C# 19061

8104P-II

REGULAR REGIONAL PANEL

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE
(Employer, Service)

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 4748
(Union, NALC)

GRIEVANT: A. Granado

POST OFFICE: Atwater, CA

CASE NUMBERS

Mgmt: F94N-4F-D97 047748

Union: GTS #39969

BEFORE ARBITRATOR: Kenneth M. McCaffree
P.O. Box 10459
Bainbridge Island, WA 98110

APPEARANCES FOR:
U.S. POSTAL SERVICE: Robin D. George
Labor Relations Specialist
Sacramento District, USPS
3775 Industrial Blvd
West Sacramento, CA 95799-0061

NALC: James L. Stankovich
Local Business Agent
Branch 1427, NALC
89 Pioneer Way
Mountain View, CA 94041

PLACE OF HEARING: Atwater, CA

DATE OF HEARING: Oct 20, 1998

AWARD: Employer did not have just cause to issue Notice of 14 Calendar Day Suspension, but misconduct of Grievant merited a Letter of Warning. Employer to compensate Grievant for lost wages and benefits during suspension.

DATE OF AWARD: December 28, 1998

Kenneth M. McCaffree

4. Ltr, Hamby to Congressman Condit, 11-15-96

Union1. Ltr, Swart to Whom it May Concern, undated
2. Ltr, Hamby to Griffin, 11-15-96, two pages
3. Statement of Perez and twelve others in support of Grievant, Nov and Dec, 1996

The parties waived closing oral arguments and submitted written post hearing briefs in a timely manner and received by the arbitrator on or about December 1, 1998. The arbitrator tape recorded the proceedings solely to supplement his personal written notes, and not as an official record of the arbitration.

ISSUES

Did the Employer violate the National Agreement, especially Article 16, by the Notice of a 14 Calendar Day Suspension, dated December 3, 1996, to the Grievant for "Conduct Unbecoming of a Postal Employee?" If so, what is an appropriate remedy?

APPLICABLE AGREEMENT PROVISIONS

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, ..., 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 Post Service, that directly relate to wages, hours or working condition, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with the 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. ....

In the Notice of Suspension, the Employer cited Sections 666.1, 666.2 and 666.86 of the Employee and Labor Relations Manual

that address. He denied saying anything to the young girl about an "attractive" girl on a bike.

On November 13, the Postmaster confronted the Grievant with Hamby's report. He denied following a woman on a bike. The Grievant explained why he went to the address, and denied the story regarding looking for an "attractive" girl on a bike. Griffin questioned the accuracy of the explanation of the Grievant. In any event, the next day, Griffin directed the Grievant to cease delivering the Hamby's mail, and on November 15, he removed the area surrounding the Hamby's residence, or about half of the Grievant's route, from his delivery duties. On this date, the Postmaster had received a complaint from a Ms Thompson that the Grievant had come to her home with out notice and talked to her about dating. Although the Grievant later apologized for the embarrassment that his visit had caused, the experience proved disconcerting to Thompson, who subsequently avoided the Grievant.

By a week later, no disciplinary action had been taken vis a vis the Grievant, although the nature of the confrontation between the Postmaster and the Grievant indicated that some was forthcoming. The Grievant attempted to get information on the complaints that Griffin had told about. He ask Ron Deaver, a supervisor, who was unaware of any written statements. Even though a Step one was scheduled, Griffin canceled it (J 5, 6). Griffin, the Grievant, Militano and Deaver met on November 23 at which certain information was provided the Union and the Grievant. At this meeting Griffin told the Grievant that he was being brought up on charges of "Conduct Unbecoming of a Postal Employee," and informed the Grievant that his story was not sufficient explanation regarding the Hamby residence incident. Thus on December `10, 1996, the Grievant received a Notice of a 14 Calendar Day Suspension, dated December 3, 1996 (J 7).

Although some discussion took place, the Employer and the Union held no official Step 2 meeting (J 5). Accordingly, the Union appealed the matter to Step 3, where the Employer denied the grievance (J 3 and 4). The Union appealed the grievance to arbitration and these proceedings have taken place (J 1 and 2).

testimony of Thompson indicated similar behavior on the part of the Grievant. In this instance, he went to the residence of Thompson in uniform and approached the woman for a date. This was similar action to that reported by the Hambys and indicated a pattern of improper behavior.

Finally, according to the Employer, the testimony of the Grievant cannot be considered credible. Here the Employer contended that the same type of behavior, as described above, occurring to separate customers on two separate occasions by a city letter carrier is rare, unless perpetrated by the "same" city letter carrier.

According to the Employer, the preponderance of the evidence supported the discipline. The suspension was issued for just cause. The grievance should be denied, the Employer concluded.

2. Union

The Union contended that the suspension was without just cause, and the grievance should be sustained. This position rested on a different set of circumstances, as related by the Grievant, rather than those put forth by the Employer. First, the Grievant insisted that he went to the residence because of a new name for the address and to be certain the delivery was correct. Although the Employer asserted this was improper, the Grievant had done so before for other customers on his route, as indicated by the testimony of Perez. There the Grievant ask about a daughter and son-in-law who moved in temporarily with the Perez family. Further the Grievant denied that he told the girl at the door of the Hamby residence that the girl on the bike was attractive, or that he followed her there from her bike ride.

Second, the Union contended that the Employer had no direct evidence that the Grievant had behaved as the Employer had alleged. Hamby testified, but he was not present, and was telling only what he had been told by his daughters. Further, according to the Union, Hamby had a reputation for jumping to conclusions, as indicated by Swart and Perez testimony. But more important, according to the Union, the statements of the daughters and that

contrary testimony indicated that it was either not a widely distributed policy unknown to the Grievant or not uniformly enforced. The testimony of Perez and Militano, as well as the Grievant, that carriers did check at addresses on occasion to determine if the mail addressed for that address was actually to be delivered to that address. In any event, the testimony on this point was sufficiently mixed, that this act in itself was insufficient to justify the fourteen day suspension. At the same time, as discussed later below, such conduct does give, or can give an impression or appearance of impropriety that an experienced letter carrier should have known about and avoided.

The crucial aspects of the testimony were whether the Grievant followed the "girl on the bike" to the Hamby address, and whether at the door, the Grievant did tell Blayney, and overheard by Melissa, "I just wanted to let her know that she's very attractive."

First there was no credible testimony that the Grievant followed the girl on the bike to the Hamby residence. The statements of both Melissa and the letter from Mrs Hamby quoting Melissa were different, and indicate that "apparently" the Grievant followed Melissa home (E 1 and 2). That the Grievant followed his route, and that the Hamby residence was further down the route than when he and Melissa met at the corner of Manzanita and Shaffer Road, does not establish that the Grievant "followed the girl on the bike" for the express purpose of following her. As the Grievant asserted, he had to follow his route, and it went by the Hamby residence. The latter explanation, as offered by the Grievant, was more reasonable than that the Grievant deliberately followed the "girl on the bike."

The central issue is what the Grievant said when at the door of the Hamby's residence. Here, the arbitrator has the written statements of a thirteen year old, and that of a 24 year old daughter, neither of whom testified at the hearing, that both assert the Grievant did ask Blayney to tell the older girl that she was attractive. These statements are hearsay evidence, prepared under circumstances not disclosed at the hearing. Mrs

least in a postal uniform would be relevant. Admittedly, it appeared to be a crude approach toward the development of a relationship, but whether or not ulterior motives existed were clearly not established, even by the direct testimony of Thompson, who admitted that the Grievant apologized for the embarrassment that he had caused. Clearly, whether or not ulterior motives prompted the Grievant's conduct, his behavior created an improper impression and "appearance" to the discredit of the Postal Service.

In addition, the discipline of the Employer was set aside because of indication of bias on the part of the decision makers. First, the seven calendar day suspension was cited and relied upon to justify, in part, the instant 14 calendar day suspension. Since the seven day suspension was grieved and in the grievance procedure subject to arbitration, it should not have been relied upon. This is so for the reason that subsequent arbitration set aside the suspension and reduced the discipline to a letter of warning. An employee is not "guilty" of misconduct until his appeals for review have been exhausted.

Aside from the reduction in the level of discipline, the issue of more severe discipline can be raised because of the dissimilarity of the earlier misconduct to that alleged here. The earlier suspension was for insubordination. The instant discipline related to how the Grievant allegedly approached and or treated postal customers, seeking personal favor and or relationships that used his position as a uniformed postal employee to make initial approaches. These represent different types of alleged misconduct, and as such, under the principle of progressive discipline, discipline may not be compounded. Greater discipline for a second offense must rest upon misconduct of a nature similar to the first offense, or on its own character, the second offense alone justify the level of discipline imposed. The Employer did not make this latter argument in this case.

Thus on the basis of the above considerations and analysis, I concluded that the Employer did not have just cause to issue the Notice of 14 Calendar Day Suspension to the Grievant. There

DECISION AND AWARD

After study of the testimony and other evidence produced at the hearing and of the arguments and statements of the parties on that evidence in post hearing briefs and discussions during the hearing in support of their respective positions on the matters in dispute, and on the basis of the above discussion, considerations, findings of fact, analyses and conclusions, I decided and award as follows:

I. The Employer violated the National Agreement, especially at Article 16 by its failure to have just cause to issue the Notice of 14 Calendar Suspension, dated December 3, 1996, to the Grievant for "Conduct Unbecoming of a Postal Employee." In this respect the grievance was sustained.

II. Because the conduct of the Grievant gave the appearance of impropriety to the discredit of the Postal Service, the Employer is directed to issue the Grievant a Letter of Warning in lieu of the Notice of 14 Calendar Day Suspension. In this respect the grievance was denied.

III. Further, the Employer is directed to compensate the Grievant for all lost earnings and benefits on account of the unjust 14 Calendar Day Suspension.

IV. The case is closed.

Sincerely,

Kenneth M. McCaffree

KMM:mem

BEFORE THOMAS F. LEVAK, ARBITRATOR

C 6299

In The Matter of the Regular
Western Regional Arbitration
Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Idaho Falls, Idaho)

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO
THE "UNION"

(E. Alvarado, the "Grievant")

DISPUTE AND GRIEVANCE
CONCERNING REMOVAL FOR
MISHANDLING MAIL/CODE
OF CONDUCT VIOLATIONS

W4N-5L-D 12735

ARBITRATOR'S OPINION
AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., June 19, 1986 at the offices of the Service, Idaho Falls, Idaho. The Service was represented by Clyde Buckley. The Union was represented by Jim Edgemon. The Grievant, Edward L. Alvarado, appeared and gave testimony on his own behalf. Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGES AND THE ISSUE.

The December 16, 1985 Notice of Proposed Removal provides:

> This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 days from the date of your receipt of this letter.
>
> CHARGE 1: MISHANDLING MAIL MATTER
>
> The M-41 Handbook, City Delivery Carriers Duties and Responsibilities, part 112.25 states in part "Be prompt, courteous, and obliging in the performance of duties..." The Code of Conduct contained in the Employee Labor Relations Manual (ELM) states in part 661.3 "Employees must avoid any action, whether or not specifically prohibited by this code, which might result in or create the appearance of:... f. Affecting adversely the confidence of the public in the integrity of the Postal Service."

On 12-9-85 at approximately 11:30 AM I received a phone call from Robison's Inc. at 690 Northgate Mile, stating that you had deliviered a package. They had asked that you not drop the package. You dropped the package to the floor anyway. Your response to the customer was that the package was from Taiwan and had probably been dropped several times in getting there.

I found you on your route and brought you back to the post office. I took you into the office and asked you what happened. You stated that you would not say until you heard the complaint. I then repeated to you about the call and my visit to Robison's. You then described to me what had happened and it was the same story.

Your failure to properly handle this package is a failure on your part to be courteous, obliging, and has adversely affected the confidence of the public in your continued performance as a public servant.

CHARGE 2: VIOLATIONS OF THE CODE OF CONDUCT.

The Code of Conduct contained in the ELM Part 666.1 states "Employees are expected to discharge their assigned duties conscientiously and effectively." Part 666.2 states "Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the postal service..."

On 12/9/85 at approximately 11:30 AM after dropping the package listed in the above charge, you went out to your vehicle and got a small bundle of mail for Robison's business. You came back in the door and threw the bundle of mail towards the counter (approximately 21 feet) hitting one of the employees. In her written statement she states that "If I hadn't put up my hand it would have hit me in the head."

When I talked to you, you stated that this was a regular practice to throw the mail. Written statements from employees at Robison's describe you as having a really bad attitude, "He got ignorant. His language and attitude has been a problem in the past also, but this day was really a little too much."

I find your behavior on 12-9-85 to be an outrageous breech of the professionalism expected and required of a postal employee.

In addition, the following element(s), of your past record will be considered in arriving at a decision if the charge(s) are sustained:

1. On October 9, 1985 you received a 14 day suspension for failure to follow instructions.

2. On January 16, 1985 you received a letter of warning for failure to follow instructions.

3. On October 9, 1984, you received a letter of warning for failure to follow instructions.
(J2H)

The January 6, 1986 Letter of Decision provides:

On 12-17-85 you were issued a notice proposing to remove you based on the charges outlined in the notice.

I have given full consideration to your unsigned written answer dated 12-23-85, your verbal response to me on 12-24-85, and all other evidence of record. I find, however, that the charges stated in the notice you received on 12-17-85 are fully supported by the evidence and warrants your removal.

In your written response you justify dropping the package at Robison's by stating it had no markings on it to indicate it was fragile or not to be dropped. A carrier with your postal service should have known that to drop a package in front of a customer is totally unacceptable and totally unprofessional, irregardless of whether the package is known to be fragile or not. Your rationale for this blatantly discourteous act are unacceptable.

As to your statements concerning Mr. Walker's immediate investigation into this matter, I find his actions both appropriate and timely. As to your alleged quote of Mr. Walker i.e. "Your finished, and we're going to get rid of you because you are too reckless.", I find to be not true. He never made that statement.

Youstate that "Three written complaints were not received until December 10th and 11th. This removal was decided before Walker heard

Alvarado's side of the story." That statement is also not true. The final decision to remove you from the postal service is being made now, after I have reviewed the evidence, your written and verbal statements which were given to me 12-24-85.

You challenge the prior discipline cited in the Letter of Proposed Removal as not being remotely connected to the charges cited. I find that they are related to your behavior. Your failure to follow instructions and your failure to follow prescribed driving and safety rules.

In no instance have you denied dropping the package on the floor and you do not deny throwing the bundle of mail at the customer. I find your throwing mail at a customer to be totally unacceptable and dangerous conduct. Your action in this case could have resulted in an injury to this customer.

I have not read or heard any mitigating circumstances which would warrant any modification of my decision. I have, though, considered the nature and seriousness of your actions and conclude your action warrant your removal from the postal service.

It is my decision, therefore, that you be terminated from the postal service effective end of your tour of duty 01-16-86. (J2G)

The stipulated issue is as follows:

Did just cause exist, as required by Article 16 of the National Agreement, for the removal of the Grievant for mishandling of mail matter in violations of Code of Conduct? If not, to what remedy is the Grievant entitled?

II. FINDINGS OF FACT.

This case arose at the Idaho Falls, Idaho Main Office of the Service. The Idaho Falls postmaster was Mel Kuykendall. Kuykendall issued the Letter of Decision. The Grievant's immediate supervisor was Supervisor of Delivery and Collection Merrill E. Walker. Walker issued the Notice of Proposed Removal. The Idaho Falls shop steward was Roger Whitmill. Whitmill processed the grievance at Steps 1 and 2.

The Grievant has been a Service letter carrier for 24 years. He served his first 15 years at the San Francisco, California

office, and since August 1978 served as a carrier at the Idaho Falls office.

The Grievant's regular mounted route contains a number of businesses, including "Robison's," a sporting goods store located at 690 Northgate Mile, Idaho Falls, Idaho. The Grievant had delivered mail to Robison's for at least several months. The normal employee comment at Robison's is part-owner/manager Larry Robison and 4 delivery/stock/sales employees Jill Robison,John Larson, Angela Scott and Sam Beck. Larry and Jill Robison both testified at the arbitration hearing, and their statements and the statements of the other 3 Robison employees were received into evidence as joint exhibits.

At approximately 11:00 a.m. on December 9, 1985, the Grievant arrived at Robinson's in his postal vehicle with a 1/2 to 1" bundle of mail, a 1/2 to 1" bundle of flats and a rectangular parcel approximately 3'x1'x6" in size, weighing approximately 10 to 15 lbs.

The Grievant walked into Robison's front door carrying the parcel by its straps at waist height. All of the Robison employees were behind the counter about 25' feet away, except for Beck who was in the back room. From a standing position, and in full view of the employees, the Grievant let the parcel drop 3' to the floor, instead of setting it down in any careful manner.

In the Grievant's own words, one of the employees said to him words to the effect of: "Geez, don't do that. It's breakable stuff in there." The Grievant responded in a somewhat curt and caustic manner with words to the effect of:

> How was I supposed to know that? This package came all the way from Taiwan. . You don't know what's happened to it on the way. It's not marked fragile and Post Office employees throw these packages around.

The Grievant testified at the arbitration hearing:

> In hindsight, I shouldn't have made that "Taiwan" statement. It made a poor public image.

The Grievant also testified:

> The parcel didn't have any fragile markings on it. I had no idea what was in it. They made such a big fuss about it.

There is no contention by the Service that the package was marked "fragile."

The Grievant went back to his vehicle and picked up the flat and letter bundles and brought them to the counter. While he

discussed a postage due with Jill Robison, she, in the Grievant's own words,

> was glaring at me like she wanted to cut my throat. I asked her what she wanted me to do about it. She ragged me real good about the parcel. She was real mad about that. I got the postage due and walked back to the door.

The Grievant testified that he was embarrassed and upset because Jill Robison and one or more of the other employees kept complaining about the dropped parcel in front of store customers. He testified that because of that embarrassment he forgot to leave the letter bundle at the counter with Jill, so when he got to the door he turned around and tossed the bundle to Jill standing about 25' away.

The Grievant testified that over the preceding months he had sometimes tossed bundles of flats and mail to employees at Robison's and to employees in an appliance store next door, yelling out words such as: "Airmail!" He testified that he never threw the mail unless employees were ready to catch it.

The Grievant testified that when he threw the bundle toward Jill Robison, he thought that she was looking at him. He did not call out any kind of warning. In fact, Jill Robison was not paying attention to the Grievant.

The thrown bundle of letters flew directly toward Jill Robison's head. When Robison noticed the bundle, she reflexively raised her arm to protect her face and the bundle struck her in the forearm. The evidence established that had she not raised her head, the bundle would have struck her in the head or face. As Jill Robison testified:

> It would have hit me somewhere from eyes to the top of the head. It stung my arm and it would have hurt real bad if it hit me in the face.

The Grievant also testified:

> Evidently, Jill didn't expect me to throw it. She raised her hand up as she testified. But, she has seen me throw it before.

Neither Larry nor Jill Robison felt that the Grievant intentionally threw the mail at Jill with the object of hurting her. Both testified that they thought he threw the mail because he was angry and in a bad mood. Both also testified that they had never before seen the Grievant drop a parcel. It is evident to the Arbitrator that the Grievant did not intend to hit Jill, and that he simply committed an unthinking and careless act that was the result of his being embarrassed and upset.

After the bundle struck Robison, it broke apart and hit the floor. The Grievant did not attend to Jill Robison or apologize to her and simply got into his vehicle and drove away.

For the next 15 to 20 minutes, the Robison employees waited on customers and discussed what to do about the incident, including whether to lodge a complaint with the Service. Their discussion centered around the Grievant's attitude. As Jill Robison testified:

> Most of the time Alvarado came in, he was kind of cross and acted like he didn't want to be there. But on this last day, he was very cross and angry. He threw the mail in anger. We had talked about his conduct in the past.

Finally, and after some discussion, employee John Larson stated: "I'm gonna call the Post Office and file a complaint." Manager Larry Robison stated: "That's okay with me." So, at about 11:30 a.m., Larson called the Main Office, talked to Supervisor Walker and lodged a formal oral complaint, describing what had happened at their store.

Walker immediately went to the store and interviewed all 5 employees, who recited the above-noted general facts. Walker then went out onto the Grievant's route, took the Grievant off the route and took him to his office. Walker recited the employees' complaint in detail and asked the Grievant for an explanation. The Grievant admitted having dropped the parcel and also admitted having thrown the mail and that the mail had struck Jill Robison's arm. The Grievant offered no special explanation for his misconduct.

Pending further investigation, Walker kept the Grievant off his route and assigned him to throwing flats. The next day, Walker went back to Robison's and asked each of the 5 employees to provide him with statements of the incident in their own handwriting. On the following day, Walker went back to Robison's and picked up the statements. The written statements simply restated the employees' earlier oral statements.

Subsequently, Walker recommended to Postmaster Kaykendall that the Grievant be removed, and ultimately the Notice of Proposed Removal was issued.

The M-41 and the Code of Conduct.

The Grievant did not dispute that he was aware of that portion of the M-41 which is cited in Charge #1. The evidence established that the Grievant was never provided a copy of the ELM or the Code of Conduct and that the Code of Conduct was never posted at the Idaho Falls office. It was the position of the Service that every letter carrier knows or should know that the standards encompassed by the cited Code of Conduct provisions are inherent requirements of the position of letter carrier.

Established Practice Concerning the Dropping of Parcels or Throwing of Bundles.

The Union and the Grievant did not contest the fact that it is improper to drop parcels in front of customers or to throw bundles of mail to them. The Grievant also conceded that he has never seen postal employees throw parcels within the Idaho Falls office. He did testify that when he was at the San Francisco office, employees within that facility would throw parcels over 10' into the air into tubs.

The Grievant's Past Record.

The October 9, 1984 Letter of Warning was issued as a result of the Grievant having violated posted written instructions against taking beverages onto the workroom floor and loitering on the workroom floor. The Grievant admitted at the arbitration hearing that he violated those written instructions when he took a cup of coffee onto the workroom floor and stopped to talk to an employee, and testified that he did not file a grievance to protest the warning letter.

The January 16, 1985 Letter of Warning was issued to the Grievant for failing to follow previous instructions to not stop at a certain business location on his route because the stop was not authorized. The Grievant conceded at the arbitration hearing that he committed the infraction cited in the Letter of Warning when he made an unauthorized stop on his route to pick up a package of cigarettes, and testified that he did not grieve the Letter of Warning.

The October 9, 1985 Letter of Suspension was issued to the Grievant for violating driver safety rules relating to the backing of a postal vehicle. Basically, the Grievant improperly backed his vehicle and struck a pole with a vehicle door. The 14-day suspension was grieved and at Step 3 the suspension was reduced to a 6-day suspension.

At some time during the past 2 years the Grievant received additional discipline. That discipline was grieved and the matter was subsequently processed to arbitration. On or about December 3, 1985, an arbitrator set aside the discipline. These facts are recited only because the Union alleges that the Service overreacted to the arbitrator's decision by removing the Grievant.

The Grievant has never been disciplined for having a bad attitude, for being discourteous to patrons, for mishandling the mail, for violations of the Code of Conduct, or for altercations with patrons or fellow employees.

The Grievant has never had a step increase withheld.

Additional Robison Employee Comments.

Larry Robison testified that when he gave his statement to Walker he commented regarding the Grievant:

> If he's kept on, I'd rather he wasn't on our route anymore.

Jill Robison testified:

> If the carrier were reinstated, I'd rather come to the Post Office and pick up the mail instead of having him deliver it to the store. He's just rude. If it had been up to me, I would have been picking up the mail all along.

III. SERVICE CONTENTIONS.

The Service concedes that discipline should be corrective, rather than punitive; however, under certain circumstances, progressive discipline is not appropriate. In the instant case, the Grievant's misconduct is so heinous as to justify removal.

The Grievant deliberately dropped a parcel in front of postal patrons and he threw a bundle of mail that hit a patron in the arm. Had the patron not reflexively raised her arm, she could have been blinded or otherwise seriously injured. Those actions are far below postal standards, especially considering the Grievant's long experience as a letter carrier.

The Service concedes that the Code of Conduct was never published or given to the Grievant. However, a carrier with the Grievant's background should be charged with the responsibility of understanding the nature of the code. Further, a carrier with the Grievant's background should reasonably be held to understand that he must never drop a parcel in front of a patron or throw a bundle of mail at a patron.

The Grievant's disciplinary record shows some disregard for postal regulations and rules. The Grievant's failure to follow instructions in previous cases relates to his failure to follow requirements of the M-41, the Code of Conduct and other inherent requirements for the position. The unsafe practice and the Letter of Suspension also relates to the Grievant's unsafe practice in Charge #2 of the instant case.

The Service's witnesses were credible and believable and established the Grievant's commission of the charges offenses. The Union has blown "alot of smoke" in this case, mostly in an effort to divert attention from the real issue which is that the Grievant has engaged in disgraceful and dangerous conduct. Either charge alone would justify removal.

IV. UNION CONTENTIONS.

It should first be noted that the Grievant has not been charged with the commission of an unsafe act, and that there has been no allegation within the charges that he violated any safety rule or regulation contained in any handbook or manual. The allegations of lack of safety are simply a smokescreen argument developed after the fact. The Grievant's status must be determined solely under the specific charges.

The Service contends that its witnesses were very credible. Let us examine each of the credible statements of those witnesses. First, Walker testified he receives about 10 carrier complaints a day, an enormous amount; yet, he also testified that this case was the first time he ever solicited a patron to make a written complaint. The reason is the personal vindicative relationship caused by an arbitrator having reversed discipline 5 days before the Grievant's acts. It is obvious that the Service was upset by the arbitrator's decision and moved against the Grievant in retaliation.

Further, the evidence established that Walker never went over the witness statements with the Grievant, which denied the Grievant's right to due process and his right to confront his accusers.

Numerous violations of the M-39 existed. Walker never asked employees to demonstrate how the box was dropped. Neither did Walker learn how many pieces of mail were thrown in the bundle. Neither did Walker interview the Grievant after he received the witness statements.

Charge #1 is faulty in its entirety. It is established from Walker's testimony and from the testimony of the Robison witnesses that the Grievant was not told to not drop the package before he did. In fact, all employee comments were after he dropped the package.

The Code of Conduct was never posted or given to the Grievant, so cannot serve as a basis for the charges against him.

The Grievant's statements concerning Taiwan and the Postal Service were improper, but they were true. It was common practice for mail to be thrown around, if not at the Idaho Falls office, then at the San Francisco office where the Grievant had worked. The Grievant's dropping of the parcel was a part of his heritage within the Post Office. He has been led into a false sense of security and believed that such action was not improper.

Walker failed to gain all the facts in this case before taking action against the Grievant, and when he later learned of all the facts, it was too late because positions had become polarized.

It is undisputed that there was no negative publicity

against the Service in this case, i.e., the public was not affected because the matter was not reported to the press or the media.

The Postal Inspector's Office was never called in this case. Hence, we can only draw the conclusion that the matter was not serious enough to justify removal. Similarly, no emergency suspension was issued in this case, so we can only conclude the matter was not serious enough to justify removal.

At the time the Notice of Proposed Removal was issued the Grievant was escorted from the office like a common criminal. Such unfair conduct by the Service makes its motives questionable.

There has never previously been any patron complaints against the Grievant for discourtesys to customers, throwing parcels in front of customers or any other complaints related to the instant case. Neither was there any discipline against the Grievant for any similar infraction. It is well established by arbitrators that for discipline to serve as a past element in a case, the alleged progressive discipline must be reasonably related. In this case, there is no reasonable relationship between the prior elements and the charges cited in the Notice of Proposed Removal.

It is undisputed that there was never claim by Robison for damages.

It is also undisputed that Walker never issued any directions to the Grievant not to go to Robison's; neither did Robison's request that the Grievant not come to their store after the removal.

It is also undisputed that no letter carrier has ever been removed for circumstances relating to a customer complaint, except where theft has been involved.

Larry Robison conceded that he had been asked by Walker to write a statement and that he would not have written a statement otherwise. Robison also testified that he felt that the Grievant had not thrown the mail with the intention of hitting Jill Robison, and also that the Grievant threw the mail underhanded.

Larry Robison also testified that he did not personally complain to the Service and that he did not ask Larson to complain. Robison also noted that he had made no claim for damages based on any damage to property within the parcel.

Robison also testified that he had seen the Grievant throw mail before, and that he did not ever ask the Grievant not to throw mail, and he never complained to the Service about that.

Larry Robison also testified that the package that was

dropped was not marked fragile.

Jill Robison testified that the Grievant had thrown mail before and that she had never complained to the Grievant or to the Service about that. She also testified that she did not feel that the Grievant had tried to hit her. He noted that the Grievant was not any more mad at her than at any other employee. Because she saw the Grievant throw the mail, she couldn't have been too surprised. Also, she had seen him throw the mail before.

In all probability, the parcel that was dropped only fell about 1 1/2'; so, it was more in the nature of a gentle lowering than a drop from any great height.

The Grievant testified that he threw the mail in order to save steps, not because he was malicious. Perhaps the Grievant was lazy, but he had no intent to hurt anyone.

It appears to the Union that Walker had some personal relationship with Robison employees which he denied during testimony. The fact that he called them all by their first name supports that contention.

The Union's position in this case is supported by the Arbitrator's decision in Case No. W4N-5D-D 10711, dated 4/7/86.

The Union acknowledges that the Grievant used poor judgment, but that lack of judgment does not warrant the penalty of discharge. No more than a short suspension is merited in this case. The Grievant should be reinstated to his former position and route with full pay and benefits, except for a short period of suspension.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that Service has failed to establish by clear and convincing evidence that the removal of the Grievant was for just cause. However, the Service has established that just cause existed for a thirty (30) calendar day suspension. Accordingly, the grievance is sustained in part. The following is the reasoning of the Arbitrator.

First, as the Arbitrator has noted in other cases (See, e.g., Seattle Case #W4N-5D-D 10711, 4/7/86), National Agreement Article 16 requires that discipline be corrective, rather than punitive, and also sets forth a relatively clearly defined progressive discipline program. In the Seattle case the Arbitrator further noted the following principles: (1) major offenses allow summary discharge, while minor offenses require progressive discipline; (2) neither the National Agreement nor any handbook or manual clearly delineate major and minor offenses; (3) past practice may establish certain offenses as major; and (4), absent the showing of a "nexus," actions of

carriers which bring discredit to the Service under ELRM Section 666.2 are not major offenses.

Second, an additional principle applicable to this case is that where progressive discipline is to be applied in an increasingly severe manner to the point of discharge, there should be some reasonable relationship between the chain of offenses. That is, there should be more than a remote connection between the types of offenses in the chain.

In that regard, it must be remembered that some sort of connection can always be established. For example, virtually every type of infraction within the Service is covered by some handbook or manual. So the Service can always argue that the infraction is always related to a failure to follow instructions. Similarly, virtually every disciplineable act is the result of either intentional misfeasance or non-feasance (carelessness or negligence). So the Service can always argue that every act of misfeasance is akin to a failure to follow instructions, and every act of nonfeasance is the result of a safety violation, which in turn may be construed as a failure to follow instructions relating to safety. Such a general connection does not satisfy the last stated principle; a connection between types of offenses must be more than remote.

Third, another principle applicable to this case is that the degree of progressive discipline must be reasonable. That is, the degree of discipline imposed for a related minor offense must not be unreasonably greater than the earlier minor offense. For example, it is a reasonably well-established practice within the Western Region for a 7-day suspension to be followed by no more than a 14-day, or at the most, a 30-day suspension. The Arbitrator knows of no cases upheld by Western Region arbitrators where a removal has followed a 7-day suspension.

An exception to both of the last-stated principles sometimes is allowed where an employee is guilty of a very high number of unrelated offenses within a very short period of time. In some cases, the types and numbers of offenses are simply overwhelming. The situation is similiar to that in which a series of offenses in rapid succession makes it impossible for an employer to administer progressive discipline, and the employee's acts will be deemed as a whole to justify discharge. See Elkouri & Elkouri, How Arbitration Works, BNA 4th Ed., at p. 673, fn. 112.

In applying the aforestated principles to the facts of this case, the first point is that, taken to its lowest common denominator, the Grievant has been charged with discourteous and offensive conduct which adversely affected the confidence of the public in the integrity of the Sevice. The Grievant has been charged only with E&LRM Sections 661.3.f, 666.1 and 666.2 and with M-41 Section 112.25. He was not charged with a violation of any safety regulations; he was not charged with the negligent or careless mistreatment of mail; he was not charged with any failure to follow instructions; and he was not charged with

damaging any property or injuring any person. He was charged only with performing acts that caused Service partrons to react unfavorably to him and to the Service.

The next point is that while the Grievant had never been provided a copy of the E&LRM, and while the Code of Conduct had never been posted, the nature of the infractions are such that the Grievant and all carriers are charged with knowledge of the cited provisions. Indeed, the Grievant admitted his actions were improper and the Union stipulates that some discipline is appropriate.

The third point is that the Grievant's actions on December 9, 1986 can only be characterized as a minor offense, as opposed to a major offense. At the common law, less serious forms of discourteous, offensive or outrageous behavior at the office of a customer which reflect both upon the employee and his employer, do not rise to the level of a dischargeable offense. More serious forms of improper behaviour, such as sexual misconduct, racial slurs or sexual harrassment, are not at issue in this case.

Within the Service, the Arbitrator knows of no custom and practice within or without the Western Region whereunder such isolated acts historically have been treated as dischargeable offenses. It is noted that the Service cited no arbitration decisions in support of its position. The only exception (and one not relevant hereto) involves "nexus" type cases where the employee's actions have been generally publicized and have therefore undermined the confidence of the general public (as opposed to the confidence of a single business) in the employee. Thus there is no reason for the Arbitrator to treat the Grievant's misconduct as other than relatively minor.

The fourth point is that the Grievant's actions of December 9, 1985 are only remotely connected with the actions cited as past elements. None of the prior elements relate to the Grievant's interaction with or affect on members of the public. None of the prior elements relate to discourteous, offensive or outrageous misconduct, involving either patrons, supervisors or fellow employees. And none of the prior elements relate to an appearance of impropriety. The prior elements are only remotely connected with the Grievant's actions in the sense that they relate either to some form of misfeasance or nonfeasance.

The fifth point is that the degree of discipline imposed in this case was not reasonable. The Grievant's last prior element was agreed by the parties at Step 3 to merit no more than a 6-day suspension. It is patently unreasonable for the Service to have moved directly from 2 warning letters and a 6-day suspenion for unrelated offenses to a removal. The fact that the 6-day suspension was originally a 14-day suspension is irrelevant. The reduction took place after the Service's final removal decision on January 6, 1986. In any event, removal would be unreasonable even in the face of an unmodified 14-day suspension.

It should finally be noted that the Service never made it clear at the arbitration hearing whether it considered the Grievant to have been progressively disciplined to the point of removal or whether it considered the Grievant's December 12 misconduct to be removable of itself. The Arbitrator's impression is that the Service felt that the Grievant had committed a major infraction which justified summary removal. If that is the case, the Arbitrator can only respectfully disagree.

The Grievant committed a minor offense. At the most, a 30-day suspension would have been justifed. Because of the nature of the Grievant's offense and the reaction of his patrons thereto, the Service shall have the right to assign the Grievant to another route, provided such reassignment does not violate the rights of any carriers covered by the National Agreement. Accordingly, the removal will be modified to a 30-day suspension.

AWARD

The removal of the Grievant was not for just cause. Just cause existed for a thirty (30) calendar day suspension. The Grievant shall be immediately reinstated to his former position with full back pay less the period of suspension and with full benefits and seniority. The Service may, in its discretion, assign the Grievant to any route within the geographical jurisdiction of the Idaho Falls, Idaho office, provided that such assignment shall not violate the rights of any other carriers under the National Agreement.

DATED this 30th day of June, 1986.

Thomas F. Levak, Arbitrator.