USPS-NALC ARBITRATION PANEL
SOUTHERN REGION
WILLIAM J. LeWINTER, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE (Tampa, Florida) -AND- NATIONAL ASSOCIATION OF LETTER CARRIERS (Branch No. 599)	C# 05164 A,B Case Nos. S1N-3W-D 45373 S1N-3W-D 46383 Record Closed: August 8, 1985

OPINION AND AWARD

epresenting the Employer:
Angela N. Ferguson
Acting Labor Relations Representative

Representing the Union:
Robert M. Harkinson
Regional Administrative Assistant

Preliminary Statement

On November 15, 1984, the Union filed a written grievance on behalf of Robert Portuguese, alleging the Employer violated the parties' collective bargaining agreement by issuing grievant an Emergency Placement in Off-Duty Status without just cause (Case No. S1N-3W-D 45373). On December 5, 1984, the Union filed a written grievance on behalf of the same grievant wherein it was alleged the Employer issued a Notice of Removal without just cause (Case No. S1N-3W-D 46383). The parties, being unable to resolve the matters, assigned them to arbitration. The two grievances, arising out of the same factual context, were combined for hearing. Hearing was held before William J. LeWinter, Panel Arbitrator, at Tampa, Florida, on May 9, 1985 and June 21, 1985, at

which time the parties were accorded full opportunity to present witnesses for direct and cross examination and such other evidence as was deemed pertinent to the proceedings. The record was closed on August 8, 1985, at which time all briefs filed by any of the parties were received. From the evidence adduced at the hearing, the arbitrator makes the following:

Findings of Fact

The grievant has been employed by the Postal Service for approximately 12 years. 11 1/2 years have been spent at the Sulphur Springs Station, Tampa, Florida. On October 17, 1984, grievant was issued the following Emergency Placement in Off-Duty Status:

> You are hereby notified that you were placed in an off-duty (without pay) status effective October 17, 1984, and will continue in this status until you are advised otherwise.
>
> The reason for this action is:
>
> During the period from 10/4/84 to 10/16/84, you were observed by Postal Supervisors destroying mail on three different occasions.

The said notice was received by grievant by Certified Mail on October 25, 1984. On October 31, 1984, the Union filed a Grievance Investigation Request on the suspension action wherein it requested "copies of all relevant information relied upon to bring this particular action." On November 7, 1984 the Union initiated the grievance procedure at the First Step. At that time, it was given two supervisors' statements. On November 15, 1984, the Union filed the grie-

vance over the suspension at the second step of the grievance procedure. The grievance made complaint of lack of information necessary to represent the grievant. No second step meeting was held.

On November 19, 1984, the grievant was issued a Notice of Removal, which he received November 21. The said Notice states, in pertinent part:

> You are hereby notified that you will be removed from the Postal Service on January 4, 1985.
>
> The reasons for this removal action are:
>
> Unsatisfactory performance - mishandling and the destruction of mail.
>
> Investigation reveals that from the period October 1, 1984 through October 16, 1984, you mishandled or destroyed mail on a number of occasions. On October 4, 1984, at approximately 3:55 p.m., station manager Howard Golby received a telephone call from a Postal Customer to complain she had not received her Neighbor Money Saver newspaper for the last couple of weeks. As a result of this call, a bundle of approximately 20 Neighbor Money Saver circulars from the no obvious value bin at the Sulphur Station were found. These circulars were labeled for delivery on Route 44, which is regularly delivered by yourself. You did, in fact, carry mail on Route 44 on that date. An examination of the bundle disclosed one addressed to neighbor 8510 N. Otis, Tampa, FL 33604.
>
> On October 5, 1984, it was determined that 10 of the Neighbor Money Saver retrieved from the no obvious value bin on October 4 were deliverable as addressed and should have been delivered. The delivery addresses were recorded and the mail was subsequently delivered.
>
> On October 10, 1984, at approximately 3:46 p.m., you were observed throwing a bundle of Tribune newspapers all labeled for the delivery on route 44 were retrieved. An eximination (sic) of the newspapers disclosed one piece addressed to 8510 N. Otis, plus four additional pieces addresses (sic) to customers on route 44 that had previously been verified as good addresses on October 5.

These customers had not received the Neighborhood Money Saver circulars either.

On October 11, 1984, at approximately 3:35 p.m., you were observed throwing a bundle of Neighbor Money Saver circulars into the no obvious value bin. An examination of the mail determined it to be 23 pieces of the October 11 issue of the Neighbor Money Saver for delivery on route 44. Two of these pieces were addressed to residences that were verified as being deliverable as addressed.

Later on October 11 after you had left the office, the substitute carrier for your route was observed casing mail for route 44, bulk rate "detached" cards from the ADV-System, also referred to as "marriage mail", were distributed in the case for route 44 by the substituted (sic) carrier along with the additional mail.

On October 12, 1984, at approximately 3:40 p.m., you were observed putting a bundle of mail in the no obvious mail bin. The bundle was recovered and examined, which disclosed 100 ADV-System, marriage mail, detached labels in the center of the bundle surrounded by flat sides, bulk rate permit imprint mail. The 100 detached labels were marked for delivery on carrier route 44. On October 16, 1984. The mail was examined in the case for route 44. It was determined that numerous Babcock third class circulars were cased for delivery, including one addressed to 8510 N. Otis. At approximately 3:30 p.m., the mail was examined that you had placed in the no obvious value bin. The Babcock circular addressed to 8510 N. Otis was not among the mail and presumed to be delivered.

At approximately 3:35 p.m., on October 16, you were interviewed by Postal Inspectors. You were advised that an inquiry was being conducted concerning the handling of non-preferential mail on route 44. You then outlined for the inspectors you procedures for the delivery of third class mail and disposition of undeliverable mail of no obvious value. You were then asked to review mail from the bundles you had placed in the no obvious value bin from October 10 through October 16, and identify those pieces that were deliverable as addressed and those pieces that were non-deliverable.

Of the 23 Tribunes recovered on October 10, you identified 8 as deliverable and 15 as non-deliverable. Of the 23 Neighbor Money Saver circulars recovered on October 11, you identified 12 as

deliverable and 11 as non-deliverable. During this review the only time you indicated any uncertainty was related to the 100 marriage mail cards, you stated you did not recall having discarded those pieces, even after you were told those items were the core of a bundle of mail that you had been observed discarding on October 12, 1984.

You were then questioned concerning the pieces of apparently deliverable mail; you stated that your "poor work habits" and "carelessness" had been causative factors. You denied intentionally discarding good deliverable mail and stated those items had inadvertenently (sic) mixed with legitimate no obvious value mail.

A subsequent examination of the recovered mail disclosed that of the 15 Tribune newspapers from October 10, which you identified as non-deliverable, 5 of those were found to be deliverable as addressed. Of the 11 Neighbor Money Savers from October 11, which you identified as non-deliverable, 3 additional circulars were found to be deliverable as addressed. Eighty-five of the 100 ADV-System, marriage mail cards, were determined to be deliverable as addressed. There were also 31 pieces of miscellaneous 3rd Class Permit Imprint mail recovered during October 10 through October 12 of which 8 pieces were deliverable as addressed.

Your actions are inconsistent with Part 112.1, 112.31 and 112.32 of the M-41 Methods Handbook and Parts 666.2, 666.1 and 661.3 of the Employee and Labor Relations Manual. Mishandling and the destruction of mail cannot be tolerated in the Postal Service. Employees are required to perform their duties in an efficient and effective manner and uphold the trust and integrity in the eyes of the public.

On November 27, the Union instituted the grievance procedure at the first step on behalf of grievant. At the time, the Union made demand, in the same language as before, for information relating to the discipline. On December 5, 1984, the Union filed the written grievance at the second step wherein it alleged the Employer had not proven grievant guilty of the offenses charged and raised the questions of

failure to render information on both grievances.

Thereafter, both grievances proceeded through the grievance procedure. The Union preserved its arguments at all levels, and at all levels the grievances were denied on the basis of the facts alleged as the charge in the Notice of Removal. At the hearing, the Union raised the question of due process wherein it claimed the Employer's procedure was sufficiently deficient that it destroyed to disciplines. The arbitrator, with concurrence of both parties, reserved decision on the procedural questions and heard the matter on both procedure and on the merits.

Contractual Provisions

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure--Steps

Step 1: ...

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(c) If no resolution is reached as a result of such discussion, the supervisor shall render a decision orally stating the reasons for the decision. The supervisor's decision should be stated during the discussion, if possible, but in no event shall it be given to the Union represen tative (or the grievant, if no Union representative was requested) later than five (5) days thereafter unless the parties agree to extend the five (5) day period. Within five (5) days after the supervisor's decision, the supervisor shall, at the request of the Union representative, initial the standard grievance form that is used at Step 2 confirming the date upon which the decision was rendered.

(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed

by agreement of the parties, which shall include appropriate space for at least the following:

1. Detailed statement of facts;
2. Contentions of the grievant;
3. Particular contractual provisions involved; and
4. Remedy sought.

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Step 2: (a) ...

(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. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

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Section 3. Grievance Procedure--General

(a) The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

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(c) Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

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ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Statement of Principle

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.

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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 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 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 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 6. Indefinite Suspension - 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.

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.

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.

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.

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, the

emergency action taken under this Section may be made the subject of a separate grievance.

Section 8. Review of Discipline

A 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.

B In associate 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.

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ARTICLE 31

UNION-MANAGEMENT COOPERATION

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Section 2. Information

The Employer will make available for inspection by the Unions 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 should be directed by the National President of the Union to the Senior Assistant Postmaster General for Employee and Labor Relations.

The Employer shall, on an accounting period basis, provide each Union at its national headquarters with a list of hires, promotions, demotions, and separations of bargaining unit employees for the

Union. During March and September the Employer shall furnish the Unions a computer tape from the Data Center computer files containing the following information concerning employees in the bargaining unit: name, full address, and social security number; craft designation; health benefits enrollment code number; post office name, finance number and class.

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

Employee and Labor Relations Manual

661.3 Standards of Conduct

Employees must avoid any action, whether or not specifically prohibited by this Code, which might result in or create the appearance of:

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c. Impeding Postal Service efficiency or economy.

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f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

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666 USPS Standards of Conduct

666.1 Discharge of Duties

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

666.2 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation. employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

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M-41 Methods Manual

112 GENERAL RESPONSIBILITIES

112.1 Efficient Service

Provide reliable and efficient service. Federal statutes provide penalties for persons who knowingly or willfully obstruct or retard the mail. The statutes do not afford employees immunity from arrest for violations of law.

112.31 Protect all mail, money, and equipment entrusted to your care.

112.32 Return all mail, money, and equipment to the post office at the end of the workday.

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Discussion

The Union has raised procedural questions on two levels. It argues that the Notice of Emergency Placement in Off-Duty Status is sufficiently vague that it does not determine the nature of the suspension and does not provide advance notice. Further, the Union argues that both disciplinary actions are fatally invalid for lack of concurrence. These are substantive matters of procedure, and if defective remove the Employer's right to issue the discipline.

In addition, the Union argues that it was not given sufficient information, in possession of Employer, to permit it to represent the grievant. Also, it argues that the grievance must be sustained because the subject of the disciplinary action, the mail that was alleged to be wrongfully disposed of, was never shown to the Union and, more particularly was not a proven fact as it was not presented

at the hearing. These are procedural questions which, according to the facts of the individual case, may or may not warrant the granting of a grievance. They usually are determined on the question of prejudice to the grievant's case.

As to the substantive questions, I must disagree with the Union as to the basic nature of the Notice in the suspension case. The Notice does not state whether it is issued under Article 16, Section 6 or Section 7. It does not state "Emergency" suspension. However, a reading of the entire Notice, *supra*, clearly shows the reason for which it was given. It may not have great detail, but the Union has procedural methods to follow to have the information refined. It is sufficient to show that the suspension was an indefinite one and given for grounds that the Employer fears for the safety of the mail in the grievant's hands. Whether or not the Employer has actual grounds for the fear is another question to be decided on the merits. For the procedural matter, the Notice is sufficient. Under those circumstances, there need be no advance notice before removal from the work place.

As to the question of concurrence, however, the Union must be sustained. In uncontested testimony, it was demonstrated that the Employer has a Form which it uses when requesting discipline to be issued and concurrence. This is known as Form 278E. Thomas Pawlowski, then Superintendent of Delivery, testified that he filed a Form 278E to request concurrence on the suspension. According to his testimony,

Mr. Pawlowski, called Area Manager Mike Kigin at the outset. He believes Mr. Kigin concurred in the discipline. As for the Removal, Delivery Supervisor, A. W. Almand, was the issuing supervisor. There was no evidence he used a Form 278E. Howard F. Golby, Jr., Station Manager, testified that he "concurred".

Concurrence by a higher official is mandatory before the Employer can issue any suspension or before it can issue a discharge. The language is as follows, in Article 16:

Section 8. Review of Discipline

> A 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.)

The Employer argues that there is nothing in the agreement that the concurrence must be in writing. That is true; however, once the parties establish a certain formal procedure to follow in disciplinary cases, evidenced by the local form, Form 278E, failure to provide the form accompanied by a contest by the Union on the fact of concurrence, raises an inference that there was no concurrence. This is especially true where the supervisor, such as Mr. Pawlowski, in the suspension case, testified he filed that form. In such a circumstance, it is up to the Employer to prove concurrence.

Concurrence is not a mere "rubber-stamp" action by upper level supervision. It requires a degree of separate action by the concurring superior to "review" the disci-

pline. In this case, there was no evidence of any review in either discipline.

In the case of the suspension, Mr. Pawlowski testified he called the concurring superior, Area Manager Kigin, and explained the problem. This was before the Investigative Memorandum was filed by the Postal Inspectors. Acting quickly in Emergency Suspension cases is not improper, but it does not eliminate the need for concurrence. The Employer did not present Area Manager Kigin. From the evidence presented by Mr. Pawlowski, he merely told him of his suspicions, and the discipline was forthcoming. There was no evidence that Mr. Kigin even asked him any questions or did anything but take his statement on face value. It may not be necessary to have the concurrence in writing, but without it and without any evidence that the Form 278E filed by Pawlowski was in existence, there is a total lack of any review by Mr. Kigin or any superior source.

The removal is subject to the same defect. Here, there is no Form 278E testified to or presented at the hearing. The issuing supervisor, Mr. Almand, gave no testimony that he requested any concurrence. Mr. Golby testified that he "concurred" with the removal. At no time, however, did Mr. Golby testify that he was requested to give the formal concurrence as required by the contract. Mr. Golby's testimony is no more effective than if he testified that he agreed with the removal as a general theory. There is no link of the Golby "concurrence" with the discipline issued. Concur-

rence is a specific and formal contract requirement to the issuance of a suspension or a discharge. It must occur before the issuance of the discipline and not afterwards. The requirement is not met merely because a superior agrees with the discipline. It must be demonstrated that he was requested to concur, and that he reviewed the matter in light of all the current information at the time of concurrence, and that he than gave his consent to the issuance of the discipline. While the contract does not require a writing to accomplish this, it is the Employer's burden to demonstrate it occurred. Without a writing, it needs substantially more evidence than was presented at this hearing.

In addition, the Union presents procedural errors which require sustaining the grievance. The grievance procedure is the heart of the collective bargaining contract. By its very nature, such a contract is made so that the parties are able to continue commerce even though it is impossible to delineate all possible problems which will occur.

It must be remembered that a labor agreement controls individuals. Their individuality is what differentiates them as a factor in the operation of the Postal Service from items such as machinery, inventory and the like. As a result, the collective bargaining agreement is non-specific in many areas where the individual case creates a situation which must be controlled by the agreement but is not specifically set forth. In such cases, the agreement acts as a road map demonstrating the concepts to be used to resolve conflicts between the parties. There is an ongoing process

of collective bargaining in such areas. The highway through which the parties travel to resolve the problems is the grievance procedure. Through that procedure the parties are able to resolve the mass of problems generated by individuals at work. The cases that are arbitrated and resolved by the force of an outside party are a small part of the actual problems which arise and must find adjustment.

The parties have recognized this in their agreement in Articles 15 and 31. Thus, the Union is in error when it argued that the Employer violated the agreement when it failed to issue an answer at a step in the grievance on the suspension. Article 15, Section 3(c) anticipates such an action and provides for the grievance to be moved to the next step. However, the Union is correct in its arguments relating to other deficiencies involving the failure of the Employer to give information necessary to properly represent the grievant.

In order for the grievance procedure to work, there must be open exchange of information between the parties so they can intelligently make their decisions. While there are certain elements of the adversary procedure, surprise is not to be one of them. The parties are to divulge to each other the basis of the claim being made by the Union and the basis of the denial of that claim by the Employer. This includes not only the parties' concepts of the labor agreement but the facts of the case known to the parties and the manner in which those facts are to be demonstrated to the

arbitrator, if the grievance is to proceed that far. Obviously, neither party is bound to disclose what is shown to be actually known or considered obvious unless specifically requested to. Therefore, the failure to impart information throughout the grievance procedure is considered in the presentation of evidence in the case or in the decision of the case in relation to the degree of prejudice to the "surprised" party's presentation.

As a result, arbitrators have held that the failure to previously volunteer names of witnesses have made those witnesses unable to testify and have permitted the witnesses to testify. Certain facts have been denied presentation in the arbitration hearing because their context was not previously raised and have been permitted because the context was held to have been known by the "surprised" party. In this area, arbitrators make their decisions based on the prejudice to the party. Thus withholding of evidence which does not come as a surprise to the other party because the facts must be deemed to be known and expected do not constitute a fatal defect. Where the withholding of information prevents the other party from obtaining information to which it is entitled and to which it cannot be held to be aware is a violation of the grievance section of the contract, Articles 15, 16 and 31, and will affect the presentation of evidence and/or the decision of the case.

In this case the Union's arguments relate to the request for information. The evidence demonstrates that while the forms used may have changed from time to time, the lan-

guage of the request has remained the same since 1976. It has been a local practice for the Union to demand information in a specific manner for grievances based on contractual issues as distinguished from those based on discipline. In the disciplinary case, the demand for information as filed herein by the Union: "copies of all relevant information relied upon to bring this particular action", is standard and results in the Employer disclosing the grievance file including the Form 278E (request for discipline and concurrence), all witness statements, any Postal Inspector's Investigation Memorandum, etc. After receiving the information, the Union may then request specific information. Naturally, the information requested must be pertinent to the disciplinary proceeding.

Here, the Union made the general request and was supplied with two supervisors' statements, the Investigative Memorandum without attachments and the Notices used for discipline. The Union made a specific request orally, not denied by management, to view the mail the grievant was alleged to have thrown away, the Forms 278E and statements of all individuals questioned. The specific requests were not complied with.

The mail which was the subject of the disciplinary procedure was never produced, nor was there any copy of it presented by management. It is management's position that the mail which it retained was no obvious value (NOV) mail that was undeliverable and would have been proper to place

in the NDV bin. The deliverable mail had been culled out of the recovered mail and delivered. This does not mean that the Union is not entitled to examine what is in the Employer's possession. The Employer informed the Union and the arbitrator that the mail was in the possession of the Inspection Service. It is the obligation of the head of the installation or his designee, under Article 31, to handle these requests from the Union. It was the obligation of the Employer to obtain the evidence from where it was residing and provide reasonable access to it to the Union. During the hearing and stated in the Notice of Removal, there was some question between the Employer and the grievant as to what was or was not deliverable. Whether copies were made of the mail eventually delivered or not could well be germane as to the merits of the case. Further, the Employer is obligated to meet the burden of proof, and it must demonstrate that mail was mishandled or destroyed. To deny the Union knowledge as to the state of that evidence is prejudicial to the grievant's case.

The question of concurrence, as explained above, was germane to the presentation of the Union's case. I have previously ruled the Employer did not prove concurrence as required by the contract. However, had the Employer brought in witnesses which would have proven concurrence, the Union would have been prejudiced by the Employer's failure to furnish the Forms 278E or inform it of the lack of same.

After the initial request, the Employer furnished the statements of two supervisors, Pawlowski and Almand. A

major claim by the Union was that grievant was being treated differently from others. The evidence indicated that whenever mail was discovered improperly placed in the NOV bin, the carrier would be called over to explain. When grievant's first incident occurred, no questions were ever asked of him, and it was assumed that he was purposefully attempting to rid himself of mail he did not want to carry, or that he was purposefully mishandling the mail. The testimony of Mr. Golby, Station Manager, demonstrated that he was the individual who took the patron's call that started the entire investigation. It was the patron who claimed that she thought the carrier was being too lazy to walk to her box. It was from this the assumptions were made. The Union was never given the statement that Mr. Golby had made, and this important piece of information, from the Union's presentation, was first learned at the arbitration hearing. Had the statement been presented to the Union, as was normal with the generally worded request in the past, it could well have changed the entire course of investigation on the part of the Union. The information elicited at the hearing could well raise certain inferences, which if followed, could have been important to the Union's representation of the grievant. To deny the Union the information was prejudicial.

The above cited defects adequately demonstrate, in my mind, that the portions of the grievance procedure which make it work were side-stepped in this case. As a result, the Union was prevented from investigation which may or may

not have proven beneficial to grievant, but to which it was entitled.

Under the state of the procedure of this case and the resultant presentations, we will never know whether grievant was guilty of an offense or not. The procedure was fatally defective as to the contractual requirements of concurrence and the procedural requirements of the grievance process. Accordingly, it is not necessary or proper to examine the merits of the case. The grievance must be sustained.

Since the basis of issuance of both disciplinary actions were faulty, the grievant must be reinstated with full contract rights with back pay. The Union also demands interest under the decision at the National Level by Arbitrator Benjamin Aaron at Case No. H1N-5-FD-2560. In that Award, Arbitrator Aaron states, in conclusion:

> On the basis of my interpretation of Article 16 and Section 436.11 of the ELM, I conclude that under the National Agreement arbitrator's have discretionary authority to grant or to refuse interest on back-pay awards when sustaining disciplinary grievances.

The regional arbitrators are bound by the National Awards. The Aaron Award authorizes the ordering of interest. Whenever an arbitrator utilizes his discretionary powers, those powers must be exercised within accepted bounds of labor relation concepts. The grant or denial of interest is not at the whim of the arbitrator but at his discretion, an entirely different thing.

An analogy may be made to cases wherein the arbitrator finds a grievant guilty of a disciplinable offense but must

mitigate the penalty the Employer has issued. Mitigation is also not ordered in accord with the arbitrator's personal feelings or desires. It is ordered only after the arbitrator has found the Employer to have abused its right to determine the degree of discipline. In assessing the amount of discipline to be rendered, the arbitrator should utilize the maximum amount he would sustain, not what he would issue had he been the supervisor involved. There are many elements taken into account. The grievant's equitable position in his employment status, the acts committed, the Employer's activity in the case, etc.

For the arbitrator to act responsibly in deciding the question of interest, similar decision making must occur. In this case, the grievant testified that he was negligent or careless in the handling of the mail. He denied any intentional mishandling. His carelessness, however, was a major part of his being in the position he is in. His contribution to the process whereby he was disciplined requires that he bear some responsibility for his actions. Because of the procedural defects, the grievance has been sustained, and he will receive back pay. He, however, must be denied interest because of his contribution to the incident.

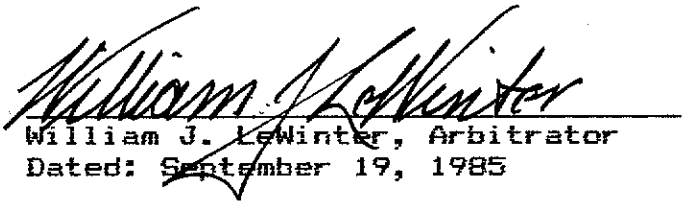
The arbitrator will retain jurisdiction solely on the question of remedy. The parties are directed to discuss grievant's reinstatement and back pay. In the event the parties are unable to agree to the remedy, including back pay, the arbitrator will set a hearing date on that issue at the request of either party hereto.

AWARD

The grievances are sustained in both of the above-numbered cases. Grievant shall be reinstated as of the date he was placed on a non-pay status. He shall have full contract rights and back pay.

The arbitrator will retain jurisdiction solely on the question of remedy. The parties are directed to discuss grievant's reinstatement and back pay. In the event the parties are unable to agree to the remedy, including back pay, the arbitrator will set a hearing date on that issue at the request of either party hereto. In the event a hearing must be held concerning to remedy, the parties must be prepared to present sufficient evidence that will permit the arbitrator to calculate an Award in a specific amount in dollars.

Respectfully submitted,



William J. LeWinter, Arbitrator
Dated: September 19, 1985