were in reference to a typical eight hour work day, not a twenty four hour day. He was never advised to be at bed rest when not when (sic) working. (Union Exhibit 3)

In correspondence signed by Garfinkel to Grievant dated September 9, 2002 he states:

> Theresa Fleming of the U.S.P.S. Labor Relation Department, prior to the August 26, 2002 hearing, called this office and informed my staff that my attendance at the hearing was not mandatory.

This advice to a subpoenaed witness appears to have caused or contributed to his failure to appear at the arbitration hearing. Garfinkel's medical involvement in the Investigation was a primary basis for the accusations and charges resulting in Grievant's discharge. Even if the Arbitrator did not question the veracity, details, or surrounding circumstances, or other aspects of Garfield's written

opinion rendered in his sworn statement, the Grievant was clearly entitled to do so, and the Employer is contractually obliged to share the available information from the Investigation with the Union. Grievant was not afforded his right to interview, confront or cross-examine Garfinkel, and his reprsentatives' efforts to subpena the doctor were apparently hindered by the questionably ethical tactic of Management's advocate advising the witness that his appearance was not mandatory. Neither the Arbitrator or Grievant's represenstative was advised by Management's advocate of any prior contact with Garfinkel or advice given, regarding his failed scheduled appearance. The Arbitrator considers this tactic an improper interference within (if not obstruction of) the arbitration process, denying Grievant the right of cross-examination and his due process right to confront a crucial witness.

The proper application of and appropriate standard of proof in Emergency Suspensions under Section 16.7 of the CBA both require determinations of just cause. The plain language of Section 16.7 conveys the sense of "emergency" in which the immediate removal of the subject employee to prevent harm is intended. The nature of Emergency Suspensions being that expedient, immediate action is called for, the ground for such action, although defined as "just cause", is probably functionally more equivalent to "reasonable cause". The fact that "reasonableness" is so variable that it can range between suspicion and certainty given the particular case facts, is the "elasticity" described by Arbitrator Mittenthal. Clearly, the grounds for Emergency Suspensions are enumerated in Section 16.7. These are specifically, allegations of intoxication (drugs or alcohol), pilferage, failure to observe safety rules and regulations, potential damage to USPS property, loss of mail or funds, or potential injury to self or others. Management's stated rationale for Grievant's emergency suspension, of preventing harm or more serious injury, is not quite logical. If, as Management believed, Grievant was working less time and less strenuously than he was then, in fact, capable of doing, then there was no demonstrable danger to him or other safety risk in his continued work at the limited duty level. However, Arbitrator Keith Poole describes (in

USPS Case No. H98N-4H-D 00204757; GTS No. 50991) the operative rationale actually employed by the Service in the instant case:

> Where an employee files a false workers' compensation claim, the employee is asking for compensation from the Agency to which he or she would otherwise not be entitled and at the same time is improperly depriving the Agency of his or her services, thereby forcing the Agency to pay someone else to do the work in question. Such a claim causes a loss of funds to the Agency and is the direct and immediate result of the employee's action. For these reasons, I believe that although Article 16, Section 7 must be construed narrowly, it does cover an allegation that an employee filed a false OWCP claim is covered because the immediate and direct result of the employee's action may result in a loss of funds to the Agency.
> (at page 4 of the Arbitrator's Decision)

The evidence of dishonest (or fraudulent) conduct by Grievant which the Service perceived from the Investigation was a legitimate ground upon which to base its Emergency Suspension. Under the analysis offered by Arbitrator Mittenthal, the "reasonable" belief that Grievant was acting deceitfully or fraudulently constitutes just cause for the immediate suspension. Accordingly, the Arbitrator finds that there was just cause for the Emergency Suspension of Grievant by the Service.

B. Removal

The Union's argument that the Employer's reliance on the Investigation constituted a failure by Management to conduct an independent investigation is rejected as without merit. Questions as to the adequacy of the fact finding in the case can be dismissed since it is unnecessary for Postal Management to conduct a completely separate and independent investigation when its own inspection agency has already done so. The Investigation conducted by the Postal Inspection investigators may suffice for the Postal Service, *if done reasonably and properly, and if made known to the Union and Grievant in sufficient time for them to process the information during their own investigation and preparation.* The requirement of fairness is satisfied so long as Grievant is given the full opportunity to tell his side of the story, not by duplication of the investigation

process. There is no basis in law, contract or equity which requires the Service to conduct two separate investigations of a suspected offense.

Likewise, the Arbitrator finds no merit in the Union's objection respecting the delay between commencement of the Investigation and Management's initiation of discipline against Grievant. The approximately six months of part-time, limited duty work performed by Grievant under the alleged and suspected overly-restrictive work limitations was completely consistent with Grievant's return-to-work plan of gradually increasing work days.

The Union's objections to the lack of thoroughness in the Investigation has merit however. Following the Emergency Suspension of Grievant, the Service had ample opportunity to conduct fitness for duty and/or work capacity evaluations to accurately assess his physical condition and make a proper determination of his duty status. The Service chose not to do this, but to rely on its "one picture is worth a thousand words"-approach, which, under the circumstances, may not have been a misrepresentation of things, but certainly not a full presentation. Had the Service been timely with its sharing of requested information and surveillance tapes with the Union, it might have precluded any legitimate objection of failure to disclose. The Union's claims of violation of Article 17, Section 3 and Article 31, Section 3 by the Service appear to be well-founded and those violations seem to have materially prejudiced the Grievant's rights at the arbitration hearing.

The determination of just cause for the Removal of Grievant involves a somewhat stricter standard of proof, as illustrated by Arbitrator Poole's comments later in his opinion cited above:

> In this case, I am not called upon to diagnose the grievant's injuries or how they should be treated; rather, I am called upon to judge the extent of those injuries based on his videotaped activity.
>
> ...
>
> In making this determination I specifically note that the standard for "just cause" in an Article 16, Section 7 case is lower from the standard for Just cause" in an Article 16, Section 4 or 5 case and therefore, my conclusion in this case is not applicable to the grievant's removal case.
> (at page 6 of the Arbitrator's Decision)

The issue of most concern to the Arbitrator in this case is the conduct by the Employer of

failure to produce evidence and advising Garfinkel that his attendance at the arbitration hearing was either not mandatory or unnecessary after having been subpoenaed. The Union was not provided factual information upon which to investigate the case, in a sufficiently timely manner so as to exercise its appropriate representational role. That conduct was improper, prejudicial to Grievant's due process rights, and suggestive of evidentiary weaknesses in the case presented by the Employer. Postal arbitrators have universally found that the Employer's sharing of video tapes with the Union is essential in support of a removal decision in cases involving surveillance of an employee. In the Arbitrator's view, the question of Grievant's actual fitness for duty is one that should have been determined by proper medical examination as opposed to the prosecutory investigation employed by the Inspectors.

The Arbitrator does not discount the Service's legitimate concern for potential employee fraud, but the evidence available to the Arbitrator is far less than compelling that Grievant was a perpetrator of deliberate misrepresentation. The removal of an employee from employment for the reasons given in this case (i.e., misrepresentation and fraud), requires a stronger showing of misconduct and wrongful intent than that made by the Service The case by the Service was inconclusive due to an insufficiency of evidence to show deceit or a willful intent to defraud by the Grievant. Since Grievant's Removal was based on the Investigation, that decision by the Service appears to have been based upon misplaced confidence in evidence which does not sustain its burden of proof to show misconduct involving dishonesty or fraud. The Video does not establish the kind of conduct from which one could conclude that Grievant was attempting to deceive and defraud the Employer. Quite simply, the Arbitrator cannot rely solely upon the purported violation of work restrictions while on vacation to define Grievant's physical condition, or to determine his

representations of his work capacity. Accordingly, for the reasons stated above, the Union's removal grievance is sustained.

AWARD

The Arbitrator finds that there was just cause for the Emergency Suspension of Grievant but insufficient evidence for his Removal. Accordingly, the Union's grievance of the Article 16.7 Emergency Suspension is denied. The Service was unable to establish by convincing evidence that the Grievant intentionally misrepresented his physical condition for the purposes of gaining benefits to which he was not otherwise entitled. The grievance of Kraig's Removal from employment is sustained. Grievant shall be reinstated to his position preceding the suspension, subject to the following conditions:

1. Grievant's Notice of Removal is hereby rescinded and shall be expunged from his personnel file.

2. Grievant is to be made whole for all lost wages, less compensation received during the period of termination, including interest at the recognized federal rate, from his date of termination to the date of his reinstatement.

3. Grievant shall immediately undergo such evaluations of his fitness for duty and work capacity as necessary and directed by the Service to determine an appropriate work assignment and restrictions. The Arbitrator shall retain jurisdiction over this matter for ninety (90) days to resolve any questions pertaining to this remedy and award. The Union's grievance is sustained in part and denied in part.

DATED: October 25, 2002

Respectfully submitted,

Claude Dawson Ames

CLAUDE DAWSON AMES, Arbitrator

511.3 Eligibility

511.31 Covered

Covered by the leave program are:

a. Full-time career employees.

b. Part-time regular career employees.

c. Part-time flexible career employees.

d. To the extent provided in the USPS National Rural Letter Carriers' Association (NRLCA) National Agreement, temporary employees assigned to rural carrier duties.

Note: Transitional employees are not covered by the leave program, but do earn leave as specified in their union's national agreement.

References to A–E Postmasters also apply to Part-Time Postmasters.

511.32 Not Covered

Not covered by the leave program are:

a. Postmaster relief/leave replacements, noncareer officers in charge, and other temporary employees except as described in 511.31d.

b. Casual employees.

c. Individuals who work on a fee or contract basis, such as job cleaners.

511.4 Unscheduled Absence

511.41 Definition

Unscheduled absences are any absences from work that are not requested and approved in advance.

511.42 Management Responsibilities

To control unscheduled absences, postal officials:

a. Inform employees of leave regulations.

b. Discuss attendance records with individual employees when warranted.

c. Maintain and review PS Form 3972, *Absence Analysis,* and PS Form 3971.

511.43 Employee Responsibilities

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

512 Annual Leave

512.1 General

512.11 Purpose

Annual leave is provided to employees for rest, for recreation, and for personal and emergency purposes.

should include an estimate of leave credit and reflect the factors forming the basis of the estimate.

b. If the leave record or statement justifies it, the amount of leave shown is recredited.

512.923 **Leave Buy-Back — OWCP**

The following provisions concern leave buy-back:

a. Under the provisions of the Injury Compensation Program, current employees may be permitted to buy back sick and annual leave they used while awaiting adjudication of their cases by OWCP. In traumatic injury cases, employees may be permitted to buy back only the leave that is used after the end of the 45-day continuation-of-pay period.

b. When the employee buys back annual leave for a previous year that exceeds the applicable maximum (see 512.32), the excessive leave is automatically forfeited. Employees are allowed to buy back only those hours that can be carried forward.

c. Some loss of leave may occur when the period of absence is changed to an LWOP status as a result of leave buy-back. For every 80 hours of paid leave bought back and changed to LWOP, both annual and sick leave are adjusted by the amount earned in 1 pay period. The employee must be informed of this so there will be no misunderstanding.

See Exhibit 514.4, item e, for further information.

513 Sick Leave

513.1 Purpose

513.11 Sick Leave for Employee Incapacitation

Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment.

513.12 Sick Leave for Dependent Care

A limited amount of sick leave may also be used to provide for the medical needs of a family member. Nonbargaining unit employees, and bargaining unit employees if provided in their national agreements, are allowed to take up to 80 hours of their accrued sick leave per leave year to give care or otherwise attend to a family member (as defined in 515.2(a), 515.2(b), and 515.2(c) with an illness, injury, or other condition that, if an employee had such a condition, would justify the use of sick leave. If leave for dependent care is approved, but the employee has already used the maximum 80 hours of sick leave allowable, the difference is charged to annual leave or to LWOP at the employee's option. (See 515 for information about FMLA entitlement to be absent from work.)

513.222 **Part-Time Employees**

Part-time employees are not credited with sick leave in excess of 13 days (104 hours) per 26-period leave year.

513.223 **Leave Replacements for Rural Carriers**

Substitute rural carriers or RCAs assigned to and serving (a) a vacant route or (b) a route from which the rural carrier is on extended leave, and RCAs assigned to and serving an auxiliary route are credited with sick leave starting with the first pay period following the 90-day qualifying period.

513.224 **Auxiliary Rural Carriers**

Auxiliary rural carriers are not credited with sick leave in excess of 104 hours per leave year. If they serve in another capacity (e.g., flexible employees) in the Post Office, that service is also used in computing sick leave credit (see 513.21).

513.225 **Substitute Rural Carriers in Dual Appointment**

Substitute rural carriers in dual appointments earn sick leave only when their service is performed in a position that is subject to the Civil Service Retirement Act. The leave can be used only while they are serving in a leave-earning position.

513.226 **Leave Credit Adjustment for LWOP**

See 514.24.

513.3 Authorizing Sick Leave

513.31 Policy

513.311 **General**

Sick leave cannot be granted until it is earned, except as provided in 513.5.

513.312 **Restriction**

An employee who is in sick leave status may *not* engage in any gainful employment unless prior approval has been granted by appropriate authority (see 662, Federal Standards of Ethical Conduct).

513.32 Conditions for Authorization

Conditions for authorization are as follows:*

Conditions	
Illness or injury.	If the employee is incapacitated for the performance of official duties.
Pregnancy and confinement.	If absence is required for physical examinations or periods of incapacitation.
Medical, dental, or optical examination or treatment.	If absence is necessary during the employee's regular scheduled tour.
For eligible employees (as indicated in 513.12), care for a family member (as defined in 515.2(a) 515.2(c), and 515.2(e)).	Up to 80 hours of accrued sick leave per leave year if the illness, injury, or other condition is one that, if an employee had such a condition, would justify the use of sick leave.

Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request.

513.365 **Failure to Furnish Required Documentation**

If acceptable substantiation of incapacitation is not furnished, the absence may be charged to annual leave, LWOP, or AWOL.

513.37 Return to Duty

An employee returning from an FMLA-covered absence because of his or her own incapacitation must provide documentation from his or her health care provider that he or she is able to perform the functions of the position with or without limitation. Limitations described are accommodated when practical. Bargaining unit employees must also comply with requirements in 865.

513.38 Performance Ability Questioned

When the reason for an employee's sick leave is of such a nature as to raise justifiable doubt concerning the employee's ability to satisfactorily and/or safely perform duties, a *fitness-for-duty medical examination* is requested through appropriate authority. A complete report of the facts, medical and otherwise, should support the request.

513.39 Restricted Sick Leave

513.391 **Reasons for Restriction**

Supervisors or installation heads who have evidence indicating that an employee is abusing sick leave privileges may place the employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

a. Establishment of an absence file.

b. Review of the absence file by the immediate supervisor and higher levels of management.

c. Review of the absences during the past quarter of LWOP and sick leave used by employees. (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory.)

d. Supervisor's discussion of absence record with the employee.

e. Review of the subsequent quarterly absences. If the absence logs indicate no improvement, the supervisor is to discuss the matter with the employee to include advice that if there is no improvement during the next quarter, the employee will be placed on restricted sick leave.

513.392 **Notice and Listing**

Supervisors provide written notice to employees that their names have been added to the restricted sick leave listing. The notice also explains that, until further notice, the employees must support *all* requests for sick leave by medical documentation or other acceptable evidence (see 513.364).

513.393 **Recision of Restriction**

Supervisors review the employee's PS Form 3972 for each quarter. If there has been a substantial decrease in absences charged to sickness, the employee's name is removed from the restricted sick leave list and the employee is notified in writing of the removal.

665.26 Intoxicating Beverages

Employees must not drink beer, wine, or other intoxicating beverages while on duty; begin work or return to duty intoxicated; or drink intoxicating beverages in a public place while in uniform. Unless the postmaster general specifically authorizes an exception (for example, an official reception), employees must not have or bring any container of beer, wine, or other intoxicating beverage into any Postal Service facility or premises, whether or not the container has been opened. Employees found to be violating this policy may be subject to disciplinary action.

665.27 Gambling

Employees must not participate in any gambling activity while on duty or while on property owned or leased by the Postal Service or the United States. This prohibition includes the operation of any gambling device, conducting a game for money or property, or selling or purchasing a numbers slip or ticket.

Note: This section does not prohibit participation in activities specified here if participation is necessitated by an employee's law enforcement duties, or if participation is in accordance with Executive Order No. 10927, relating to agency-approved solicitations, or in accordance with the Randolph-Sheppard Act, when approved by postal management.

665.3 Cooperation in Investigations

Employees must cooperate in any postal investigation, including Office of Inspector General investigations.

665.4 Attendance

665.41 Requirement of Regular Attendance

Employees are required to be regular in attendance. Failure to be regular in attendance may result in disciplinary action, including removal from the Postal Service.

665.42 Absence Without Permission

Employees who fail to report for duty on scheduled days, including Saturdays, Sundays, and holidays, are considered absent without leave except in cases where actual emergencies prevent them from obtaining permission in advance. In emergencies, the supervisor or proper official must be notified of the inability to report as soon as possible. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or who fails to provide satisfactory evidence that an actual emergency existed will be placed in a nonpay status for the period of such absence. The absence may be the basis for disciplinary action. However, once the employee provides management with notice of the need for leave in accordance with Family Medical Leave Act (FMLA)-required time frames, and the absence is determined to be FMLA protected, the employer must change the AWOL to approved FMLA-LWOP, and delete the AWOL status from the record.

113.4 Park and Loop Route

A route that uses a motor vehicle for transporting all classes of mail to the route. The vehicle is used as a moveable container as it is driven to designated park points. The carrier then loops segments of the route on foot.

113.5 Dismount Route

A city delivery route on which 50 percent or more of the possible deliveries are made by dismount delivery to the door, Vertical Improved Mail (VIM) Room, Neighborhood Delivery and Collection Box Units (NBU), Delivery Centers, etc. (If the dismount deliveries are less than 50 percent of the total possible deliveries of a route, the route will be classified as per the majority of the type delivery; e.g., curbline, park and loop, etc.)

114 City Delivery Area Map

114.1 Each unit must have a map of the ZIP Code area served. Show the boundaries of each route using street names or numbers and identify each route by number. If desired, use different colors to show each route.

114.2 The unit manager can study the line of travel to discover possible improvement.

114.3 Location of collection and relay boxes can be shown. This will serve to determine the adequacy of the boxes and as instruction or reference to new carriers.

115 Discipline

115.1 Basic Principle

In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

115.2 Using People Effectively

Managers can accomplish their mission only through the effective use of people. How successful a manager is in working with people will, to a great measure, determine whether or not the goals of the Postal Service are attained. Getting the job done through people is not an easy task, and certain basic things are required, such as:

a. Let the employee know what is expected of him or her.

b. Know fully if the employee is not attaining expectations; don’t guess — make certain with documented evidence.

c. Let the employee explain his or her problem — listen! If given a chance, the employee will tell you the problem. Draw it out from the employee if needed, but get the whole story.

115.3 Obligation to Employees

When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves, as well as to the employee, to:

a. Find out who, what, when, where, and why.

b. Make absolutely sure you have all the facts.

c. The manager has the responsibility to resolve as many problems as possible before they become grievances.

d. If the employee's stand has merit, admit it and correct the situation. You are the manager; you must make decisions; don't pass this responsibility on to someone else.

115.4 Maintain Mutual Respect Atmosphere

The National Agreement sets out the basic rules and rights governing management and employees in their dealings with each other, but it is the front-line manager who controls management's attempt to maintain an atmosphere between employer and employee which assures mutual respect for each other's rights and responsibilities.

116 Mail Processing for Delivery Services

116.1 Scheduling Clerks in a Delivery Unit

Schedule distribution clerks in a unit with decentralized distribution so that service standards will be met and an even flow of mail will be provided to the carriers each day throughout the year. Schedule the accountable clerk to avoid delaying the carriers' departures in the morning and for clearance of carriers on their return to the office.

116.2 Mail Flow

116.21 Leveling Volume Fluctuations

When volumes for daily delivery vary substantially from the lightest to the heaviest day in the week, a unit cannot operate at maximum effectiveness. Substantial changes in the daily relationships of flats and letters have considerable effect on delivery costs. If this situation exists, the unit manager must document the problem and request, through appropriate management channels, a more even flow of mail.

116.22 Plan for Next Day's Workload

Each day as early as is practical, using procedures developed locally, the delivery unit manager should obtain information about anticipated volumes, especially flat volumes for the next day's delivery. This information will assist in planning the next day's manpower needs. Anticipating the flow of mail will minimize undertime and overtime which can be controlled. If undertime occurs often in the morning or afternoon, examine the mail flow, the scheduling of the delivery unit's clerks and carriers, and the affected routes.

4. *You may begin the interview, if appropriate, by saying the following:*
   a. You are going to be asked a number of specific questions concerning (specify the issue causing the interview);
   b. You are subject to disciplinary action if you refuse to answer or fail to respond truthfully to any questions; and
   c. Your steward may advise you and participate in the interview (assuming the employee has requested a steward).

The Principles of Just Cause

The main purpose of any disciplinary action is to correct undesirable behavior on the part of an employee. All disciplinary actions must be for just cause and, in the majority of cases, the action taken should be progressive and corrective in nature.

As stated earlier in this guide, it is typically the Postal Service's burden to prove that all disciplinary actions are issued for just cause.

The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause.

These criteria are the *basic* considerations that the supervisor uses before initiating disciplinary action. Discipline should not be issued if “No” is the answer to any of the questions.

The following is the list of six sub-questions:

1. **Is there a rule? If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule?**

   It is not enough to say, “Well, everybody knows that rule,” or, “We posted that rule ten years ago.” You should be prepared to present the document(s) that supports that the employee knew, or reasonably should have known, the rule (posting and location, previous discipline, relevant sections of handbooks, regulations, etc.)

   Certain standards of conduct are normally expected in the work place, and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, or insubordination, may generally be assumed to have understood that these offenses are neither condoned nor acceptable, regardless

National Association of Letter Carriers
Request for Information
Discipline

To: Big Dummy (Manager/Supervisor)

Date: July 1, 2020

_____ (Station/Post Office)

Manager/Supervisor Big Dummy,

Pursuant to Articles 17 and 31 of the National Agreement, I am requesting the following information to investigate a grievance concerning the Letter of Warning issued to Hard Worker on July 1, 2020:

All information can be emailed to BADASS at thebadass@email.com

I am also requesting a copy of any and all documents, statements, records, reports, audio/video tapes, photographs, or other information learned, obtained, developed or relied upon by the Postal Service in the issuance of the above mentioned discipline.

I'm also requesting time to interview the following individuals:

_____ _____

_____ _____

_____ _____

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

BAD ASS
Shop Steward
NALC

Request received by: _____

Date: July 1, 2020

National Association of Letter Carriers
Request for Information
Discipline

To: Big Dummy
(Manager/Supervisor)

Date: July 3, 2020

(Station/Post Office)

Manager/Supervisor Big Dummy,

Pursuant to Articles 17 and 31 of the National Agreement, I am requesting the following information to investigate a grievance concerning the Letter of Warning issued to Hard Worker on July 1, 2020:

PS Form 3972 for all USPS employees assigned to Anytown Post Office

TACS EERs for all employees for the dates cited in the LOW

All information can be emailed to BAD ASS at thebadass@email.com

I am also requesting a copy of any and all documents, statements, records, reports, audio/video tapes, photographs, or other information learned, obtained, developed or relied upon by the Postal Service in the issuance of the above mentioned discipline.

I'm also requesting time to interview the following individuals:

Big Dummy

Ben Arnold

Hard Worker

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

BAD ASS
Shop Steward
NALC

Request received by: Benedict Arnold

Date: July 3, 2020

National Association of Letter Carriers
Request for Information
Discipline

To: Big Dummy
(Manager/Supervisor)

Date: July 5, 2020

(Station/Post Office)

Manager/Supervisor Big Dummy,

Pursuant to Articles 17 and 31 of the National Agreement, I am requesting the following information to investigate a grievance concerning the Letter of Warning issued to Hard Worker on July 1, 2020:

PS Form 3972 for all USPS employees assigned to Anytown Post Office

TACS EERs for all employees for the dates cited in the LOW

All information can be emailed to BAD ASS at thebadass@email.com

I am also requesting a copy of any and all documents, statements, records, reports, audio/video tapes, photographs, or other information learned, obtained, developed or relied upon by the Postal Service in the issuance of the above mentioned discipline.

I'm also requesting time to interview the following individuals:

Big Dummy

Ben Arnold

Hard Worker

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

BAD ASS
Shop Steward
NALC

Request received by: Big Dummy

Date: July 5, 2020

National Association of Letter Carriers
Request for Information
Discipline

To: Big Dummy
(Manager/Supervisor)

Date: July 8, 2020

(Station/Post Office)

Manager/Supervisor Big Dummy,

Pursuant to Articles 17 and 31 of the National Agreement, I am requesting the following information to investigate a grievance concerning the Letter of Warning issued to Hard Worker on July 1, 2020:

PS Form 3972 for all USPS employees assigned to Anytown Post Office

TACS EERs for all employees for the dates cited in the LOW

All information can be emailed to BAD ASS at thebadass@email.com

I am also requesting a copy of any and all documents, statements, records, reports, audio/video tapes, photographs, or other information learned, obtained, developed or relied upon by the Postal Service in the issuance of the above mentioned discipline.

I'm also requesting time to interview the following individuals:

Big Dummy

Ben Arnold

Hard Worker

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

BAD ASS
Shop Steward
NALC

Request received by: Benedict Arnold

Date: July 8, 2020

National Association of Letter Carriers
Request for Steward Time

To: Big Dummy Date: July 1, 2020

(Supervisor Customer Services)

Anywhere Station

(Station/Post Office)

Dear Big Dummy,

Pursuant to Article 17 of the National Agreement, I am requesting the following steward time to:

Investigate a Grievance ☑ Write & Prepare a Grievance ☑ Interview Witnesses ☑

I anticipate needing approximately four (4) (hours) of steward time, which needs to be scheduled no later than July 7, 2020. In the event more steward time is needed, I will inform you as soon as possible.

Individuals the union needs to interview:

Big Dummy

Hard Worker

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

Bad Ass

Shop Steward
NALC

Bad Ass

Request received by: _____

(Supervisor)

Date: July 1, 2020

National Association of Letter Carriers
Request for Informal A Meeting

To: Big Dummy _____ Date July 15, 2020 _____
(Manager/Supervisor)

Anywhere Station
_____
(Station/Post Office)

Last day for Informal Step A Meeting: July 15, 2020 _____
(14th day)

Grievant/Class: Hard Worker _____

NALC Grievance #: _____

Pursuant to Articles 15, 17 and 31 of the National Agreement, I am requesting to discuss the above referenced dispute at an Informal Step A Meeting:

Meeting scheduled for July 15, 2020 _____ with Big Dummy _____.
(Mutually agreed upon date/time) (Manager/Supervisor)

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

BAD ASS
_____Request received by: _____
Shop Steward
NALC Date: July 1, 2020 _____