A L E R T

Advanced **L**abor **E**ducation **R**esource **T**raining

PAUL PRICE, NATIONAL BUSINESS AGENT, REGION 2
NATIONAL ASSOCIATION OF LETTER CARRIERS

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BURDEN OF PROOF

One of the most misunderstood concepts in the grievance arbitration procedure is that of the burden of proof borne by the moving party in contractual and disciplinary disputes.

It is well established that the burden of proof in contractual cases is required of the Union, while the Employer is responsible for meeting the burden of proof in disciplinary matters.

In contractual cases, the Union must show that the actions or inactions of management are inconsistent with some limitation, contractual or otherwise, in the labor agreement.

It is not enough to allege a violation of the above without evidence which would support the contention of the Union in the contractual grievance.

The National Agreement is always the starting point in building a case when an employee or the Union feels that the contract has been violated.

Based on the fact circumstances of the dispute, the burden of proof may be met by going to relevant handbook cites, as well as local memorandums and other proofs of agreement made by the parties.

As is stated above, it is well established that in disciplinary and discharge matters, management has the burden of proof.

This is so because the "just cause" concept, in Article 16.1, is an agreement by which the Employer has, through bargaining, agreed to take that responsibility.

A consideration of whether Management has met its burden of proof by showing "just cause" in disciplinary and discharge matters would necessitate answering the following questions in view of the fact circumstances surrounding the disciplinary action. A "no" answer to any one question may resort in the conclusion just cause did not exist.

1. **Did the Employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?**

   The Employer must be able to show that the employee has been put on notice through issuance of actual oral or written communication to the employee.

   While this is a requirement, there are some offenses which assume that the employee would have knowledge that such action would subject them to

discipline, such as; insubordination, coming to work intoxicated, theft of property of the company or fellow employees. These and other offenses are so serious that a reasonable person would be aware that such behavior is unacceptable.

2. **Was the Employer's rule or managerial order reasonably related to the (1) orderly, efficient, and safe operation of the company's business and (2) the performance that the company might properly expect of the employee?**

   Arbitrators have clearly required that employees "obey now, grieve later" except in those circumstances where the employee is put in the position that obeying the rule or order would seriously and immediately jeopardize their personal safety and/or integrity.

3. **Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?**

   This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which they are charged in order to defend their behavior.

   This investigation must be completed before the disciplinary decision is made. If the Employer fails to do so, its failure may not normally be excused on the ground that the employee will get their day in court through the grievance procedure after the exaction of discipline. By that time, the positions of the party are hardened and it is much more difficult to look at the evidence in the proper manner.

   The National Agreement does provide for indefinite and emergency suspensions, but those actions may also be the subject of grievances with the just cause principles to be applied to them.

   The Employer's investigation should also include an inquiry into possible justification for the employee's alleged rule violation(s).

4. **Was the Employer's investigation conducted fairly and objectively?**

   This goes to the very heart of the employee's right to due process in that the management official who does the investigation may be both prosecutor and judge, but they may not also be a witness against the employee.

Article 16.8, of the National Agreement requires that a higher level official review and concur with suspension actions. This is done to make sure that the Employer's investigation is conducted in a fair manner.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

It is amazing that when the regional representatives process grievances or prepare for arbitration, many times a rudimentary investigation shows that the employee is not even guilty of the charges which appear in the body of the notice.

While arbitrators are divided as to the quantum of proof necessary to meet a party's burden of proof, there are basically three categories which relate to that quantum of proof.

Some arbitrators use the standard of "preponderance of the evidence".

Preponderance of the evidence basically means that the party who has the burden of proof must convince the trier of fact that it is more likely than not its version and interpretation of the facts is correct.

In its most simple terms, this quantum of proof allows that even if your case might be weak in some areas, if you can convince the trier of fact that your strengths outweigh your opponent's, the case will be sustained or modified.

A second quantum or proof utilized by arbitrators is that of "clear and convincing evidence".

This level of proof utilizes a "more likely than not" decision making basis and allows great discretion by the arbitrator to interpret the facts as he/she sees fit. This is the quantum of proof utilized by the great majority of arbitrators in both disciplinary and contractual matters.

A third level of proof is that of "beyond a reasonable doubt" and is limited to those cases where an employee is disciplined, and where the offense involves an element of moral turpitude or criminal intent.

This quantum of proof comes directly from the criminal codes which require that the individual be considered innocent until proven guilty and that all doubts be found in favor of the employee. This obviously is the highest standard of proof

that arbitrators require.

6. **Has the Employer applied its rules, orders and penalties even handedly and without discrimination to all employees?**

   Arbitrators are uniformly appalled when the Employer will disparately treat one employee to the detriment of another.

   A finding of disparity would require that the party arguing such give specific examples of the disparity.

   If the Employer has been lax in enforcing its rules and orders, and decides henceforth to apply them rigorously, the company must tell all employees beforehand of its intent to enforce hereafter all rules as written to avoid a finding of discrimination.

7. **Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in their service with the Employer?**

   Arbitrators fundamentally divide offenses into either minor or major categories.

   If an offense is determined to be major, then many arbitrators will not require progressive discipline.

   If the arbitrator finds the offense to be minor, then in most cases, arbitrators will require progressive discipline and management must build such a basis before removing the employee.

   An offense proven to be minor does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past.

   Article 16.10 requires that if an employee has gone without any disciplinary action for a two-year period, then any prior disciplinary actions may not be considered in determining the level of penalty in any subsequent disciplinary case.

It is hoped that this summation of the burden of proof in contractual and disciplinary matters is helpful to the parties at the local level and a consideration of these elements must be made in both contractual and disciplinary disputes.

DEFENSES TO DISCIPLINE

INTRODUCTION

Just Cause

Each year, management takes disciplinary action - letters of warning, suspensions and removals - against thousands of letter carriers. In some cases, the disciplined letter carrier accepts the punishment as having been warranted and does not dispute the action taken by management. In many cases, however, the letter carrier does not accept management's sanction, and files a grievance. Most of the time such grievances are resolved amicably in the grievance procedure, but in some cases the NALC and management are unable to reach agreement, and the grievance is appealed to arbitration.

At the core of discussions concerning discipline - in grievance meetings or in arbitration hearings alike - is whether the discipline was for just cause. The requirement that discipline must be for just cause is established in Article 16, Section 1 of the National Agreement between the NALC and the Postal Service. Other than simply stating the requirement, however, Article 16 does not define just cause. Thus, it is for parties to determine and define just cause on a case-by-case basis.

To some extent, just cause must remain undefined and undefinable, because each case in which discipline is imposed is in some ways unique and different from all other cases.

To a certain extent, however, just cause has been defined. Every working day, NALC arbitrates nine or ten discipline grievances - more than 1,882 discipline grievances in 1998 alone, and more than 30,000 such grievances since the inception of the NALC/USPS grievance-arbitration procedure in 1972. In each of these grievances, the arbitrator has faced the issue of just cause. And for each grievance, the arbitrator has written a decision and award explaining the reasons for finding the contested discipline to be either for just cause or not for just cause. From those decisions in which the NALC's grievance was denied, it is possible to glean a practical definition of just cause. From those decisions in which NALC's grievance was sustained in whole or in part, it is possible to find a practical definition of what is not for just cause, and, further, it is possible to distill those defenses to discipline which have compelled arbitrators to rule that discipline was without proper cause. This booklet is about those defenses.

The Four Categories of Defenses

Almost always, the grievant and the NALC assert that there are mistakes or inaccuracies in management's case in one or more of four categories: (1) technical objections unrelated to the merits of the case; (2) disputes about whether grievant's conduct, if proven, would constitute a valid basis for the imposition of discipline; (3) claims that management cannot prove its fact allegations or that management has omitted some vital acts; and (4) claims that, because of mitigating circumstances, the discipline imposed is too harsh.

(1) The first of these, technical objections, includes assertions that discipline was issued untimely, that discipline was issued by the wrong person, or that management failed to follow certain other required procedures. Defenses in this category do not even touch upon the merits of the discipline. By using a technical defense, the NALC is in effect saying to the arbitrator: "In order to resolve this dispute, it is not necessary to consider management's claim that grievant engaged in misconduct, because the way in which management imposed the discipline was so improper that no discipline should be allowed."

(2) The second category, disputes about whether a valid basis for discipline has been charged, includes situations in which a letter carrier has been disciplined for accident-proneness, failure to meet casing standards, or absenteeism resulting from a compensable injury. The claim made by this defense is that no valid rule proscribes grievant's conduct. By using this defense, the NALC is in effect saying to the arbitrator: "Even assuming that grievant acted as charged, nothing has happened which properly gives rise to discipline."

(3) The third category, disputes about the accuracy or completeness of the alleged facts, may take any of several forms. The NALC may simply sit back, in effect saying: "We deny that grievant acted as you charge, it is management's burden in disciplinary matters to prove its version of the facts, and the evidence offered by management is insufficient to meet that burden." Or the NALC may take a more active stance, saying: "The grievant did not act as charged, and the evidence offered to that effect by NALC is more credible than the evidence offered by management to the contrary." Finally, NALC may assert that while grievant did act as charged, management improperly failed to notice some relevant facts, such as the grievant was provoked by another.

(4) The fourth category includes assertions that the discipline imposed is seen as too harsh when all of the circumstances are considered. Included are claims that grievant's misconduct was unintentional, and that insufficient consideration was given to grievant's long service. These "mitigation" defenses are a variant of the third category, in that the NALC here also alleges that management's facts are

incomplete. The difference between them is that those in the third category, when successful, usually result in the complete recision of discipline, while with the mitigation defenses NALC is usually conceding that some discipline was warranted, and the argument is about how much.

State Multiple Defenses Separately and Alternatively

The NALC will often try more than one of the above categories in a single case - and sometimes will use all of them. When multiple defenses are used they should be stated separately and argued in the order in which they are presented above. Thus, the summary of argument of the grievance of a letter carrier with 32 years of service charged two months after the fact with discarding deliverable mail might be as follows:

1. The discipline should be disallowed as untimely.
2. Even if the discipline was not untimely, the discipline should be disallowed because management failed to prove that grievant acted as charged.
3. Even assuming that grievant acted as charged, the discipline imposed is too harsh given grievant's 32 years of discipline-free employment.

A series of arguments stated separately and alternatively ("even if", "even assuming"), as above, gives the arbitrator the maximum number of hooks upon which to hang his or her hat. If two of the arguments are found totally unmeritorious, prevailing on whichever remains means at least a partial win.

Using Defenses to Discipline

The remainder of this booklet is divided into four sections, one for each of the categories of defenses described above. For each of the defenses, there is a "Case Example(s)" section providing one or more quotes from arbitrations in which the defense was employed. Each defense also has a "Supporting Cases" section which lists cases in which the defense was employed, showing the NALC Computer Arbitration Number ("C" number) for each case, as well as the name of the arbitrator and the date of the decision.

Stewards may use ***Defenses to Discipline*** as a starting point for the investigation

of potential discipline grievances. The described defenses should be used as a checklist, and the steward should explore carefully the possible availability of each defense. Representatives who discuss discipline grievances at various steps of the grievance procedure can use their familiarity with the defenses to help focus grievance discussions on those points which are most likely to determine the final outcome. Arbitration advocates can use the cited material and listed cases as a starting point to pull together arbitration precedent in support of the arguments they will make to an arbitrator.

A Final Caveat

There are two fundamental truths in arbitration: 1) No two cases are exactly alike, and 2) Different arbitrators rule differently. Taken together, this means that finding a previous winning case very similar to the one with which you're concerned does not guarantee a win. Finding such a case is a big plus, but it's not the end of the game.

Case Example

> A review of the arbitration awards submitted in this case shows that regional arbitrators have reached different and opposing conclusions. The Service and the Union have submitted those regular awards that support their positions. This is <u>not</u> a situation where the party that submits the most arbitration decisions wins, however. I shall make my decision based on <u>my</u> analysis of the meaning of Article 8.9 and the Seattle LMOU language. **(C#19070)**

SECTION ONE

Technical Defenses Unrelated to the Merits of the Discipline

Many arbitrators have found principles of procedural due process to be implied by the just cause standard. The examples of technical defenses in this section illustrate ways in which arbitrators have applied these principles in USPS cases.

When technical defenses are used, NALC turns the tables and takes the initiative. Management, who started the whole business by making an accusation of misconduct, finds the finger pointed back at it. Because technical defenses are exhilarating, there is an unfortunate temptation to try to use them in every case, even where not quite justified. This temptation should be resisted, because overuse blunts their sharp effect, and erodes credibility.

Moreover, NALC representatives should note that in the vast majority of disciplinary grievances, the outcome is dependent on the central facts and merits of the discipline - whether the grievant acted as charged, the severity of the infraction, mitigating factors and the grievant's disciplinary record, if any. Although some discipline is so flawed procedurally that it can be overturned on that basis alone, NALC representatives should be careful not to expect this in every case, or even in most cases.

Technical Defense No. 1
Discipline was not timely issued.

When management discovers a letter carrier's misconduct, it must initiate discipline in a timely manner. If management does not do so, it waives whatever rights it may have to impose discipline.

It is not clear exactly where the line is drawn between timely and untimely discipline. A letter of warning for a one-minute extension of a break issued thirty years after the event would obviously be untimely. However, a removal two weeks after mail was discarded might be found timely, particularly where management spent the two week period investigating to make certain that it had all the facts before it acted to impose discipline.

Case Examples

In the usual grievance a delay in presenting charges can mean the loss of evidence to the aggrieved. Memories fade with the passage of time, witnesses become difficult to locate so as to reconstruct the events in question, a photograph of the scene taken weeks later may be inaccurate as to the conditions that prevailed on the date of occurrence. In my opinion a delay of 47 days in presenting a letter of charges is too long and I find that the Employer has violated Article 16 of the National Agreement. **(C#01261)**

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The Postal Service urges that there is no statue of limitations in the agreement as to when a charge must be brought. That argument misses the point, however, which is that the grievant must be given a meaningful opportunity to respond to and defend against the charges. In this case, given the nature of the offense - the failure to withdraw a piece of mail from the departure case - and the volume of mail normally handled by the grievant, the grievant did not have such an opportunity when he was not given any indication of the offense until almost one month later. **(C#01458)**

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It is a fundamental principle in law as well as contract arbitration that a party possessed of certain rights must not let them lie fallow, but must act upon them promptly. The agreement in this case gives management the right to discipline and/or discharge for just cause. The Postal Service took the position that grievant had on August 3, 1976, committed an offense which might be the subject of discipline. An investigation was begun which was not terminated until January 28, 1977 . . .In the intervening six months, grievant continued on the job. While an employee has no need or right to expect to be kept advised of an investigation, unless a contract holds otherwise, he does have the right to expect that the result of the investigation or the charge under consideration will be promptly communicated. If he has committed an offense worthy of punishment by his employer he must know it promptly after the wrongdoing. This is part of due process or fairness in the employment setting - an unsettled charge must not be kept pending unduly long. Insofar as the action of August 3, 1976, is grounds for discipline, the arbitrator concludes that for the Postal Service to have waited six months to finalize the offense into discipline is unreasonable and contrary to the degree of promptness which is an employee's due. **(C#1504)**

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> 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.
> **(C#13924)**

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Supporting Cases

C#00033, Arbitrator McConnell, September 17, 1981
C#00036, Arbitrator Rentfro, February 14, 1979
C#00289, Arbitrator Kotin, April 20, 1982
C#00516, Arbitrator Dolson, November 8, 1984
C#01261, Arbitrator Schedler, June 3, 1982
C#01458, Arbitrator Dobranski, September 2, 1982
C#01504, Arbitrator Krimsly, January 18, 1978
C#01516, Arbitrator Holly, March 6, 1978
C#03607, Arbitrator Stephens, June 20, 1983
C#03808, Arbitrator Gentile, June 30, 1983
C#06647, Arbitrator Sobel, November 17, 1986
C#07106, Arbitrator Howard, May 8, 1987
C#13924, Arbitrator Jacobs, September 22, 1994
C#15110, Arbitrator Jacobs, January 28, 1996
C#16970, Arbitrator Olson, Jr., June 24, 1997
C#17613, Arbitrator Powell, December 16, 1997
C#18103, Arbitrator Walt, March 11, 1998

Technical Defense No. 2
Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.

The decision whether to impose discipline, and the decision as to the degree of discipline to be imposed, should be made by the letter carrier's immediate supervisor. While higher authority may advise, if asked, it is improper for officials above the immediate supervisor to initiate discipline or to override the immediate supervisor's recommendation as to extent of penalty.

Case Examples

The decision to discharge grievant was not made at the local level; it was made by labor relations officers at the MSC. It is clear that (grievant's immediate supervisor) exercised no independent judgement. When she signed the disciplinary notices, she was following instructions. The evidence does not even suggest that she had or believed she had authority to do anything contrary to MSC directions. She was told that grievant "had to be removed," and from then on the decision was no longer hers.

The agreement requires discipline to be proposed by lower-level supervision and concurred in by higher-level authority. The requirement was omitted in this instance. **(C#04679)**

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Obviously, the Employer in this case did not properly apply corrective progressive discipline to the Grievant for the incident on October 15, 1997. For that reason, in part, this Arbitrator concludes the removal action must be overturned.

More importantly, the other reason for reaching that conclusion, is because of the influence exerted by Labor Relations staff on Supervisor Santos decision to issue the Grievant a Notice of Removal. Supervisor Santos admitted under cross-examination that when she contacted Labor Relations, she asked if she should issue a 14 working day suspension. According to Santos, Labor Relations advised her "to go for removal." In the opinion of this Arbitrator that type of recommendation from Labor Relations is totally inappropriate. Clearly, the function of appropriately disciplining employees lies with the immediate supervisor and the reviewing authority, that is, Installation Head or his/her designee, rather than Labor Relations staff.

Certainly, this Arbitrator does not condone the Grievant's actions. His conduct on October 15, 1997, deserves severe discipline.

Thus, based upon the record and for the reasons set forth above, this Arbitrator concludes management did not have just cause to issue the Grievant the November 18, 1997, Notice of Removal. **(C#18938)**

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On the other hand, Labor Relations personnel cannot direct local management to remove an employee. That responsibility lies solely with the employee's supervisor in accordance with Article 16.8 of the National Agreement. If the Union had proven such an allegation involving the Grievant's removal, this Arbitrator would not hesitate to overturn the removal and order reinstatement. However, the Union has failed to prove such an allegation in this case. Clearly, the Labor Relations staff were consulted and assisted in both the drafting of the Grievant's Notice of Removal, as well as the processing of the grievance. Again, there is nothing wrong with this.

The record clearly established Supervisor Hughes recommended the Grievant's removal and was involved in the fact-finding investigation conducted by Labor Relations. Additionally, the Grievant was given a full opportunity to explain her actions, yet she decided to defer to prior statements made to the police and to the Inspection Service. **(C#18667)**

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Supporting Cases

C#00396, Arbitrator Howard, June 23, 1976
C#00908, Arbitrator Caraway, September 8, 1986
C#04282, Arbitrator Zumas, April 19, 1984
C#04674, Arbitrator Zumas, February 8, 1985
C#04679, Arbitrator Dworkin, January 12, 1985
C#05250, Arbitrator Giles, November 12, 1985
C#06012, Arbitrator Nolan, March 6, 1983
C#06658, Arbitrator LeWinter, November 21, 1986
C#09873, Arbitrator Rentfro, February 23, 1990
C#11504, Arbitrator Johnston, December 17, 1991
C#15025, Arbitrator Stephens, December 18, 1995
C#16090, Arbitrator Shea, November 21, 1996
C#18667, Arbitrator Olson, September 9, 1998
C#18938, Arbitrator Olson, November 25, 1998

Technical Defense No. 3
Management's grievance representative lacked authority to settle the grievance.

Article 15 specifically confers upon management's grievance representatives full authority to resolve any grievance. Where it can be demonstrated that

management's representative lacked authority, discipline has sometimes been overturned. (This defense is closely related to Technical Defense No. 2 above. Where higher management has initiated discipline, it is presumed that subordinate supervisors lack authority to settle.)

Case Example

> [B]oth Step 1(a) and (b) of Section 2 of Article XV entitled Grievance-Arbitration Procedure, are couched in express mandatory language. Specifically, Step 1(a) requires that any employee who feels aggrieved "must discuss the grievance with his immediate supervisor within a designated time period. Step 1(b) provides in relevant part that in any such discussion" . . .the supervisor shall have authority to settle the grievance.
>
> "Proper compliance by management with these terms of the Agreement was, however, seemingly not achieved, for the record indicates that while the appropriate representatives met at Step 1, substantial doubt nevertheless exists as to the authority of the supervisor to settle the grievance. In this regard, the testimony demonstrates, as evidenced by the admission of the Postmaster under cross-examination, that he initiated the suspension, that the supervisor at Step 1 did not have the authority to settle the grievance without consulting him. This failure of management to comply with the prescribed language of Article XV, Section 2, Step 1(a) and (b) of the Agreement, which clearly bestows upon Grievant's supervisor the authority to settle the grievance, cannot properly be viewed as harmless error and non-prejudicial to the rights of the Grievant. To the contrary, in the considered judgment of the arbitrator, this failure goes to the very heart of the grievance process in that the Grievant is thereby denied the contractual right to have his grievance considered independently and objectively at the outset of the grievance procedure by his supervisor who is generally most familiar with his work record. Any removal of the supervisor's authority to settle the grievance, it seems to the Arbitrator, is violative of the letter and spirit of the Agreement and renders the Step 1 procedure little more than a charade. Accordingly, the Arbitrator finds the assertion by the Employer that the Grievant was not denied due process to be without persuasive merit.
> **(C#01469)**

Supporting Cases

C#01469, Arbitrator Britton, March 25, 1981

C#01944, Arbitrator Holly, May 20, 1980
C#04282, Arbitrator Zumas, April 19, 1984
C#06530, Arbitrator Williams, October 17, 1986
C#14907, Arbitrator Barker, November 10, 1995
C#15668, Arbitrator Vrana, July 29, 1996
C#17067, Arbitrator Britton, July 18, 1997
C#17854, Arbitrator Johnston, January 6, 1998
C#17884, Arbitrator Helburn, January 30, 1998
C#17897, Arbitrator Helburn, February 30, 1998

Technical Defense No. 4
Double Jeopardy

Management may not twice impose discipline for a single act of misconduct. Thus, to issue both a letter of warning and a seven-day suspension for the same roll-away accident would be improper. It is not improperly subjecting a letter carrier to double jeopardy, however, when a removal is issued for the same misconduct for which an emergency suspension or an indefinite suspension has been issued (unless the employee was returned to work after the suspension).

Case Examples

> [B]y returning the grievant to work after the emergency suspension [USPS] implicitly mitigated the penalty to that encompassed by such suspension. Thus, the imposition of the discharge action, almost four weeks after the grievant returned to work, constituted a subsequent increase of or addition to the penalty for the same offense, an action which is violative of the due process rights of the grievant. Having implicitly set the penalty for the grievant's offense, the Service may not subsequently add to that penalty, thus subjecting the grievant to a form of `double jeopardy'. **(C#00095)**

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> In other words, the grievant was removed from service on the basis of a charge which, as noted previously, was fully and finally settled. A reading of that settlement makes it clear that the notice of removal was held in abeyance and was to be removed by September 1, 1993 if no similar incidents occurred. A similar incident would have to be conduct unbecoming a postal employee (striking another postal employee) and there is no evidence on the record to indicate that such occurrence took place.

By application of "double jeopardy" concepts it has been held that once discipline for a given offense has been imposed and accepted it cannot thereafter be increased.

. . .The Postmaster stated that, when he resolved the original removal notice, he was unable to get the Union and grievant to agree to a last chance agreement or any other language to cover the consequences of not adhering to the provisions of the agreement. He admitted he issued the August 13, 1993 removal notice for lack of any other means or alternative of dealing with the issue of the grievant's alleged failure to provide him with documentation of his prognosis on a monthly basis. It is difficult to justify punishment on two separate occasions because of the same alleged misconduct and on that basis alone the grievance must be sustained.

Furthermore, the evidence concerning the grievant's attempt to enter into a therapy program with a qualified psychologist or psychiatrist was fairly well documented. The grievant's first attempt was met with refusal to be treated by the psychiatrist. At that point, he then became involved with a Postal Service EAP counselor in an attempt to find a psychologist or psychiatrist to take his case. The Postmaster admitted he was aware of the grievant's attempt to enter into a therapy program and his involvement and close contact with the counselor. The Postmaster's concern was that he was not receiving any reports on the prognosis of the grievant. His concern in that regard was for the safety of all of the employees under his jurisdiction as well as the grievant's well-being.

In summation, the Postal Service lacked just cause to discharge the grievant for the very basic reason that it removed him from service on the basis of a charge which had been discussed and resolved by the parties four months prior to the action taken by the Postal Service in August, 1993. **(C#13435)**

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Supporting Cases

C#00095, Arbitrator Howard, March 30, 1977
C#00398, Arbitrator Gamser, November 11, 1976
C#00541, Arbitrator DiLeone, December 27, 1984
C#04890, Arbitrator Howard, April 23, 1985
C#13435, Arbitrator DiLauro, February 18, 1994
C#14305, Arbitrator Johnston, March 20, 1995

Technical Defense No. 5
Higher management failed to review and concur.

While it is up to the immediate supervisor to initiate disciplinary action (see Technical Defense No 2, above) before a suspension or removal is imposed it must be reviewed and concurred to by higher-level management.

Case Examples

> Concurrence 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 gave his consent to the issuance of discipline. While the contract does not require a writing to accomplish this, it is the employer's burden to demonstrate it occurred.
> **(C#05164)**

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> . . . 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 the 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 added) 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.
> **(C#16970)**

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Supporting Cases

C#00908, Arbitrator Caraway, September 8, 1986
C#01477, Arbitrator Holly, February 15, 1982
C#04156, Arbitrator Goldstein, February 22, 1984
C#05164, Arbitrator LeWinter, September 19, 1985
C#05685, Arbitrator LeWinter, January 27, 1986
C#06679, Arbitrator Carson, November 24, 1986
C#14481, Arbitrator Alsher, May 12, 1995
C#16568, Arbitrator Ames, January 10, 1997
C#16970, Arbitrator Olson, June 24, 1997
C#17674, Arbitrator Johnston, December 22, 1997
C#18208, Arbitrator Hales, April 12, 1998

Technical Defense No. 6
Insufficient or defective charge.

Article 16 requires that management give a letter carrier a written notice of charges when imposing a suspension or a discharge. Implicit in this requirement is that the notice of charges describe and explain the basis for the discipline with sufficient specificity that the letter carrier may make a defense.

Case Examples

> A `charge' in a disciplinary matter has a similar meaning to an indictment in a criminal matter before a grand jury. Basically, a `charge' is an accusation in writing that claims that the individual named therein has committed an act or been guilty by omission, and such act or omission was a violation of shop rules or usual good behavior expected of an employee and punishable by discipline. A letter of charges is the foundation of going forward with discipline . . . No discipline can be sustained without a charge. For that instant grievance the removal letter merely related in narrative style the events that the Employer believed occurred on April 15, 1981. There was not a single sentence in the entire letter of removal that accused [grievant] of conduct contrary to the rules of the shop; therefore his discharge was without just cause. **(C#01233)**

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> Preliminarily, the Arbitrator deems it appropriate to restate the well-recognized principle that a discharge must stand or fall on the reasons given at the time the discharge is imposed. In the case at hand, the sole charge leveled against the

> Grievant in the Notice of Removal was that of filing a false accident or injury claim. The Service is bound by that notice.
>
> The Grievant was not charged with violating E&LRM Sections 665.1 and 665.2m; neither was he charged with giving a false sworn statement to a Postal Inspector. The objection of the Union relative to those post-removal charges is well-taken, and the Service's belated allegations concerning them have been disregarded by the Arbitrator.
>
> The Service had the opportunity to charge the Grievant with those offenses, but did not do so. The Grievant had the right to expect that he would be defending only against the charge set forth in the Notice of Removal at the time he processed his grievance and at the time of the arbitration hearing. **(C#5219)**

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Supporting Cases

C#01233, Arbitrator Schedler, April 1, 1982
C#01311, Arbitrator Levak, September 24, 1982
C#05219, Arbitrator Levak, November 25, 1985
C#06710, Arbitrator Williams, December 3, 1986
C#07106, Arbitrator Howard, May 8, 1987
C#15515, Arbitrator Axon, June 8, 1996

Technical Defense No. 7
Management failed to render a proper grievance decision.

Article 15 requires that management state certain information in its Step 2 and Step 3 grievance decisions. Failure by management to state that information has sometimes resulted in the overturning of the contested discipline.

Case Examples

> [T]he failure of the employer to provide the contractually required 3rd Step decision letter deprived the Union of the benefit of a detailed statement of the reasons for the denial. While it is evident that the Union's representative knew what the Employer's 3rd Step representative had said during the meeting, he was deprived of the final analysis of the Employer's representative's reasoning in reaching the decision. Hence, the grievance process was frustrated by these procedural errors and those frustrations operated to the detriment of the Grievant. . . As a consequence, the [Union's] motion is granted, and the case

will not be considered on its merits.
(C#01477)

* * * * *

The parties to the National Agreement are bound to comply with its clear and unambiguous procedural provisions designed to insure that due process is accorded to employees charged with disciplinary offenses. Arbitrators are likewise bound to enforce these agreed-upon procedures and sustain grievances where the failure to do so prejudices the rights of the grievant. I am convinced that the failure in this case to provide the Union with the reasons for the decision at the third step was prejudicial to the Grievant and denied him due process. Accordingly, the procedural error forms a sufficient cause to sustain the grievance without consideration on its merits. **(C#01833)**

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The Postmaster's failure to timely issue a Step 2 decision made it progressively more difficult for the Union to present and prove its case. For example, the Postmaster failed to timely give the Union a detailed statement of his reason(s) for denying the grievance. As a result, when the Union appealed the case to Step 3, it was still unclear about Management's allegations against Grievant. Management's failure to communicate with the Union made it difficult for the Union to fashion a defense for Grievant. Further, by failing to timely issue a written Step 2 decision, Management deprived the Union of its right to file complete additions and corrections under Article 15.2 Step 2(g). Moreover, without a Step 2 decision, it was difficult for the Step 3 official to prepare for and present the Union's case at Step 3.

The Union was indisputably prejudiced by Management's failure to render a Step 2 decision. Accordingly, I conclude that Management also violated Article 15.2 Step 2(f) of the National Agreement. **(C#16747)**

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Supporting Cases

C#01477, Arbitrator Holly, February 15, 1982
C#01833, Arbitrator Foster, March 12, 1982
C#06647, Arbitrator Sobel, November 17, 1986
C#16747, Arbitrator Vrana, May 5, 1997

Technical Defense No. 8

Management failed to properly investigate before imposing discipline.

Before the decision to impose discipline is made, management must conduct a full, fair and impartial investigation, including giving the letter carrier an opportunity to respond to the charges.

Case Examples

It has been said that the real heart of procedural due process is not even a question of the employee's guilt or innocence; it is how the company goes about arriving at its decision. When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards.

The reasons why due process requires that an investigation be made into all the relevant facts and circumstances, including the employee's explanation, before disciplinary action is taken are several. If this is not done, the employer risks nondisclosure of essential elements of the case. A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits deliberate, informed judgment to prevail. By giving the grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider, even in the light of new information, is more pronounced in labor-management relations because the employer has an additional institutional interest to `stand firm' and defend the authority of the supervisory personnel who made the decision to discharge. **(C#01030)**

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The procedural defect in this case is that no member of management interviewed the Grievant and obtained his version of these events prior to imposing the fourteen-day suspension. Mr. Damien testified that he did not remember interviewing the Grievant prior to issuing the letter of suspension. The Grievant unequivocally testified that Mr. Damien did not speak with him.

The M-39 Handbook clearly directs managers to get the employee's version of the facts before imposing discipline. The Arbitrator has had the argument raised before him in the past, that the failure of management to obtain the Grievant's version of a dispute prior to the imposition of discipline is fatal to the discipline. This is the generally accepted practice in labor relations. . . .

The sharply disputed facts which are present in this case make it one in which the Grievant should have been interviewed prior to making the decision to discipline him. Had the Service been aware of the sharply disputed facts before deciding to impose discipline, another decision might have been made. In any event, the generally accepted notion of industrial due process requiring the employer to obtain the Grievant's version of an incident prior to imposing discipline, seems clearly applicable in the present case. For the foregoing reasons, the grievant is sustained. **(C#08977)**

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Due process in discharge cases demands that the employee be given the opportunity to explain, if possible, the misconduct with which she is charged. This explanation should be sought before a decision is reached and positions are frozen. The only opportunity for explanation afforded the Grievant before the decision to discharge was an abortive interview with two Postal Inspectors, with whom she refused to speak. Her reluctance to discuss the matter with the Inspectors is understandable. Suddenly faced with a reading of her Miranda rights by two strangers, she feared criminal prosecution for whatever it was she was being charged with. It is quite another thing for her supervisor or someone in labor relations to talk to her about it, point out the discrepancies found in the certificates previously accepted, and ask for any explanation she might have for the apparent alterations.

The Inspectors were doing their job. It was primarily aimed at garnering evidence to support the charge of submitting falsified medical certification. When they confirmed the charge to their own satisfaction, they tendered the case back to Postal Service supervision for final action. Supervision's function is different than that of the Inspection Service. At this point it became supervisor's responsibility to confront Grievant in an effort to ascertain if she had any explanation for the altered certificates, especially in light of their initial acceptance some six months earlier. This kind of investigation was not undertaken until after minds were made up and the Union served notice that it was grieving the discharge. **(C#00036)**

* * * * *

The Union's due process argument is quite another matter. First, the Postal

Service violated its own regulations and contractual obligations by failing to conduct an investigative interview with the Grievant. Had it done so, it would have discovered that she did not serve jail time, and might have learned something more of the background of her situation at the time of her arrest.

The Union has presented some 15 prior Postal Service arbitration awards, including four cases from the present Arbitrator, in which the arbitrators found serious deficiencies in the Postal Service case for lack of a proper investigation. What would appear to be the weight of arbitral opinion was expressed by Arbitrator Thomas F. Levak in Case W7N-5R-D 23796,21499: "The vast majority of arbitrators take what might be called a `hard-line' approach to the matter, holding that an employee must be given a personal interview or hearing before any discipline is imposed . . . . The requirement is not merely a matter of a technicality, but serves to ensure that an employee will not be discharged except on the basis of all the facts and with adequate cause. As noted above, `It is the process, not the result which is at issue.'" Arbitrator Levak cited other authorities, which he concluded had been uniformly followed by Regular Panel arbitrators to the effect that the purpose of the personal interview cannot be served by an ex post facto determination as to whether the grievant was `prejudiced' or not by a lack of due process." **(C#16387)**

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Supporting Cases

C#00036, Arbitrator Rentfro, February 14, 1979
C#00053, Arbitrator McAllister, June 10, 1983
C#01030, Arbitrator Rentfro, April 9, 1979
C#01405, Arbitrator DiLeone, June 23, 1981
C#05073, Arbitrator Gentile, August 27, 1985
C#05204, Arbitrator Rentfro, October 1, 1985
C#05424, Arbitrator McConnell, January 10, 1986
C#08977, Arbitrator Eaton, August 10, 1984
C#10412, Arbitrator Levak, November 18, 1990
C#13895, Arbitrator Shea, September 6, 1994
C#15556, Arbitrator Shea, June 26, 1996
C#16387, Arbitrator Eaton, February 26, 1997

Technical Defense No. 9
Improper citation of "past elements"

It is improper for management to cite discussions as past elements in support of another disciplinary charge. It is also improper to cite discipline which has been grieved but not finally settled or adjudicated as a past element. When these are cited, arbitrators sometimes order the present discipline rescinded or modified.

Case Examples

> The Employer's case is further flawed by the fact that it is violative of that portion of Article XVI of the National Agreement which provides, `. . .such discussions may not be cited as an element of a prior adverse record in any subsequent disciplinary action against an employee. . .." The Notice of Removal cites two such discussions as elements of the Grievant's past record.
>
> These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprived the Grievant of his right to due process. In the absence of due process the grievance must be sustained without any consideration of its substantive merits.
> **(C#01944)**

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> The second procedural flaw which the Union maintains is fatal centers around Ruden's reliance on discipline which was more than two years old and his conclusion that Grievant could not be rehabilitated. In so doing, Ruden breached Article 16, Section 10: . . . **(C#11883)**

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Supporting Cases

C#00584, Arbitrator Levak, October 26, 1982
C#01944, Arbitrator Holly, May 20, 1980
C#01983, Arbitrator Holly, August 6, 1981
C#03541, Arbitrator Hardin, May 11, 1983
C#03910, Arbitrator Fasser, June 18, 1977
C#04335, Arbitrator Hardin, June 7, 1984
C#04401, Arbitrator Williams, July 16, 1984

C#06907, Arbitrator Nolan, March 29, 1987
C#11883, Arbitrator Goodman, April 16, 1992
C#14470, Arbitrator McAllister, May 17, 1995
C#17750, Arbitrator Duda, November 13, 1997

Technical Defense No. 10
Management refused to disclose information to the Union (including claims that information was hidden).

Management must disclose to NALC all relevant information concerning the discipline.

Case Examples

> The testimony in the record clearly proves that the management representative at the Step 2-A hearing did not make [the postal inspector's investigative summary] available to the Step 2 Union representative, whether or not he asked for it. While the record is contradictory as to whether such material was requested by the Union's Step 2-A representative, management has the burden to prove that it has `just cause' for the grievant's discharge, and concomitant with that `burden of proof' was the requirement that it make available to the Step 2-A Union representative all the pertinent material it had in its possession upon which it based its discharge decision. This it simply did not do. **(C#00308)**

* * * * *

> . . . In light of the unrebutted testimony of the Union President that he never received the Memorandum, the Arbitrator is required to conclude that the Memorandum was not made available to the Union as is required under the grievance procedure.
>
> As read by the Arbitrator, Article 14, Section 2, Step 2(d) requires the Employer to ". . .make a full and detailed statement of facts and contractual provisions relied upon . . ." and to ". . .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." In the matter at hand, it cannot be said with certainty that the Union was aware that the Postal Inspection Service had prepared an Investigative Memorandum with respect to the Grievant. Under

this circumstance, the Union cannot reasonably have been expected to request a copy of the Memorandum, and it therefore seems to the Arbitrator that the Employer had an obligation to ensure that the Memorandum was made available to the Union so that the latter could adequately prepare its case. The inability of the Employer to rebut the Union President's testimony through the presentation of probative evidence or credible testimony that the Memorandum was supplied to the Union requires that the Arbitrator find the case against the Grievant procedurally defective and, as a result, the removal lacking in just cause. This finding necessarily forecloses further consideration by the Arbitrator as to the merits of the Employer's contentions that the Grievant submitted falsified medical documentation to cover unscheduled absences and, as a result, received pay fraudulently.
(C#08919)

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Supporting Cases

C#00090, Arbitrator Willingham, December 11, 1972
C#00308, Arbitrator Dash, May 17, 1974
C#04273, Arbitrator Williams, May 2, 1984
C#05751, Arbitrator Scearce, February 12, 1986
C#06658, Arbitrator LeWinter, November 21, 1986
C#08919, Arbitrator Britton, April 10, 1989
C#14131, Arbitrator Eaton, January 2, 1995
C#14767, Arbitrator Render, September 9, 1995

SECTION TWO

Disputes Whether Grievant's Conduct, if Proven, Would Constitute a Proper Basis for the Imposition of Discipline

All letter carrier behavior may conceptually be divided into two categories: 1) behavior for which no discipline may be imposed, and 2) misconduct for which discipline may be imposed. Examples of behavior for which discipline may not be imposed include finishing one's route on time every day, or taking lunch at an authorized location. Examples of misconduct for which discipline may ordinarily be imposed include stealing from the mail, or assaulting a supervisor.

Sometimes management crosses the line between these categories and issues discipline for behavior which may not be properly characterized as misconduct, either because the behavior violates no rule, or because the rule which is violated is invalid. When this happens, the discipline should be disallowed.

While this is a dramatic defense, it is inapplicable to most disciplinary actions - decisions directly addressing this defense count for fewer than .01% of NALC's discipline arbitrations.

Although the opportunities to employ this defense are infrequent, it is the only proper defense in certain recurring situations. For example, management sometimes disciplines employees simply for failure to meet the "18 and 8" standard. Such a charge does not form a valid basis for the imposition of discipline, because NALC and USPS have jointly agreed that failure to meet that standard, by itself, is not disciplinable misconduct. In such situations, the NALC representative handling the grievance must look behind the charge and ask "what is the rule implied by the charge?"

Where the charge is failure to meet standard, the rule implied is that failure to meet standard, by itself, is disciplinable misconduct. But such failure is not misconduct, and this defense, therefore should be employed. In other kinds of cases, a valid rule will be found to be implied. For example, in a discharge for fighting the rule implied by the charge is that fighting is disciplinable misconduct, a valid rule. And because a valid rule was found, this defense could not appropriately be used.

Case Examples

[T]he Service has failed to charge the Grievant with a dischargeable offense. The reason given by the service for the removal of the Grievant is both void for vagueness and an obvious attempt to discharge the Grievant for being "accident-prone," a non-offense.

"The Service may properly charge an employee with physical inability to perform assigned duties, with psychological inabilities to perform assigned duties or with specific acts of negligence or violations of established safety standards. However, the Service is not entitled to concoct a bastardized form of infraction in order to remove employees it considers to be accident-prone. **(C#01311)**

* * * * *

If Grievant was in fact acting as a Steward on January 7, 1982, his personal abusiveness to [his supervisor] falls precisely into the zone for which the special immunity status was created; a closed grievance meeting or closed discussion to discuss Union matters. It is in this context, and this context alone, that the parties meet as equals. The Steward is entitled to the same deference and latitude as his or her supervisor. It is in this situation, away from the audience of other employees, where a steward may display a loss of temper or use profanity and still be protected from discipline. **(C#01191)**

* * * * *

[T]he Employer cannot discipline an employee for absences which are legitimately caused by the physical incapacity of an employee up to at least the point where that employee exhausts his/her accumulated sick leave benefits. To hold otherwise would make it possible for the employer to say to an incapacitated employee, `although you have accumulated sick leave available, you cannot use it because to do so would make your attendance unsatisfactory.' Certainly, such a conclusion is not in accord with either the intent or spirit of the negotiated Sick Leave benefits. **(C#00599)**

* * * * *

> [I]t is the arbitrator's considered opinion that to remove the grievant for absence caused by an injury suffered while on duty and one which he had no control over and from which he appears to have fully recovered, would be punitive in nature rather than corrective. **(C#04024)**

* * * * *

Supporting Cases

C#01191, Arbitrator Goldstein, July 6, 1982
C#01311, Arbitrator Levak, September 24, 1982
C#01599, Arbitrator Holly, August 2, 1978
C#04024, Arbitrator Parkinson, December 29, 1983
C#04163, Arbitrator Larney, December 28, 1983

SECTION THREE

Disputes About the Correctness or Completeness of the Facts Used to Justify the Discipline

This defense may be divided into two major categories.

The first category - management failed to prove that grievant acted as charged - is a defense that is available in every discipline case. This is so because whenever management issues discipline, it assumes the burden of proving that the grievant acted in such a way as to provide cause for discipline. To meet this burden, management must come forward with probative evidence sufficient to convince the arbitrator that the misconduct with which the grievant has been charged actually occurred. The Union does not bear a corresponding burden - it does not have to prove that the grievant did not act as charged. Instead, the Union's job is to poke holes in the proofs offered by management.

This is not to say that the Union should waive its opportunity to present its side of the case. If the Union can prove through its own presentation of evidence that the grievant did not act as charged, so much the better.

The second category - grievant may have acted as charged, but was provoked by another - is an affirmative defense. If the Union employs this defense, it bears the burden of proving that provocation occurred. Thus, for example, if a letter carrier punches a supervisor, the Union must prove that the supervisor first attacked the letter carrier, and that the letter carrier was merely defending him/herself.

Defense on the Merits of No. 1
Management failed to prove Grievant acted as charged.

Before any discipline will be allowed, management must prove that the letter carrier actually engaged in the misconduct with which charged. Management's proof must be in the form of evidence. Arguments, assumptions, guesses, conjectures, allegations or speculations are not evidence. Testimony of a witness who has personal and direct knowledge is evidence, as may be photographs or fingerprints.

The arbitrator's primary function in a typical discipline case is to weigh the evidence, to determine whether the evidence is sufficient to conclude that management has

met its burden of proof. In performing this function the arbitrator must decide the weight, if any, to be given hearsay or circumstantial evidence; and if witnesses have given testimony which is contradictory, the arbitrator must decide whose testimony is to be credited, and whose discounted. The decisions listed under "Supporting Cases" below, illustrate the ways in which arbitrators deal with these kinds of problems.

When you are preparing to make this defense in a case, you should also look at other discipline cases having the same charge. By doing so, you'll be able to identify the kind of evidentiary problems that may be specific to a certain charge. For example, the fact patterns found in falsification of employment application cases are quite similar to each other, but are quite different from the fact patterns found in cases in which discarding deliverable mail is charged - and the methods used by arbitrators to resolve disputes of fact in the two kinds of cases is also quite different.

Case Examples

> In industrial discipline, as in the criminal justice system, an employee is deemed to be innocent of charges against him until proved otherwise, and the burden of such proof lies with the employer in industrial discipline, as it does with the state under our criminal justice system. **(C#04891)**
>
> * * * * *
>
> Under these facts, I certainly have not given any weight to the denials of wrongdoing of the Grievant. I do not find him `innocent of wrongdoing.' On the charge of improperly imbibing on duty and/or being intoxicated on the job, I hold merely that Management at hearing completely failed to prove its case. That is, after all, the burden assumed by it in discipline and discharge cases under the contract. **(C#04711)**
>
> * * * * *
>
> The best evidence that could have been presented as proof of management's statement of facts regarding July 10 was testimony from those individuals who were present when the events occurred. The Employer failed to present those witnesses, and the burden of going forward with such testimony cannot now be shifted to the Union. The grievant denied any wrongdoing at 604 Sunset on July 10, and there was no credible evidence to rebut his version of the facts. By failing to prove the events of the precipitating incident, the Employer has failed to set forth justification for terminating the grievant.
> **(C#4710)**
>
> * * * * *

The evidence presented by the Postal Service is circumstantial in nature, however, it is noted that proof of guilt may be accomplished by the use of persuasive circumstantial evidence alone. This arbitrator requires that the evidence in support of disciplinary actions be clear and convincing. The burden of proof is, of course, upon the Postal Service.

There is no question that mail was discovered in a trash container on April 22, 1985, that the mail was addressed for the grievant's route and that she delivered the route that day. There are no witnesses who could establish that [the grievant] dumped the mail in the trash. There were also no witnesses who could establish that the grievant left the Postal Annex for her deliveries on the day with the recovered mail. More importantly, no motive was shown as to why [the grievant] would throw deliverable mail away, especially on her assigned route.

[I]t is my determination that the Postal Service has failed to clearly and convincingly prove that [the grievant] improperly and unlawfully disposed of canceled and deliverable mail. **(C#05396)**

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Let's be clear from the beginning of this discussion on tampering that management compromised its case by not only failing to conduct an investigation into this issue, but chose to ignore it entirely. In addition, there is a good deal of evidence to suggest that management was too quick to jump to a conclusion of guilt, and that it chose to ignore other explanations because of what appeared to be a very thorough investigation by postal inspectors.

To be sure, there remains a good deal of suspicion about grievant's innocence. Like those in management, this Arbitrator, too, was drawn into the web of what appeared to be strong circumstantial evidence of guilt. And yet the Union has provided a reasonable explanation which allows for other inferences to be drawn from the evidence. Those inferences lead to exoneration (Please keep in mind the difference between guilty and not guilty as distinguished from guilty and innocent. Our justice system is based on the former, which is to suggest that there are occasions when there will be insufficient evidence of guilt, which does not necessarily mean the accused is innocent.) and accordingly, consistent with direction from Arbitrator Snow, credibility of testimony becomes critical to the outcome of this case.

> Their error occurred not because of what they had in the way of evidence, but because of their unwavering conviction that there was no other plausible explanation. This is not a case where there was a rush to judgment or even the absence of an adequate investigation. Instead, this is a case where management was unwilling to listen or react to what the Union had to say. The Union had done its homework. . . Thus, what was thought to be a strong case of circumstantial evidence suffered as a result. Now there is reasonable doubt, and the Arbitrator must conclude that there was an absence of just cause for the removal. **(C#15714)**

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Supporting Cases

C#01312, Arbitrator Eaton, September 23, 1982
C#01345, Arbitrator Eaton, June 8, 1982
C#01400, Arbitrator Epstein, July 25, 1980
C#01432, Arbitrator Aaron, December 13, 1976
C#02689, Arbitrator Schedler, December 20, 1985
C#03945, Arbitrator Bowles, November 7, 1983
C#04710, Arbitrator Snow, February 13, 1985
C#04711, Arbitrator Goldstein, March 11, 1985
C#04771, Arbitrator Schedler, April 2, 1985
C#04812, Arbitrator LeWinter, May 3, 1985
C#04891, Arbitrator Howard, April 23, 1985
C#04976, Arbitrator Williams, July 28, 1985
C#05166, Arbitrator Goldstein, September 5, 1985
C#05396, Arbitrator Parkinson, November 22, 1985
C#15714, Arbitrator Goodman, August 7, 1996

Defense on the Merits of No. 2
Grievant may have acted as charged, but was provoked by another.

This is one of the only possible defenses to some forms of misconduct, including assaults on supervisors, customers, or other employees.

Case Examples

> There is no question from this record but that grievant engaged in a `cuss-fight'

with a customer. The question is: does that fact serve as just cause for removal, or do the circumstances here - some already discussed and some not - tend to mitigate such a harsh penalty? The undersigned is of the opinion they do. He will briefly explain why he reaches this conclusion lest someone think he does not agree that such a `cuss-fight' is `unsatisfactory performance - conduct unbecoming a Postal employee.' It is, there is no question about that. But it is to be quickly added, provocation is a consideration that necessarily comes within the concept of just cause, which is the test to be applied here. **(C#05321)**

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The evidence convincingly established that [the supervisor] well knew from his long relationship with the Grievant that he was not being threatened on May 30th and that the Grievant was no danger to himself or others. It is apparent to the Arbitrator that [the supervisor] had learned to play the Grievant's emotions `as a musician plays a violin.' Thus, not only did he provoke and cause the situation, he well knew that the Grievant's reaction was neither threatening, abusive nor potentially injurious. **(C#05873)**

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The undersigned will not burden these sophisticated parties by giving them his understanding or definition of the `just cause' concept as was intended by them when they put it in the National Agreement. He knows they know what it means. He believes they will not disagree with him however when he finds, as he does, that just cause is not present when a 9 year employee, who has a good work record as a letter carrier and is serving as station steward, is removed from the Postal Service because he refused to stand still and take from the supervisor public criticism of his official efforts as a steward, with the supervisor all the while standing less than 2 feet away, vigorously shaking a pencil in the steward's face. This is not to also say that under such circumstances the steward is authorized to `come out fighting.' He is not and any trained steward or seasoned employee, and the grievant was both, knows this. It is to say, however, that if a supervisor acts improperly toward an employee by publicly criticizing him and also violates the employee's right to be treated in a reasonable fashion, both such being found to have happened in this case, any subsequent overreaction on the part of the employee is subject to mitigation in direct proportion to the seriousness of the supervisor's breach of accepted practice and policy. **(C#04203)**

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Supporting Cases

C#04203, Arbitrator Williams, March 28, 1984
C#04213, Arbitrator Williams, May 10, 1984
C#04478, Arbitrator Williams, June 14, 1984
C#04750, Arbitrator LeWinter, March 25, 1985
C#05138, Arbitrator Rentfro, September 3, 1985
C#05321, Arbitrator Williams, October 29, 1985
C#05242, Arbitrator Render, October 6, 1985
C#05873, Arbitrator Levak, March 11, 1986
C#06717, Arbitrator Goldstein, December 8, 1986
C#06782, Arbitrator Sobel, December 8, 1986
C#14730, Arbitrator Snow, August 25, 1995
C#17699, Arbitrator Erbs, November 13, 1997

SECTION FOUR

Allegations That, Because of Mitigating Circumstances, the Discipline Imposed is too Harsh, or No Discipline is Warranted

The final group of defenses may be called the "mitigation" defenses. With them, the NALC in effect says "even assuming that the grievant's behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive."

"Mitigation" should not be confused with "leniency." The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn't. Leniency - simply asking for another chance - is within the exclusive province of management, and will not be considered by any arbitrator.

Mitigation Defense No. 1
Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").

A letter carrier should not be disciplined for violating a rule of which he/she was not aware. It should be noted, however, that employees are presumed to know the major rules of the shop. This defense, therefore, will not be useful where the grievant has assaulted a customer, or has intentionally discarded deliverable mail.

Case Examples

> There remains the question whether [grievant's] surreptitious recording, though legal, nevertheless violated a Postal Service regulation of which [grievant] was, or should have been, aware. This question can be disposed of on the basis that, so far as this record shows, management never informed the grievant that the surreptitious recording of a conversation with a supervisor was forbidden. It suffices to recall that none of the grievant's supervisors knew of any Postal Service rule on the subject. Indeed, the only prior incident of surreptitious recording ever referred to at the hearing was an incident that management had condoned. Thus, assuming that the E&LR Manual does forbid what [grievant]

did, there is no evidence that he had ever been so instructed, or otherwise should have known. If the postal Service wishes to punish its employees for lawful conduct, recording conversations in which they participate, then the Postal Service must take steps that will ensure that its employees are informed of the rule. **(C#01438)**

* * * * *

In most cases I am unimpressed with arguments about lack of knowledge or training in familiar areas of job assignments. It must be noted in the instant case that the Employer argued it was not plausible (sic) that no supervisor explained to the Grievant his obligations while on jury duty. However, no supervisor who gave any instructions to the Grievant was brought forward and the Grievant's testimony that the Postmaster's order was not posted at the Branch was uncontroverted.

I recognize that an argument can be advanced that the Grievant should have known there were rules and regulations for jury duty (as there are virtually every aspect of employment in the Postal Service) and the Grievant should or could have when he visited the Main Post Office sought out such rules to insure he was aware of his obligations.

However, I do not feel the entire burden can be shifted to the Grievant and his failure to investigate what should have been communicated by supervision and therefore some question exists as to just what the Grievant can be reasonably held on notice as to his obligations. **(C#01272)**

* * * * *

. . .Grievant was, all circumstances considered, a quite unsophisticated employee in matters of this kind . . . He had never traveled for the Postal Service before. He had concededly received no formal training or instruction in the intricacies, such as they are, of filling out travel vouchers. . ..

On this state of the record the Arbitrator concludes that the Postal Service itself is not without fault in the instant situation. Certainly, greater precaution should have been taken, especially in the case of a new and quite untutored employee, to insure that he be given some training or formal instruction to cope with his responsibilities in the matter of compensation for travel and the procedures incidental thereto. The Arbitrator, without condoning Grievant's conduct here, finds no basis for concluding that there was any conscious effort or intent by Grievant, to commit fraud on the Postal Service or to obtain illicit compensation. **(C#00112)**

* * *

> The Employer offered no evidence that, prior to February 10, 1993, the grievant knew that the method of discarding undeliverable mail (which led to her jettisoning deliverable mail) was improper. Documentary evidence from the apartment managers corroborated the grievant's assertion that she had been requested to discard undeliverable mail that had collected around the mail boxes.
>
> Nor did the grievant's mode of operation reveal an inappropriate intent. She made no effort to hide her activities. The dumpster was in plain sight of the apartments. Throwing away thirty-six deliverable mailers would have saved the grievant little time. She actually delivered over 600 of them the same day. Additionally, she returned other undeliverable Home Base mailers to the postal facility that afternoon for reprocessing. **(C#13458)**

* * * * *

Supporting Cases

C#00112, Arbitrator Cushman, November 8, 1979
C#01272, Arbitrator Leventhal, June 16, 1982
C#01438, Arbitrator Hardin, November 8, 1982
C#01786, Arbitrator Eaton, March 11, 1981
C#04563, Arbitrator Schedler, December 11, 1984
C#13458, Arbitrator Snow, march 3, 1994
C#16511, Arbitrator Olson, March 2, 1997
C#16708, Arbitrator Britton, April 9, 1997

Mitigation Defense No. 2
Grievant has long prior service, good prior record, or both.

As a letter carrier works the job year after year, he/she establishes ever greater "property rights" to the job, and a letter carrier with substantial time on the job deserves a more moderate response to a transgression than does a new hire. This defense is most effective when the years of service have been relatively discipline-free.

Case Examples

Grievant has served this Employer for over eight years without any demonstrated disciplinary penalty. I have, in the past, referred to this as a `bank of good will.' In such instances of long, good service, it must be recognized that a single violation, even a serious one may occur without an assumption that [there has been] the destruction of the trust necessary to the continued employment relationship. Indeed, years of good, faithful service have many times been used and accepted as substantive evidence of lack of just cause for discharge. **(C#03587)**

* * * * *

The Grievant's record consists of one unspecified element which occurred some 20 years prior to the incident giving rise to his removal. The Grievant's most recent elements involved a Letter of Warning for an extended break and two 7-day suspensions for unauthorized use of overtime, all of which are the result of infractions which took place within 12 months of the incident leading to the removal. The charge against the Grievant is unrelated to these prior elements, but the two 7-day suspensions for the same offense evidence a sudden change in the Grievant's otherwise almost perfect work record for almost 28 years and support the Union's contention that the advent of DPS mail may, indeed, have had some impact on the Grievant's ability to delivery his route in an efficient and timely manner.

In sum, the Grievant committed a very grave error in judgement and one which, in my opinion, could, under different circumstances, cause the Employer to have extreme difficulty with showing faith, reliance and trust in the grievant's ability to fulfill his duties as a letter carrier. But the arbitrator finds there are enough mitigating factors in this case for him to find the penalty imposed to be excessive and therefore not for just cause. My efforts to fashion what I believe to be an appropriate remedy were guided by the judgement, opinion and rationale of Arbitrator Harry J. Dworkin in American Welding and Manufacturing Co, 47 LA 457, 463 (1966) wherein he held that ". . .the grievant's proximity to retirement. . .is not germane to the issue presented, nor does it constitute a mitigating circumstance. An employee
cannot claim immunity from the consequences of his misconduct, nor can he claim that a proper form of penalty is unwarranted, due to the fact that he may be close to retirement. The fact that an employee may be eligible in the future to claim benefits under an existing pension system, would not constitute a mitigating circumstance, nor would it preclude disciplinary action which is otherwise proper and reasonable." **(C#18933)**

* * * * *

Supporting Cases

C#02287, Arbitrator Walt, September 14, 1979
C#02386, Arbitrator Seitz, November 12, 1979
C#02871, Arbitrator Walt, November 20, 1979
C#03587, Arbitrator LeWinter, May 3, 1983
C#03863, Arbitrator Gentile, October 28, 1983
C#04275, Arbitrator Bowles, April 25, 1984
C#04570, Arbitrator Epstein, December 11, 1984
C#04644, Arbitrator Dash, February 21, 1985
C#05970, Arbitrator Seidman, December 31, 1985
C#06952, Arbitrator Howard, March 3, 1987
C#16572, Arbitrator Duda, March 12, 1997
C#18933, Arbitrator Parent, October 22, 1998

Mitigation Defense No. 3
Grievant's misconduct was not intentional.

Unintentional misconduct (e.g., "negligence") is generally viewed as being less serious than intentional misconduct. Intent is an essential element of almost all charges of misconduct, and it is clear that it is management's burden to prove that the grievant's acts were intentional.

Case Examples

> The real question in the instant case thus reduces itself to this inquiry: Whether or not the Grievant's action on March 18, 1981, was a `willful' and `intentional' act?
>
> After evaluating all of the evidence and the apparent candor of the Grievant when he testified, the Arbitrator reached the conclusion that the Grievant's act was that of `carelessness' and `gross negligence,' but not a `willful' and `intentional' act to circumvent or thwart the fundamental purpose of his job. Those factors which strongly influenced this conclusion in addition to the Grievant's apparent unblemished record with the Service and his own testimony which was given considerable weight, were these: (1) the subject mail was placed openly in the Station's waste hamper, a location which demonstrated no reasonable attempt by the Grievant to conceal in a clandestine manner the fact that mail was being discarded; (2) the mail was left in sequential order in a type

of `bundle' state which would further highlight its presence and support the Grievant's `fanning' statement; (3) the Grievant, when initially confronted with the mail in question did not attempt to conceal the fact that he was the responsible person, but that in his judgment, which was subsequently proven wrong, the mail was not deliverable, and (4) a goodly portion of the mail was in fact not deliverable. **(C#01721)**

* * * * *

[T]he essence of the dischargeable offense of falsification is the employees (sic) dishonesty that requires a finding of intentionally issuing a false statement, as distinguished from a reasonable mistake, in direct conflict with the necessary characteristic of a letter carrier that he must always be trustworthy. Thus, the critical question is not just whether the Grievant had in fact been fired, or forced to resign from a former job, but whether he misrepresented the known fact in order to be accepted for employment. In addressing this factual question, the employee must be presumed innocent with the Employer bearing the burden of rebuttal by clearly establishing fraudulent intent. **(C#01988)**

* * * * *

One element of assault is an intent on the part of the aggressor to hit or strike the other. In this case, the testimony of the victim, or the object of the assault, clearly indicates that the aggressor has no intent to hit him with the letters. Therefore, the Service has not established that an assault occurred. Since there was no assault, it is the Arbitrator's opinion that the Grievant cannot be discharged. **(C#03611)**

* * * * *

Supporting Cases

C#01062, Arbitrator Howard, August 14, 1975
C#01274, Arbitrator Goldstein, April 28, 1982
C#01298, Arbitrator Leventhal, September 16, 1982
C#01402, Arbitrator DiLeone, November 17, 1980
C#01424, Arbitrator Jones, November 20, 1978
C#01721, Arbitrator Gentile, November 10, 1981
C#01988, Arbitrator Foster, August 7, 1981
C#03611, Arbitrator Render, May 29, 1983
C#06483, Arbitrator LeWinter, September 20, 1986

C#13458, Arbitrator Snow, March 3, 1994
C#15436, Arbitrator Dennis, May 24, 1996
C#17676, Arbitrator Bankston, September 2, 1997
C#18215, Arbitrator Hales, April 15, 1998

Mitigation Defense No. 4
Grievant was emotionally impaired.

This is a sub-category of Mitigation Defense No. 3 above. Here it is argued that grievant was emotionally impaired, and because of that impairment grievant's misconduct should be viewed as unintentional.

Case Examples

> In August of 1977, [grievant] labored under severe stress and emotional tension, a condition sufficiently aggravated to require medical treatment. Indeed, he was granted sick leave for that very reason on three of the days that separated his conduct on August 23 from that of August 29 and August 30, 1977. After eight years of satisfactory employment with the Postal Service during which he won the praise and affection of many of the patrons on Route 901, [grievant] suddenly inundated the waste hamper with deliverable third class mail. If it had been his desire to dispose of that mail in order to reduce his delivery time he would have done so away from Station O. There clearly exists a different explanation for his conduct.
>
> The distraught emotional condition of the grievant at the time in question is corroborated by his doctor and the probation officer who saw him on the day of his arraignment in the United States District Court. True enough, [grievant] told the Postal Inspectors he had disposed of some third class mail without malice and in court he entered a plea of guilty to the charge of obstruction of mail. In doing so, however, he explained that his conduct was the result of being "tired and weary." More precisely, he was reacting to an overwhelming emotional burden and not intentionally violating either the mail processing procedures at Station O or statutory law. He stands guilty of no more than negligence and the appropriate sanction should therefore have been a substantial disciplinary suspension rather than discharge. **(C#02362)**
>
> * * * * *
>
> It is, of course, the burden of the Union to raise and prove mental illness as a

defense in the form of mitigating circumstances. The burden is on the Union to demonstrate by a preponderance of the evidence that, even though the Grievant is guilty of the charged offenses, he should be resolved of responsibility to some degree as a result of the mental disorder.

The Service is not prohibited from disciplining an employee who is a threat to other employees or who cannot perform the duties of his job, regardless of the fact that the employee's malfeasance or nonfeasance is the result of a mental illness or disorder. The Arbitrator does not agree with those who say such discipline is a breach of the just cause clause. The Service is not under the obligation to retain an employee who suffers from a mental disorder at all costs. The Service has an obligation to operate efficiently, as well as the duty to protect the safety of its employees. On the other hand, when the Service chooses to discipline an employee who it knows suffers from a mental disorder, it does so at some risk. If the employee is a `qualified handicapped individual' within the meaning of the Rehabilitation Act of 1973, the Service must be certain that it has reasonably accommodated the employee. The Service must also be prepared to face the contention that the discipline violated the employee's E.E.O. rights. The instant case does not involve either of those pieces of legislation. However, the Service must also be prepared to confront proof by the Union that the following factors exist:

(1) Proof that the medical disorder exists.
(2) Proof that the alleged offense was the result of the mental disorder.
(3) Proof through the best medical evidence that the employee is not a threat to other employees.
(4) Proof that the disorder does not disable the employee from regularly performing his duties.
(5) Proof through the best medical evidence that the employee's disorder is under control and that he ultimately will be rehabilitated.
(6) Proof that management failed to properly consider the alleged offense in light of the employee's disorder. **(C#03805)**

* * * * *

The tragic circumstances experienced by the Grievant, especially the drowning death of her three-year-old son, does not excuse the misconduct and the use of illegal drugs which impaired the Grievant's ability to perform her postal job duties. However, they can be viewed as mitigating factors to explain the misconduct engaged in by the Grievant who otherwise was a model employee. The Postal Service persuasively argues that the Grievant is only a short-term employee with less than nine months as a permanent employee and should not

be accorded reinstatement. Although the Agency's position is understandable, it is also at variance with Article 35 (Employee Assistance Program) and the American Disabilities Act. Neither the National Agreement or Act permits the Agency to treat a long-term permanent employee differently than an employee with less seniority. The test to be applied, is whether an employee can be rehabilitated to become a valuable asset to the postal service with appropriate treatment and accommodation. **(C#15338)**

* * * * *

Supporting Cases

C#00077, Arbitrator Cohen, February 22, 1982
C#00274, Arbitrator Williams, May 18, 1983
C#00295, Arbitrator Feldman, February 3, 1978
C#00551, Arbitrator Dash, January 16, 1985
C#01200, Arbitrator Seidman, July 16, 1982
C#01365, Arbitrator Epstein, June 2, 1982
C#01916, Arbitrator Walt, September 30, 1981
C#01972, Arbitrator Levin, May 9, 1980
C#02362, Arbitrator Roberts, November 7, 1978
C#02375, Arbitrator Epstein, October 12, 1978
C#02677, Arbitrator Goldstein, December 18, 1982
C#03342, Arbitrator Dash, March 10, 1983
C#03805, Arbitrator Levak, September 22, 1983
C#04350, Arbitrator Gentile, June 30, 1984
C#04913, Arbitrator Walsh, April 8, 1985
C#05304, Arbitrator Carson, November 4, 1985
C#15338, Arbitrator Ames, April 12, 1996
C#15644, Arbitrator Johnston, July 24, 1996
C#17324, Arbitrator Abernathy, September 16, 1997

Mitigation Defense No. 5
Grievant was impaired by drugs and alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).

This is a sub-category of Mitigation Defense No. 3 above. Here it is argued that grievant was impaired by drugs or alcohol, and because of that impairment grievant's misconduct should be viewed as unintentional.

This defense is used more frequently than any other; only rarely, however, is it presented with the thoroughness of preparation required for a satisfactory result. If you determine that this defense may fit a case which you are preparing, carefully study the cases listed below, and make certain that you can match the elements essential for a win. If you can't, you may be better off concentrating your efforts on other defenses. (One arbitrator of NALC/USPS discipline cases was recently heard to ask, "What have you got when you sober up a drunken mail thief?" His answer: "A sober mail thief.")

Case Examples

> What then are the factors which would allow an arbitrator to mitigate the offense committed by the alcoholic which led to his removal from the Postal Service to order that he be reinstated by the Postal Service. The decided cases rely on several factors; First, that the act was done while the grievant was an alcoholic and at the time the act was committed he was either drunk or under the influence of alcohol; Second, that the Grievant's prior work record is either relatively clear of disciplinary action or that all, or most, of the prior disciplinary actions occurred as the result of the grievant's alcoholism; Third, that the grievant is successfully participating in [PAR] and that participation has caused both his counselor and the officer in charge of the P.A.R. program to indicate that he is likely to be successful candidate for rehabilitation; and Fourth, that the grievant has had a substantial length of Service with the Post Office, generally for a period of at least 10 years, with the likelihood of reinstatement increasing if the period of prior service is 20 years or more. **(C#01928)**

* * * * *

> The element which must give pause in this dispute is none of the above, but the evidence concerning the cortisone medication which the Grievant was taking for an indisputably serious skin condition. Odd though it may seem to a layman the testimony is uncontradicted that a side effect of the Depomedrol injection - which can last up to two weeks - can be serious personality aberrations. It is true that Dr. Jensen could not testify positively that the Depomedrol caused the Grievant's actions. However, he could testify that the medication had been given, and that in some cases it can, and has, caused similar behavior.
>
> "Absent this consideration removal would clearly be warranted. Its presence,

> however, taken together with the prior excellent record of the Grievant, does seem to indicate abnormal behavior which one would not expect to be repeated in the future. **(C#01237)**
>
> * * * * *
>
> While the Service emphasizes the seriousness of the charge of delaying the mail, clearly the seriousness of the charge rests upon the intent and deliberation of the offender. The record makes clear that as a result of overindulgence in alcohol, the grievant was not in full possession of his senses on the day of the incident and really was not aware of what he was doing. His conduct cannot be regarded as a deliberate and intentional delaying of the mail. **(C#02849)**
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> * * * * *

Supporting Cases

C#00282, Arbitrator Zack, February 26, 1982
C#01237, Arbitrator Eaton, July 13, 1982
C#01565, Arbitrator Haber, July 30, 1976
C#01820, Arbitrator Zumas, January 12, 1981
C#01928, Arbitrator Seidman, February 22, 1982
C#02368, Arbitrator Howard, June 21, 1978
C#02371, Arbitrator Rentfro, January 27, 1979
C#02372, Arbitrator Moberly, March 20, 1978
C#02831, Arbitrator Dash, December 19, 1977
C#02846, Arbitrator Aaron, May 19, 1975
C#02849, Arbitrator Howard, March 19, 1975
C#06375, Arbitrator Rentfro, July 23, 1986
C#07057, Arbitrator Goldstein, April 16, 1987
C#07126, Arbitrator Eaton, May 15, 1987
C#12085, Arbitrator Taylor, June 11, 1992
C#17945, Arbitrator Olson, January 31, 1998

Mitigation Defense No. 6
Grievant was disparately treated.

Letter carriers who are similarly situated should receive the same discipline for the same misconduct. For example, if two letter carriers with no prior discipline extend their lunches by an hour, management might be able to justify giving each a letter of

warning; in the same situation, management could not justify giving one a letter of warning, and firing the other.

Case Examples

Union witnesses testified to eight specific cases of deviation in which no more than a letter of warning was assessed. Management witnesses questioned only one of them and corroborated most of them. Included was one instance of deviation to go to the bathroom. However, there was not even a formal discussion of the deviation. In another, there was an employee with a terrible record who deviated and was playing video games. Yet, his ultimate discipline was a letter of warning. In fact, Management witnesses agreed that no one ever before had been terminated for deviation. In general, postal arbitrators would overturn discipline if only one example of disparate treatment was proved (in fact, several were referenced by Union). Thus, it is abundantly clear that the disparate treatment in the subject case, standing alone, would call for reinstating the grievant with full back pay.
(C#04401)

* * * * *

The parties herein are well aware of the general rule that disparate treatment - unequal discipline for similar misconduct - is not looked upon with favor by any arbitrator. Unequal discipline imposed, even by a well meaning but somewhat disorganized employer, will consistently be overturned as discriminatory when appealed to arbitration. **(C#01760)**

* * * * *

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. **(C#16970)**

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Supporting Cases

C#01047, Arbitrator Holly, March 30, 1979
C#01760, Arbitrator Rentfro, June 25, 1980
C#01920, Arbitrator Gentile, September 30, 1981
C#01945, Arbitrator Scearce, June 23, 1980
C#02354, Arbitrator Caraway, July 5, 1978
C#02403, Arbitrator DiLeone, October 7, 1977
C#02801, Arbitrator Caraway, March 31, 1978
C#04401, Arbitrator Williams, July 16, 1984
C#04432, Arbitrator Williams, July 7, 1984
C#04518, Arbitrator Weisenfeld, December 21, 1984
C#05267, Arbitrator Seidman, November 4, 1985
C#16237, Arbitrator Hutt, December 31, 1996
C#16303, Arbitrator Abernathy, November 18, 1996
C#16970, Arbitrator Olson, June 24, 1997
C#17453, Arbitrator Duda, October 12, 1997

Mitigation Defense No. 7
Rule Grievant broke was otherwise unenforced.

This is a variant of Mitigation Defense No. 6, above. If management routinely permits letter carriers to violate a rule, or routinely to follow a certain behavior, it may not suddenly impose discipline for violations without first announcing its intention to begin enforcing the rule, or to stop tolerating the behavior.

Case Examples

The core of this issue is the established past practice at the Pittsburgh Post Office of sometimes disposing of deliverable third class mail, however contrary to postal regulations, and however illegal it may have been. That practice existed, and it is of crucial consideration in this dispute.

When such a practice is condoned it is simply not fair that one or two employees bear the entire brunt of the correct, necessary, and entirely justifiable determination of management to bring such a practice to a halt. An employer has the right to enforce reasonable regulations, and the Postal Service in particular has an obligation to see that the mail is delivered. That is the reason for its existence.

Any employer has an obligation to inform employees clearly, without

equivocation, and without the possibility of misunderstanding, when rules which have been ignored are to be enforced, and when wrongful practices which have been condoned are to cease. While the Postal Service has endeavored to show that it met these obligations in the present dispute, the proof falls short of making that showing. **(C#02803)**

* * * * *

It is a basic tenet of labor management relations that prior to the imposition of discipline, an employee must be aware that the employer considers his actions or conduct violative of the labor agreement or existing rules and regulations and he must know of the possibility that discipline may result. Where an employee believes his actions and conduct are justified and no indication has been given that persistence in that course of conduct can and probably will result in discipline, subsequently imposed sanctions must be set aside. **(C#01455)**

* * * * *

The Employer also argued that the grievant violated postal regulations by failing to complete a Form PS-1571 to record his curtailment of the mail for 1102 West International Airport Road. Testimony from several witnesses, including Station Manager Belisle, supports a conclusion that supervisory personnel at the grievant's station did not require him to complete such a form or even to inform his supervisor of the curtailment, if he intended to
deliver the mail on the next working day. There was unrebutted testimony from the grievant that he, in fact, did intend to deliver the curtailed mail on his next working day, and it must be concluded that he did not violate procedures in place at the Sand Lake Station. **(C#12635)**

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Supporting Cases

C#01448, Arbitrator Dworkin, November 8, 1982
C#01455, Arbitrator Walt, December 17, 1979
C#01875, Arbitrator DiLeone, April 11, 1979
C#02029, Arbitrator Warns, July 24, 1972
C#02803, Arbitrator Eaton, May 25, 1978
C#12635, Arbitrator Snow, December 24, 1992
C#16426, Arbitrator King, January 15, 1997

Mitigation Defense No. 8
Management failed to follow principles of progressive discipline.

While management may dispense with minor forms of discipline for certain offenses which are normally dischargeable by themselves (e.g., theft of mail), for most types of misconduct, management must follow a corrective (and all arbitrators have read this to mean "progressive") pattern of disciplinary actions. This means that discharge must normally be preceded by one or more large suspensions, and that a large suspension must be preceded by one or more small suspensions, and so forth. When management fails to follow the progressive path, discipline will usually be disallowed or modified.

Case Examples

Grievant's supervisor was asked if he had considered a lesser penalty. He replied that he had, and had decided against it on the grounds that he felt it would `have no impact.'

The action of the supervisor in this regard is a violation of Article 16, Section 1, of the National Agreement. The first sentence of this Article states: `In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive.'

It has been held many times by other arbitrators that, for discipline to be corrective, it must be progressive.

This directive from the National Agreement is mandatory. It is not discretionary. Management does not have a choice as to whether it will issue corrective discipline or not. It must attempt to make discipline corrective. Here, Grievant's supervisor decided for reasons which appeared to him to be valid that corrective discipline would be useless. He does not, however, have that discretion. He must attempt to issue corrective discipline even though he believes that it will be no use. **(C#00557)**

* * * * *

The progression of discipline upon which the discharge was based does not properly conform to the principles of progressive discipline that would warrant a dismissal.

Progressive discipline means that each succeeding disciplinary measure is of a more severe degree so that an employee may know precisely where they stand

> in the progression. If supervision decides to issue a lesser degree of discipline than the last, the progression then begins again at that point. The previous disciplinary elements [in this case] are letters of warning. Even though there are earlier suspensions, the later letters of warning must be followed by further suspension if discipline is to properly progress to dismissal. **(C#01043)**

* * * * *

Supporting Cases

C#00060, Arbitrator Dash, May 18, 1979
C#00557, Arbitrator Cohen, January 4, 1985
C#00584, Arbitrator Levak, October 26, 1982
C#01043, Arbitrator Levin, June 4, 1979
C#01974, Arbitrator Schedler, June 7, 1981
C#05902, Arbitrator Levak, April 7, 1986
C#06299, Arbitrator Levak, June 30, 1986
C#06894, Arbitrator Snow, February 27, 1987
C#13284, Arbitrator Parkinson, November 19, 1993
C#16602, Arbitrator McGowan, March 29, 1997

LC Paragraph Chart

ARTICLE 8, OVERTIME - LETTER CARRIER PARAGRAPH

A. Case Elements

1. A full-time regular carrier (not on the OTDL) was required to work mandatory overtime, on their own assignment, on a regularly scheduled day.

   Auxiliary assistance at a similar rate of pay was available. Auxiliary Assistance is defined as:
   a. Casuals
   b. PTFs at straight time or overtime
   c. T-6 on the work assignment list
   d. Carriers on the ODL at the overtime rate
   e. Regular carriers on undertime
   f. Unassigned regulars with no hold down on straight time
   g. Reserve carries with no hold down on straight time
   h. Full-time Flexibles with no hold down on straight time

B. Definition of Issues

1. Was auxiliary assistance available?
2. Does management argue (8.5.C.2.d) that they are not restricted when working a regular carrier on their own assignment?

C#10414
C#07401
C#08021
C#07049

3. Did management argue that `operational windows' prohibited implementation of the Letter Carrier Paragraph?

C#10637
C#12669
C#11251
C#07886
C#07727

4. Would it have been reasonable for management to provide assistance?

C#08258

5. Was management previously ordered, or had they agreed, to cease and desist violations of the Letter Carrier Paragraph?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 8
4. Memorandum of Understanding, December 24, 1984
5. Memorandum of Understanding, June 8, 1988 (M-00833)
6. Memorandum of Understanding, December 20, 1988 (M-

00884)

7. Article 19
   Postal Operations Manual (POM)
   Employee & Labor Relations Manual
   432.3 Work Schedules and Overtime Limits
   M-39 122.3 Authorizing Overtime and Auxiliary Assistance
   M-41 Section 280
   EL 401 Section V.C. and V.D.
8. Article 31 Section 3

C#07956 **D. Arguments**

1. Auxiliary assistance was available at a similar rate of pay (i.e., casual employees on straight or overtime, PTF employees on straight time or at the regular overtime rate, carriers on the ODL at the regular overtime rate, regular carriers on undertime, unassigned or reserve carriers with no hold down on straight time).
2. The "operational window" that management is claiming prohibited it from honoring the LCP is not a legitimate operational window. Actual office closing times and last dispatch times are after the alleged operational window.
3. Management is aware of its obligation concerning Article 8 and the Letter Carrier Paragraph. The Union can show that management has signed a "cease and desist" concerning this type of violation and/or previous monetary remedies have been won. Past settlements should be included.
4. A monetary remedy is appropriate (i.e., the non-ODL carrier forced to work overtime to be paid an additional 50% of their straight time rate and the carrier who should have worked paid what they would have earned had they worked).

E. Documentation/Evidence

1. Joint Contract Administration Manual Article 8
2. Time cards/Employee Activity Reports (ETC Reports) indicating begin, leave, return and end tour times.
3. 3996's, 1571's
4. Electronic Work Hour Transfer Reports
5. PS 3997 Unit Daily Record

6. PS 1813 Late Leaving and Return Report
7. Statements from the employees who were available as auxiliary assistance.
8. Statement of employee required to work overtime when auxiliary assistance was available.
9. Copy of the list of ODL carriers.
10. Unit seniority list.
11. Documentation which identifies each type of employee: casual, PTF, ODL, work assignment, non-ODL, T-6, PTR.
12. PS 2608 Grievance Summary - Step 1
13. PS 2609 Grievance Summary - Step 2
14. The "Letter Carrier Paragraph"

F. Remedies

1. Injunctive relief for initial infraction. Cease and desist if an honest mistake without prior history.

C#07027
C#16966

2. The effects of any remedy should be to correct the harm to the employee who was improperly required to work and to prevent future violations from occurring. Management believes that an appropriate remedy in these instances would be to compensate the employee an additional 50% straight time pay for the overtime worked. The Union believes that an additional 50% is appropriate for isolated or initial violations, however, repeated violations may required higher monetary remedy. Arbitrators have ruled that administrative leave, additional time and a half or double time are viable remedies in these instances.

C#06297

3. The appropriate remedy for a bypass is to pay the employee the actual amount of time worked by the other employee at the bypassed employee's appropriate rate.

OVERTIME - LETTER CARRIER PARAGRAPH

A. Case Elements

1. A full-time regular carrier (not on the work assignment or OTDL) was required to work mandatory overtime, on their own assignment, on a regularly scheduled day.
2. Auxiliary assistance at a similar rate of pay was available.
   a. Casuals
   b. PTFs at straight or overtime
   c. Carriers on the ODL at the overtime rate
   d. T-6 on work assignment list for the route
   e. Regular carriers on undertime
   f. Unassigned regulars with no hold down on straight time
   g. Reserve carries with no hold down on straight time
   h. Full-time Flexibles with no hold down on straight time

B. Definition of Issues

1. Was auxiliary assistance available?

Auxiliary assistance in accordance with the "Letter Carrier Paragraph" is defined as:

a. Casual employees on straight time or overtime.
b. PTF carriers on straight time or regular overtime.
c. Available T-6 on work assignment list for the route.
d. Carriers on the ODL at the regular overtime rate.
e. Regular carriers on undertime.
f. Unassigned regulars with no hold down on straight time.
g. Reserve letter carriers with no hold down on straight time.
h. Full-time Flexibles with no hold down on straight time

M-01016

". . . `auxiliary assistance' as used in the Letter Carrier paragraph of the Article 8 MOU does include the use of part-time flexibles at the overtime rate."

M-00730

"Based on the evidence presented in this grievance, we find that auxiliary assistance is normally granted on the street. However, this does not preclude management from granting auxiliary assistance in the office."

2. Management argues since the overtime is on the regular's route on a scheduled day, Article 8.5.C.2.D. controls and the Letter Carrier Paragraph contradicts the National Agreement.

This issue was decided at National Arbitration when Arbitrator Mittenthal, in the "Fifth Issue" ruled:

C#06297 Mittenthal "Fifth Issue" 1986 Sustained
"A close comparison of Article 8, Section 5.C.2.d. and the `letter carrier paragraph' of the Memorandum is most revealing. Section 5.C.2.d. says Management may work a non-ODL carrier overtime on his own route on his regularly scheduled day without having to resort to the ODL. Or, should Management so choose, it may work this overtime with someone from the ODL. Article 8 thus gives Management substantial discretion in assigning a carrier to overtime in this situation. The `letter carrier paragraph' when read along with the May 1984 supplemental agreement, establishes a quite different set of priorities. It requires Management to work a non-ODL carrier overtime on his won route on his regularly scheduled day if he has signed up for such `work assignment' overtime. If he has not signed up, then the Memorandum requires Management to `seek' people from the ODL before `requiring' the carrier in question to work `mandatory overtime' on his own route. In short, the very discretion granted management by Section 5.C.2.d. is taken away by the `letter carrier paragraph.'

After the 1986 award the parties agreed.

M-00833 National Joint Statement on Overtime - June 8, 1988 - Memorandum of Understanding, September 19, 1992
Employees may be required to work overtime on their own route on a regularly scheduled day if management has exhausted all available auxiliary assistance as required by the "Letter Carrier Paragraph" with the exception that interim adjustments under the X-route concept may require overtime work up to 20 minutes daily.

C#07460 Stephens 1987 Sustained
"The new provisions of Article 8 were the subject of an arbitration hearing by Arbitrator Mittenthal. In the case referenced above Mittenthal held: "My conclusion is that ODL employees do not have the option to accept or refuse overtime beyond the 5F limitations. They can be required to perform such overtime. The non-ODL employees may not be required to work overtime until the ODL employees have exhausted their overtime obligations under 5G." (p.15)

Thus, it is clear that the new provisions of Article 8 (5.G) which became effective January 19, 1985, takes precedence over Section 5.C.2.d. A memorandum sent by David Charters (Regional Director, E&LR, Memphis) on January 15, 1985 agrees with this position. The memo includes the following; `full-time employees NOT on the `ODL' may not be required to work until ALL AVAILABLE employees on the list have worked up to 12 hours in a day or 60 hours in a week.'

From the above, it is obvious that the employer violated the agreement when it required Howard to work on the day in question. The union had requested one hour of penalty overtime for Benjamin as the remedy. Arbitrator Scearce, in case No. S4N-3F-C 37898,

heard the almost identical issue as in the instant case - the use of a letter carrier not on the ODL to perform overtime on his own route instead of giving it to a carrier on the ODL. Scearce ruled that the remedy is to pay the carrier on the ODL for the amount of overtime in question."

In the event the auxiliary assistance (as defined above under A.2) is exhausted, management is required to draft non-ODL employees by rotating juniority. (Article 8.5.D.)

JCAM p. 8-12
However, if the Overtime Desired List does not provide sufficient qualified full-time regulars for required overtime, Article 8.5.D. permits management to move off the list and require non-ODL carriers to work overtime on a ***rotating basis*** starting with the junior employee. This rotation begins with the junior employee at the beginning of each calendar quarter.

M-00833
When full-time regular employees not on the Overtime Desired List are needed to work overtime on other than their own assignment, or on a non-scheduled day, Article 8, Section 5.D., requires that they be forced on a rotating basis beginning with the junior employee. In such circumstances management may, but is not required to seek volunteers from non-OTDL employees.

Management must abide by the Letter Carrier Paragraph even during route inspection with a few exceptions.

M-01106 H7N-1N-C 34068/34114 - Under the following conditions:
1. On the day or days during the week of inspection when the carrier is accompanied by a route examiner, management may require a carrier not on the ODL or Work Assignment List to work overtime on his/her own route in order to allow for a completion of the inspection.

2. On the other days during the week of inspection when the carrier counts mail, management may require a carrier not on the Overtime Desired List or Work Assignment List to work overtime on his/her own route for the amount of time used to count the mail.

3. **Did management argue that `operational windows' prohibited implementation of the Letter Carrier Paragraph**?

C#15827 Vrana 1996 Sustained
As with most overtime cases, I am faced with deciding whether the Union is guilty of "Monday morning quarter backing" or whether Management is guilty of poor planning.

Management may not ignore its obligations under Article 8, Section 5. Rather, Management must assess its ability to effectively deliver the mail in conjunction with its responsibilities under Article 8, Section 5.

Article 8, Section 5 unquestionably required Management to exhaust the qualified overtime desired list carriers ***before*** scheduling a volunteer on the work assignment list. In spite of this requirement, Parker failed to exhaust the overtime desired list before drafting Drew. Management relies upon the window of operations concept to avoid its responsibility of exhausting the overtime desired list.

The concept of an operational window is valid and recognized by Arbitrators. When Management proves that such an operational window exists, a letter carrier is not available to work overtime after such window, if it would cause the mail to miss a dispatch and result in an untimely delivery. See, e.g., Arbitrator J.E. Williams in Case No. S4N-3V-C 540688. In contrast, when Management fails to prove a window of operations, Arbitrators have held that Management must work employees on the overtime desired list up to the maximum before requiring non-overtime desired list employees to work overtime. See, e.g., Arbitrator Elvis C. Stephens in Case No. S4N-3N-C 38105.

In the instant case, Management failed to establish its alleged window of operations. For instance, the letter carriers' clock rings clearly establish that Management frequently requires them to work past the window of operations (See Jt. Ex. No. 2, pp. 10-18). Moreover, Parker admits that on March 20 and 21, 1995, letter carriers delivered mail until approximately 6:30 p.m.

Further, each of the Union's witnesses testified that Management does not observe the window of operations.

Other than a mere declaration, Management failed to introduce any evidence proving that it adheres to window of operations at the Northside station. Without more, I cannot conclude that there was a window of operations in effect at the station during the relevant time period. To rule otherwise, would allow Management to use its window of operations as both a shield and a sword.

C#08707 Levak 1988 Sustained

. . .the National Agreement and its incorporated Memorandum of Understanding require that overtime work be assigned in a certain manner.

The thrust of management's position is that it has the right to preshift all Letter Carriers, without regard to its Article 8 commitments or the "letter carrier paragraph," on a projected heavy volume of mail day following a holiday. Management argues that it is entitled to do so to meet the demands of its unilaterally declared Operational Window. The Arbitrator cannot agree with that position. Absolutely nothing within the National

Agreement supports management's reasoning.

. . .Overtime language necessarily inhibits management's right to schedule, and to assign and direct the work force, and necessarily results in increased costs in the form of overtime wages.

Further, in order to find in favor of the Service, the Arbitrator would have to conclude that the Beverly Hills management-imposed 4:30 p.m. Operational Window is binding on the Union and somehow overrides the overtime language of the National Agreement. That conclusion, too, is not possible. Such a unilaterally imposed managerial objective, however, soundly grounded in good business practice, cannot override express employees rights granted by the National Agreement. Article 3, Management Rights, allows some unilateral action, but does not aid the position of the Service, since this case involves clearly expressed specific employee rights.

C#10414 Collins 1990 Denied

This grievance was filed when carriers not on the ODL were worked and OTDL carriers were worked less than 12 hours. The Postal Service's basic argument came down to "operational window."

"The evidence establishes that as long as memory reaches - at least 17 years - with the exception of one period not here relevant the West Roxbury Post Office has closed, for delivery and delivery support functions, at 5:00 p.m. The Union argues that management never announced this fact; the Arbitrator believes that it is not necessary to announce what everyone concerned has always known. Furthermore the 5:00 p.m. closing hour, particularly on a winter Saturday evening, can hardly be said to constitute an abuse of management's discretion to make determinations as to how best to service postal customers. The principle thrust of the Union's case before the Arbitrator is that management had improperly refused to extend the closing hour on November 25; the Arbitrator, for the foregoing reasons does not agree with that contention."

C#07401 Searce 1987 Sustained

". . . If a valid operational restriction is demonstrated that compels an alteration, it is the undersigned's opinion that the Memorandum is sufficiently broad in its intent to cover such circumstance."

C#08021 Britton 1988 Sustained

"Basically, management endeavors to justify its decision in the instant matters to work employees not on the overtime desired list on the need for efficiency and to meet its operational `window.'

. . . the Employer is still obligated to adhere to the terms of the National Agreement as fashioned by the parties during the negotiation process. Pertinent hereto in this regard, is the language of Article 8, Section 5.G. of the National Agreement which expressly proves that `. . . full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week . . . .' Under Sub-Section 2 thereof, it is further provided that employees on the overtime desired list `excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.'

. . . it remains the responsibility of management to conform to and stay within the confines of the language agreed upon between the parties."

C#07049 LeWinter 1987 Sustained
The grievant in this case was an ODL carrier, and although the grievance was sustained, the arbitrator would not give the requested remedy of "triple pay."

"From the explanation given at the hearing, I must conclude that the window is a management policy that is unilaterally generated. There is no question that the carriers agree that they do not like working in the dark hours which, at the time of these grievances in January, comes early in the evening. However, I have not been given any reference to the window as a part of the collective bargaining agreement. The only contractual connection provided by the Employer arises from an arbitration opinion by Arbitrator Marlatt in Cases Nos. S4C-3U-C 7824 and S4C-3U-C 8101 (1987).

The matter here is not whether the window is desirable, nor whether it is the best approach for the parties. I have no jurisdiction to make such decisions. My authority is derived from the collective bargaining relationship as it defines the enforceable contract obligations of that relationship. When, as here, a party claims that the contract is violated, any practice which contravenes the contract must fall before it. A practice may affect a decision as to remedy, but it cannot vary the terms of the contractual obligations. Therefore, if the Union's claims as to the contractual requirements of Article 8 conflict with the window, the window policy must fall before the contract."

C#17181 Powell 1997 Sustained
" . . However when a rule is established great care and inquiry must be made of all other rules governing delivery of mail. Article 8 deals with overtime.

Conflicts between the proper interpretation of Article 8 and its utilization are magnified when management attempts to create an exception. If a carrier is not on the ODL, management must not assign overtime to that carrier without first fulfilling the obligation outlined in the Article 8 memorandum (p.148). Granted that management is given leeway to act within a rule of reason. However, arbitrary assignment of overtime to

non-ODL carriers when ODL carriers are available is in contradiction to the intent of Article 8."

4. **Would it have been reasonable for management to provide assistance**?

M-00884 Item #2 Memorandum of Understanding
December 20, 1988

"The determination of whether management must use a carrier from the ODL to provide auxiliary assistance under the letter carrier paragraph must be made on the basis of the rule of reason. For example, it is reasonable to require a letter carrier on the ODL to travel for five minutes in order to provide one hour of auxiliary assistance. Therefore, in such a case, management must use the letter carrier on the ODL to provide auxiliary assistance. However, it would not be reasonable to require a letter carrier on the ODL to travel 20 minutes to provide one hour of auxiliary assistance.

Accordingly, in that case, management is not required to use the letter carrier on the ODL to provide auxiliary assistance under the letter carrier paragraph."

C#10637 Talmadge 1991 Denied

In this case the supervisor determined that half hour "pivots" could be given to two non-ODL carriers as their own assignments would be done in undertime on the day in question. The carriers disagreed and in fact stated that their assignments would require overtime. Management contended that the carriers were told to turn in 3996's if they needed assistance, and the carriers contend that they requested 3996's, but were refused. The Arbitrator stated that he was not going to "enter the fray as to the whereabouts of the completed Form 3996(s)."

The Arbitrator put much weight on the absent 3996's.

"Absent the proper completion of the Form 3996, the Service, having determined after a recent route review that these routes were `undertimed,' had no way to predict that overtime would be necessary. It was postal supervisors' evaluation that the Carriers had ample time `to pivot' without the need to work overtime or for the Service consequently to resort to the OTDL."

There is assuredly uncertainty as to whether the Carriers completed the required PS 3996 before leaving the postal facility for street delivery."

C#12669 Erbs 1992 Sustained

This case was a Class Action filed in River Rouge, Michigan when management

required all carriers to work their non-schedule days. Management cited a snow storm (which took place weeks earlier) and concern for carrier safety (i.e., working in darkness) as their motivation.

"One of the first justifications for Management's action was that this was an emergency based upon the snow storm. It is noted, however, that the snow storm took place on January 14, 1992. This was almost a month prior to Management's implementation of this procedure to eliminate the problems created by `this emergency.' Management's evidence in regard to the problems that were created by this snow storm, and its effect on the operations almost four (4) weeks later, did little to establish an `emergency' or a back log which justified its actions. The Arbitrator was certainly not convinced that the January snow storm created the time sensitive, critical problems that were alleged. There was absolutely no convincing evidence that this snow storm created the back log which required the utilization of all of the non-ODL employees on the days in question. This was amplified even more when the Management witness stated that they could not bring in carriers early in order to maximize their usage because there was not enough mail early in the day. If there was such a backlog that it required all of this overtime from non-scheduled employees it would appear that that backlog could have been worked in the earlier hours. As the Union has stated: `You can not have it both ways.'"

"Nor was the Arbitrator convinced that the safety issue, which was raised later in the grievance procedure by Management representatives, was as critical as was suggested. It is noted that many of the carriers worked after dark. It is also apparent that not one carrier was allowed to work into a penalty pay situation despite the fact that some daylight was still available. Carriers who were working on their 5th day were cut off before they got into the penalty situation even though it was still daylight even though Management claims there was a time sensitive need. The conclusion in this regard is buttressed even further by the note from one supervisor specifically advising that some of the Grievants were not to work penalty overtime despite the alleged need for all of this extra work. Certainly there was a clear indication, with Management's own document, that its scheduling was dictated not in accordance with the terms of the National Agreement, nor necessarily by operational needs, but in order to avoid penalty overtime.

Management, under the provisions of the National Agreement, is to work ODL employees up to 12 hours before scheduling non-ODL employees. An exception, as previously indicated, would occur for time sensitive situations. The Postal Service has not proven that the time sensitive exception applies in this case. Nor has the Postal Service proven any other exception to the requirements of 8.5.G."

C#11251 Sirefman 1991 Denied

On the day in question the grievant, a non-ODL carrier, was given auxiliary assistance which proved to be inadequate and the carrier worked an additional hour plus. It is

noted that the carrier was allowed time off in the afternoon to attend to a personal matter after which he returned to deliver the remainder of his route. The Union would argue that management should have known that the grievant was then in an overtime situation and provided help under 8.5.G. The Arbitrator did not agree.

"In the instant grievance the carrier had a substantial amount of mail but had previously delivered such volume in a regular 8 hour day. He had requested 1? hours of assistance. Instead he was permitted to leave the office 55 minutes later than usual and was given 1 hour and 18 minutes of street assistance.

Therefore the intent of the `Letter Carrier Paragraph' was carried out. In a sense the Union's argument is that this assistance was inadequate as Wallace still went into overtime. But the furnishing of assistance is not an exact science as Arbitrator E. Levin pointed out in N7N-1E-C 1804. Here it cannot be said that the combined additional office time and auxiliary assistance was unreasonable.

Still the Levin Award observes that management should make arrangements to get a carrier back from the street on time if he is not on the OTDL. As indicated such reasonable efforts were indeed employed. Yet the Union points out that in the early afternoon Wallace asked permission to cease delivery to attend to a personal matter and it was granted. After that he returned to the job, but the delay made it obvious that he would have to run significant overtime, and that `notice' should have triggered 8.5.G.

In my view that is an unnecessarily narrow reading of Article 8. There was nothing in this record to indicate that management had known of the request for time off during the route until around 2PM that very day. Surely that would fit any reasonable sense of an `unforeseen accident.' Secondly given the combined additional office time and street assistance, together with knowledge of the route the reasonable expectation was of sufficient overall delivery time, and Wallace's failure to deliver at a sufficient rate could be characterized as truly `unforeseen.'"

C#07886 McConnell 1988 Modified

This case is the result of four grievances which were filed for events on two different days. On both days a non-ODLer was worked when an OTDL carrier was available. Without going into all the specifics of the case, it was determined that one of the non-ODLers would be paid a remedy.

"Management frequently faces a manpower squeeze because of extra heavy volume and/or unscheduled absences. Management is constantly required to make decisions as to how best to meet unexpected, though not unusual, manpower needs. And it is Management's responsibility to meet its manpower needs without violating the Agreement.

Protection of the right of employees not to work overtime is a guarantee under the Agreement. The existence of some flexibility in assignment of overtime to those not on the ODL encourages some supervisors to take advantage of the flexibility to make the easiest possible decisions on the use of non-ODL carriers, or to make use of non-ODL carriers on overtime to save money without seeking other alternatives. This was not the intent of the contract provisions protecting the rights of those not wishing to work overtime.

With respect to the use of non-ODL carriers to meet certain manpower needs, supervisors in the Buffalo Post Office had previously been put on notice that contractually approved assignments would have to be made to meet manpower shortages such as occurred September 14 and 16. (See case #E4N-2W-C 4746) And, in fact, the Buffalo Post Office itself has accepted responsibility for violations in similar cases. (See Grievances 62/87; 80/87; 109/87) A recurrence of such incidents leads to the conclusion that perhaps not sufficient importance is being attached by supervisors to the contractual rights of employees who do not wish to work overtime."

C#07727 Jacobowski 1988 Denied

This case stems from a non-ODL carrier being worked on his non-scheduled day and therefore does not fit directly into the "letter carrier paragraph" scenario. The grievant thought that his very high seniority made him immune from having to work overtime. Arbitrator's comments follow:

"On the basis of the above outlined facts, circumstances and contentions in this case, I have readily concluded that they fully justify the employer's mandated overtime of the grievant, and that the union has failed to prove its case or show otherwise. I so conclude for the following reasons.

1. By far the main and primary reason is that the employer has shown full persuasive justification from the facts and circumstances at hand that day. I have specific reference to the unusual mail volume, the 14 carriers missing or absent, 8 regular and 6 PTF's, the full utilization of all available help, the substantial overtime worked by most or all, either that day or earlier in the week and the uniqueness of the grievant's route requiring an experienced carrier. Within the time frames required for delivery, no other help and scheduling was available to avoid the required overtime of the grievant.

2. A number of the union's arguments and contentions were conclusively disproven, discounted or conceded by the evidence, and the admissions of the local branch representatives. The union's main claim was on the requirement to work PTF's 10

hours, but over half were assigned elsewhere and the remaining available worked almost 10 hours. Even the local reps did not extend their claim beyond their own location, as the first sentence of Article 8.5 itself provides. They conceded the impropriety of running deliveries late into the night hours. They conceded the impracticality and unavailability of certain night hours. They conceded the impracticality and unavailability of certain individual carriers from the examples explored. No ODL list was produced and no claim of 12 hours by ODL's was made during the initial steps of the grievance.

3. It appears that the union made its claim and rested its case during the initial steps of the grievance on the oversimplified premise that the top seniority of the grievant and his non-ODL status entitled him to avoid the overtime mandated, and to assume that among all the other employees, the grievant could have been accommodated, but, without taking into account the specific circumstances and problems at hand that day and without taking into account the full provisions and context of Article 8 and the Memo that were applicable."

5. Was management ordered, or had they agreed, to cease and desist violations of the Letter Carrier Paragraph?

C#08258 Lange 1988 Sustained

The issue of this case was to establish the appropriate remedy for a "Letter Carrier Paragraph" violation.

"These matters arose as the result of the two instances (October 26 and October 27, 1987) where the Grievant was required to work overtime although he was not on the `Overtime Desired List' (`ODL') and other carriers on the ODL were available on the days in question.

The parties stipulated that a violation of the `letter carrier paragraph' had occurred and the matter before the undersigned for determination was the remedy. Due to the limited nature of the instant proceeding, it is unnecessary to cite the provisions of the National Agreement or otherwise recount the events surrounding the violation. It is further unnecessary to analyze the `letter carrier paragraph' beyond the generality that it creates a situation where Postal Service management has agreed to substantial restrictions on its ability to assign overtime work to carriers who have not indicated a desire to work overtime.

The Union argued that the undersigned should assess a monetary penalty which would be equivalent to the `penalty overtime' rate. A monetary penalty would be appropriate since the Spokane Post Office had been on notice of a 1986 violation of the `letter carrier paragraph.' The Service argued that a monetary penalty was inappropriate, and that the Grievant should receive, at most, some additional paid time off. The Service

argued that the current Shadle Garland Station Postmaster was not at that station in 1986 and was unaware of the disposition of the prior `letter carrier paragraph' grievance.

In Case No. H4N-NA-C-21 (5th Issue), Arbitrator Richard Mittenthal analyzed the `remedy' issue for violations of the `letter carrier paragraph' (Union Exhibit A). Although his decision in that particular case was that `...no money remedy is justified...,' his discussion is enlightening:

For reasons set forth above, the appropriate remedy for the violation of the `letter carrier paragraph' is that (1) the Spokane Post Office be ordered to case and desist from any future violation of the `letter carrier paragraph' and (2) the Grievant shall receive penalty overtime for the overtime worked on October 26 and October 27, 1987."

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 8, JCAM
4. Memorandum of Understanding, December 24, 1984
5. Memorandum of Understanding, June 8, 1988 (M-00833 - Joint Statement on Overtime).
6. Memorandum of Understanding, December 20, 1988 (M-00884)
7. Article 19
   ELM 432.3 Work Schedules and Overtime Limits
   M-39 122.3 Authorizing Overtime and Auxiliary Assistance
   M-41 280 Auxiliary Assistance
   EL 401 V.C. and V.D.
8. Article 31 Section 3 Information

D. Arguments

1. ODL carriers were available to perform the work.

C#07956 Scearce 1988 Denied

In this case non-ODL carriers were worked when an ODL carrier was not. The ODL carrier was the grievant.

"The case presented here by the Union suffers from a lack of documented proof to support the claims presented. It asserts, but does not demonstrate, specifics concerning when the grievant may - or may not - have worked, or had been denied overtime opportunities, and/or when other employees worked overtime and he did not. The record is even devoid of a showing that the grievant was on the ODL.

We need look no further to conclude that the Union's demand is unsupportable. For its part, the Union asserts that the Service's response at Step 2 is sufficient cause to warrant a favorable finding: the Service responded to the written grievance (at Step 2) by relying upon Article 8, Section 5.C.2.d. To that extent, the Union is correct, since the rationale set out in national arbitration case H4N-NA-C-21 (5th Issue) established the potential that denial of work opportunities to those on the ODL could arise if a non-ODL carrier was forced to work his own route while ODL carriers were available to do so but not called upon. (The remedy, however, is a different matter but need not be addressed here since the Union cannot prevail due to lack of proof.) The problem here is a lack of showing that such circumstances existed, i.e., no ODL, no work schedules showing who did - and did not - work on specific days and, if so, that the grievant was available to cover such other routes. It is axiomatic that the party bearing the burden of proof be able to do more than merely assert error on the part of the offending party. The Union has not met its obligation in that regard, and the Award is drawn accordingly."

2. **Other assistance was available.**
   Auxiliary assistance was available at a similar rate of pay (i.e., casual employees on straight or overtime, PTF employees on straight time or at the regular overtime rate, carriers on the ODL at the regular overtime rate, regular carriers on undertime, unassigned or reserve carriers with no hold down on straight time). Schedules and 3996's, time cards, electronic time keeping printouts, showing the availability of these carriers.

3. **The contract requires compliance with the language and there is no valid operation window.**
   The "operational window" that management is claiming prohibited it from honoring the LCP is not a legitimate operational window. Documentation of actual office closing times and last dispatch times should be included, as well as prior cites and evidence to establish the self imposed window is repeatedly violated.

4. **This is not an isolated instance.**
   Management is aware of its obligation concerning Article 8 and the Letter Carrier Paragraph. The Union can show that management has signed a "cease and desist" concerning this type of violation and/or previous monetary remedies have been won. Past settlements should be included.

5. **Cease and desist will not suffice.**
   A monetary remedy is appropriate (i.e., the non-ODL carrier forced to work overtime to be paid an additional 50% of their straight time rate and the carrier who should have worked paid what they would have earned had they worked).

E. Documentation/Evidence

1. Electronic Time Cards (ETC) showing begin, leave, return and end tour.
2. Time cards/Employee Activity Reports (Electronic Work Hour Transfer Report)
3. PS 3997 Unit Daily Record
4. PS 1813 Late Leaving and Returning Report
5. Statement from the employees who were available as auxiliary assistance.
6. Statement of employee required to work when auxiliary assistance was available.
7. Copy of the unit ODL for the relevant quarter.
8. Unit seniority list - indicating type of employee: PTF, ODLer, etc.
9. PS 2608 Grievance Summary - Step 1
10. PS 2609 Grievance Summary - Step 2
11. The "Letter Carrier Paragraph"
12. Local memo if relevant
13. Mail dispatch schedule
14. PS 1571, Curtailed Mail Report
15. PS 3996 Auxiliary Assistance Request

F. Remedies

1. Injunctive relief, cease and desist.
2. The effects of any remedy should be to correct the harm to the employee who was improperly required to work and to prevent future violations from occurring. Management believes that an appropriate remedy in these instances would be to compensate the employee an additional 50% straight time pay for the overtime worked. Union believes that an additional 50% is appropriate for isolated or initial violations, however, repeated violations may required higher monetary remedy. Arbitrators have ruled that administrative leave, additional time and a half or double time are viable remedies in these instances.
3. The appropriate remedy for a bypass is to pay the employee the actual amount of time worked by the other employee at the bypassed employee's appropriate rate.
4. In flagrant or repeated violations the remedies may progress.

OV 8.5.G Chart

OVERTIME - ARTICLE 8.5(G)

A. Case Elements

1. A full-time regular non-ODL employee is worked overtime off their assignment on a scheduled day.
2. A full-time regular non-ODL employee is worked overtime on their non-scheduled day.
3. In both 1. and 2. above, auxiliary assistance is available.

B. Definition of Issues

C#05860
C#06775
C#07323
C#06775

1. Was auxiliary assistance scheduled up to 12 hours?

C#07673

2. Was the overtime assigned to the regular because he was considered by management to be best qualified to do the work?

C#03319

3. Did management argue that it is inefficient to split a route between on-duty ODLers and call in a non-OLDer?

C#04479
C#09384

4. Did management argue that it is inefficient to call in an ODLer and instead split the work among non-ODLers?

C#10894
C#01674
C#09450
C#10717
C#10383

5. Did management argue that it had "good cause" to require non-ODLers to work overtime off their assignment?

C#10347
C#08707
C#16352
C#16738
C#16690

6. Did management argue there's a valid "operational window"?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 8 (8.5.G.), JCAM

4. Article 19
   M-39 Section 122.3 Authorizing Overtime and Auxiliary Assistance
   M-39 Section 122.32 When relief is essential
   M-41 Section 280 Auxiliary Assistance
   ELM 432.6 Guarantee Time
   EL-401 Handbook
   F-21 Time and Attendance
   F-22 PSDS Time and Attendance
   POM 617.2

C#10873 5. Article 41 Section 1.C.4.
6. Applicable memoranda

D. Arguments

C#19599 1. The ODLer could have worked pre-tour.
2. The ODLer does not have to be available to work all the overtime needed.
C#07637 3. The ODLer is qualified to do letter carrier work.
C#06775 4. Volunteers on a holiday are for 8 hours, overtime to non-ODLers.
C#03319 5. Management should pivot a route with ODLer prior to calling
C#04479 in non-ODLer.
C#09384
6. Call in ODLer prior to pivoting non-ODLers.
C#12669 7. Safety (darkness) was not an issue.
8. No valid emergency existed.
9. Management was scheduling purely to avoid penalty time pay.
10. Management consistently misses operation window.

E. Documentation/Evidence

1. Time cards/employee activity reports (PSDS offices)
2. Form 3997 Unit Daily Record
3. Form 1813 Late Leaving and Returning Report
4. Statements from OLDers
5. Statements from non-ODLers
6. Copy of Overtime Desired List

7. Seniority List
8. Form 3996(s)
9. Steward's statement detailing what auxiliary assistance was available.
10. Truck dispatches/schedules
11. Number of times employees were out past self imposed operational window.

F. Remedies

1. First violation injunctive relief, cease and desist.
2. The non-ODLer required to work off assignment or non-scheduled day overtime should be compensated an additional 50% of straight time pay.

C#07027

3. The ODLer, or available auxiliary assistance employee, should be compensated for the time worked by the non-ODL employee at the appropriate rate of pay.
4. Provide pay adjustment forms to NALC.
   PS 2240 Pay Adjustment Request
   PS 2243 - PSDS Hours Adjustment Record

ARTICLE 8, OVERTIME - ARTICLE 8.5(G)

A. Case Elements

1. A full-time regular non-ODL employee is worked overtime off their assignment on a scheduled day.
2. A full-time regular non-ODL employee is worked overtime on their non-scheduled day.
3. In both 1. and 2. above, auxiliary assistance is available. (Auxiliary assistance is casual employees, PTFs up to and including the penalty rate, available full-time regular employees, such as unassigned or reserve carriers at the straight time rate, and Overtime Desired List carriers up to and including the penalty rate.)

B. Definition of Issues

1. Was auxiliary assistance scheduled up to 12 hours?

Article 8, Section 5.G

"Full-time employees not on the "Overtime Desired List" may be required to work overtime only if all available employees on the "Overtime Desired List" have worked up to twelve (12) hours in a day or sixty (60) hours in a week."

Article 8, Section 5.D

If the voluntary "Overtime Desired List" does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

M-00833 - Joint Statement on Overtime - June 8, 1988 (in part)

Mandatory Overtime. "The `letter carrier paragraph' of the 1984 Overtime memorandum obligates management to seek to use auxiliary assistance, when available, rather than requiring a regular letter carrier not on the Overtime Desired List to work overtime on his/her own assignment on a regular scheduled day.

When full-time regular employees not on the Overtime Desired List are needed to work overtime on other than their own assignment, or on a non-scheduled day, Article 8, Section 5.D., requires that they be forced on a rotating basis beginning with the junior employee. In such circumstances management may, but is not required to seek volunteers from non-OTDL employees."

C#05860 Mittenthal 1986 Sustained

"First Issue - An employee on the OTDL does not have the option of accepting or declining on the fifth scheduled workday, on the seventh day, or beyond eight hours on a non-scheduled day. Instead, an employee on the OTDL must work until the exhaustion of the 12 and 60 hour limits before an employee not on the list is required to work overtime.

This general rule, however is inapplicable to situations involving a letter carrier working on a regular scheduled day. Such situations are controlled by Article 8, Section 5.C.2.d and the `letter carrier paragraph' of the overtime memorandum."

M-00859 Memorandum October 19, 1988
"The parties agree that with the exception of December, full-time employees are prohibited from working more than 12 hours in a single work day or 60 hours within a service week. In those limited instances where this provision is or has been violated and a timely grievance filed, full-time employees will be compensated at an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12 or 60 hour limitation. The employment of this remedy shall not be construed as an agreement by the parties that the Employer may exceed the 12 and 60 hour limitation with impunity.

As a means of facilitating the foregoing, the parties agree that excluding December, once a full-time employee reaches 20 hours of overtime within a service week, the employee is no longer available for any additional overtime work. Furthermore, the employee's tour of duty shall be terminated once he/she reaches the 60th hour of work, in accordance with Arbitrator Mittenthal's National Level Arbitration Award on this issue, dated September 11, 1987, in case numbers H4N-NA-C- 21 (3rd issue) and H4N-NA-C 27."

C#07323 Mittenthal 1987 Sustained
"This grievance concerns the pay consequences, if any, of Management sending an employee home before he completes a regularly scheduled day because of the 60 hour work limitation in Article 8, Section 5.G.2. of the National Agreement. The Unions insist that he is entitled to be paid for the regularly scheduled hours he lost, that these hours are part of his guaranteed workweek. The Postal Service disagrees.

To better understand the issue, it would be helpful to consider a hypothetical example. Suppose "X" is a full-time regular on the overtime desired list (ODL). Suppose further that his regular schedule for given week was Monday through Friday on day tour and that he worked the extra hours indicated below:

	S	S	M	T	W	T	F
Hours Scheduled			8	8	8	8	8
Extra Hours	8	4	4	4	4		
Actual (Total) Hours	8	12	12	12	12	8	

All of the extra hours, eight on Sunday and four on Monday through Thursday, were paid for at the overtime rate (time and one-half) or the penalty overtime rate (double time). At the end of "X"'s Thursday tour, he had worked a total of 56 hours. My original award in this case (dated May 12, 1986) held that Article 8, Section 5.G.2. establishes `an absolute bar against an employee working more than 60 hours in a service week.' Management was hence obliged to send "X" home after four hours of work on Friday, his last regularly scheduled day."

C#07323 Mittenthal 1987 Sustained
"The full-time regular is thus plainly guaranteed those core hours." Any analysis of the problem must begin with certain Management admissions. The Postal Service argued in the earlier case that `Article 7, Section 1 and Article 8, Sections 1 and 2C constructed a core schedule for full-time regulars' and that `a full-time regular is guaranteed that basic core schedule.' For example, Article 8, Section 1 speaks of the `normal workweek' being `forty (40) hours per week, eight (8) hours per day . . . .' The full-time regular is thus plainly `guaranteed' those core hours, those hours which are part of his regularly scheduled week.

M-00919
"A full-time employee sent home upon reaching the sixty (60) hour limit after having worked a partial nonscheduled day is entitled to be paid for the eight (8) hour guarantee provided in Article 8.8.B. Accordingly, the grievant in this case shall be paid for four (4) hours at the time and one-half rate."

2. Was the overtime assigned to the regular because he was considered by management to be best qualified to do the work?

C#07637 Caraway 1987 Modified
Article 8, Section 5.G. establishes the priority as to overtime between employees on the "Overtime Desired" list and full-time employees not on this list. In strong unambiguous language the employees not on the "Overtime Desired" list only work overtime where the employee on the "Overtime Desired" list has worked up to twelve (12) in a day. This means that the employee on the "Overtime Desired" list gets a priority call on any available overtime.

This principle was set forth by Arbitrator Schedler in the decision dated November 16, 1986 in Case No. S4N-3W-C-12625 where he said:

> `The word `only' is very restrictive and its use in Section 5.G. clearly limits the circumstances on which an employee, not on the Overtime Desired list, may be assigned overtime.'"

"While the grievant in this case was an ODL carrier, rather than a non-ODL carrier, the Arbitrator speaks of the obligations management has under 8.5.G., as well as to the issue of scheduling `best qualified'.

"Mr. Brooks had signed the `Overtime Desired' list and agreed to work up to twelve (12) hours per day. This is a commitment which he made which obligated the Postal Service to offer him overtime over other employees not on that list. The evidence showed that January 6, 1987 was a very heavy mail volume day. Auxiliary assistance was requested on every route except one. There were three (3) carriers scheduled in early, this was on Routes 2304, 2314 and 2319. This meant that on the day before, January 5, management knew that it had a heavy mail volume requiring certain carriers to come in early. There is no reason why Mr. Brooks could not have been scheduled to report in early in order to satisfy the requirements of Section 5.G. By not scheduling Mr. Brooks in early on January 6 the Postal Service violated the cited provision and did not fulfill its commitment to exert every possible effort to assure Mr. Brooks overtime up to twelve (12) hours per day. While it is true that Mr. Brooks was the second to last carrier to report back at the end of the day, there was no reason why management could not have scheduled him to come in early and work overtime on that occasion."

"In its Step 2 decision management stated that Mr. Brooks was not proficient in the casing of other routes and accordingly the implied conclusion is that he could not have performed any work at the station if he had reported early. However, this contention must be rejected in terms of the Letter of Agreement of February 8, 1984 between Mr. Bayliss of the Labor Relations."

M-00291

. . . "A full-time regular letter carrier is considered to be a qualified craft employee, and the overtime provisions in Article 8 do not provide for the assignment of the `best qualified' employee available."

3. Did management argue that it is inefficient to split a route between on-duty ODLers and called in a non-OLDer?

C#03319 Aaron 1983 Sustained

On the basis of the entire record, the Arbitrator makes the following: "Under the particular facts of this case, the employer violated Article VIII, Section 5 of the 1978-1981 National Agreement by calling in an employee not on the Overtime Desired list when employees who were on the list were on duty.

The employer shall reimburse the following employees by paying them overtime pay for the indicated number of hours, respectively:

J. Ryan - 2.50 hours
D. Bowser - 1.50 hours
D. Arvin - 1.50 hours
A. Bowman - 1.50 hours
L. Sipe - 1.00 hour

"On 27 February, of the 12 carriers on the Overtime Desired list of the 03 section, one had bid out of the section, one was an acting supervisor, one was on sick leave, and one was on annual leave. Of the eight remaining, all were already scheduled for work, and three were scheduled to work until 5:00 or 5:15 p.m. on their own routes. Management thus had only two options: (1) it could `pivot' the vacant route among the remaining five carriers, or (2) it could call in an employee not on the Overtime Desired list to work the route on overtime.

`Pivoting' is defined in Section 617.2 of the Postal Operations Manual (JX-3) as follows:

.11 Pivoting is a method of utilizing the undertime of one or several carriers to perform duties on a temporarily vacant route or to cover absences. Non-preferential mail may be curtailed within delivery time standards on the vacant route and/or on the routes of the carriers being pivoted.

.12 Pivoting is not limited to periods when mail volume is light and when absences are high but can be utilized throughout the year for maintaining balanced carrier workloads.

Management followed the second course, calling in Ronald Summers, the carrier regularly assigned to Route No. 317, who had the day off."

"It would be a poor management practice to split up a route on overtime when a regular is available. Additionally it would be a disservice to our customers to have them receive their mail in the late afternoon by carrier working on overtime."

The Union then appealed to Step 3. Management's response, dated 3 June, read in part: "It is Management's position that all contractual provisions have been met where all Carriers on the Overtime Desired List have been called into work. Management is not obligated to split up a route to be carried by those employees on the Overtime Desired List already at work and assigned to other duties.

In our judgment, the grievance involves an interpretive issue pertaining to the National Agreement or a supplement thereto which may be of general application, and thus may only be appealed to Step 4 in accordance with the provisions of Article XV of the National Agreement.

At the Step 4 meeting, Howard R. Carter, for the Postal Service, and Halline Overby, for the Union, jointly executed a statement, dated 10 August, that no national interpretive issue was presented by the grievance and that it should therefore be remanded to step 3. On the remand, management again denied the grievance; its answer, dated 15 September, was identical with that given on 3 June. The case was then appealed to arbitration.

". . . the position taken by the Postal Service throughout the four steps of the grievance procedure was that Article VIII, Section 5 does not require it to assign overtime work to carriers on the Overtime Desired list if they have already been called in to work, and that management has no obligation `to split up a route to be carried by those employees . . . already at work and assigned to other duties.'

This interpretation is predicated, mistakenly, on Article III, which is expressly made `subject to the provisions of this Agreement,' including Article VIII.

The Postal Service advanced other, more credible arguments at the arbitration hearing to support the reasonableness of its decision to assign the disputed work to Summers, but none of these except the later delivery of mail had been raised during earlier steps of the grievance procedure."

"Both parties seem to accept Arbitrator Bernstein's good cause standard. By its very nature, however, this standard must be applied on a case-by-case basis; it does not lend itself to embodiment in a per se rule. In this case the Postal Service relied almost entirely on its own per se rule during the grievance procedure, and I have concluded that this rule goes too far. The Union should not interpret this decision, however, as meaning that under any conceivable circumstances the Postal Service is forbidden to assign overtime work to a carrier not on the Overtime Desired list simply because another carrier or carriers on that list, who have already been scheduled for work, desire to perform some or all of the overtime involved.

Although there is some question in my mind that all of the overtime work in this case, if pivoted as the Union asserted it should have been done, could have been completed before dark, the Postal Service waived its right to dispute the Union's claim by failing to challenge it directly in the grievance procedure. Accordingly, I shall grant the remedy requested."

C#13181 Britton 1993 Sustained
Finally, it appears to the Arbitrator that early scheduling, and or pivoting the routes of employees Dickerson and Payne among the available ODL's, offered management a viable alternative to the action taken. In this connection, the Employer explains that it could not have brought the carriers in early because of the language of the M-39 (Management Exhibit No. 10) which states that "At least 80 percent of the carriers daily delivery workload should be on or at their cases when they report for work." This could not be done, according to the Employer, because the clerks would be in the process of spreading the mail and carriers would experience non-productive time. This, it seems to the Arbitrator, is not a fully satisfactory explanation of management's failure to utilize the available option of pivoting Payne's and Dickerson's routes among the available ODL's in order to avoid the action made the basis of these grievances.

4. Did management argue that there is no obligation to or it is inefficient to call in an ODLer and instead split the work among non-ODLers?

C#04479 Rentfro 1984 Sustained
"After careful consideration of all the evidence in this matter, it is the Arbitrator's conclusion that Management violated Article 8, Section 5, when it failed to offer Grievant the available overtime and instead utilized carriers not on the OTDL.

The requirements for overtime assignments set forth in Section 8.5 are clear. Management must offer overtime to carriers on the OTDL before it requires non-OTDL carriers to work. Section 8.5.C.2.a distinguishes between those on the OTDL and those not on the OTDL; it makes no mention of a difference between carriers on or off duty. Management does not fulfill its obligation by merely considering the OTDL carriers on duty - it also owes an obligation to those OTDL carriers not on duty. This is not to say that Management must call in off-duty OTDL carriers any time minimal overtime is available. That would be unnecessarily expensive and contrary to Management's mandate to carry out operations efficiently. Management must and does have discretion in those situations.

"On October 25, 1982, however, there were 12.84 hours of overtime available after all on-duty OTDL carriers were given overtime. With more than eight hours of overtime available, the assignment became one which must be offered to any off-duty OTDL carrier available.

Management's reasons for not offering the overtime to Grievant are not persuasive. It is first claimed that since there were no single eight-hour routes available, it had no obligation to call in an off-duty OTDL carrier. There is nothing

in the National Agreement which would require Management to assign the entire eight hours on one route. In practice, carriers are often assigned to `swings' of various routes in the course of an eight-hour shift. In fact, Management used `swings' extensively on October 25, 1982, to cover all of its routes."

C#09384 Ables 1989 Sustained
"On February 18, 1989, during a snow storm, two employees scheduled to work did not report, resulting in two unscheduled absences. First class mail was cased and ready for delivery at 9:30 a.m. A 204 B supervisor assigned work such that mail was not delivered on a certain route (Route 21).

The grievant, on the Overtime Desired List, was available to work but was not called.

At 4:45 p.m., the postmaster learned that mail had not been delivered on Route 21. He assigned two regular letter carriers who had not clocked out to deliver mail on that route. One such carrier worked 1.68 minutes; the other work 1.77 minutes. Also, a temporary, casual, employee worked two hours overtime on Route 21.

The best evidence is that most of the mail was not delivered, that day, on Route. 21.

The union's request that the grievant be paid for eight hours, at the overtime rate, is based on a claim that the Postal Service violated Article 8, Section 5 by not calling the grievant early in the day when it was clear a letter carrier was needed to service the route in issue."

"Management's argument that it decides when overtime is needed is besides the point in dispute. Management had already decided overtime was needed. It required two on-duty letter carriers to deliver mail on the uncovered route - on overtime. Most of the mail was still undelivered even after assigning a temporary, casual, employee to cover the route. Clearly, overtime was needed. The Overtime Desired List is designed to provide qualified employees to perform required service. The grievant was positioned to do this. He should have been called."

5. Did management argue that it had "good cause" to require non-ODLers to work overtime off their assignment?

C#10894 Scearce 1991 Denied
"This is a grievance filed on behalf of one letter carrier; it is not a class action on behalf of all carriers at Crosstown Station who were on the ODL on July 16, 1990. The Union asserts that `Article 8, Section 5.G acts as a guarantee that signatories to the

ODL will be entitled to overtime to the maximums before it is offered to carriers not on the List. When this provision is read in conjunction with `Article 8 Memorandum of Understanding' cited in the Agreement (at the base of Article 8, Section 5.G), it is apparent that the provision was primarily intended to protect the interests of those employees who have opted not to work overtime. To do so, the drafters provided that, when a carrier signs the ODL, he/she commits to be available to work up to the maximums, if required."

"The Union argues that the Service could have pivoted this route in order to permit carriers on the ODL to work in lieu of calling in English. Even if the limited scope of this grievance could be overlooked (the demand for compensation for one hour for the grievant), it is sheer speculation whether there would have been sufficient carriers available to cover the vacant route for the other six (6) hours and, if so, when such route would have been completed. The Union raised no such arguments as part of the grievance procedure. While pivoting may be an alternative in certain instances, it is not apparent that it would have been so here.

In sum, I find an insufficient showing by the Union to support the claim in this grievance."

C#01675 Bernstein 1981 Denied

"Resolution of the present controversy involves the balancing and adjustment of two sometimes-conflicting rights: the right of the Service to operate in the most efficient possible manner (recognized in Article III) and the right of unit members to be protected from compulsory overtime (recognized in Article VIII).

Both rights are important, but neither is absolute. The preamble in Article III expressly recognizes that all of the management rights alluded to herein are `subject to the provisions of this Agreement.' Similarly, the unit members have no absolute right to avoid compulsory overtime; they can be forced to work it if `sufficient qualified' volunteers are not available."

The conflict in the present case concerns whether sufficient volunteers are available, thus barring the Service from resorting to compulsory overtime, if they are not available in the precise time periods that management wishes the overtime to be worked (which in this case would be 4:00 to 5:00 p.m.), but they are available at a different time during the same day (in this case, 5:00 p.m. to 6:00 p.m.). Management claims it has the sole right to schedule work at any time it chooses. The Union, on the other hand, argues that management has a duty to utilize all people on the voluntary overtime list for the maximum number of hours that they can be required to work per day (ten hours) before it can force others to take compulsory overtime assignments.

"The Arbitrator believes the proper construction of the collective bargaining agreement requires a position somewhere between the disparate interpretations put forward by the parties. The Service does have the right in the first instance to schedule working hours, but the scheduling that it does must be `reasonable'. The concept of reasonableness necessarily includes some recognition and protection of the overtime allocation principles contained in Article VIII. The avoidance of compulsory overtime by maximum utilization of the service of the employees on the "Overtime Desired" list is a factor that must be considered in any appropriate scheduling decision. However, that is not to say that avoidance of compulsory overtime is an overriding consideration; there are many other factors that also are relevant, and they may sometimes dictate a work schedule that involves more compulsory overtime than is absolutely necessary. However, if the Service does adopt such a schedule, it must have `good cause' for doing so."

C#09450 Scearce 1989 Denied

"Did the Service violate the Agreement and/or related regulations and understandings when it did not utilize letter carriers cited in the grievance on their non-scheduled work day, or when it used volunteers or required employees not on an Overtime Desired List to perform such duties on July 5, 1988; if so, what is the appropriate remedy?

"The Union contends that the Service was obliged to schedule coverage on the open routes in advance which, arguendo, would have called for use of the grievants in lieu of non-ODL carriers. There is no credible evidence in the record that the Service had knowledge that routes 9008, 9009 and 9012 would not be covered (although a fair surmise might be made that more than a usual number of vacations would be requested in conjunction with a holiday), but even had such circumstance been known, the Service is not precluded from scheduling its available work forces to cover such voids. It is noteworthy here that there has been no showing that any of the non-ODL carriers grieved being called to perform such overtime work.

While retrospective analysis <u>might</u> support a conclusion that bringing in one or more carriers on their off-days would have been feasible or even preferable, it must be remembered that the parties have endeavored to protect the rights of employees to be able to observe their non-scheduled days off. In any case, the evidence and arguments raised by the Union do not support a finding of error by the Service sufficient to affirm the grievance."

C#10717 Liebowitz 1991 Denied

"This case arises in the Farmington NH Post Office; there is one regular route and one auxiliary route. Mr. Krawczyk, the grievant, is the only full-time regular Letter Carrier in the office. There are two PTF Letter Carriers. The grievance arises because on Saturday, March 24, 1990, one of the PTF Letter Carriers, Robin McKuhen, was granted Annual Leave and Mr. Krawczyk was required to work overtime on his non-scheduled day delivering his route. He was paid overtime at time and one-half for so doing; while the grievance papers requested that he be paid double time, the Union's position, at hearing and in discussion of the case in a conference call with the advocates on March 13, 1991, is that it seeks a declaration of rights and not a monetary remedy because this was the first time that this occurred."

"The Union contends that granting annual leave to a PTF carrier so as to require the working of involuntary overtime by the regular carrier is a poor business decision and contrary to the intent of the National Agreement to minimize assignments of involuntary overtime to full-time regular employees. The Union points out that this date did not fall within the choice vacation period(s) referred to in Article 10.3 of the National Agreement. It cites Article 10.3.D.4: "The remainder of the employee's annual leave may be granted at other times during the year, as requested by the employee." The Union emphasizes the word "may" and argues that the Service was not required to grant annual leave to the PTF carrier on the date in question; it could have required her to work and thus spared the grievant, the regular carrier, from being assigned to work his route on a non-scheduled day."

"Based upon the provisions of the National Agreement and of the awards, cited above, were this a case involving repeated occurrences of this event, it would be fair to say that unless there were a valid reason to schedule one of the two PTF Carriers to be off on one of the regular's non-scheduled days, the office should avoid such a schedule; that is, having to require Mr. Krawczyk to work on one of those days on overtime. In an office of this size, however, some flexibility is required. These observations are appropriate per the submissions and the discussions at hearing and in the conference call. They respond to the parties' positions.

But this grievance involves only a single instance. Events alleged to have occurred after the date in question are not a part of this grievance and therefore not before me. The issue boils down to whether or not the Union, which has the burden of proof on a contract case, satisfied that burden by its showing or whether it fell short as the Postal Service maintains.

In this single instance, I conclude that not enough has been shown to substantiate

the view that management violated the intent of the National Agreement in the assignment of Mr. Krawczyk on the day in question. We do not have sufficient evidentiary information to sustain such a finding. Therefore, on the limited facts and circumstances of this particular case, this grievance should be denied.

Award - On the particular facts and circumstances of this case, and for the reasons explained in the Opinion, this grievance is denied."

C#10383 Taylor 1990 Denied

"(b) On May 2, 1990, at 2:45 p.m., the League City policy notified Management that a Postal vehicle had been involved in an accident. A supervisor immediately proceeded to the scene of the accident. Upon learning that there were no serious injuries the supervisor then proceeded to cover the remainder of the Route which remained undelivered. The most immediately available Carriers, those who had completed their Route and who had returned to the Station, were assigned the task of delivering the undelivered mail on overtime.

Management contended that because an emergency situation had arisen it did not have time to find Carriers who were on the ODL; that it had to call upon the first available Carriers, even if they were not on the ODL, to deliver the mail. The Union protested, however, that Management should have taken the mail, even on uncompleted Routes, to Carriers who were on the ODL and that Management violated the provisions of Article 8 when Carriers not on the ODL were utilized to perform the tasks."

"There was an emergency when the policy notified League City management that a Carrier and a Postal vehicle were involved in an accident. After first attending to the needs of the Carrier involved in the accident, supervision was faced with the immediate problem of getting the remaining mail in the damaged vehicle delivered to the patrons on the Route. Under such an emergency situation and the short time frame involved, Management gave the assignment to Carriers who had completed their Routes and who had returned to the Post Office even though they were not on the ODL.

Certainly there was no Contractual violation involved under these circumstances. Management fulfilled its mission to deliver the mail in the most practical and expeditious manner while at the same time preserving the sanctity of the National Agreement. Once again it is unreasonable to argue that supervision should have delayed the mail delivery until Carriers on the ODL could be located even if mail had to be taken to them on the street and the 5:00 window exceeded. This argument is without logic and cannot be allowed to prevail."

"(a) On April 30, 1990, the acting Supervisor was properly notified that two Carriers who were scheduled to work that day called in sick. The supervisor was then faced with the immediate problem of calling in two Carriers to service the vacant Routes. At 6:55 a.m. the supervisor called the home of Carrier Fred Patrick who was off on his non-scheduled day and who was on the ODL. No one answered the call. However, a recording device took a message stating the intent of the call. When Mr. Patrick did not return the call in ten minutes, at approximately 7:05 a.m., the supervisor proceeded to fill the vacancies with Carriers not on the ODL since Patrick was the only Carrier off that day who was on the ODL.

At approximately 8:05 a.m., one hour and 10 minutes after the initial call, Carrier Patrick called the Office and notified the supervisor that he would accept the overtime assignment. He was notified that the vacancy had already been filled and that his services would not be required.

On May 18, 1990, the Union filed a grievance contending that Carriers not on the ODL were forced to accept overtime."

"The supervisor had no knowledge that Mr. Patrick was even at home much less that he would return the call shortly after 8:00 a.m. It was unreasonable for the Union to argue that Patrick should have been called in anyway once he had made his availability known. By the time the Grievant did eventually return the supervisor's call the Route had already been covered as prudent Management dictated. The bottom line is that supervision made a reasonable, good-faith effort to contact Mr. Patrick whose name appeared on the ODL. Since the employee, for whatever reason, failed to answer the phone and did not return the call, as advised on a recorded message, within a reasonable length of time, then Management had fulfilled its obligation and in my view can it be concluded under no stretch of the imagination that the supervisor violated Article 8 of the National Agreement."

6. Did management argue "operational window"?

C#08707 Levak 1989 Sustained

". . .the National Agreement and its incorporated Memorandum of Understanding require that overtime work be assigned in a certain manner.

The thrust of management's position is that it has the right to preshift all Letter Carriers, without regard to its Article 8 commitments or the `letter carrier paragraph,' on a projected heavy volume of mail day following a holiday. Management argues that it is entitled to do so to meet the demands of its unilaterally declared Operational

Window. The Arbitrator cannot agree with that position. Absolutely nothing within the

National Agreement supports management's reasoning.

In order to support the Service's position, the Arbitrator would have to conclude, at the least, that the parties to the National Agreement never contemplated or realized that heavy 1st Class mail volume days regularly would follow holidays. Clearly, such a conclusion is an impossible one to reach. The Arbitrator would also have to conclude that when the parties negotiated the National Agreement and their Memorandum of Understanding that they never foresaw that staffing difficulties would result from that language, never foresaw that Local management would be severely hampered on post-holiday heavy mail volume days by that language, never foresaw that compliance with that language might require the overtime scheduling of employees who bring the first class mail from other facilities, and never foresaw that such language would sometimes require the payment of substantial overtime and penalty pay. Such a conclusion is equally impossible to reach. Overtime language necessarily inhibits management's right to schedule, and to assign and direct the work force, and necessarily results in increased costs in the form of overtime wages.

Further, in order to find in favor of the Service, the Arbitrator would have to conclude that the Beverly Hills management-imposed 4:30 p.m. Operational Window is binding on the Union and somehow overrides the overtime language of the National Agreement. That conclusion, too, is not possible. Such a unilaterally imposed managerial objective, however soundly grounded in good business practice, cannot override express employee rights granted by the National Agreement. Article 3, Management Rights, allows some unilateral action, but does not aid the position of the Service, since this case involved clearly expressed specific employee rights.

Even assuming, arguendo, some merit in the Service's Operational Window argument, the Arbitrator's basic conclusion would be the same. Evidence submitted by the Union clearly establishes that management could have met its Operational Window goal had it complied with the overtime provisions of the Agreement."

C#13464 Lurie 1994 Denied

"For at least the 6 years preceding the events in this case, an end-of-day dispatch truck departed the station at 5:30 p.m., and Management attempted to have all of the mail delivered and the carriers' back in the station in time to meet that dispatch.

Although the Union contested the Service's claim that the 5:30 dispatch constituted a `dispatch of value' or an `operational window' (as variously termed by Management), this Arbitrator has previously found (E90N-4E-C-93049751, November, 1993), and again finds that, in the summer of 1993, the 5:00-5:15 p.m. return-to-station time in fact was recognized as an operational reality by the management and the carriers at the Green Springs Station. Other Regional Panel arbitrators have concluded similarly."

C#10347 Levin 1990 Denied
"There is no evidence that at the time the volunteer was assigned the Express Mail for delivery there was any overtime desired list carriers available.

The nature of Express Mail is such that item is of the essence and waiting until an overtime desired list employee was available would be an unreasonable delay in the delivery.

Therefore, inasmuch as the Union has not shown that anyone on the overtime desire list was available when the Express Mail was assigned to a volunteer carrier not on the overtime desired list, no violation of the National Agreement is found. The Postal Service did not violate the National Agreement when it assigned overtime to a volunteer carrier not on the overtime desired list. The grievance is denied.

C. Contractual/Handbook (other) Citations

1. Article 3
   Article 5
   Article 8 (8.5.G.)
   JCAM
2. Article 19
   M-39 Section 122.3 Authorizing overtime and Auxiliary Assistance
   M-39 Section 122.33 "The employee, upon request will be provided a Form 3996"
   M-41 Section 280 Auxiliary Assistance
   ELM 432.6 Guaranteed Time
   ELM 434.612 Out of schedule Premium
   EL-401 Handbook Part IV B Work Schedule Guarantee
   F-21 and F-22 Time and attendance Handbooks
   POM 617.2
3. Article 41 Section 1.C.4. - Where the employee is moved off their bid assignment. (See C#10873)
4. Applicable memoranda

D. Arguments

1. ODL employees could have and should have worked pre-tour (or even post tour the prior day) to ensure an early leave for the street and timely return.

   Schedules and statements of available mail to be cased must be included in the file. Documented recent history can indicate management should have anticipated heavy A.M., P.M. mail. (C#10599)

2. The ODL does not have to provide a particular ODLer. Instead the total sum of assistance needed to provide for an 8 hour day could be carried by different ODL employees.

   The mere fact that an 8 hour day is not achievable for the non-ODLer, management must still provide assistance to the extent possible.

3. Any ODL employee who currently has signed the ODL list is qualified to provide the assistance absent medical restrictions or driving privileges being revoked, the best qualified is of no consequence.

   Familiarity with the territory served or casing ability is not a consideration. (C#7637)

4. Carriers volunteering or being required to work the holiday are considered available assistance for non-ODL or work assignment carriers, even if on OT and if properly detailed could ensure compliance with Article 8.5.(G). (C#6775)

5. Management should pivot routes with ODL employees prior to requiring a non-ODL employee to work overtime.

   C#13181 Britton 1993 Sustained
   "Finally, it appears to the Arbitrator that early scheduling, and or pivoting the routes of employees Dickerson and Payne among the available ODL's offered management a viable alternative to the action taken. In this connection, the Employer explains that it could not have brought the carriers in early because of the language of the M-39 (Management Exhibit No.10) which states that `At least 80 percent of the carriers daily delivery workload should be on or at their cases when they report for work.' This could not be done, according to the Employer, because the clerks would be in the process of spreading the mail and carriers would experience non-productive time. This, it seems to the Arbitrator, is not a fully satisfactory explanation of management's failure to utilize the available option of pivoting Payne's and Dickerson's routes among the available ODL's in order to avoid the action made the basis of these grievances."

   Management on a regular basis pivots routes for delivery to achieve their desired efficiency ratings. Management, on the other hand, cannot ignore the obligation to pivot with ODL employees prior to requiring non-ODLers to work overtime. Proof of the practice of pivoting should be in each case file.

   Clock rings, 3996's, Work Hour Transfer Reports, along with schedules and statements can demonstrate the pivoting practice. (C#3319, C#4479, C#9384, C#13181)

6. Management must attempt to schedule or call in ODL employees before requiring non-

ODLers to work off their assignment on a regular scheduled day.

C#09384 Ables 1989 Sustained
a. Call in ODLer prior to pivoting non-ODLers.
Findings
"Management's argument that it decides when overtime is needed is besides the point in dispute. Management had already decided overtime was needed. It required two on-duty letter carriers to deliver mail on the uncovered route - on overtime. Most of the mail was still undelivered even after assigning a temporary, casual, employee to cover the route. Clearly, overtime was needed. The Overtime Desired List is designed to provide qualified employees to perform required service. The grievant was positioned to do this. He should have been called."

7. Safety (darkness) was not an issue. While its recognized some deliveries or neighborhoods are considered dangerous and not deliverable after dark. ODL carriers should be required to provide assistance even in the dark (if safe) to ensure Article 8.5.(G) is not circumvented. (C#12669, C#13181)

C#12669 Erbs 1992 Sustained
"This Class Action grievance was filed in March of 1992 after the Management at the River Rouge, Michigan Station declined to reverse its position that all carriers would be required to work overtime even on their non-scheduled days. Union evidence indicated that the steward protested the notice advising that all non-scheduled days were cancelled prior to the time that the policy went into effect. The Union suggested to Management that the employees on the Overtime Desired List (ODL) should be allowed to work up to 12 hours prior to the utilization of employees on their non-scheduled days.

The Union evidence also indicated that the employees on the ODL were allowed to work up to ten (10) hours, four (4) days a week, but on Fridays the records indicate that they were not allowed to work beyond eight (8) hours. While management denied that this was a conscious decision to avoid the penalty pay situation, otherwise knows as "V" pay, the Union presented a document prepared by one of the managers, indicating `no OT penalty' and then listing the names of the particular grievant's in the instance case.

In the nine (9) days at issue there were eighty-eight (88) hours worked by employees on their non-scheduled days. The Union then presented a schedule as to how those eighty-eight (88) hours should have been allocated to the employees on the ODL to bring them closer to the twelve (12) hour maximum.

The evidence also indicated that employees who are called in on a non-scheduled day

would receive penalty pay for in excess of eight (8) hours. None of the employees called in on their non-scheduled days were allowed to work over eight (8) hours.

The Postal Service had advised the Union that one of the reasons that it was not allowing the work sought by the Union for those on the ODL was because of a safety factor due to darkness. However, it is acknowledged that the employees working on their non-scheduled day would not have been working in darkness if they had been allowed to work up to 10 hours. None of them worked more than 8 hours. It is also evident from the documentation that the employees on the ODL were allowed to work up to 6 o'clock even though it admittedly was dark at such time. However, they were not allowed to work beyond 10 hours on any of such days except minimally for one or two units.

Nor was the Arbitrator convinced that the safety issue, which was raised later in the grievance procedure by Management representatives, was as critical as was suggested. It is noted that many of the carriers worked after dark. It is also apparent that not one carrier was allowed to work into a penalty pay situation despite the fact that some daylight was still available. Carriers who were working on their 5th day were cut off before they got into the penalty situation even though it was still daylight even though Management claims there was a time sensitive need. The conclusion in this regard is buttressed even further by the note from one supervisor specifically advising that some of the Grievants were not to work penalty overtime despite the alleged need for all of this extra work. Certainly there was a clear indication, with Management's own document, that its scheduling was dictated not in accordance with the terms of the National Agreement, nor necessarily by operational needs, but in order to avoid penalty overtime.

Management also declined to allow the employees on the ODL to come in early indicating that the mail was not arriving until later, however, evidence indicated that during this interim mail was being delayed and not getting to the office until the afternoon and that limited and light duty employees were being utilized in this regard rather than processing it the next morning as requested by the Union.

Management witness stated that they could not bring in carriers early in order to maximize their usage because there was not enough mail early in the day. If there was such a backlog that it required all of this overtime from non-scheduled employees it would appear that that backlog could have been worked in the earlier hours. As the Union has stated.
Postal Service Management also stated that the snow storm on January 14, 1992 affected the situation. There was testimony from a Supervisor that there were also subsequent snow storms which carried over into February, however, there was no documentation of that presented other than the statements of the Supervisor. Nor did she detail exactly how the snow storm on January 14 affected the situation one month

later.

It is clear that the situation during this two (2) week period was not an emergency. The snow storm had happened a month prior to this time and there was no convincing evidence that this storm continued to create an emergency almost one (1) month later. There was no reason why scheduling within the context of the National Agreement could not have been accomplished in that one month period.

Instead the case presents a two (2) week planned scenario where all of the non-scheduled carriers were required to work overtime and those on the ODL were, by conscious planning, not to be utilized for 12 hours in accordance with Article 8. The schedule appears to have been prepared solely for Management's convenience without considering the ramifications to the employees nor the obligations set forth in the contract. The only obligation in this regard set forth in the contract which appears to have been considered is the need to avoid the penalty overtime situation. The evidence makes it clear that for this two (2) week period carriers were required to cease work at 6 pm, or 4 pm on the 5th day, prior to penalty overtime and this requirement was in place whether the employees worked into darkness or not."

8. No valid emergency existed.

C#13181 Britton 1993 Sustained

"The Employer argues that its prime concern and reason for being in business is to provide service to its customers, and to provide this service, it must meet certain standards and reasonable hours of delivery. Based on management's knowledge of the operational requirements on the date after Veterans Day, i.e., November 12, 1991, the Employer contends that it would have been unreasonable to schedule six routes vacant and risk a chance of operational failure. To ensure that all mail is delivered and operational standards are achieved, the rule of reason, according to the Employer, dictates that it is necessary to schedule a minimum of two (2) employees on the day after Thanksgiving, i.e., November 29, 1991. To do otherwise, the Employer contends, would have risked not getting all mail delivered and failing to provide service to its customers. While the Arbitrator is fully cognizant of the concerns of the Employer in this regard, he nonetheless, cannot rightfully agree that these objectives can properly be achieved by unilaterally ignoring the language of Article 8, Section 5.G of the National Agreement."

(Please see the Operational Window argument under "Overtime - Letter Carrier Paragraph" section in this ALERT handbook.)

Sick calls and holidays are **not** an emergency, nor an unseen event.

9. Management was scheduling purely to avoid penalty time pay.

Management is not allowed to work non-ODL employees off of their regular assignment or on a non-scheduled day to avoid penalty overtime.

Article 8, Section 5.G

G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list:

1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and

2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

E. Documentation/Evidence

1. Time cards/employee activity reports (PSDS offices) indicating begin, leave, return and end tour times. These include Work Hour Transfer Reports.
2. PS 3997 Unit Daily Record
3. PS 1813 Late Leaving and Returning Report
4. Statements from ODLers
5. Statements from non-ODLers
6. Copy of Overtime Desired List
7. Seniority List classifying each employee(casual, PTF, work assignment, ODL)
8. PS 3996 Carrier - Auxiliary Control forms
9. Steward's statement detailing what auxiliary assistance was available.
10. Truck dispatch schedules with statements on mail distribution
11. Number of times carriers failed to meet self imposed operational windows. Complete with evidence to establish proof.

F. Remedies

1. For first violation, injunctive relief is the minimum. Injunctive relief is also a cease and desist settlement.
2. The non-ODLer required to work off assignment or non-scheduled day overtime should be compensated an additional 50% of straight time pay. (C#10873)
3. The ODLer, or available auxiliary assistance employee, should be compensated for the time worked by the non-ODL employee at the appropriate rate of pay. (M-00884)
4. Copies of Pay Adjustment Forms (PS 2240 and PS 2243).

ARTICLE 8, OVERTIME EQUITABILITY

A. Case Elements

1. There is a lack of equity within the Overtime Desired List at the end of the quarter.
2. A daily charting of the quarters overtime shows there were low OTDL carriers who could have worked to be made more equitable.
3. The Union files a grievance under Article 8.5.C.2.a-d.
4. An appropriate make whole remedy is requested.
5. The prior quarter may need to be taken into consideration.

B. Definition of Issues

C#06364
C#17557
C#17557

1. Were hours <u>and</u> opportunities considered in determining equitability?

C#00675
C#00675
C#06103A

2. Was the overtime distributed on some basis other than Article 8.5.C.2.a-d?

C#03319
C#09581
C#09472
C#09384
C#11001
C#10873

3. Were OTDL carriers available to carry overtime which would have caused a more equitable distribution?

C#10421
C#00311
C#10414
C#10515
C#17308

4. Did management treat the contract in an arbitrary and capricious manner as to the requirement to equitably distribute hours and opportunities?

C#09870

5. Is there a showing of favoritism or discrimination to Overtime Desired List employees?
6. Does the daily charting of the quarter's overtime show OTDL carriers were available to work?
7. Did the Union make a prima facie case showing inequity and did management explain it away?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5

3. Article 8.5.C.2.a-d
4. Article 30.B.14
5. Article 11 (if applicable)
6. Article 41.1.C.4 (if applicable)

D. Arguments

1. There is a lack of equity within the Overtime Desired List.
2. The hours and opportunities were not equitably distributed.
3. Management has treated the contract in an arbitrary and capricious manner.
4. Overtime Desired List carriers were available to carry trackable overtime which would have made for a more equitable distribution.
5. Management has demonstrated in prior quarters a disregard for equalizing the OTDL and this can be proved with prior grievance settlements and affects remedy.
6. Management ignored early requests by the steward to address the inequity in the OTDL.
7. Management failed to provide make-up opportunities from prior quarter.
8. Only trackable overtime is considered a make-up opportunity or monetary remedy is appropriate.

E. The documentation that should be jointly reviewed to establish a violation exists:

1. Overtime Desired List for affected quarter.
2. Charting of opportunities given, opportunities missed and hours worked by OTDL employees for the entire quarter.
3. PS 3997 Unit Daily Record for each day of the quarter.
4. PS 3996 Carrier Auxiliary Control for each day.
5. Time cards/Employee Activity Reports
6. DSIS Work Hour Transfer Reports
7. PS 1813 Late Leaving and Return Report
8. Daily begin, leave, return and end tour times for each date.
9. Communications informing management an inequity exists.

F. Remedies

1. Management cease and desist practice of violating Article 8.5.C.2.b-c.
2. When appropriate, make up opportunities being offered.
3. When appropriate, monetary make whole remedies.
4. Copies of Pay Adjustment Forms (PS 2240 and PS 2243).

ARTICLE 8, OVERTIME EQUITABILITY

A. Case Elements

1. There is a lack of equity within the Overtime Desired List.
2. A daily charting of the quarter's overtime shows there were OTDL carriers who could have worked.
3. The Union files a grievance under Article 8.5.C.2.a-d.
4. An appropriate make whole remedy is requested.

B. Definition of Issues

1. **Were hours <u>and</u> opportunities considered in determining equitability?**

C#6364 Bernstein 1986 Sustained

"The Arbitrator agrees with the Union that the number of opportunities offered should not be the principal criterion to determine the correctness of the distribution of overtime to employees on the Overtime Desired list.

First of all, although the Service is correct in noting that the section talks only of the distribution of `overtime opportunities,' the goal that the section mandates is the `equitable' distribution of those opportunities and not (as the Service seems to contend) the `equal' distribution. There is a significant difference between the two phrases: `equal' is objective and precise, while `equitable' is subjective and indeterminate. In other words, the parties who drafted the relevant contractual language went to great lengths to select a rather vague standard, which was to distribute overtime `fairly.'

It should be added, although it is irrelevant for determination of the narrow issue before the Arbitrator, that the agreement does not even obligate the Service to distribute overtime `fairly,' only to make `every effort' to do so. There can be no doubt that the parties intended that the Service would have to utilize a great deal of judgment and not just apply a rigid procedure (which is the case with the other crafts) in the actual distribution of overtime opportunities. However, in doing so, the Service was obligated to at least try very hard to make its distribution as fair as possible.

. . . On the other hand, there is no substantial correlation between relative number of overtime opportunities offered and overtime compensation. One carrier could have gotten 10 8-hour overtime opportunities while another was awarded 10 1-hour assignments. The first carrier would have been able to earn eight times as much as the second. All other things being equal, no one other than the first carrier would regard that result as `fair' or `equitable.'

This conclusion also provides a possible explanation for Article 8.5.C.2.c. That section sets out a procedure to check on the number in which the Service is actually distributing overtime to make sure that the Service is trying to be `equitable.' If the posted evidence shows hours worked to be drastically uneven and the disparity is not explainable in terms of opportunities offered but rejected (which would also be posted), that information would presumably pressure the Service to explain the disparity; perhaps, if the difference could not be justified, the Service might have to undertake corrective action in the next quarter. Obviously, as the Union argues, if hours worked are irrelevant to appraising the equitability of the overtime distribution, the parties who drafted the agreement would not have included the specific reference to it in the mandatory posting section."

M-00370

"The interpretive issue is whether equitable opportunities shall be determined by the number of opportunities offered or the number of hours offered per opportunity.

We mutually agreed that in order for overtime opportunities to be distributed equitably in accordance with Article 8, Section 5, the number of hours per opportunity may be considered along with all the other factors such as leave, light duty, qualifications, off days, refusals, unavailability, etc. For example, the fact that one employee received an opportunity to work 8 hours overtime and another employee received an opportunity to work 1 hour overtime may not be the sole criteria for determining equitable opportunity, particularly, when there is considerable time left in the quarter."

M-00754

"The question in these grievances is whether management violated Article 8 by recording as an overtime opportunity the supervisor's unsuccessful attempts of calling the grievant in to work on his/her nonscheduled day.

It was mutually agreed to full settlement of these cases as follows:

1. An employee who cannot be contacted to work on his/her nonscheduled

day will not have that call recorded as a missed opportunity.

2. The day in question also will not be counted as a day where the employee was available for overtime."

M-00135
"The question in this grievance is whether counting the time carriers work overtime on their own routes, on a scheduled workday, as an overtime opportunity offered, violates Article 8 of the National Agreement.

After a discussion of the issue, it was mutually agreed to full settlement of this grievance as follows:

1. Overtime worked by a letter carrier on the employee's own route on one of the employee's regularly scheduled days is not counted as an `overtime opportunity' for the purposes of administration of the overtime desired list.

2. Overtime that is concurrent with (occurs during the same time as) overtime worked by a letter carrier on the employee's own route on one of the employee's regularly scheduled days is not counted as an `opportunity missed' for purposes of administration of the overtime desired list."

M-00362 or M-00754

2. Was the overtime distributed on some basis other than Article 8.5.C.2.a-d?

C#6364 Bernstein 1986 Sustained
"The Arbitrator concludes that the parties intended that the distribution should be `fair' to the carriers on the overtime list without regard to the Service. The Service would appear to have no particular interest in how the overtime is distributed so long as competent carriers can be found to do the work. It should matter not to management (unless it is trying to play favorites) whether one employee does it all or if overtime is split among many. It is only the individual carriers on the list who are directly concerned with how overtime is distributed. Therefore, the contract must be construed as setting forth as the goal to which the Service should strive in distributing overtime opportunities that it should make `every effort' to make that distribution appear to be fair from the standpoint of the carriers who appear on the list."

M-00854

8.5.C.1.a-b do not apply to letter carrier craft.

M-00833

"The Overtime Desired Lists control the distribution of overtime only among full-time regular letter carriers.

Overtime opportunities for carriers on the regular OTDL are not distributed by seniority or on a rotating basis. Nor is a carrier on the regular OTDL ever entitled to any specific overtime, even if it occurs on his/her own route.

Rather, Article 8, Section 5.C.2.b., requires that overtime opportunities must be equitably distributed during the quarter. Accordingly, whether or not overtime opportunities have been equitably distributed can only be determined on a quarterly basis. In determining equitability consideration must be given to total hours as well as the number of opportunities."

M-00113

"The grievance is sustained to the extent that the amount of overtime accrued on the grievant's own route on regularly scheduled days will not deter him from receiving equitable overtime opportunities on his non-scheduled day if he is on the Overtime Desired list."

M-00291

"A full-time regular letter carrier is considered to be a qualified craft employee, and the overtime provisions in Article 8 do not provide for the assignment of the `best qualified' employee available.

M-00372

Nothing precludes management from utilizing PTFs in an overtime status prior to full-time regulars on the OTDL.

C#00675 Zumas 1985 Denied

USPS not obligated to schedule OTDL over casuals for overtime.

C#06103 Mittenthal 1980 Denied

Service may award overtime to PTFs prior to those on ODL.

3. **Were OTDL carriers available to carry overtime which would have caused a more equitable distribution?**

M-00124

". . .local management will in the future whenever possible contact the employees who were on sick leave or annual leave the day prior to their nonscheduled day when overtime duties are available for those

employees."

M-00492

"1. Normally, employees on the overtime desired list who have annual leave immediately preceding and/or following nonscheduled days will not be required to work overtime on their off days.
2. However, if they do desire, employees on the overtime desired list may advise their supervisor in writing of their availability to work a non-scheduled day that is in conjunction with approved leave."

M-00169

Overtime Desired List carriers cannot refuse overtime.

M-00145

After exhausting the ODL management may draft non-volunteers on rotating basis.

Article 8 Section 5. Overtime Assignments

G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list:
2. Excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

C#03319 Aaron 1983 Sustained

"On the other hand, the position taken by the Postal Service throughout the four steps of the grievance procedure was that Article VIII, Section 5 does not require it to assign overtime work to carriers on the Overtime Desired list if they have already been called in to work, and that management has no obligation `to split up a route to be carried by those employees . . . already at work and assigned to other duties.' This interpretation is predicated, mistakenly, on Article III, which is expressly made `subject to the provisions of this Agreement,' including Article VIII."

C#11001 Sobel 1991 Sustained

"No genuine `emergency' existed on the grievant's N/S dates which PTF Brantley worked the entire day. As the too numerous to cite arbitral citations offered by the parties as support for their respective positions would attest, an `emergency' exists only after the Employer has made all the contractually sanctioned moves within its powers to staff its positions and still finds itself unable to find enough employees to do so.
One such contractually sanctioned method of staffing, if the so called shortfall of employees falls on a given employee's N/S day, is to call in that employee

on that day even it means the payment of overtime. The grievant was the only person on an N/S day when Brantley was called in, and since he was known to be available on those days he should have been called in before Brantley's utilization.

Arguendo assuming an emergency existed it was one caused by the Monroe MSC's failure to authorize a replacement at Farmerville for Mr. Brantley. However, the Employer's first step response itself belies any notion of an emergency as justification for its action. SPO Killen explicitly stated that Brantley was brought `in on straight time in lieu of overtime for the regular carrier.'

The argument based upon Management's exercise of its Article 3 prerogative to make manpower adjustments in the interest of efficiency is invalid."

C#10873 Levin 1991 Sustained
Management called in a non-ODL employee when OTDL carriers were available.

4. **Did management treat the contract in an arbitrary and capricious manner as to the requirement to equalize hours and opportunities?**

M-00858

M-00771
Management needs to take the necessary measures, when calling an overtime employee, to make sure the employee declined the opportunity.

M-00949
When a route is adjusted by providing a router the work assigned to the router is not part of the route for overtime purposes.

M-00587
When a hand-off is used in an adjustment, the hand-off is considered to be part of the route through which it is delivered for purposes of the OTDL.

C#10421 Liebowitz 1990 Sustained
Management's blanket refusal to leave messages on an answering machine for an OTDl carrier were a violation of Article 8.

C#00311 Martin 1983 Denied
Unilateral and unchallengeable right of management to determine if overtime is to be used.

C#10414 Collins 1990 Denied
Article 8.5 cannot be used to force the Service to deliver mail at times when it is dangerous or inefficient.

C#10515 Purcell 1990 Denied
OTDL does not have to be personally signed.

5. Is there a showing of favoritism or discrimination to Overtime Desired List employees?

C#09870 Williams 1990 Sustained
Page 4 "Without exception, the Arbitrator never has seen a more thoroughly documented case of overtime distribution. It included every hour that any carrier worked any day during the quarter, the hours for each carrier totaled separately, and a comparison of the total for all carriers. Thus, the disparity between the opportunities and hours of virtually all carriers and the grievant is thoroughly documented.

"The grievant was out on a number of days for a few minutes to two to three hours for Union business as the steward. She testified the supervisor told her that, on those days, he would make sure she would get no overtime. This was despite the fact she always returned before the end of the shift and was available for overtime. The huge disparity between the grievant's hours and almost all others, standing alone, gives some credence to this testimony.

Again, the grievant prepared special calendars for the quarter which showed the days she was available, when she was on Union business, how many opportunities for overtime existed in the station on a daily basis, and how many hours were distributed. This was backed up by documentation as to when she was at the GPO for EEO work and when she was performing Union business as shown by 3971."

Page 14 Monetary remedy.

6. Does the daily charting of the quarter's overtime show OTDL carriers were available to work?

a. Non-trackable overtime: Overtime on own assignment on regularly scheduled day. Notation of start time.
b. Trackable overtime: Time worked on another assignment on regularly scheduled day, or time worked on non-scheduled day. Notation of start time.

C#13229 Lurie 1993 Sustained
"This Arbitrator was presented with a similar grievance in Lawton, Oklahoma, on May 23, 1993. Because I addressed identical questions of contract interpretation, I will reproduce here those portions of that decision which are dispositive of the issue in this case.

As a general principle, the burden of proving the breach of a contract provision is on the party asserting the breach. Thus, the burden of proving that Management violated Article 8.5.C.2.b. is initially with the Union. The first question which the Arbitrator must address, therefore, is whether the existence of a vast disparity in overtime hours worked constitutes prima facie proof of a violation of 8.5.C.2.b., such that the burden of proof then shifts to the Service to explain the disparity. This shifting of the burden of proof seems to have been implied by Arbitrator Neil N. Bernstein in the National Award cited above (H1N-5G-C 2988):

> ***`If the posted evidence shows hours worked to be drastically uneven and the disparity is not explainable in terms of opportunities offered but rejected (which would also be posted), that information would presumably pressure the Service to explain the disparity. . ."***

This quotation of Arbitrator Bernstein also presumes that Management will maintain records of its overtime distribution practices sufficient to explain such disparities.

In order to attempt to distribute overtime opportunities equitably, as well as to achieve some equity in the number of hours represented by those opportunities, Article 8.5.C.2.c. of the Agreement requires the maintenance and posting of overtime hours worked and opportunities offered. In the Arbitrator's judgment, the failure to maintain such records would <u>not</u> prove that Management failed to make every effort to distribute overtime hours equitably. [ ] However, the maintenance of such records, and the demonstration by those records of a good faith effort to achieve approximate equity, would certainly go a long way toward avoiding Article 8.5.C.2.c. disputes. As for the

content of that record, the Arbitrator has found the following information to be indispensable in assessing equitability:

1. the time, date and duration of each overtime opportunity which arises,
2. the OTDL carriers who were available to receive the opportunities, and those who are unavailable and the reason for their unavailability (e.g. leave, work assignment overtime, etc.).
3. those available OTDL carriers whom the Service makes a good faith effort to notify of the opportunity, and the method of notification, and
4. the identity of the carrier who receives the opportunity, and the carrier's response to it.

7. Can management explain why the inequity exists and what prevented them from making all ODL employees equal.

C#13229 Lurie 1993 Sustained

Page 14 . . ."the Arbitrator concludes that, once vastly disparate overtime hours worked are established, the burden of proof shifts to the Service to show that every effort was made to offer overtime opportunities equitably. (Emphasis added)

[By this, the Arbitrator means that once the Union has presented a prima facia case for inequitable distribution of overtime hours worked, the burden of coming forward with rebuttal or justifying evidence is placed upon the Service. The burden of proof of a contract violation remains with the Union.]"

C#13094 Berkman 1993 Sustained

"In this case it is evident that Management did not try `very hard' to distribute overtime hours equitably. Management must be vigilant in this regard. If necessary to insure a fair distribution of hours, Management must give employees who start on later shifts the opportunity to work overtime before the start of their shift. If an employee has below average overtime hours Management should be prepared to call the employee at home to come in on an unscheduled day. This does create extra work for Management, however, the National Agreement and arbitrational precedent require Management to make this effort. The Union has presented a prima facie case that Article 8 has been violated and Management has been unable to present a reasonable explanation for the disparity in overtime hours."
Also see National Arbitrator Bernstein C#6364

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 8.5. JCAM
3. Article 11 (if applicable)
4. Article 30 (if applicable)
5. Article 41.1.C.4 (if applicable)
6. Joint Statement on Overtime

D. Arguments

1. There is a lack of equity within the Overtime Desired List.
2. The hours and opportunities were not equitably distributed.
3. Management has treated the contract in an arbitrary and capricious manner.
4. Overtime Desired List carriers were available to carry overtime which would have made for a more equitable distribution.
5. Management has demonstrated in prior quarters a disregard for equalizing the OTDL and this can be proved with prior grievance settlements.
6. Employees on the OTDL were treated in a disparate manner.
7. Management cannot explain with precision why the inequity is not a violation.
8. Management ignored early requests by the steward to address the inequity in the OTDL.
9. Management failed to provide make-up opportunities.
10. A monetary remedy is appropriate.

E. Documentation/Evidence

1. Overtime Desired List for affected quarter.
2. Charting of opportunities given, opportunities missed and hours worked by OTDL employees. Please see NBA office developed Tracking Sheet at the end of this section.
3. Form 3997
4. Form 3996
5. Time cards/Employee Activity Reports which demonstrate begin tour times, leave to the street, return times, and end tour times.
6. Form 1813
7. Statements as to availability of affected employees.
8. Supervisor's notes or statements explaining why the hours and opportunities were not equitable.
9. Prior grievances showing where inequitable distribution had occurred in prior quarters.
10. Grievance settlements of prior inequitable distribution grievances.

F. Remedies

1. Management cease and desist practice of violating Article 8.5.C.2.b-c.
2. When appropriate, make up opportunities being offered.
3. When appropriate, monetary make whole remedies for past offense. Makeup opportunities should be in very next quarter. **C#11429**
4. Copies of Pay Adjustment forms (PS 2240 and PS 2243).

ODL TRACKING FORM

2-sided

ODL TRACKING FORM

2 sided

9/03

FFD Chart

FITNESS-FOR-DUTY EXAMS

A. Case Elements

1. Employee is required to undergo a Fitness for Duty examination.
2. FFD exam does or does not relate to an FMLA condition/absence.
3. FFD exam does or does not relate to an on-the-job injury (OWCP claim).
4. Employee requests a copy of the FFD examination report.

B. Definition of Issues

C#05724
C#11942
C#16295
C#10076

1. Did management have a legitimate reason for requiring an FFD exam?

C#18387

2. Did management follow required procedures in ordering/scheduling the FFD exam?
3. Did management place employee in a pay status for time spent at and traveling to/from the FFD exam?

C#04461
C#09670

4. Did management pay all costs of the FFD exam?
5. Was the FFD exam performed by a USPS medical officer or contract physician?
6. If the FFD exam was related to an FMLA related condition, did management comply with FMLA regulations?
7. If the FFD exam is related to an OWCP accepted condition, did management must comply with the FECA?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5

3. Article 19
   EL-311 Section 340 Physical Fitness After Appointment
   ELM Section 515.54 Additional Medical Opinions
   Section 547 Return to Duty
   Section 864 Physical Examinations
   EL 806 Section 160 Fitness for Duty Examination
4. Article 21.4
5. 29 CFR 825.307 & 825.310
6. 20 CFR 10.324

D. Arguments

1. Management's request for the FFD exam was arbitrary and capricious and/or for an improper or illegal reason.
2. Management did not comply with the required procedures in ordering and scheduling a FFD exam.
3. Management did not pay the employee for the time spent at, and travelling to/from, the FFD exam.
4. Management did not pay all expenses associated with the FFD exam, such as travel, fees, etc.
5. Management did not comply with FMLA regulations regarding FFD exams.
6. Management did not comply with OWCP regulations regarding FFD exams.
7. Management did not provide the employee with a copy of the FFD exam report, upon request.

E. Documentation/Evidence

1. Form 2485 signed by installation head prior to FFD exam.
2. Request or recommendation for the FFD exam by supervisor/manager/Injury Compensation Specialist.
3. Supervisor's written statement concerning the employee's duties, work environment, and physical requirements of the job, attached to the 2485. (EL 311 343.321)
4. Completed Form 2485, after the FFD exam is over.

5. Note or memorandum of medical officer attached to Part 1 of Form 2485. (EL 311 343.42)
6. Any written results of the fitness-for-duty exam in addition to Form 2485.
7. Statement by (or interview notes of) supervisor/manager/ICS who recommended the FFD exam concerning the reasons for doing so.
8. Statement by (or interview notes of) installation head who signed the 2485.
9. Statement of grievant.
10. Form CA-17 completed by the FFD exam physician.

F. Remedies

1. Rescind the requirement to submit to the FFD exam.
2. Cease and desist requiring FFD exams in an arbitrary and capricious manner and/or for improper reasons.
3. Pay the grievant for all time spent at and travelling to/from the FFD exam.
4. Pay all expenses associated with the FFD exam, including, but not limited to, the cost of the exam, travel expenses, etc.
5. Cease and desist requiring FFD exams without fully complying with the procedures found in the EL311, the EL806 and the ELM regarding FFD exams.
6. Cease and desist requiring FFD exams relative to FMLA accepted conditions in violation of FMLA regulations.
7. Cease and desist requiring FFD exams relative to OWCP accepted injuries or illnesses in violation of OWCP regulations.
8. Immediately provide the grievant with a complete copy of the FFD exam report.

FITNESS-FOR-DUTY EXAMS

A. Case Elements

1. Management requires an employee to submit to a Fitness for Duty examination.
2. The medical condition or circumstances which underlie the requirement to submit to a Fitness for Duty examination may be an FMLA protected condition. The employee may be on FMLA protected leave at the time of the requirement to submit to the Fitness for Duty Examination.
3. The medical condition or circumstances which underlie the requirement to submit to a Fitness for duty examination may be an OWCP accepted condition.
4. The employee may (and should) have requested a full and complete copy of the medical report which followed the Fitness for Duty examination.

B. Definition of Issues

1. Did management have a legitimate reason for requiring an FFD exam?

The Postal Service has broad authority to require Fitness for Duty examinations. However, management must have a legitimate business reason for doing so. If management requires a Fitness for Duty examination for improper or illegal or arbitrary and capricious reasons, that action is grievable.

C#05724 Foster 1982 Denied

(The provision) authorizing management to "order fitness for duty examinations at any time" is in force and effect and not subject to attack as to its validity in this proceeding. The exercise of that authority is not an unfettered one, however. Overriding all such expressed rights of management is the implicit limitation that its authority may not be exercised in an arbitrary, capricious or discriminatory manner.

C#11942 Sobel 1992 Sustained

Part 864.32 clearly accords the Employer the right to order Fitness For Duty (FFD) examinations, almost at will. The only limitations upon this right are the obligations to advance specific reasons for requiring that the employee submit to such an examination. The reasons must have some basis in reality and should not have been advanced for some purpose other than to ascertain the person's fitness for work. However, the burden of proof devolves upon the Union to prove that the request was arbitrarily or capriciously advanced. Otherwise it must be presumed that the Employer was acting reasonably....(T)he Employer's behavior after the submission of the Form 13, proved totally incompatible with its expressed concerns about its employees' safety. This behavior nullified all the Employer's stated reasons for requesting the FFD and, therefore, rendered its action in

ordering the FFD arbitrary and capricious.

C#16295 Zigman 1997 Sustained

...despite the fact that the Service has the right to order fitness for duty examinations, it violated the grievant's rights and the collective bargaining agreement in this situation as the order was premised on an arbitrary and capricious manner and/or in retaliation against the grievant's seeking to avail himself of his contractual rights.

C#10076 Snow 1990 Denied

In this case, the Employer has ordered a Fitness for Duty examination in order to obtain medical information which management had a reason to believe was relevant to the business operation. Although the Employer's right to order Fitness for Duty examinations has been recognized when it is necessary to do so in order to obtain medical information relevant to the business operation, it remains essential to act reasonably when exercising this right. When legitimate managerial rights intrude on personal rights of employees, the Employer needs to be unduly cautious and sensitive to the manner in which it pursues its right.

2. Did management follow required procedures in ordering/scheduling the FFD exam?

Management is required to follow specific procedures when ordering and scheduling a Fitness for Duty examination. Any violation of these procedures should be grieved separately from the issue of whether management had a valid reason to require the examination.

a. Management must use Form 2485 when requiring the examination. Use of the form is mandatory. See EL 311 343.31, EL 806 162.1 and M-00860. Form 2485 is a 6 page form with 2 copies each of pages 1 and 6, for a total of 8 pages.

C#18387 Parent 1998 Sustained

I therefore find that the Employer violated Section 343.31 of the handbook EL-311 and Section 162.1 of handbook EL-806 when it did not complete its part of a Form 2485 prior to the grievant's physical examination of May 7, 1996.

b. The installation head must authorize the exam by signing Form 2485. The only exception is in the case of a Fitness for Duty examination in connection with an on-the-job injury, where the District Director of Human Resources is also authorized to approve the exam. The installation head may not designate this authority to someone else. See ELM 547.31, EL 806 162.1, EL 311 343.31 and M-00860.

c. The employee's supervisor must recommend the examination in non-job related cases. See EL 311 341.2, EL 311 343.321 and EL 806 162.1.

   In a situation where the underlying condition is job related, the injury compensation control office supervisor or specialist can recommend the examination. See EL 311 341.2, ELM 547.31, ELM 864.34 and EL 806 162.1.

d. The employee's supervisor must attach information to the Form 2485 concerning the employee's duties and working environment, including physical requirements of the job. See EL 311 343.321 and EL 806 162.1.

e. If the employee has made any statements concerning their condition, such statements must be attached to the 2485. See EL 311 343.322.

f. Management must state the specific reasons for requiring the examination. See ELM 864.32.

3. Did management place employee in pay status for time spent at and traveling to/from the FFD exam?

Management must pay an employee for the time spent at a Fitness for Duty examination, as well as for the time spent traveling to and from the examination. See Step 4's M-00094, M-00550, M-01045, M-01350.

4. Did management pay all costs of the FFD exam?

Fitness-for-Duty examinations are done at no cost or expense to the employee. Management must pay for all costs associated with the examination. This includes doctor fees, transportation costs (including mileage if the employee drives their own vehicle), etc. See EL 311 343.2, EL 806 161.2.

C#04461 Foster 1984 Sustained

"...management acted properly in sending Grievant to Dr. Jeryan for a fitness for duty examination in December of 1981....the three follow-up examinations of Grievant by Dr. Jeryan must be viewed as extensions of the initial December 1981 scheduled fitness for duty examination that the Employer was required to provide. While not expressly authorized by the Employer, each of these examinations was a part of the single process impliedly authorized and not objected to as the necessary means of determining Grievant's ability to work. Accordingly, Grievant is entitled to reimbursement for the expenses incurred."

C#09670 Dunn 1990 Sustained
In response to the Postal Service's directions, the Grievant went to Dr. Greve for a fitness for duty examination. Dr. Greve's letter of August 22, 1989 states that he saw the Grievant on 08-22-89 for one hour. Dr. Greve recommended that the Grievant be hospitalized "so that I can do more extensive evaluations."...In my judgement, Dr. Greve did not complete the fitness-for-duty examination. The Postal Service's refusal to follow through and pay for the psychological evaluation that was recommended by Dr. Greve was not within its discretion once it had subjected the Grievant to the process. Demanding that the Grievant pay for the remainder of Dr. Greve's fitness-for-duty examination was a violation of the Personnel Operations Handbook. It states clearly: "Fitness-for-duty examinations are taken at the direction of the Postal Service at no cost to the employee."

5. **Was the FFD exam performed by a USPS medical officer or contract physician?**
Regulations require that Fitness for Duty examinations be performed by a USPS medical officer or contract physician. See EL 311 343.1.

However, there is an important exception: if the underlying condition is FMLA protected and the Fitness for Duty examination is a second medical opinion, management may not use a USPS medical officer or contract physician. In such a case, management must select a health care provider that is not employed by the Postal Service on a regular basis. See ELM 515.54, 29 CFR 825.307(a)(2) and .307(b).

6. **If the FFD exam was related to an FMLA related condition, did management comply with FMLA regulations?**
If a Fitness for Duty examination is related to an FMLA protected condition, management must comply with the FMLA.
   a. Management may not use a physician that is regularly employed by the Postal Service. See point 5 above.
   b. Management must provide the employee with a copy of the report within two business days, upon request by the employee. See 29 CFR 825.307(d).
   c. Management must reimburse the employee for any reasonable "out of pocket" travel expenses incurred. See 29 CFR 825.307(e).

7. **If the FFD exam is related to an OWCP accepted condition, management must comply with the FECA.**
   a. An employee cannot be required or compelled to undergo medical examination during non-work hours. See M-01117 and M-01161.
   b. The Fitness for Duty physician must complete Form CA-17. See M-01324 and ELM 547.34.
   c. Management must bring the results of the examination to the attention of the District OWCP office. See ELM 547.32.
   d. The examination may not interfere with treatment from the employee's own physician. See 20 CFR 10.324.

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 19

EL-311	Section 340	Physical Fitness After Appointment
ELM Section 515.4		Additional Medical Opinion
ELM Section 547		Return to Duty
	Section 864	Physical Examinations
EL 806	Section 160	Fitness for Duty Examination

4. Article 21.4
5. 29 CFR 825.307 & 825.310
6. 20 CFR 10.324

D. Arguments

1. Management's reason for requiring the examination was improper or illegal or arbitrary and capricious. If management refused to give a specific reason, that refusal is evidence that its action was arbitrary and capricious.
2. Management failed to follow required procedures in ordering/scheduling the examination:
   a. Management failed to use a Form 2485.
   b. The postmaster (or Manager Human Resources in the case of an OWCP-related FFD exam) failed to sign the 2485.
   c. The employee's supervisor did not recommend the examination (in job related injury cases, the injury compensation office may recommend the examination).
   d. The employee's supervisor did not attach information to the Form 2485 concerning the employee's duties, work environment, and physical requirements.
   e. Management failed to attach any statements by the employee to the

2485, where the employee has made such statements.

f. Management failed to state the specific reasons for requiring the examination.

3. Management failed to pay the employee for all time spent at the examination, travelling to and from the examination, etc.
4. Management failed to pay the employee for all costs of the examination, including travel costs.
5. Management violated FMLA provisions, where the underlying condition is FMLA protected.
   a. Management used a physician that is regularly employed by the Postal Service, where the fitness for duty examination was required as a second opinion because management questioned the medical certification provided by the employee's health care provider.
   b. Management failed to provide the employee with a copy of the examination report within two business days of a request by the employee.
   c. Management failed to reimburse the employee for reasonable "out of pocket" travel expenses incurred.

6. Management violated FECA provisions, where the underlying condition is related to an OWCP-accepted claim.
   a. The employee was required to undergo the examination during non-work hours.
   b. No CA-17 was provided to the physician and/or the physician failed to complete CA-17.
   c. Management failed to notify OWCP of the results of the examination.
   d. The examination interfered with treatment from the employee's own physician.

E. Documentation/Evidence

1. Form 2485 as presented to the examining physician.
2. Form 2485 as completed by the examining physician.
3. Any written recommendation by the employee's supervisor for the examination, including notes, memos, e-mail, letters, etc.
4. Interview notes by the shop steward of the employee's supervisor(s) regarding recommendation for the examination.
5. Any written recommendation by individuals in the Injury Compensation Control Office for the examination, including notes, memos, e-mail, etc.
6. Interview notes by the shop steward of individuals in the Injury Compensation Control Office regarding recommendation for the examination.
7. Written information from the employee's supervisor(s) regarding employee's

duties, working environment, and physical requirements of the job, attached to the 2485, or otherwise provided.

8. Interview notes by the shop steward of the employee's supervisor(s) regarding whether the supervisor(s) provided information regarding the employee's duties, working conditions and physical requirements of the job.
9. Statement of the employee which was provided to management concerning the employee's condition.
10. Statement of the employee provided to the shop steward concerning each of the points outlined in this ALERT chapter.
11. Any letter or other correspondence to the employee from management concerning the Fitness for Duty examination.
12. All internal management documents, including but not limited to, correspondence, letters, memos, phone logs, e-mail, etc., concerning the Fitness for Duty examination.
13. Interview notes by the shop steward of the installation head (or Human Resources Manager) regarding the reason(s) for the examination.
14. ETC report(s) showing pay status of employee during the period in which the examination, and travel to/from it, took place.
15. Copies of bills of travel expenses paid by the employee. Statement of employee regarding miles driven in privately owned vehicle travelling to/from examination.
16. Statement of employee regarding submission of bills, description of expenses, etc., to management.
17. Copy of the contract between the Fitness for Duty physician and the USPS.
18. Copy of the employee's request to management for a full and complete copy of the report of the examining physician. Statement of the employee regarding management's action in response to that request.
19. Form CA-17 completed by management and the examining physician.
20. Correspondence from the employee and OWCP confirming whether the FFD results were sent to the District OWCP office.
21. Interview notes by the shop steward of the Injury Compensation Control Office manager regarding when and if the results of the examination were shared with OWCP.

F. Remedies

1. Rescind the requirement to submit to the FFD examination.
2. Acknowledge that the requirement to submit to the FFD examination was improper or arbitrary and capricious. Cease and desist requiring FFD examinations for improper or arbitrary and capricious reasons.
3. Pay the grievant for all time spent at and travelling to/from the FFD exam, at the appropriate rate.

4. Pay the grievant for all expenses associated with the FFD exam, including,

but not limited to, the cost of the exam, travel costs, etc.

5. Acknowledge that management did not comply with the procedures found in the EL 311, the EL 806 and the ELM regarding FFD exams. Cease and desist from failure to fully comply with these procedures.
6. Acknowledge that management violated FMLA regulations. Cease and desist from such violations.
7. Acknowledge that management violated OWCP regulations. Cease and desist from such violations.
8. Immediately provide the grievant with a complete copy of the FFD exam report.

MEDICAL CERTIFICATION FOR THREE DAYS OR LESS

A. Case Elements

1. Employee calls in sick on a regularly scheduled day.
2. Management requests the employee secure medical documentation to substantiate an incapacity for normal duties. (C#13239, C#03860)
3. Employee goes home due to sickness on a regularly scheduled day or claims incapacity after being called in on a non-scheduled day. (C#17298)
4. Employee may or may not be on restricted sick leave.

B. Definition of Issues

1. Was the employee sick for <u>more</u> than 3 days?
2. Was the employee obviously ill? (C#03860, C#01309)
3. Was the employee on restricted sick leave? (C#17298)
4. Does the employee have a condition covered under FMLA?
5. Was the request for medical certification arbitrary and capricious? (C#10422)
6. Is there any evidence of sick leave abuse? (C#05015, C#04033, C#03032)
7. Is the day in question in conjunction with a non-scheduled day and is there a pattern? (C#00008)
8. Was the request for medical certification made on the first day of absence?
9. Did management grant the sick leave?
10. Did management argue that operational problems caused the request for medical certification? (C#00276)
11. What was the sick leave record of the grievant?
12. Did the employee request sick leave to avoid work? (C#17298, C#06123, C#04033, C#03032)

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 10
4. Article 19

ELM 513.361 Three Days or Less
513.364 Medical Documentation or other Acceptable Evidence
513.37 Restricted Sick Leave
FMLA 29 CFR Section 825

D. Arguments

1. Management abused their discretion in requesting medical certification.
2. Employee was obviously ill when leave was requested.
3. Management is aware of on-going condition covered under FMLA or OWCP.
4. Employee treated disparately.
5. Management had no knowledge of abuse.
6. Grievant's record does not indicate abuse of sick leave (i.e., 3972, disciplinary record, etc.)
7. If management did not ask for medical certification the first day of absence, then no valid reason existed for subsequent days.
8. Employee is not on restricted sick leave (ELM 513.37).
9. Management never advised employees of criteria to be utilized in "protecting interests."
10. Management ordered medical certification simply because management's workload was heavy.

E. Documentation/Evidence

1. 3972 Absence Analysis's for grievant and comparables.
2. 3971's Request for Notification of Absence
3. Medical certificate and statement of treating physician.
4. FMLA certification.
5. Grievant's statement of events.
6. Witness statements, including family members.
7. Copy of doctor's billing.
8. Statement of other related expenses.
9. Witness statements regarding grievant's demeanor.
10. Proof of insurance payment, if any.
11. Schedule
12. Work Hours Report for date in question.

F. Remedies

1. Cease and desist.
2. Pay grievant for the cost of securing medical certificate.
3. Pay mileage and lost time for time spent getting the medical certificate.

C#13239
C#17298
C#19828

MEDICAL CERTIFICATION FOR THREE DAYS OR LESS

A. Case Elements

1. **Employee calls in sick on a regularly scheduled day.**
2. **Management requires medical documentation to substantiate the illness.**

MRS - Medical Certification

ELM Section 513.361 "For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.37) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

Stated simply, ELM 513.361 establishes three rules:
1) For absences of more than three days, an employee must submit "medical documentation or other acceptable evidence" in support of an application for sick leave, and
2) For absences of three days or less a supervisor may accept an employee's application for sick leave without requiring verification of the employee's illness (unless the employee has been placed in restricted sick leave status, in which case verification is required for every absence related to illness regardless of the number of days involved), however
3) For absences of three days or less a supervisor may require an employee to submit documentation of the employee's illness "when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

C#19250 Brandon 1999 Sustained

"The right to require medical documentation, while broad, is not without its limitations. Those limitations are stated in Section 513.361. For absences of three days or less a supervisor may exercise some discretion in requiring medical documentation, but documentation may only be required: 1) when the absent employee is on restricted sick leave, or 2) when the supervisor deems documentation desirable for the protection of the interests of the Postal Service. The first limitation is clear. The last one is less so. But the first limitation gives meaning to the second.

Obviously, it is within the Service's best interests to prevent all absences based upon fraudulent claims of illness or injury. Thus, carried to its logical extension the full effectuation of this policy would require medical documentation for all absences of whatever duration and particularly where

the illness or injury is not manifested by a measurable or observable symptom. But medical documentation in every instance is neither reasonable nor practical, and Section 513.361 implicitly recognizes this by setting the limitations already noted. Accordingly, in context, limiting the requirement of medical documentation to employees on restricted sick leave, clearly suggests that the second limitation is intended to apply to circumstances where there is a reasonable basis for suspicion on the part of the supervisor or management personnel that an absence is not based upon a bona fide illness or injury. This view is in keeping with the award of Arbitrator Mikrut, supra, and an award of Arbitrator Dobranski, Case No. C1C-4B-C 1655, cited therein."

3. **Employee goes home due to sickness on a regularly scheduled day or claims incapacity after being called in on a nonscheduled day**.

M-00270
"A blanket order for all employees to provide medical reasons for absences due to illness in a separate statement is improper."

M-00489
"For the purposes of ELM 513.362, an absence is counted only when the employee was scheduled for work and failed to show. A nonscheduled day would not be counted in determining when the employee must provide documentation in order to be granted approved leave."

C#3032 Leventhal 1983 Sustained
"From the awards cited by the Union in C8N-4A-C 9427, C8N-4F-C 13163, C8N-4E-C 15142, WIC-5K-C 2433 and C8N-4B-C 10454, 12479, it is clear that the operative concepts of this case have been subjected to repeated arbitral review.

It appears clear that management may request medical verification only if there is some demonstrable need to "protect" the interests of the service, absent such requesting a medical verification from employees may be an abuse of discretion and it also appears well settled that when such a finding is made the employee may seek as a remedy reimbursement of medical costs which would not have been incurred `but for' the Employer's improper requirement.

What emerges to me in this case are a number of concepts which should be present either singularly or in concert in order to establish a reasonable basis for the Employer to require medical verification for employees not on restricted sick leave for the protection of the interest of the postal service.

A. A pattern of sick leave utilization which while not yet warranting restriction, is indicative of abuse in a particular circumstance where the supervisor has a good faith reason to question the bona fide of the absence.
B. Where an employee by his conduct has given good cause to conclude his use of sick leave is pretextural for the withholding of services or for some purpose not authorized for sick leave utilization.
C. Where the absence (perhaps on very short notice) will cause substantial disruption to the employer's operation.

He was not feeling well for several days prior and this was apparent. The supervisor who ordered the medical verification because the carrier foreman (the Grievant's immediate supervisor) had already gone home, should at a minimum checked with the carrier foreman before he reached the conclusion the Grievant was in fact to `pull a fast one.' In fact, a check with the carrier foreman in all probability would have confirmed that the Grievant was reporting the undelivered weekenders on the appropriate forms. Other significant information may also have been secured as to the Grievant's work habits and state of health."

MRS - Medical Certification

"In C#04627, the supervisor had denied the employee's request for assistance delivering mail and the employee then had asked for sick leave. The arbitrator concluded that the supervisor's actions were proper under the circumstances. The fact that the employee had not asked for sick leave until he was denied assistance delivering mail, coupled with his leaving work the previous day because of illness, made it reasonable for the supervisor to consider the possibility that the grievant was not truly ill. The same situation arose in C#06123. . ."

In other incidents, "Arbitrators have concluded that medical documentation was properly requested by a supervisor when the employee called in for sick leave for a day for which the employee had previously requested annual leave. (See C#01160, C#04897, C#06747 and C#06751)

Arbitrators have not always ruled in favor of certification required of an employee who requested sick leave for a day preceding or following a day off or a holiday. Under such circumstances, however, arbitrators have been generally sympathetic to supervisors' concerns and have required only minimal further support of supervisory decisions to required certification."

See also C#03057, C#04209, C#04117, C#04967, C#06167 and C#13239.

4. **Employee may or may not be on restricted sick leave.**

ELM 513.371

"Restricted Sick Leave. Reasons for Restriction. Supervisors or installation heads who have evidence indicating that an employee is abusing sick leave privileges may place an employee on the restricted sick leave list. In addition, employees may be placed on 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 by 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 is there is no improvement during the next quarter, the employee will be placed on restricted sick leave."

B. Definition of Issues

1. **Was employee sick for <u>more</u> than 3 days?**

M-00489

"The issue in this grievance is whether the grievant was improperly required to submit documentation in support of a sick leave request.

After further review of this matter, we agreed that there was no national interpretive issue fairly presented as to the meaning and intent of Section 513.362 of the Employee and Labor Relations Manual (ELM).

The parties at this level agree that for purposes of ELM 513.362, an absence is counted only when the employee was scheduled for work and failed to show. A nonscheduled day would not be counted in determining when the employee must provide documentation in order to be granted approved leave."

2. **Was the employee obviously ill?**

C#01224 Dileone 1982 Sustained
The request for medical documentation was not reasonable when the employee actually appeared ill to the supervisor at the time she requested sick leave. The arbitrator pointed out that "an employee can have a lousy record of attendance but still can become ill at work which would justify excusing him from work."

C#04033 Foster 1984 Sustained
"The single, isolated incident of the grievant leaving work due to illness on a prior occasion, with no indication otherwise in the grievant's work record that he was a malingerer likely to abuse sick leave, is not sufficient to produce a substantial doubt in the mind of a reasonable person that the grievant left his route on the day in question simply because he did not want to complete the overtime assignment." In this case the supervisor had conceded that the grievant had the outward appearance of being sick by the hoarseness in his voice.

3. **Was the employee on restricted sick leave which would require certification on most absences?**

ELM 513.37 (See A. #4 above)

4. **Does the Family Medical Leave Act (FMLA) bar the Agency from requiring medical certification at this time?**

Postal Bulletin 21847, 8-5-93
"515.51 General. An employee must provide a Form 3971, ***Request for or Notification of Absence***, together with documentation supporting the request, at least 30 days before the absence if the need for the leave is foreseeable. If 30 days notice is not practicable, notice must be given as soon as practicable. Ordinarily at least verbal notification should be given within 1 or 2 business days of when the need for leave become known to the employee. The employee will be provided a notice detailing the specific expectations and obligations and consequences of a failure to meet these obligations. Additional documentation may be requested, which must be provided within 15 days or as soon as practical under the particular facts and circumstances. During an absence, the employee must keep his or her supervisor informed of intentions to return to work and of status changes which could affect his or her ability to return to work. Failure to provide documentation can result in the denial of family and medical leave under

this section."

Code of Federal Regulations **Title 29 Section 825**

"Section 825.308 Under what circumstances may an employer request subsequent recertification of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in Section 825.114(a)(2)(ii),(iii) or (iv), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications): or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b) (1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required."

M-01378
"The DOL WH-380 form does not require medical information that directly violates the employee's right to privacy. However, we realize health care providers may give more detail than requested on the form (i.e., prognosis and diagnosis) and that employees may not want to provide this information to their immediate supervisors. Therefore, to address the union's concern, the Postal Service reviewed and approved APWU and NALC FMLA forms that, when properly filled out by the health care providers, provide enough information is provided to certify that the absence qualifies as a covered condition under the FMLA.

3) Postal Service regulations do not require employees to submit a diagnosis/prognosis when requesting sick leave for themselves or for their dependents. However, in cases where employees voluntarily provide this information, supervisors have a responsibility to protect the employees' and dependents' privacy. Therefore, all restricted information is to be submitted to the medical unit to be filed in the employee's medical file, returned to the employee, or destroyed after necessary review."

5. Was the request for medical certification arbitrary and capricious?

C#19250 Brandon 1999 Sustained
"The Postal Service violated the National Agreement.

The grievant's supervisor testified that she could not recall whether she specifically inquired of the grievant the nature of his illness. Nor could she specifically describe any factor or consideration not already mentioned above which caused her to suspect that the grievant's claim of illness was not genuine. Under these circumstances, it is difficult to understand what reasonable purpose the requirement of medical documentation served.

The reasonableness of the Service's actions in this case constitutes an affirmative defense. No reasonable, logical, much less compelling, reason has been shown by the Service reflecting how its interests were served by forcing the grievant to provide medical documentation establishing his incapacitation for work on December 29, 1995. Accordingly, the Service's actions in requiring medical documentation of the grievant was unreasonable and unwarranted. Such actions must be considered as inconsistent with the provisions of Section 513.361, and the grievance must be sustained."

C#18452 Powell 1998 Sustained
"There are two exceptions when medical documentation might be required. The first is if the employee seeking the leave for taking care of a family member is on restricted sick leave, then the requirements might be applied to his case. The other condition is if the supervisor deems documentation desirable for the protection of the Postal Service. If the supervisor believes that it is necessary for the best interests of the Postal Service, then the burden of proof shifts to that supervisor and he or she is required to affirmatively prove why it is necessary. No such proof was offered in this case, and it must be assumed and presumed that the supervisor was over zealous in seeking medical documentation. There was no indication that there was any personal animus, nevertheless the supervisor's action must be considered as either arbitrary or capricious."

6. Is there evidence of sick leave abuse?

C#00586 Gentile 1982 Sustained
"The instant situation fails to provide support for RG's decision to request medical certification. Though the Arbitrator believed that RG was acting in what he perceived to be the context of Section 513.361, the facts did not demonstrate that the interests of the Service required protection. `Protection' as defined means that the Service needed to be made secure or sheltered from any harm or liability which could develop as a result of the facts. In this case, the Grievant was absent for illness on Tuesday, November 3, 1981; this absence was admittedly in conjunction with his regular days off. There was, however, no history of such abuse. The second absence was close to November 3, 1981, but it came after one day of work on Tuesday, November 10, 1981, and after three hours of work on a holiday. This did not demonstrate a pattern which would support a `concern' to require medical certification."

C#19828 Francis 1999 Sustained
". . .the evidence shows that the controversy is solely about the reasonableness of the supervisor's response to the grievant's request for sick leave on November 10, 1994. The grievant did not request light duty. Rather, she said that she had pain in her neck that day which had not been alleviated by pain medication, did not feel well enough to carry mail that day, and asked to use sick leave. In that sense, the request was not different than the request of any other Letter Carrier suffering from some malady on a particular day, wishing to take sick leave because of it.

The evidentiary record does not show that there was any reason for the

supervisor to suspect that the grievant's request for sick leave was not for a genuine cause. She was not in restricted sick leave status and did not have an attendance problem. The question here is simply whether the grievant or management should be held responsible for the consequences produced by the grievant's request for sick leave.

Given the record, I find that there is no basis for holding the grievant responsible. While supervisors have discretion to require documentation to support applications for sick leave, Section 513.361 of the Employee and Labor Relations Manual (incorporated by reference into Article 19 of the Agreement) provides that, for absences of three days or less, `medical documentation is required only when the employee is on restricted sick leave or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.' Neither of those factors was present here. The grievant was not on restricted sick leave. Furthermore, there is no showing that medical documentation was desirable for the protection of the interests of the Postal Service, within in the meaning of that phrase. The grievant had not continually claimed an inability to perform one of the most significant portions of her position or otherwise given management reasonable cause to question her physical fitness for the position. If so, such concerns should and could have been addressed through a formal referral of the grievant for a fitness-for-duty examination at the expense of management."

7. **Is the day in question in conjunction with a nonscheduled day?**
When a carrier has rotating scheduled days off, it is mathematically impossible to not set a pattern on at least 56% of days when one day sick leave is used. This advances to a minimum of 76% of the time when two consecutive days sick leave are used and to 90% when three days consecutive sick leave are used.

Likewise, for a carrier on fixed days off, he/she will set a pattern on a minimum of 40% to a high of 80% of the time when one day Sick Leave is used. This advances to a minimum of 60% and a high of 100% of the time when two consecutive days sick leave are used and to a low of 80% and a high of 100% when three days consecutive sick leave are used.

When management claims a carrier abused his/her sick leave (setting pattern) by using sick leave in conjunction with a nonscheduled day, it is doing so with the knowledge that the odds are such that it is more difficult than not - to do otherwise.

C#00008 Cohen 1982 Sustained

"The supervisor who requested the medical documentation stated that she did so because Grievant showed a pattern of taking sick leave either prior to or after a non-scheduled work day. This indicated to her that medical documentation should be required.

In considering Grievant's Absence Analysis Form 3972, which would have been the one of concern to the supervisor, I am at a loss to understand how anyone could conclude that the few sick leaves taken by Grievant could be termed a `pattern of calculated use of sick leave to extend non-schedule days.' From December 15, 1979, which would be pay period 1, through August 8, 1980, the end of pay period 17, Grievant had three instances of sick leave.

That period of time constituted some 34 weeks. Grievant took sick leave in three of the 34 weeks. Amounting to a sick leave request once in every ten weeks. This hardly constitutes a pattern that could raise suspicion and indicate that an employee's undocumented request should not be accepted."

8. **Was the request for medical certification made at the time the leave was requested?**

9. **Did management grant the sick leave?**

10. **Did management argue that operational problems caused the request for medical certification?**

M-00662
"All carrier employees were notified that any absences on the day following the holiday would require substantiation from the employee. In our view, to cover all employees in one craft with the referenced requirement is contrary to national policy. Therefore, the grievance is sustained."

11. **What was the sick leave record of the grievant?**

C#13300 Walt 1993 Sustained
"Here, grievant's attendance record is excellent. No prior instance exists where the Employer had the slightest reason to believe that a sick leave request from grievant was not justified. However, the supervisor made no attempt to discuss the fact that a prior annual leave request for the same day was denied or the circumstances surrounding grievant's statement that he was ill. Had he done so, he would have realized that the basis for grievant's earlier annual leave request no longer existed since he had

returned to Eau Claire on Sunday evening, August 15. This is not a case of an employee who did not report to work but called in sick the same day for which an earlier request for time off had been denied. Here, grievant did in fact report to work on August 16 and worked until he could no longer do so due to illness.

The resolution of the grievance issue in this case turns on its particular facts. Those facts impel a conclusion that the supervisor's requirement that grievant submit medical documentation for his illness on August 16 was not reasonable since even the most cursory inquiry that day would have revealed the circumstances surrounding the earlier denial as well as grievant's physical condition that morning. Accordingly, the Employer will be directed to reimburse grievant for the cost of the medical statement which he was required to submit."

12. Did the employee request sick leave to avoid work?

C#17298 Eaton 1997 Sustained
"In case F1N-3Q-C 11193 (C#04033) Arbitrator Robert W. Foster dealt with a situation in which a carrier had left his route claiming illness, allegedly because he did not want to complete the overtime assignment given to him. There the Arbitrator was also confronted with what he described as a `single, isolated incident of grievant leaving work due to illness on a prior occasion,' with no work record indicating that he was a malingerer likely to abuse sick leave. This, Arbitrator Foster held, was not sufficient `to produce substantial doubt in the mind of a reasonable person that grievant left his route on the day in question simply because he did not want to complete the overtime assignment.' The Arbitrator therefore found a violation in requiring the Grievant to submit medical certification on that occasion."

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 10
4. Article 19

ELM 513.361
ELM 513.364
ELM 513.37
Family Medical Leave Act
Code of Federal Regulations Title 29 Section 825

D. Arguments

1. Management abused their discretion in requesting medical certification.
2. Employee was obviously ill when leave was requested.
3. Management is aware of on-going condition covered under FMLA or OWCP.
4. Employee treated disparately.
5. Management had no knowledge of abuse.
6. Grievant's record does not indicate abuse of sick leave (i.e., 3972, disciplinary record, etc.)
7. If management did not ask for medical certification the first day of absence, then no valid reason existed for subsequent days.
8. Employee is not on restricted sick leave (ELM 513.37).
9. Management never advised employees of criteria to be utilized in "protecting interests."
10. Management ordered medical certification simply because management's workload was heavy.

E. Documentation/Evidence

1. 3972 Absence Analysis's for grievant and comparables.
2. 3971's Request for Notification of Absence
3. Medical certificate and statement of treating physician.
4. FMLA certification.
5. Grievant's statement of events.
6. Witnesses statements, including family members.
7. Copy of doctor's billing.
8. Statement of other related expenses.
9. Witness statements regarding grievant's demeanor.
10. Proof of insurance payment, if any.
11. Schedule
12. Work Hours Report for date in question.

F. Remedies

1. Cease and desist.
2. Pay for the cost of securing this medical certification.
3. Pay mileage and lost time spent securing medical certificate.

RENEGING ON SETTLEMENT

A. Case Elements

1. A grievance settlement exists.
2. Management has reneged on the settlement.

B. Definition of Issues

C#07444
C#13985
C#13497

1. Was there a proven settlement?

C#08723

2. Was there fraud or grievous error by either party? Do both parties have "clean hands"?

C#12001

3. Did the parties' representatives have authority to settle?

7LA378
C#12347

4. Was the settlement in conflict or inconsistent with the law or National Agreement?

C. Contractual/Handbook (other) Citations:

1. Article 3
2. Article 5
3. Article 15.2
   - Step 1a
   - Step 1b
   - Step 2c
   - Step 2e
   - Step 3b
   - Step 3c
   - Step 4a

   Article 15.3A
4. Article 17
5. Article 19
6. NLRA Section 9

D. Arguments

1. A binding grievance settlement was made.
2. The settlement was made in good faith by the Union.
3. Management has reneged on the settlement.

3. Management has not acted in good faith.
4. Higher management has no authority to overturn the settlement.
5. The doctrine of "Res Judicata" applies.

E. Documentation/Evidence

1. Copy of the prior grievance settlement.
2. Signed statement of the Union representative who made the prior settlement giving details of negotiations/meetings, etc.
3. Signed statements of any witnesses knowledgeable about the settlement/negotiations/meetings, etc.
4. Steward's notes of interview of manager responsible for reneging regarding the reason(s) for the renege.

F. Remedies

1. Immediately comply with the prior grievance settlement.
2. Cease and desist reneging on grievance settlements.
3. Make employees whole for any losses suffered as a result of reneging on the agreement.

RENEGING ON SETTLEMENT

A. Case Elements

1. A grievance settlement exists.
2. Management has reneged on the settlement.

B. Definition of Issues

1. Was there a proven settlement?

Ideally, the settlement is in writing, signed by a manager. As Arbitrator Schedler wrote in C#07270, "It is said that the faintest written word is clearer than the brightest memory."

However, there are cases where verbal settlements have been enforced by an arbitrator. Stewards should note that the Union will bear the burden of proof to show that a verbal settlement was made and that this will be a heavy burden.

C#08723 Leventhal 1989 Sustained

In this case, there was a clear Step 2 settlement, signed by a District Labor Relations Specialist. The same Labor Relations Specialist later wrote a revised "decision" denying the grievance, stating that "This cancels and supersedes" the earlier settlement.

C#13985 Abernathy 1994 Sustained

In this case, management reneged on a verbal Step 1 settlement. Both Union and Management Step 1 parties testified at the arbitration hearing. The arbitrator found the Union representative credible and found the management representative not credible.

C#13497 Barker 1994 Sustained

In this case, the parties met at Step 3 and agreed to settle two cases. The management Step 3 representative, after being dissuaded from honoring the settlement by his superior, then issued a Step 3 decision denying the grievances. The Arbitrator wrote:

"The preponderance of the evidence of record demonstrates that, contrary to the contention of the Postal Service, the parties....achieved a meeting of the minds on the terms of a comprehensive final settlement resolving the subject grievances. At the completion of the Step 3 settlement discussions which took place on June 10. 1993, there remained no contingencies to be fulfilled as a predicate to settlement."

The arbitrator sustained the grievance.

2. **Was there fraud or grievous error by either party?**
   Do both parties have "clean hands"? Arbitrators will not hold settlements to be binding when there is a showing of fraud on the part of the Union or grievous error on the part of management.

   C#08723 Leventhal 1989 Sustained
   "For a grievance procedure to work, each side must send individuals who are authorized to act. In some cases, lower level authority is limited and that fact either is or should be known to the other side. If a grievance was filed seeking a 10% pay increase for all employees at a given facility, and a supervisor, perhaps even a 204b, agreed and signed off, such a settlement would be unenforceable as the Union had knowledge that settlement was outside the supervisor's scope of authority.

   An additional principle to be applied is if one side or the other withholds or misrepresents material facts and therefore secures a resolution by acts of commission or omission. For example, if a supervisor advised the Union to withdraw a grievance over a disputed discharge because he had "pictures" of the employee in the "act" when no such pictures existed, such might constitute grounds for the Union to subsequently seek reinstatement of that grievance.

   Good faith requires both parties to have clean hands."

   7LA378 Blumer 1947 Sustained
   "The successful operation of the grievance procedure requires that the parties abide by the decisions and agreements on the basis of which grievances are settled...

   This Board sees two restrictions on the statement of policy as explained in the previous paragraph. One restriction is that the parties are not bound to a grievance settlement which their respective representatives had no authority to settle...The second restriction is that the grievance settlement is open to investigation in the event of a substantial charge of fraud or grievous error."

3. **Did the parties' representatives have authority to settle?**
   Stewards will note that Article 15.2 Step 1a requires that grievances be filed at Step 1 with the grievant's immediate supervisor, and 15.2 Step 1b requires that the immediate supervisor shall have authority to settle. Nevertheless, as reflected in the quotes in 7LA378 and C#08723 above, arbitrators will not consider settlements to be binding where a finding is made that the parties had no authority to settle. Conversely, where the arbitrator finds the parties

did have authority to settle, later misgivings about the settlement will not allow a party to renege.

C#12347 Abernathy 1992 Sustained
"Based on the facts and circumstances in the case before me, I also find that the Step 2 decision...was reached by Postmaster Smith who must be deemed reasonably competent to address grievances at that level....(T)herefore I conclude that the Step 2 decision was reached after good faith negotiations by two experienced advocates and that a bargain or contract was struck."

C#13985 Abernathy 1994 Sustained
"(The supervisor) made it clear, in the memo and in her testimony, that she made this Step 1 decision before investigating the grievance and before conferring with (her superiors). This decision apparently was objected to by (her superiors) when they learned of it. (The supervisor) then tried to get out of the settlement she had made. In my opinion, supervisors who make Step 1 grievance decisions before investigating that grievance and conferring with other managers are not relieved of the responsibility of living up to the settlement made by later claiming 'it was a bad decision' or 'I didn't understand all the facts.'"

4. **Was the settlement in conflict or inconsistent with the law or National Agreement?**
Arbitrators will not consider settlements to be binding where they find that the settlement is in conflict or inconsistent with the National Agreement.

C#14273 Barker 1995 Denied
"Where, as here, a grievance resolution achieved at the initial step of the grievance process has the effect of establishing precedent in violation of the National Agreement...management acted properly in setting aside those resolutions and refusing to implement standards and/or criteria imposed upon it by those resolutions."

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 15.2
   - Step 1a-b
   - Step 2c-e
   - Step 3b-c
   - Step 4a

   Article 15.3A

4. Article 17
5. Article 19
6. National Labor Relations Act

D. Arguments

1. A binding grievance settlement was made.
2. The settlement was made in good faith by the Union.
3. The parties who made the settlement had authority to settle.
4. The settlement was not in conflict with the National Agreement.
5. Management has reneged on the settlement.
6. Management has not acted in good faith.
7. Higher management has no authority to overturn the settlement.
8. Management's bad faith in reneging on the settlement violates the National Labor Relations Act.
9. The doctrine of "Res Judicata" applies. This is a legal term that means, literally, 'a thing decided'. The rule is that once a matter is settled, it is conclusive as to the rights of the parties and constitutes a bar to subsequent action involving the same claim.

E. Documentation/Evidence

1. Copy of the prior grievance settlement.
2. Signed statement of the Union representative who made the prior settlement giving details of negotiations/meetings, etc.
3. Signed statements of any witnesses knowledgeable about the settlement/negotiations/meetings, etc.
4. Steward's notes of interview of manager responsible for reneging regarding the reason(s) for the renege.

F. Remedies

1. Immediately comply with the prior grievance settlement.
2. Cease and desist reneging on grievance settlements.
3. Make employees whole for any losses suffered as a result of reneging on the agreement.

REVERSION

A. Case Elements

1. An established full-time craft duty assignment exists.
2. The assignment is vacated by the successful bidder.
3. Management does not post the vacant assignment (or management does post it but then removes the posting prior to awarding it to the senior bidder).
4. Management does or does not provide written notification to the local union that the position is being considered for reversion and the results of such consideration.

B. Definition of Issues

C#17531
C#13770
C#11167

1. Did management comply with mandatory procedural requirements when considering a position for reversion or when reverting a position?

C#17916
C#15631
C#14633

2. Was management's decision to consider for reversion or to revert, arbitrary and capricious or otherwise improper?

C#19797
C#19605
C#18484
C#18327
C#16954
C#13775
C#12126
C#12223
C#05154

3. Was management's decision to revert a violation of the maximization provisions of the National Agreement?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 7.3

4. Maximization Memos
5. Article 41.1A1

D. Arguments

1. Management did not comply with the procedural requirements of Article 41.1A1:
   a. Provide the local Union with written notification of intent to consider a vacant position for reversion within 5 days of the vacancy.
   b. Make the decision to revert or else post the vacant position within 30 days of the vacancy.
   c. Provide the local Union with written notification of the results of the consideration for reversion.
2. Management's decision to consider for reversion, or the decision to revert, was arbitrary and capricious.
3. Management's decision to consider for reversion, or the decision to revert, was for an improper reason.
4. The reversion violated the contractual obligation to maximize the number of full-time employees and minimize the number of part-time employees found in Article 7 and related MOUs.
5. The reversion was based solely on prospective savings.

E. Documentation/Evidence

1. Form 1716 (Notice of Vacancy in Assignment) or other job posting, showing when the vacant position was previously posted.
3. Notice showing when and to whom the position was previously awarded.
4. Documentation showing when the previous bid-holder vacated the position (e.g., Form 50 showing effective date of transfer, retirement, promotion, etc., Form 1716 showing effective date of assignment to new bid, etc.).
5. Steward's notes of interview of manager who made the decisions to consider for reversion and to revert, detailing all reasons for the decisions.

6. Copy of all notification(s) to the local Union concerning the reversion.
7. Statement of local Union president regarding notification (or absence of such) detailing when received, etc.
8. Copy of all management correspondence, memos, letters, e-mail, etc., regarding the reversion.

9. If reverted position was an actual route, documentation showing daily hours worked on the route both prior and subsequent to the reversion.
10. If reverted position was a reserve position, documentation showing daily hours worked by PTFs, as well as all overtime worked, both prior and subsequent to the reversion.
11. Documentation of full-time/part-time employee ratio, both prior and subsequent to the reversion.
12. Documentation showing man-year level status of installation.

F. Remedies

1. Reinstate the reverted position, post it for bid, award it to the successful bidder; if there are no bidders, promote the senior PTF to regular and assign him or her to the position
2. Cease and desist reverting positions in an arbitrary and capricious manner or for improper reasons or without complying with the mandatory procedural requirements.
3. Make all affected employees whole.

REVERSION

A. Case Elements

1. An established full-time craft duty assignment exists.
2. The assignment is vacated by the successful bidder.
3. Management does not post the vacant assignment (or management does post it but then removes the posting prior to awarding it to the senior bidder).
4. Management does or does not provide written notification to the local union that the position is being considered for reversion and the results of such consideration.

B. Definition of Issues

1. **Did management comply with mandatory procedural requirements when considering a position for reversion or when reverting a position?**
   Article 41.1A1 of the National Agreement provides that a vacant duty assignment not under consideration for reversion shall be posted within five working days of the day it becomes vacant. It further provides that when a position is under consideration for reversion, the decision to revert or not shall be made not later than 30 days after it became vacant. Finally, it provides that the employer shall provide written notice to the local union of the assignments that are being considered for reversion and of the results of such consideration.

   M-01157
   In this Step 4 settlement, the parties reiterate the requirement that management provide written notice to the union at the local level of the assignments that are being considered for reversion and the results of that consideration.

   These provisions are the mandatory procedural requirements which management must follow regarding reversions.

   Arbitrators have held these procedures are mandatory.

   C#17531 Axon 1997 Sustained
   "The essence of Article 41, Section 1(A)(1) is procedural....(it) requires management to provide written notice when an assignment is "being considered for reversion and of the results of such consideration." What this language does is to require management to provide advance written notice to the Union when it is <u>considering</u> a position for reversion."

C#13770 Powell 1994 Sustained
"However, in reverting a position there are obligations...that must be met. These conditions are clearly set forth in Article 41.1.A.1 as set forth above.

Management not only must notify the Union in a timely manner, but must do so in writing. The facts in the present case do not indicate that the original notification was in writing. Management may have discussed this with the Union, but there is no written evidence to that effect."

2. **Was management's decision to consider for reversion, or to revert, arbitrary and capricious or otherwise improper?**
Management may not revert a position (or fail to post it, claiming they are considering it for reversion), on an arbitrary and capricious basis. In other words, management must have a valid operational reason for their action. In conformance with this ban against arbitrary and capricious action, management may not have a policy that all vacant routes are considered for reversion.

M-01389
In this Step 4 settlement, a local district's policy that all vacant routes were considered for reversion was grieved. The parties agreed that a blanket policy to consider all vacant routes for reversion prior to posting is inconsistent with 41.1A1 and that routes must be considered on a route by route basis. The local district's policy was ordered rescinded.

C#17916 Devine 1998 Sustained
"...the Postal Service must demonstrate changed needs to justify reversion decisions."

C#14633 Parkinson 1995 Modified
"...the Union argues that although they do not dispute the Postal Service's right to revert a position, they cannot accept the elimination "on paper" of a bid position when the position still exists and is serviced on a daily basis. With this in perspective and upon careful review of the evidence, it is apparent that the Postal Service arbitrarily reverted the two bid positions at issue herein."

Nor may management revert a position for an improper reason.

C#15631 Maher 1996 Sustained
"However, the NALC's direct testimony and indirect evidence clearly establish that the inspection of the Grievant's route was tainted by the station manager's animus towards the Grievant. This evidence strongly suggests that

the station manager intended and deliberately sought to abolish the Grievant's route by using a route inspection as retaliation because the Grievant sought and was granted Saturdays off by Postmaster Tirdo over his objections."
*(See next page)

* Although this case involves abolishment rather than reversion, it demonstrates an example of an improper reason.

3. **Was management's decision to revert a violation of the maximization provisions of the National Agreement?**
Management reversion of a position will often violate the requirements to maximize the number of full-time employees and minimize the number of part-time employees found in Article 7 of the National Agreement and related MOUs. The Union bears the initial burden of proof to show the violation.

C#19605 Eaton 1999 Sustained
"Analysis of prior Postal Service arbitration awards demonstrates clearly that when the Article 7, Section 3.B, issue is timely raised, the provisions of that Section must be weighed in the balance with other relevant provisions of the Agreement in installations of less than 200 man years. As Arbitrator Garret held, "each sentence" of the Section must be given reasonable meaning in light of the balance of Section 3". He concluded that Section 7.3.B "requires the Postal Service at all times to maximize the number of full-time employees in all post offices." Arbitrator Gamser agreed, and pointed out that the obligation of the Postal Service is that it "shall" maximize full-time positions with the "standards of practicability" applied by Arbitrator Garret.

Subsequent regional arbitration awards show that in striking the proper balance it is not enough for local Management merely to assert that a given condition is required for flexibility and economy in the workforce, although the flexibility issue may be weighed in the balance....

(I)f Article 7.3.B is to have its intended effect, read in conjunction with other relevant provisions of the National Agreement, the Employer may have a burden of proof in rebuttal where the Union has made a prima facie case that there would be no inefficiency, that ample work is available, that there is an unusual percentage of part-time employees, that PTFs are working full 40-hour weeks on a continuous basis, or even excessive overtime, or through similar evidence."

C#18327 Dennis 1998 Sustained
"The issue...is, can the Postal Service, under the conditions present in Chicopee, revert a vacant reserve Carrier position and distribute the work

covered by that position to PTFs to perform? In reviewing the record before me, I am compelled to answer that question in the negative. The only legitimate reason stated in the record for reverting RM-5 was to provide more flexibility in the Letter Carrier complement. What the Postmaster is seeking to do is to have the required work done by PTFs and eliminate the less flexible positions of Reserve Letter Carriers when they become vacant. That approach to manpower utilization could legitimately be termed `de maximization' and that policy runs counter to Article 7 of the National Agreement and the Memorandum of Agreement addressing maximization."

C#18484 Caraway 1998 Sustained
"The conclusion of the Arbitrator is that the Postal Service violated Article 7, Section 3.C, by reverting jobs 63R-01. The Time Sheets (Union 1) dealing with the 63 Zone clearly demonstrates this conclusion. There was ample work to justify converting Mr. Bancroft and Mr. Hass from Part-time Flexible to a Full-Time Regular position during the time period in question.

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 7.3
4. Maximization Memos
5. Article 41.1A1

D. Arguments

1. Management did not comply with the procedural requirements of Article 41.1A1:
   a. Provide the local Union with written notification of intent to consider a vacant position for reversion within 5 days of the vacancy.
   b. Make the decision to revert or else post the vacant position within 30 days of the vacancy.
   c. Provide the local Union with written notification of the results of the consideration for reversion.
2. Management's decision to consider for reversion, or the decision to revert, was arbitrary and capricious.
3. Management's decision to consider for reversion, or the decision to revert, was for an improper reason.
4. The reversion violated the contractual obligation to maximize the number of full-time employees and minimize the number of part-time employees found in Article 7 and related MOUs.
5. The reversion was based solely on prospective savings.

E. Documentation/Evidence

1. Form 1716 (Notice of Vacancy in Assignment) or other job posting, showing when the vacant position was previously posted.
2. Notice showing when and to whom the position was previously awarded.
3. Documentation showing when the previous bid-holder vacated the position (e.g., Form 50 showing effective date of transfer, retirement, promotion, etc., Form 1716 showing effective date of assignment to new bid, etc.).
4. Steward's notes of interview of manager who made the decisions to consider for reversion and to revert, detailing all reasons for the decisions.
5. Copy of all notification(s) to the local Union concerning the reversion.
6. Statement of local Union president regarding notification (or absence of such) detailing when received, etc.
7. Copy of all management correspondence, memos, letters, e-mail, etc., regarding the reversion.
8. If reverted position was an actual route, documentation showing daily hours worked on the route both prior and subsequent to the reversion.
9. If reverted position was a reserve position, documentation showing daily hours worked by PTFs, as well as all overtime worked, both prior and subsequent to the reversion.
10. Documentation of full-time/part-time employee ratio, both prior and subsequent to the reversion.
11. Documentation showing man-year status of installation.

F. Remedies

1. Reinstate the reverted position, post it for bid, award it to the successful bidder; if there are no bidders, promote the senior PTF to regular and assign him or her to the position
2. Cease and desist reverting positions in an arbitrary and capricious manner or for improper reasons or without complying with the mandatory procedural requirements.
3. Make all affected employees whole.

SEXUAL HARASSMENT

A. Case Elements

1. Some degree of proof exists that sexual harassment occurred leading to a hostile work environment for co-workers and/or "obnoxious or offensive" behavior toward a patron.
2. The grievant is charged with sexual harassment of a co-worker, and/or Postal patron, while on duty.
3. The Service takes disciplinary action up to and including removal.

B. Definition of Issues (specific to discipline for Sexual Harassment)

C#8101
C#0926
C#7894
C#5806
C#7172
C#8560
C#8662
C#8510
C#8449
C#10961

1. Does the alleged misconduct meet the criteria of "sexual harassment"?
2. Did the alleged harassment take place, in whole or in part, while the grievant was on duty?

C#08456

3. Did the Service meet its Burden of Proof for the discipline

C#7833

4. Did the Service address the sexual harassment as soon as it knew, or should have known it was occurring?

C#8661

5. Did the Service do a thorough investigation

C#8149

6. Was the discipline too severe?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 15
3. Article 16
4. Article 17
5. Article 19
6. Article 31
7. Article 35
8. Article 41.1.C.4.

D. Arguments

C#06744
C#07172
C#06286
C#08661
C#08510
C#10961
C#08149
C#07833
C#08101
C#08456

1. Technical Defenses
2. Grievant is not guilty of alleged harassment.
3. The penalty is too severe.

E. Documentation/Evidence

1. Letter of Proposed Removal and Letters of Warning, Suspension, or Removal
2. ELM 660 - Conduct
   661.53 Unacceptable Conduct
   666.2 Behavior and Personal Habits
3. Article 2 of National Agreement
4. USPS policy on sexual harassment.
5. Court records - including transcripts, settlements and/or judgements).
6. Police reports, Probation Officer reports - if applicable
7. Doctor's reports and dependency treatment reports
8. Grievant's statement
9. Witness statements
10. Victim's statements
11. Investigative interviews and memorandums
12. Title 29 of the United States Code - Code of Federal Regulations 1604.11 "Sexual Harassment"
13. Police reports (if applicable)
14. Court records (if applicable)
15. Public notices (i.e., newspaper articles, TV, radio reports, etc.)

C#07833

F. Remedies

1. Purge the suspension and/or removal.
2. Make employee whole for all lost wages and benefits.
3. Interest at the Federal judgment rate.
4. A remedy which would separate the harasser from the victim is sometimes appropriate.

5. Counseling for harassers can also be an option.

SEXUAL HARASSMENT

A. Case Elements

1. Some degree of proof exists that sexual harassment occurred leading to a hostile work environment for co-workers and/or "obnoxious or offensive" behavior toward a patron.
2. The grievant is charged with sexual harassment of a co-worker, and/or Postal patron, while on duty.
3. The Service takes disciplinary action up to and including removal.

B. Definition of Issues (specific to discipline for Sexual Harassment type disputes)

1. **Does the alleged misconduct meet the criteria of "sexual harassment"?**

Sexual Harassment - Focus on Prevention (USPS)

"There are two general types of sexual harassment which have been recognized by the courts as constituting a violation of Title VII of the Civil Rights Act of 1964." The first being Quid Pro Quo and the second being hostile environment. ". . . for this type of sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

"The key to any sexual harassment claim is that the harassment was "unwelcome." The U.S. Supreme Court made a distinction between voluntary and unwelcome (see Meritor case listed below).

Federal Equal Opportunity Reporter - 917019

Page XIV-32, II Meritor Savings Bank vs Vinson, 477 U.S. 47 (1986)
"Vinson's supervisor made repeated demands for sexual favors, usually at work, both during and after business hours. Vinson initially refused her employer's sexual advances, but eventually acceded because she feared losing her job. They had intercourse over forty times. She additionally testified that he fondled her in front of other employees, followed her into the women's rest room when she went alone, exposed himself to her, and even forcibly raped her on several occasions . . . The Court had no difficulty finding this environment hostile."

29 CFR, Part 1604 - EEOC Guidelines on Discrimination Because of Sex - Section 1604.11 - Sexual Harassment (see Exhibit A)

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . .

such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

The following are examples of behavior which have been found to constitute sexual harassment:

(See Exhibit B at end of this section for text)

NALC Activist - Volume 8, No. 3 - Workplace Topics
Stopping sexual harassment. What stewards should do. (See Exhibit C 1-4 at end of this section for text)

This four page article offers two (2) examples of sexual harassment, a quid pro quo situation in which a Postmaster seeks sexual favors from a female letter carrier. Also a hostile environment situation involving a group of carriers and a female employee.

The article discusses supervisor/carrier harassment, as well as carrier/carrier harassment. It also quotes various Union officers and representatives from around the country, including from this Region, L.C. Hansen of Branch 82.

The article is written with the Union steward and/or officer in mind.

C#08101 Letter 1988 Denied
"The grievant squeezed a female letter carrier on the breast (twice, hand up-palm open) while on the workroom floor. The female hit him twice on the shoulder. The event was witnessed by another letter carrier, a friend of the grievant, who suggested the grievant apologize. The female carrier had returned to her case and was casing when the grievant came up behind her. He then put his arms around her waist and his body up against her back, also he put his cheek next to her cheek, saying, `Oh baby, I'm sorry. I didn't mean to do it.' The female carrier pushed him away. The next day she talked with her shop steward and said she `wanted something to be done.' The steward referred her to the supervisor. The supervisor talked with the grievant and told him `not to do it again.' The female carrier was not satisfied, the event

had disturbed her, and she complained to the Postmaster. The Postmaster took statements from all concerned. The grievant claimed that squeezing the female carrier's breast had been an accident. He claimed that he was reaching for the pen in her pocket, that he was not paying attention and grasped her breast `ever so slightly.' He said he did not consciously squeeze her breast. The female carrier would testify later that she did not have a pen, and even if she had, it would have been on her left side as that is the only side of her shirt that has a pocket. The grievant had grabbed her right breast.

While other discipline was cited, the Arbitrator stated that the sexual harassment, in itself, warranted termination. He held that the grievant's action involving the female carrier "constituted unsolicited and unwelcome physical contact." The removal was upheld."

C#0926 Erbs 1990 Sustained
Grievant's comments to the supervisor, while childish and immature, were ruled not to be sexually harassing.

"Specifically, you have made the following comments. . . .

"The Grievant does not deny that the statements that were attributable to him on the Notice of Removal were, in fact, made by him."

Arbitrator comments (page 18).

2. **Did the alleged harassment take place, in whole or in part, while the grievant was on duty?**
(In addition to the examples used in 1, 3, 4, 5 & 6)

C#07894 Sirefmann 1988 Modified
Grievant was in a deli on his route and touched a deli customer on the backside with a handful of mail. Asked a female deli employee to "turn around" so he could look at her. Management expanded the investigation and came up with a good number of patrons willing to give statements about the grievant's misconduct on his route. The Arbitrator found discharge "too severe" and reduced it to a months suspension.

C#05806 Rentfro 1986 Modified
Charges against the grievant included evidence he sexually harassed women on his route (specifically in a business office) for over a year while delivering mail. The complaints included unsolicited and uninvited touching, caressing, hugging and kissing. While the emergency suspension grievance was sustained, the removal grievance was denied.

C#07172 Grossman 1987 Denied
Grievant's removal was based on two charges: 1. Sexual harassment of customers on his route while on duty, 2. Entering a customer's residence without permission. In addition there were elements of past discipline cited, part of which was a suspension for misconduct of a comparable nature.

C#08560 Witney 1988 Modified
The discharge was commuted to a disciplinary suspension, and the grievant was reinstated without back pay. The case involved the grievant entering a female patron's home to massage her neck. The misconduct involved the grievant making suggestive comments and grabbing the patron's wrist. The Arbitrator found that the grievant did not engage in overt sexual behavior, with the exception of the massage which the patron was a willing participant. The wrist grabbing was unacceptable conduct, however, the Arbitrator ruled that the grievant's conduct did not amount to sexual harassment.

C#08510 Parkinson 1988 Sustained
The grievant was alleged to have created a hostile work environment, i.e., various forms of harassment, including but not limited to, staring, comments, vulgarity, and mental harassment toward a female employee. The Arbitrator found many problems with the Services handling of the alleged harassment and ordered the grievant reinstated (although it was without back pay as the grievant had not made a reasonable effort to find work after the discharge).

C#08449 Sobel 1988 Denied
The charges in this case stemmed from allegations the grievant sexually harassed a postal patron while delivering to an office building on his route.

C#10961 Parkinson 1991 Denied
The grievant in this case was initially investigated for rape of a female patron on his route (carrier admitted having sex with the patron, but insisted it had been with consent). The rape charge was later dropped.

The investigation led to information that the carrier was currently on probation for "gross sexual imposition" stemming from sexual conduct with a 10 year old girl.

C#08662 Collins 1989 Sustained
The grievant in this case was reinstated and made whole. Grievant was removed for alleged on-duty misconduct of assault and sexual harassment. The alleged assault and sexual harassment took place with two male and one female co-workers standing a foot or two away. "The Arbitrator . . . believes

that at most, in terms of the Postal Service case, there is an evidentiary `toss-up' on the issue of whether or not (the grievant) committed the infractions alleged. But a toss-up does not represent clear and convincing evidence ... ."

3. **Did the Service meet its Burden of Proof for the discipline?**

C#08456 Belshaw 1988 Sustained

In the instant case, the grievant was removed for allegedly, unsatisfactory personal habits incident to alleged sexual harassment of female employees. A rural letter carrier (the grievant), while riding with a female new hire, reached across her toward the mail box and rubbed the back of his hand against her. The discipline did not fly for two major reasons - one being "procedural aspects" in that the discipline was originated at a higher level. The second reason was for what the Arbitrator called "substantive aspects."

Procedural

Pages 6 and 7 "the whole decision was made at the high level, with lower level supervision simply going along."

Page 7 Speaking of the investigation done prior to the Notice of Charges and the Letter of Decision, the Arbitrator states, "The only evidence relative to these events came from the employer witness, and the most favorable view mandated by the non-proffer of Union evidence still left the employer case desolate."

Page 8 "A removal is procedurally defective where . . . ."

Substantive

Pages 10 & 11

The Arbitrator talks about what evidence "could and couldn't" be considered. Hearsay evidence.

4. **Did the Service address the sexual harassment as soon as it knew, or should have known it was occurring?**

United States Postal Service Policy On Sexual Harassment

(See Exhibit D at end of this section for text)

"All managers and supervisors are charged with the responsibility for preventing sexual harassment in the workplace and, if sexual harassment occurs, for taking immediate and appropriate action."

29 C.F.R. - Part 1604 - EEOC Guidelines On Discrimination Because of Sex - Section 1604.11 - Sub-sections "d" through "g."

(See Exhibit E at end of this section text)

Sexual Harassment - Focus on Prevention - USPS

Page 4 & 5 - Employer Liability

(See Exhibit F 1-2 at end of this section for text)

C#07833 Germano 1987 Sustained
"The fact that the grievant was charged with engaging in `repeated and continuous sexual harassment of a co-worker for the past two (2) years, immediately raises the questions of why and how could this alleged behavior occur for such an extended period?"

"Through its own documents and statements, the Postal Service places its case in a tenuous position. If the harassment was so pervasive, then the employer's awareness of it can be inferred. Further, if the employer had notice of offending conduct, why did it not take immediate and appropriate corrective action, and what should that action have been? . . . Management's conduct in this case, however, contradicted its professed seriousness attitude (sic) and policy concerning sexual harassment by the following:

1. Supervisors doing no more than `discussing' alleged misconduct with grievant.
2. Failure to conduct investigation when first brought to attention of EEO.

If was only after more than a year of management having some knowledge of the grievant's alleged harassment of a co-worker and the filing of a second EEO complaint that `serious' action was taken. In fact, what happened at that point was, in many ways, an overreaction by the employer."

5. Did the Service do a thorough investigation?

C#08661 Collins 1989 Sustained
In the relevant case, the grievant was accused of sexual assault and harassment. While in line at the time clock the male grievant is alleged to have put his hand on the shoulder of a female co-worker and rubbed his private parts against her "rear end." The action being grieved was the "emergency suspension." After the alleged incident, the SPO suspended the grievant without taking time to interview any of the employees mentioned in the female complainant's statement and/or the grievant.

When (the SPO) suspended (the grievant) "he had before him only a written

allegation by one employee of workplace misconduct by another."

"If the concept of "just cause," even just cause for an emergency suspension means anything, it must require some evidence, as opposed to a mere allegation of wrongdoing."

6. Was the discipline too severe?

C#08149 Franklin 1988 Modified

In this case, two female letter carriers returned from sweeping letters, had called out to their supervisor that they had brought "two feet" of mail back to their cases. The grievant, turning from his case, told the two female carriers, "Here I got a foot for you." The women stated when the grievant made this comment he placed his hand on the zipper of his pants and made lewd gestures. The gestures were observed by an additional carrier. When one of the women voiced her displeasure at what was said, he made additional remarks about her sex life (having knowledge of her separation from her husband), ". . . hey, if you aren't getting enough, I got plenty for you." Some of the comments were overhead by the supervisor. There were additional alleged comments made toward one of the women (which the Arbitrator was not able to affirm), "You gonna write me up . . .? . . . You better not, . . . I know where you live . . . I also know where your ex-husband lives. That's where your kids stay sometimes."

The Service cited the ELM 666.2 in support of the grievant's removal, however, the Arbitrator decided that "removal is too severe a discipline, although discipline is indeed in order." The removal was modified to a 90-day suspension.

C. Contractual/Handbook (other) Citations

1. Article 3 - Management Rights
2. Article 15 - Grievance and Arbitration Procedure Section 2(b)
3. Article 16 - Discipline Procedure, Section 1 - Principles, Section 6 - Indefinite Suspension-Crime Situation (if applicable), Section 7 - Emergency Procedure, Section 8 - Review of Discipline, Section 9 - Veterans' Preference (if applicable)
4. Article 17 - Representation Section 3 - Rights of Stewards
5. Article 19 - Handbooks and Manuals

   M-39 115 Discipline
   115.1 Basic Principle
   115.2 Using People Effectively

   a. Let the employee know what is expected of him/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/her problem and 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 Obligations to Employees

a. Find out who, what, where and why.
b. Make absolutely sure you have 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.

6. Article 31 - Union/Management Cooperation Section 3 Information (when applicable)
7. Article 35 - Employee Assistance Programs (EAP) (if applicable)
8. Article 41 - Letter Carrier Craft, Section 1.C.4. (where carrier has been moved off his bid assignment)

D. Arguments

1. From Defenses to Discipline (unrelated to merits)
   a. Discipline was not timely issued.
   b. Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.
   c. Management's grievance representative lacked authority to settle the grievance.
   d. Double jeopardy.
   e. Higher management failed to review and concur.
   f. Insufficient or defective charge.
   g. Management failed to render proper grievance decision.
   h. Management failed to properly investigate before imposing discipline.
   i. Improper citation of "past elements."
   j. Management refused to disclose information to the Union (including claims that information was hidden).

2. Disputes about correctness or completeness of the facts used to justify the discipline.
   1. Management failed to prove Grievant acted as charged.
   2. Grievant may have acted as charged, but was provoked by another.

3. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline is warranted.
   a. Grievant may have acted improperly, but did so as a result of lack of, or improper training (including claims that the grievant "didn't know it was wrong").
   b. Grievant has long prior service, good prior record, or both.
   c. Grievant's misconduct was not intentional.
   d. Grievant was emotionally impaired.
   e. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
   f. Grievant was disparately treated.
   g. Rule grievant broke was otherwise unenforced.
   h. Management failed to follow principles of progressive discipline.

E. Documentation/Evidence

1. Letter of Proposed Removal and Letters of Warning, Suspension, or Removal
2. ELM 660 - Conduct
   661.53 Unacceptable Conduct
   666.2 Behavior and Personal Habits
3. Article 2 of National Agreement
4. USPS policy on sexual harassment.
5. Court records - including transcripts, settlements and/or judgements).
6. Police reports, Probation Officer reports - if applicable
7. Doctor's reports and dependency treatment reports
8. Grievant's statement
9. Witness statements
10. Victim's statements
11. Investigative interviews and memorandums
12. Title 29 of the United States Code - Code of Federal Regulations 1604.11 "Sexual Harassment"
13. Police reports (if applicable)
14. Court records (if applicable)
15. Public notices (i.e., newspaper articles, TV, radio reports, etc.)

F. Remedies

1. Purge the suspension and/or removal.
2. Make employee whole for all lost wages and benefits.
3. Interest at the Federal judgment rate.
4. A remedy which would separate the harasser from the victim is sometimes appropriate.

5. Counseling for harassers can also be an option.

Exh A

Exh B

Exh C-1

Exh C-2

Exh C-3

Exh C-4

Exh D

Exh E

Exh F-1

Exh F-2

3

CASUALS WORKED TO THE DETRIMENT OF PTFs (7.1.B.2)

A. Case Elements

1. A Part-time Flexible employee is utilized less than 40 hours in a service week.
2. A casual employee is worked in the letter carrier craft when a PTF is available and not scheduled to work 40 hours per week.
3. A casual employee is worked in another craft when an available and qualified PTF is not utilized and is scheduled for less than 40 hours.
4. The work being done in the other craft is of the same wage level.
5. A "light workload" period is being experienced by the carrier craft while an "exceptionally heavy workload" exists in the other craft.

B. Definition of Issues

C#12074
C#11957
C#11608
C#10994
C#08523
C#11385
C#12771
C#13036
C#13034
C#11722
C#10409
C#11834
C#11622
C#11608

1. Was the casual worked in lieu of the PTF?
2. Did a light workload period exist in the carrier craft while an exceptionally heavy workload period exist in another craft?
3. Was the work done by the casual in another craft?
4. Was the work done by the casual in the carrier craft?
5. Was the PTF denied training that would have qualified her/him to perform the work done by the casual?
6. Does a charting of hours show the PTF was available when the casual worked?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 7

3. The Conway Memorandum
4. M-41
5. Article 8
6. Article 19, ELM, F-21

D. Arguments

1. During the course of the service week, management did not make every effort to ensure that qualified and available PTFs were utilized at the straight-time rate.
2. The PTF was qualified to do the work that was done by the casual employee.
3. The PTF was available to do the work at the time that the casual was utilized to do it.
4. The PTF would have been at the straight-time rate.
5. The work that was performed by the casual was in the same wage level for which the PTF was qualified.
6. The work that was done by the casual was consistent with the PTFs knowledge and experience.
7. An exceptionally heavy workload existed in the craft the casual was utilized in while a light workload existed in the letter carrier craft.

E. Documentation that should be jointly developed/reviewed to establish relevant evidence.

1. Installation complement data (authorized and actual) (see O'Brien arb. Oct. 12, 1994)
2. Relevant 1813s (Supervisor's Daily Work Sheets)
3. Time cards/Employee Activity Reports (PSDS offices), of affected PTFs and casuals
4. Form 3996 (Carrier Auxiliary Control form)
5. Form 3997 (Unit Daily Summary)
6. Form 3971 (Requests for leave)
7. Weekly schedule
8. Seniority roster
9. Job description of assigned work to casuals
10. Relevant provisions of the Local Memorandum
11. Form 50 of affected employees
12. On-rolls Complement Reports

F. Remedies

1. Management will cease and desist the use of casuals when PTFs are available and have not been scheduled up to 40 hours per week.
2. Management will utilize PTF carriers across craft lines when the relevant criteria are met and PTF carriers are not scheduled for 40 hours per week.
3. Management will make the PTF carriers whole for lost wages up to 40 hours at the straight-time rate.
4. Management will make the PTF whole for any loss of leave build up.
5. Management to pay interest at the contract rate.
6. Provide Pay Adjustment forms PS 2240 and PS 2243 to NALC.

C#08523
M-01056
C#11358
C#00321
C#10409
C#12074
C#10952

CASUALS WORKED TO THE DETRIMENT OF PTFs (7.1.B.2)

A. Case Elements

1. A Part-time Flexible employee is utilized less than 40 hours in a service week.
2. A casual employee is worked in the letter carrier craft when a PTF is available and not scheduled to work 40 hours per week.
3. A casual employee is worked in another craft when an available and qualified PTF is not utilized and is scheduled for less than 40 hours.
4. The work being done in the other craft is of the same wage level.
5. A "light workload" period is being experienced by the carrier craft while an "exceptionally heavy workload" exists in the other craft.

B. Definition of Issues

1. Was the casual worked in lieu of the PTF?

C#12074 Epstein 1992 Sustained

The Dexter, Michigan, post Office was a facility of less than 200 man years of employment per year. The Grievant's contractual guarantee when requested or scheduled was 2 hours. The Grievant, a PTF letter carrier, performed the duties along the following lines: He opened the office in the morning, emptied mail bags prior to the time when clerks arrived to work, sorted flats into the flat case, sorted letters into the letter case, sorted mail into the box section, sorted parcels for both city and rural routes, had a complete knowledge of the entire city route that he cased and delivered on Saturdays, and on days when regular carriers were on vacation. He ran all Express mail in his own car for city and rural routes and started work when the office first opened.

Starting in January 1990 casuals were introduced to the small Dexter office and the Grievant's work was reduced by 2.5 to 4.5 hours per day. Casuals, which the Grievant trained, began coming in at 6:15 am and the Grievant's start time moved to the 9:30-10:00 am range.

"The Postal Service does have the obligation to make every effort to utilize qualified available part-time flexibles at straight time rates prior to any use of casuals to perform the same work which the Grievant was performing. I do not find any basis for the contention of the Postal Service that in accordance with the provisions of Article 3 the Service had the authority to make business decisions, such as the one involved herein, and that its decision to employ casuals was within its administrative authority. There does not appear to be any emergency

situation or duty requirements which were not known to the Postal

Service which might have required the sudden hiring of casuals. Under the applicable terms of the Labor Agreement I find that the Postal Service should give priority to the part-time flexible on the job before it hires any casual employees. Although the Postal Service may benefit and incur less of an expense by the utilization of casuals at a lower wage rate, that factor is not significant when one considers the general contractual requirements."

". . .information relating to the number of hours that the casuals worked in lieu of the Grievant was not entirely available to the Union. Therefore, I am directing the Postal Service to supply the Union with the necessary data upon which the remedy may be determined. If the specific information is not available within a sixty (60) day period following this award, I shall retain jurisdiction to determine the remedy available to the Union in this case."

C#11957 Britton 1992 Denied

The Grievant, a PTF letter carrier at the Greensboro, NC Post Office, was not working 40 hour weeks while a casual in another station was working over 40 hours. The matter was grieved under Article 7.1.B.1&2 of the Agreement.

"The Union argues that the failure of management to ensure that qualified and available Part-time flexible employees such as Mr. Humiston were utilized at the straight-time rate prior to assigning such work to casuals constitutes a violation of Article 7 of the National Agreement. With this the Arbitrator cannot agree. For, as read by the Arbitrator, there is no contractual language in Article 7 that requires that part-time flexible city carriers assigned to one facility, such as Summit Station, work at another facility, such as Westside or Spring Valley stations, prior to utilizing casuals assigned to those facilities. Part-time flexible are assigned to specific offices and their primary responsibility is to those offices, and there is no contractual work hour guarantee beyond the station to which they are employed. While the language of Article 7, Section 1.B.(2) provides that the Employer is required to make every effort to utilize part-time flexible employees at the straight-time rate prior to assigning work during the course of the service work to casuals, this duty is expressly limited in its application to qualified and available part-time flexible employees. In the selection of the word "available," the Arbitrator is persuaded that the parties intended that such term be given its commonly

understood meaning which is generally recognized as accessibility or presences and readiness for immediate use. So considered, the term "available" can only be reasonably viewed as applying to the facility where the part-time flexible is normally assigned. It necessarily follows therefrom, in the judgement of the Arbitrator, that the Grievant, who is assigned to Summit station as a part-time flexible employee, cannot rightfully be found to be available within the context of Article 7, Section 1.B.(2) for work at another facility such as Westside or Spring Valley stations."

2. Did a light workload period exist in the carrier craft while an exceptionally heavy workload period exist in another craft?

C#11608 Walt 1992 Denied

In this grievance filed in South St. Paul, Minnesota, took place in the second week of pay period 9 and the first week of pay period 10 (1989). A casual employee performed a small amount of carrier craft work, but was utilized mostly in the clerk craft breaking down and spreading mail.

"All part-time flexible carriers worked or were paid at least their guaranteed hours; the Employer is under no obligation to guarantee them a 40 hours work week. But of greater import, the Employer argues, is the fact that in the circumstances existing during the two workweeks in question, it was contractually barred from assigning part-time letter carriers across craft lines to perform clerk duties. Notwithstanding, the Conway memorandum, cross craft work assignments are only authorized in those circumstances set forth in Article 7.2.B. and 2.C. The Employer submits that only when the threshold conditions set forth in those sections of the National Agreement have been met does the Conway Memorandum come into play. In this case, there was not insufficient work in the letter carrier craft nor was there an exceptionally heavy workload in the clerk craft when, at the same time, a light workload existed for the letter carrier craft."

"The Union's reliance on the Conway Memorandum to support its contention that the part-time flexible letter carriers in this case should have been allowed to cross craft lines and supplant the casual in the performance of clerk craft duties fails to recognize the fact that the memorandum itself recognizes the controlling effect of Article 7.2. in determining those circumstances in which the Employer is obligated to extend "every effort. . .based on individual circumstance to utilize part-time flexible employees across craft lines. . .in lieu of utilizing casual

employees. Furthermore, the July 11, 1998, agreement between these parties continuing the Conway memorandum expressly recognized that the crossing of craft lines by part-time flexible or full-time employees must meet the qualifying conditions outlined in Article 7.2 of the National Agreement.' (emphasis added)."

"In the case at hand, the threshold requisites of Article 7.1.B. and 2.C. were not met. The part-time flexible letter carriers received at least their guaranteed work hours and there is no showing that there was `insufficient work on any particular day or days' in any of their `own scheduled assignment(s).' Section 2.B Nor were there `exceptionally heavy workload periods' in the clerk craft. Section 2.C Since existence of either condition is a prerequisite to a permissible cross craft assignment, the grievance must be denied. It is necessary to note that the requirements of Article 7.1.B. and 2.C. need not exist when cross-craft assignments are not present. In the latter situation, the provisions of Article 7.1.B.1 and 1.B.2 are directly applicable in determining the maximum utilization of the full and part-time work force in preference to the supplemental work force."

C#10994 Marx 1991 Denied
This grievance arose out of the Salem, NH Post Office when a PTF letter carrier was worked 31 hours in a service week while a casual worked 29 hours in the clerk craft. Additionally, the Union argued that the casual worked on days when the PTF was not scheduled. The Union argued Article 7.1.B. while the Service argued the light/heavy issue of 7.2.

"In sum, the convincing arbitration history shows that when the preference for PTFs over casual employees (as reflected in Article 7.1.B) involves the projected necessity of crossing craft lines, it is Article 7.2 which is controlling."

In reading the next two cases, **C#08523** and **C#11385** advocates should know that these cases represent the exception rather than the rule where there is a lack of evidence showing a light workload in the carrier craft and an exceptionally heavy workload in the clerk craft.

C#08523 Barker 1988 Sustained
In 1987 a grievance was filed with the Santa Ana Post Office (Class Action on the behalf of PTFs) by the NALC. Work was done in pay periods 6 and 7 by casual employees; the casuals were used as clerk

casuals to unload trucks, cut mail and pass it around to carrier cases and to process 4570 vehicle mileage cards. It was not disputed that the PTFs were available at the time the work was done. The records established that while casuals were being brought in as early as 6 am, PTFs were being scheduled as late as 10 or 11 am. The PTFs were not getting 40 hours in a week. The Union sought to have the PTFs reimbursed at the applicable straight time rate for the difference of forty (40) hours and the number of hours they actually worked.

The Arbitrator adopted the Union's framing of the issue: "Did the Postal Service violate Article 7, Section 1.B.2. of the National Agreement and the Conway Memorandum dated June 22, 1976, when it assigned work to casual employees instead of the part-time flexible employees?"

Management argued that: 1. The casuals were employed as "clerk casuals" and were hired under a clerk classification code and that the work they did was clerk work; 2. The carrier PTFs were subject to Article 8.3 and may be scheduled for less than 40 hours in a week; 3. Article 7.2 (light/heavy workload) was also cited by management.

"It is concluded that the grievance has merit and must be sustained. Postal management undertakes by virtue of the plain language of Article 7.1.B.2. to make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals. The Conway Memorandum provides texture to this provision by the statement: This provision <u>requires</u> that the employer make every effort to ensure that qualified and available part-time employees with flexible schedules are given priority to work assignments over casual employees except in instances of contemporaneous need for the Service of each; where utilization of the PTFs would result in the use of overtime; and where the PTF is not qualified or immediately available when the work is needed to be performed. None of these exceptions apply here."

"The `every effort' requirement mandated by Article 7.1.B.2. infers an obligation that management make a genuine attempt to schedule PTFs at the straight-time rates prior to assigning such work to casuals, even to the extent of subjugating administrative convenience" . . ."Moreover, the inference that PTFs are entitled, as a part of that genuine effort, to a <u>priority</u> in the scheduling decisions of management in this respect is made explicit by the working and content of the Conway Memorandum."

"Moreover, as the Conway Memorandum makes clear, there is no per se obstacle to assigning PTFs across craft lines in lieu of utilizing casual employees. The Conway Memorandum is explicit in stating that management is expected to make every effort based on individual circumstances to utilize PTFs across craft lines in lieu of utilizing casual employees, and Article 7.2 "(light and heavy workload)" is referenced. The Postal Service agrees that assignments across craft lines are permissible if the provisions of Article 7.2 are applied and followed, but appears to assert that Article 7.2 is a bar to the assignment of PTFs to the work performed by the casuals here."

"It is the conclusion of this Arbitrator that, in the circumstances of this case, local management was obligated to ignore craft lines and to use the PTFs to perform the work before utilizing casual employees. The evidence of record indicates that local management failed to make the effort required by Article 7.1.B.2 and was instead governed in its scheduling decisions by considerations of administrative simplicity and wage costs, as well as by misconception of the craft-lines-barrier, so to speak, to such use."

However, the remedy sought by the Union is considered inappropriate because its application would possibly, indeed, probably, result in compensating the PTFs for hours of work which they would not have performed. Accordingly, the requested action becomes punitive and not remedial.

The Postal Service is hereby directed to make the six PTFs whole (for actual hours they would have worked up to 40).

C#11385 Deitsch 1991 Sustained

Did the Employer violate the National Agreement when it failed to utilize the Grievants to perform clerk work in order to provide them up to 40 hours work at straight time during service weeks when casuals were scheduled to work and the Grievants received less than 40 hours?

The Service argued that the following two conditions detailed in Article 7, Sections 2. (B. and C.) were not met.

B. In the event of insufficient work on any particular day or days in a full or part-time employee's own scheduled assignment, management may assign the employee to any available work in the same wage level for which the employee is qualified, consistent with the employee's knowledge and experience, in order to maintain the

number of work hours of the employee's basic work schedule.

C. During exceptionally heavy workload periods for one occupational group, employees in an occupational group experiencing a light workload period may be assigned to work in the same wage level, commensurate with their capabilities, to the heavy workload area for such time as management determines necessary.

"The quantum of proof required in contract cases of this nature is `a preponderance of the evidence.' This is the Union's burden, and this standard will be used to adjudicate the instance grievances."

The Arbitrator noted that all other requirements specified in Article 7 and the Conway Memorandum had been met (i.e. qualifications, availability, non-conflicting assignments, no requirement of daily overtime, less than 40 hours scheduled during the service week). "The employer's position with regard to Article 7, Sections 2(B) and 2(C) is that the Union failed to demonstrate that the carrier workload was `insufficient' or `light' in both absolute and relative terms - relative to the clerk workload. According to the employer, overtime reports for the pay periods in question indicate just the opposite - a heavy carrier workload in absolute terms and relative to the clerk craft (i.e., a higher rate of overtime usage for the carrier craft than for the clerk craft). The Employer, therefore, was under no contractual obligation to assign the work to the PTF employees and to displace the casual clerk employees. To construe Article 7, Sections 2(B) and 2(C) as the Employer suggests would place a burden of proof on the Union that would be difficult, if not impossible, to discharge. Such a construction would effectively strip the Memorandum of its central purpose of requiring the Employer to use PTF employees across craft lines instead of casuals in accordance with the intent of the National Agreement that casuals are to be utilized as a <u>supplemental workforce</u>. Because of the unreasonable burden or proof, the Employer could use casuals instead of PTF employees with impunity. Article 7, Sections 2(B) and 2(C) would stand as absolute bars to the use of PTF employees across craft lines. This is clearly an unreasonable result stemming from Employer's construction of the disputed sections - an absurd result."

"Based upon these considerations, the Arbitrator concludes that the Employer violated the so-called Conway Memorandum and therefore Article 7 of the National Agreement against the backdrop of the facts and circumstances of this case."

The following cases all deal with situations in which PTFs were not worked across craft lines at the straight-time rate while the work they

would have been qualified and available to do was done by casual employees. Management's argument in all cases was in whole, or in part, based on the criteria in Article 7.2.B and C. Here is what some of those Arbitrators had to say:

C#12771 Rimmel 1993 Denied
"In any event, the parties have clearly acknowledged in the afore-referenced Step 4" (see M-00847) "disposition that the Conway Memorandum was not intended to provide greater rights for PTFs than set out under Article 7, Section 2 of the Agreement.

Furthermore, this record just does not show that there existed any duty assignments which the PTFs could have carried out in accordance with the provisions of Paragraph B. In any event, it would appear that provided under the referenced Paragraph B is not obligatory upon Management inasmuch as it is provided that Management `may assign' an employee where it is shown that insufficient work exists on the employee's `own scheduled assignment." In other words, it would appear that the crossing of crafts as provided for under this Paragraph B as well as Paragraph C of Section 2 is subject to a certain amount of discretion on Management's part."

C#13036 Laurie 1993 Denied
"Indeed, this jurisdictional protection of the right of craft members to perform the work normally associated with their bargaining unit is a bargained-for contractual right, to which, in the Arbitrator's experience, the parties have attached considerable importance. In the absence of clear evidence that the parties had intended the subservience of Section 2 to Section 1 of Article 7, the Arbitrator will attribute an interpretation of these provisions which gives full and enabling effect to each: that is, that Section 1 pertains across craft lines only under those circumstances delineated in Section 2.A."

C#13034 Suardi 1993 Denied
"When trying to reconcile the relevant language of Article 7.1.B.(1) and (2) with Article 7.2(B) and (C), the Arbitrator concurs with Arbitrator Bloch that both unusual and reasonably unforeseeable circumstances must be present before the fundamental separation of craft lines can be overcome. These conditions precedent to crossing craft lines are readily discernable from the negotiated language. They arise when there is an insufficient work load in one group and an exceptionally heavy work load in another group. Likewise, it is also important to
recall that while there is a stated preference for PTF employees over

casuals, there is nothing in the National Agreement which provides that all PTFs at an installation must receive 40 hours before casual employees can be scheduled."

C#11722 Klein 1992 Denied
"Item 2 of Article 7.1.B. requires Management to utilize qualified, available PTFs at the straight time rate prior to assigning work to casuals. However, PTFs are not guaranteed 40 hour weeks, and Article 7.1.B. cannot be read or interpreted to change contractually prescribed work hour guarantees or to impose the restriction that all PTFs must have received 40 hours prior to scheduling casuals. The contract must be read and interpreted as a whole, and when this is done, it is reasonable to conclude that Article 7.2.B. and C. impose certain qualifying conditions which must be met prior to assigning career employees across craft lines. While Article 7.1.B. makes no reference to crafts, the prerequisites and requirements imposed by Article 7.2 cannot be overlooked, even though every effort is to be made to give priority to PTFs; giving such priority cannot encompass ignoring other contractual obligations. The National level awards of Arbitrators Bloch and Mittenthal clearly hold that assignments across craft lines may be made only if the qualifying conditions of Article 7.2.B. or C. are met. Those conditions were not met in the instant case."

3. Was the work done by the casual in another craft?

C#10409 Sobel 1990 Sustained
The NALC filed a class action grievance when management at the Fort Lauderdale, Florida Post Office worked casuals to spread mail while PTF carriers, who should have been given the assignment were worked substantially less than 40 hours per week. The Union argued that it not only met all the criteria in Article 7 for the assignment to the jobs of spreading mail, but also the criteria of the Conway Memo, even as amended specifically by Article 7.2.

The Service argued that: 1. It was obligated to give the mail spreading work to the clerk craft and would be in the position of having a grievance filed if the work were to be given to carrier PTFs; 2. The language of Article 7.2 is only permissive. The term `may' rather than `must' is utilized. Since `may' is utilized, `may not' is equally permissible. This is especially applicable in the case of PTFs who can be assigned both flexible hours and job assignments as determined by the employer. In this instant case the Fort Lauderdale management

chose not to do so; 3. The entirety of Article 7 must be consistent, not just Article 7.1.B.2 which if taken solely would plainly justify the Union's demands. This would be the case if the casual workers were to perform carrier functions while PTFs were accorded less than 40 hours of work. However, such is not the case since the casuals were performing work which arbitration in the same jurisdiction had assigned to the clerk craft.

"Employer may, at any time, change the casuals' functions and assignments to a given craft and yet still retain the code designation (belonging to the other craft). Countless arbitrators have determined that the casual status overrides any code, which is designated solely for accounting convenience and that regardless of code those designated as casuals are without craft status. They could be transferred at will to work in the other craft."

"The letter carriers, both explicitly statement of the Station Manager (who was the Step 1 designee) and implication of the data which was reluctantly furnished to the Union by the Employer, proved it met what might be termed the requisite of 7.2.C. (light workload in carrier craft, heavy work load in clerk craft)."

"In sum, this data conclusively indicate that the carriers were experiencing light loads during the pay periods in question." (Carrier work load was established by showing the average number of hours worked by carrier PTFs, the average being 67.85. For the casuals doing clerk craft work the average hours for the same pay periods was 81 hours per casual.)

"The Employer neither contended nor demonstrated that the pay level of spreading the mail assignment currently belonging to the clerks was different than that of the carrier PTFs. In short, the Union met the `same pay level' criterion of Article 7.2.B." Additionally, the criterion of "knowledge and experience" was not a problem as PTF carriers had been assigned to the mail spreading assignment in the past.

"Each of the Class Grievant are to be compensated 40 hours per week for the designated two week pay periods. They therefore are entitled to be compensated for the difference between the number of hours actually worked in the cited pay periods and 40 hours. Such payment will be at the straight time hourly rate."

C#11834 Suardi 1992 Sustained

In the instant case out of Mount Morris, Michigan, a PTF was scheduled

to work from 9am to 2pm on Wednesday, August 28. On the same day a casual employee had been scheduled to work from 5am to 7am dumping mail. The NALC took the position that the Service had violated Article 7, Section 1.B. of the Agreement. The Union president did not push the jurisdictional dispute over what craft had a right to the work, but rather a dispute over a PTF's right to work over the casual employee. However, it was clear that in the past the mail dumping work had been performed by PTFs from both the clerk and carrier crafts.

There had previously been a grievance filed when clerks had delivered mail on an auxiliary route and the Postmaster had agreed to discontinue the practice. Thereafter the clerks filed a grievance contending that mail dumping work was primarily clerk work and belonged exclusively to the clerk craft. While the Postmaster would later agree (verbally) to give the dumping work to the clerk craft (the NALC was not included in the resolution process), the matter was still in dispute when the PTF/casual issue arose.

The Service argued that Article 7 must be read as a whole; that Article 7.2.B and C. conditions must be met too. Notably, management was arguing that neither "insufficient work" nor "exceptionally heavy workload" conditions existed.

Management also raised the question that the wage level might not be the same (while PTF clerks and carriers had done this work in the past, the work might actually be classified as level mailhandler work).

The Arbitrator found that the main thrust of the Service's argument was that Article 7.1.B cannot be viewed in a vacuum and must be read in light of the provisions of Article 7.1.B and C. He noted that the Conway memorandum alludes to Article 7.2 in its final paragraph. The Arbitrator is convinced that he must interpret Article 7 with both Sections 1 and 2 in mind.

"Interestingly, the language relied on by the Union does not expressly state that PTFs are to be given preference whenever a cross-craft situation arises. For this reason the Arbitrator believes the differences between Article 7, Sections 1 and 2 will continue to be a fertile area for controversy. Nevertheless, it is extremely significant that the challenged assignment involved in <u>this</u> case (i.e. dumping mail) had previously been performed by <u>both</u> PTF clerks and PTF carriers. Similarly, both crafts received Level 5 pay for this work rather than the Level 4 pay which a mailhandler would have received had Mount Morris possessed such an

employee. In the Arbitrator's opinion the historical overlap among those performing dumping work in Mount Morris makes this case an exception to the general rule requiring detailed analysis of the Article 7, Section B. and C. criteria."

"In the Arbitrator's opinion even if Article 7 could not be construed as giving the Grievant automatic preference over" (the casual) "the rather unsettled character of mail dumping work in Mount Morris on August 28 was such that the Grievant, a qualified PTF carrier, should have been called in before the casual."

4. Was the work done by the casual in the carrier craft?

C#11622 Powell 1992 Denied

In this grievance out of Harrisburg, PA the issue was framed as follows: Did management violate 7 of the National Agreement when it used casuals to carry auxiliary routes at the Uptown station branch? If so, what shall the remedy be?

"Management, in using casual employees, created schedules as much as three weeks in advance. PTF employees were sometimes assigned on a daily basis. The grievance herein alleges that management is using the casuals in holddown assignments in lieu or PTF carriers.

"At this station (Uptown station there are two auxiliary routes) management has either assigned or allowed casual employees to elect or to work these assignments while requiring PTF employees to report at a later time with no known assignments."

"Auxiliary routes are preferred assignments, and PTFs should be given priority in the assignment of these routes rather than be assigned on a daily basis."

Position of the Postal Service

All PTFs are now being employed between 38 and 40 hours per week, casuals are being employed for a lesser number of hours. Management is using the casuals on repeated tasks to improve efficiency in operations. Assuring the PTFs of continuity and full schedules is an obligation of the Employer and he has met this by providing full employment which has been enjoyed by part-time regular employees."

"It is difficult to read into Article 7 that PTFs have a preferential right to any particular job or work assignment. The essence of Article 7 and the

supplementary memorandum issued by the Senior Assistant Postmaster General is to assure that supplemental employees (casuals) will not displace or work more hours than the regular employees. The specific assignment and utilization must be lodged in the hands of management. These are not bid jobs, these are work assignments which management establishes to best carry out its mission. Advance scheduling of casuals to known positions or job are using part-time regulars (should read `flexibles') for the more sensitive daily changes is again a function of management's planning and direction of its workforce. Such assignments are not in violation of Article 7."

On page 4 Powell refers to the Zumas Award of 1985 (see C#00675) "There is no restriction as to how such casual employees may be utilized (assigned), except that the Service is required to `make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals."

5. Was the PTF denied training that would have qualified her/him to perform the work done by the casual?

C#11608 Walt 1992 Denied

In this grievance filed in South St. Paul, Minnesota, took place in the second week of pay period 9 and the first week of pay period 10 (1989). A casual employee performed a small amount of carrier craft work, but was utilized mostly in the clerk craft breaking down and spreading mail.

The grievance was denied for reasons pertaining to the Union's failure to show that a light workload existed in the carrier craft while a heavy workload existed in the clerk craft. However, a significant dispute existed in that management argued that the PTFs were not trained to do the work.

"The supervisor further testified that while part-time flexible carriers received 40 hours of training `downtown' (at the St. Paul Main Post Office), they were not trained, as was the casual clerk craft in breaking down classes of mail, properly tagging mail and reading those tags, and breaking down the mail between five digit routes and other routes."

"The Union argues . . .part-time flexible carriers were both available and qualified to perform the relatively simply tasks assigned to the casual employee during the two weeks in question. At most, it would take only five or 10 minutes to explain all of these functions to the letter carriers."

Casuals Worked to the Detriment of PTFs (7.1.B.2)

6. Does a charting of hours show the PTF was available when the casual worked?

	SAT	MON	TUE	WED	THR	FRI
	PTF/Cas	PTF/Cas	PTF/Cas	PTF/Cas	PTF/Cas	PTF/Cas
0600						
0700						
0800						
0900						
1000						
1100						
1200						
1300						
1400						
1500						
1600						
1700						
1800						
	Total PTF Hours					
	Total Casual Hours					

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 7 Section 1 and 2
3. Wording of The Conway Memorandum*

Memorandum to Regional Postmasters General
Subject: Utilization of casual employees
Dated: June 22, 1976
Authority: James V.P. Conway, Senior Assistant Postmaster General

Conway stated:

As a result of a number of grievances received by this office, it is necessary to reaffirm the responsibilities of the U.S. Postal Service pursuant to the provisions of the National Agreement regarding the utilization of casual employees. The Agreement state (sic) in part, "during the course of a service week, the employer will make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight time rate prior to assigning work to casuals.

This provision requires that the employer make every effort to ensure that qualified and available part-time flexible employees with flexible schedules are given priority in work assignments over casual employees. Exceptions to this priority could occur, for example, (a) if both the part-time flexible and the casual employees are needed at the same time, (b) where the utilization of a part-time flexible will otherwise be scheduled for 40 hours during the service week, or (c) if the part-time flexible is not qualified or immediately available when the work is needed to be performed.

Furthermore, in keeping with the intent of the National Agreement, the casuals are to be utilized as a supplemental work force, every effort should be made based on individual circumstances to utilize part-time flexible employees across craft lines (see Article VII, Section 2) in lieu of utilizing casual employees.

Please ensure that local officials are made aware of these guidelines concerning the utilization of casual employees.

*The Conway Memorandum was reaffirmed on July 11, 1988, by the general manager of the USPS Grievance and Arbitration Division and NALC Vice President Lawrence Hutchins (see M-00847)

M-00847 an excerpt from the July 11, 1988, agreement between the parties states: "During our discussion, we mutually agreed to the continued application of the principles contained in the June 22, 1976, Memorandum to the Regional Postmasters General on the subject of `Utilization of Casual Employees' by James V.P. Conway, the then Senior Assistant Postmaster General, with the understanding that the crossing of craft lines by part-time flexible or full-time employees must meet the qualifying conditions outlined in Article 7.2 of the National Agreement."

4. M-41 Part 124 Part-time Flexible City Carriers
5. Article 8 Section 8
6. Article 19
   ELM 419.11
   F-21 112.4 (b)
   231.2

D. Arguments

1. During the course of the service week, management did not make every effort to ensure that qualified and available PTFs were utilized at the straight-time rate.
2. The PTF was qualified to do the work that was done by the casual employee.
3. The PTF was available to do the work at the time that the casual was utilized to do it.
4. The PTF would have been at the straight-time rate.
5. The work that was performed by the casual was in the same wage level for which the PTF was qualified.
6. The work that was done by the casual was consistent with the PTFs knowledge and experience.
7. An exceptionally heavy workload existed in the craft the casual was utilized in while a light workload existed in the letter carrier craft.

E. Documentation/Evidence

1. Installation complement data (authorized and actual) (see O'Brien arb. Oct. 12, 1994)
2. Relevant 1813s (Supervisor's Daily Work Sheets)
3. Time cards/Employee Activity Reports (PSDS offices), of affected PTFs and casuals
4. Form 3996 (Carrier Auxiliary Control form)
5. Form 3997 (Unit Daily Summary)
6. Form 3971 (Requests for leave)

7. Supervisor's weekly schedule
8. Seniority roster
9. Job description of assigned work to casuals
10. Relevant provisions of the Local Memorandum
11. Form 50 of affected employees
12. On-rolls Complement Reports

F. Remedies

1. Management will cease and desist the use of casuals when PTFs are available and have not been scheduled up to 40 hours per week.
2. Management will utilize PTF carriers across craft lines when the relevant criteria are met and PTF carriers are not scheduled for 40 hours per week.
3. Management will make the PTF carriers whole for lost wages up to 40 hours at the straight-time rate.
4. Management will make the PTF whole for any loss of leave build up.
5. Management to pay interest at the contract rate.
6. Provide Pay Adjustment forms PS 2240 and PS 2243 to NALC.

C#08523 Barker 1988 Sustained

However, the remedy sought by the Union is considered inappropriate because its application would possibly, indeed, probably, result in compensating the PTFs for hours of work which they would not have performed. Accordingly, the requested action becomes punitive and not remedial.

The Postal Service is hereby directed to make the six PTFs whole (for actual hours they would have worked up to 40).

M-01056 APWU Pre-arb 1982

Four PTFs who did not work on April 7, 1982, will be paid eight hours each. Seven PTFs who did not work on April 8, 1982, will be paid eight hours each. Nine PTFs who did not work on April 9, 1982, will be paid eight hours each. The pay will be at the applicable straight time rate.

C#11358 Deitsch 1991 Sustained

"Did the Employer violate the National Agreement when it failed to utilize the Grievants to perform clerk work in order to provide them up to 40 hours work at straight time during service weeks when casuals were scheduled to work and the Grievants received less than 40 hours? If so, the remedy requested is compensation for all hours short of 40."

The Employer is hereby directed to compensate the Grievants at the straight time hourly rate for all hours short of 40 hours worked during the service

weeks covered by the grievance.

C#00321 Rentfo 1984 Sustained
"It is impossible to determine from the evidence the exact number of hours each PTF is entitled to be reimbursed. Thus, the 79 hours worked by (the casual) are to distributed evenly among all the PTFs scheduled to work during the month of (the casual's) employment."

C#10409 Sobel 1990 Sustained
Each of the Class Grievants are to be compensated 40 hours per week for the designated two week pay periods. They therefore are entitled to be compensated for the difference between the number of hours actually worked in the cited pay periods and 40 hours. Such payment will be at the straight time hourly rate.

C#12074 Epstein 1992 Sustained
The Union refers the Arbitrator to the corrective action requested in its appeal to Step 3 because the Union was able only to document some of the remedy it requested. Due to the fact that not all investigative material was given to the Union prior to filing the grievance, the Union requests that the Arbitrator retain jurisdiction after the decision is rendered so that the Union can document the full extent of the lability if the decision upholds its position.

1. The grievance in this matter was timely filed.
2. The assignment of casual employees to the Grievant's work area since January 1, 1990, decreased the number of hours available for work by the Grievant in violation of the Labor Agreement between the parties.
3. The parties are directed to determine the extent of the remedy available to the Grievant based upon information which the Postal Service is directed to supply to the Union concerning the number of hours that casual employees performed services for which the Grievant was qualified and available to bring him up to a maximum of 40 hours per week during the period beginning with January 1, 1990.

C#10952 Liebowtiz 1991 Sustained
1. The Postal Service violated Article 7.1.B.1 and 2. and 7.2.C. of the National Agreement in its failure to assign PTF letter carriers, and its assignment of casuals, to work in the clerk craft during the periods stated above, April 22 through May 23, 1989, and December 9, 1989, to February 9, 1990. As to work assignments such as are at issue in this case, the Postal Service is directed to comply with those provisions of the National Agreement in the future.

2. The issue of a make-whole remedy for the PTF letter carriers involved in this case is remanded to the parties for review and agreement under the criteria of the Conway memorandum as continued by the July 11, 1988, Step 4 settlement between the parties. In the event that the parties are unable to resolve that issue within 60 days from the date of this award, either party, or both, may return the case to this arbitrator for such further proceedings as may be required to resolve it. Jurisdiction is reserved for that purpose.

CASUALS EMPLOYED IN LIEU OF CAREER EMPLOYEES (7.1.B.1)

A. Case Elements

1. Casuals are employed (hired) in lieu of full or part-time employees.
2. Work that is permanent, not of a limited term, nor of a supplementary nature, is being done by utilizing casuals.
3. Vacant assignments have not been filled and the work is now being done by casual employees.

B. Definition of Issues

C#00321
C#00675
C#09471
C#11199
C#13393
C#12217

1. Were casuals worked in lieu of full or part-time carriers?

C#12962
C#13672

2. Was the work done by the casuals of a limited term supplemental nature?

C#12960
C#13954
C#12961

3. Were casuals being used to help make the transition to automation?

C. Contractual/Handbook (other) Citations

1. National Agreement
2. Article 3
3. Article 7
4. Article 7.1.B.1
5. Article 7.1
6. Article 12
7. Article 19
8. ELM 419.11
9. F-21
10. Article 31

C#13954
C#00675
C#11108
C#11328
C#12911

D. Arguments

C#12217

E. Documentation/Evidence

1. Installation complement data (authorized and actual) (see O'Brien arbitration October 12, 1994)
2. Relevant 1813s (Supervisor's Daily Work Sheets)
3. Time cards/Employee Activity Reports (PSDS offices), of affected PTFs and casuals
4. PS 3996 Carrier Auxiliary Control Form
5. PS 3997 Unit Daily Summary
6. PS 3971 Request for Leave
7. Weekly schedule
8. Seniority roster
9. Job description of assigned work to casuals
10. Relevant provisions of the Local Memorandum
11. PS 50 Notification of Personnel Action
12. On-rolls Complement Reports

F. Remedies

1. Cease and desist the use of casuals to the detriment of full and part-time carriers.
2. Monetary make whole remedy to the appropriate regular work force employees.
3. Interest at the contract rate.
4. Copies of Pay Adjustment forms PS 2240 and PS 2243 to NALC.

C#12960
C#13672
C#12962
C#12961
C#12074
C#11199
C#13954
C#11108

CASUALS EMPLOYED IN LIEU OF CAREER EMPLOYEES (7.1.B.1)

A. Case Elements

1. Casuals are employed (hired) in lieu of full or part-time employees.
2. Work that is permanent, not of a limited term, nor of a supplementary nature, is being done by utilizing casuals.
3. Vacant assignments have not been filled and the work is now being done by casual employees.

B. Definition of Issues

1. Were casuals worked in lieu career carriers?

C#00321 Rentfro 1984 Sustained

This grievance originated by the APWU out of the South Lake Tahoe Post Office which employed 10 part-time flexible employees. A PTF named Lee left for four months of maternity leave and a casual employee worked one month and resigned without being replaced by management.

The Union argued that the Service had violated Article 7, Section 1 of the Agreement. It argued that the provision requires that a casual employee "not be employed in lieu of full or part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals."

The Union argued that no part-time employee was working 40 hours per week. The remedy requested was that PTFs be reimbursed for the hours the casual worked (79 hours).

The Service's position was that the casual was needed to replace the PTF who had gone on maternity leave to "maintain the efficiency of the operation and to meet its service standard commitments." It argued that it "would have been economically inefficient and impractical to distribute Lee's responsibilities among the other PTFs."

". . .it is the Arbitrator's conclusion that by employing and scheduling the casual, the Postal Service was in violation of Article 7, Section 1 of the National Agreement" . . . "At the outset, the Arbitrator noted that the Union's claim that regular or part-time employees must be given overtime prior to the employment of a casual is `without merit.' Article 7, Section 1, requires only that PTFs be utilized at the `<u>straight-time rate</u>' prior to assigning such work to casuals.

The Arbitrator made note of an earlier Gamser award ". . .a PTF has no guarantee of 40 hours per week prior to the scheduling of a casual; nor is the Postal Service prohibited from hiring a casual to meet its service commitments."

Rentfro found that in the instant case "the Postal Service's contention in the I nstant case that the casual was needed to meet its service standard commitments is not supported by the evidence in the record."

"The Postal Service also argues that there was no difference in the work hours of the PTFs before and after the employment of the casual. Yet, a comparison of the weekly schedules for the three weeks prior to the casuals arrival with the month of her employment reveals a disparity. Averaging the PTFs' and the casual's hours for all the weeks at issue reveals that the PTFs' work hours were reduced by approximately. . . 79 hours."

C#00675* Zumas 1985 Denied

This dispute originated out of Des Moines, Iowa, when full-time regular MPLSM operators, who were on the overtime desired list, grieved casuals being worked on their non-scheduled days. The Union, on behalf of the Grievants, submitted that the ODLers were denied the opportunity to work, and requested compensation in an amount equal to overtime earnings lost. The Union cited Article 8, Section 5 as well as Article 7.1.B.1.

"The supplemental work force shall be comprised of casual employees. Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees."

"There is no restriction as to how such casual employees may be `utilized' (assigned), except that the Service is required to `make every effort to insure (sic) that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals.' It is also clear, as the Service contends, that the provision that casual employees `may not be employed in lieu of full or part-time employees relates to the number of casual employees that may be hired and to the limited duration of their employment. The term `employed' means hired and not, as the Union contends, the manner in which they are assigned (`utilized') and `employed' in different contests, in the same sentence."

C#09471* Dobranski 1989 Denied

Casuals were used to do time card data entry for a period of months while a new program was being put on line at a new location. The Union grieved that casuals were being used outside defined functional areas. Additionally, that casuals should not have access to sensitive/restricted information.

"In summary, I reject the Union contention that the casuals were utilized Improperly because of the nature of the information to which they had access. First, ". . . there are no restrictions in the Agreement or the relevant handbooks, manuals and regulations on the utilization of casuals. Moreover, neither the Agreement nor the relevant handbooks, manuals and regulations prohibit casuals from having access to sensitive, restrictive information. Finally, the evidence discloses that the two casuals in the Portland, Maine office who were inputting time and attendance data did not have access to the sensitive, restricted information over which the Union. . .expressed concern."

C#11199* Sherman 1991 Sustained

The instant grievance was filed by the APWU when the Service in Little Rock, Arkansas, hired a casual employee for work the Union saw as mail processing work that was of a permanent nature. At the time the matter came to arbitration the casual had worked 40 hours per week for a 6 month period and there was no reason to think the situation would not continue indefinitely.

The time sheets show that the casual did work from pay period 26 or 1989 through pay period 14 of 1990, 40 hours each week. . ." The casual employee worked in the labeling room, as well as having other duties on the workroom floor. All the duties were mail processing functions and were not due to heavy workloads or relief for annual leave periods, nor were they to accommodate a temporary or intermittent service condition.

The Service has consistently maintained that the only limitation placed on casuals being hired is the 5% limitation called for in Article 7, Section 1.B.3. Other than that limitation, and the length of service limitation provided in Article 7, Section 1.5.4., there are no limitations on casual hiring. The Service has also maintained that there is no, or very few, limitations on what duties casuals may perform.

The Postal Service argued that the Arbitrator had no authority to create a full-time position for bid as requested by the Union.

The Service argued that in a contract case the Union has the burden or proof. Management does not have to show it did not violate the contract, but rather the Union must show that management did violate the contract by a preponderance of the evidence. The Service accused the Union of not

presenting evidence of a contractual violation.
"Since management has admitted hiring (the casual) to assist a FTR clerk in the label room and has given her a regular 40 hour week from the time she was hired until the present, the obvious question is, `Why did the Postal Service not hire a career employee, instead?'"

The answer seems equally obvious; management preferred to have someone perform this work who had no rights and no benefits such as a career employee would have.

Did management violate Article 7, Section B (7.1.B.1)? In the Arbitrator's opinion it is difficult to imagine a more obvious violation of this contract provision.

"With respect to Section B, in some ways the intent of the parties is perfectly clear. The first clue to this intent may usually be found in the descriptive term chosen by the parties to identify the group of employees in question. Here the parties chose the title `Supplemental Work Force.' A `supplement' is something added - to make up for a deficiency. The first paragraph explains quite clearly that casual employees will be used on a temporary (limited term) basis as a supplement (to provide expertise or simply additional help when there is more work than the current work force can handle). Then, it resolves all doubt about the parties' intent by stating that casual employees may not be employed (hired) under circumstances wherein it may reasonably be expected that there will be a continuing need for someone to fill the position. In the Arbitrator's opinion, this is precisely what management did; it hired (a casual) knowing that there was a permanent position which could properly be filled by a career employee."

"The Union requested as a remedy that the Grievant be made whole and that (if the need existed) management be directed to post the position for bid by a career employee. At the hearing there was no evidence which would identify the person or persons adversely affected by management's improper action."

"The Arbitrator will not attempt to describe the remedy, in detail; instead he will direct management to discontinue the practice of hiring casuals when it knows that a permanent employee is needed. He will also direct management to do what is necessary to remedy (in some appropriate manner) the effects of the breach of contract."

C#13393 Mittenthal 1994 Sustained
In this recent case to which both the APWU and NALC were a party, a dispute arose over management's exceeding the 5% ceiling (after a cease and desist

order) on the use of casuals (7.B.3). Most of the excess casuals were employed in mail processing operations in larger postal facilities. Mittenthal felt that some of the work done by excess casuals could have been done by employees on the ODL and remanded the hashing out of the remedy back to the parties. During the dispute the Service made the following argument:

"The Postal Service also observes that Article 7, Section 1.B.1 prohibits Management from employing casuals `in lieu of full or part-time employees'. It maintains that the Union carefully monitor Section 1.B.1 at the local level and that a widespread failure by Management to honor this provision would have prompted many local grievances. It claims that the apparent absence of such grievance activity reveals there was no problem at the local level. It says that 1.B.1. should thus serve as a `litmus test' regarding casual usage in relation to full or part-time employees. It notes too a national award by Arbitrator Gamser in December 1979 holding that there is no contractual requirement that part-time flexible employees receive 40 hours of work before casuals can be scheduled."

"The Postal Service refers to the casual limitation in Article 7, Section 1.B.1. (casual employees . . . may not be employed in lieu of full-or part-time employees). It states in effect that any damage attributable to excess casual usage under Section 1.B.3., the 5% ceiling, should be remedied at the local level under Section 1.B.1. It asserts that local unions have successfully grieved under 1.B.1 and that the apparent absence of such grievance activity during the period in question suggests there was no problem at the local level."

"This argument is not persuasive. The Section 1.B.1 restriction can be invoked when Management hired casual employees `in lieu of. . .' career employees. That is a matter to be determined by conditions existing at a particular postal facility. A violation of 1.B.1. can occur at the local level even in an accounting period in which the national casual ceiling of 5% has been honored. For the casual ceiling is a Postal Service obligation beyond the essentially local obligation found in 1.B.1. There is no remedy at the local level for a violation of the national casual ceiling. Hence, the presence of the 1.B.1. restriction in no way precludes the Unions from pursuing a national remedy."

C#12217 Harvey 1992 Sustained

In this case out of Sarasota, Florida, the issue was framed as follows: Did the Postal Service violate the contract when it increased its employment of the casual work force after excessing 116 career employees (104 full-time and 12 part-time) out of the installation?

In addition to its arguments made under Article 7, the Union was successful in arguments made under Article 12: 12.4.D. and 12.5.C.5.a(2).

Article 12 Section 4
D. In order to minimize the impact on employees in the regular work force, the Employer agrees to separate, to the extent possible, casual employees working the affected craft and installation prior to excessing any regular employee in that craft out of the installation. The junior full-time employee who is being excessed has the option of reverting to a part-time flexible status in his/her craft, or of being reassigned to the gaining installation.

Article 12 Section 5.C
5. Reduction in the number of employees in an installation other than by attrition.
a. Reassignments within installation. When for any reason an installation must reduce the number of employees more rapidly than is possible by normal attrition, that installation:
(2) Shall, to the extent possible, minimize the impact on regular work force employees by separation of all casuals.

"The Union prepared an exhaustive summary based on its review of Postal data. The Union identified the work assignments of the casuals and graphed the hours worked by individual casuals showing for example at the Main Post Office that a number of casuals worked hours beginning at 4 or 5am through 5 to 6pm and that by combining the shifts worked, there would be several continuous 8 hour shifts available that could be worked by FTRs if allowed to `retreat' to Sarasota.

Thus, I believe it appropriate to consider the language of Article 12.4.D and 12.5.C.5.a.(2) in resolving this grievance. First, as conceded by the Union, there is potential conflict in the wording of the two sections, with the language of the general section (12.4.D.) stipulating that the Employer agrees to separate, to the extent possible, casual employees. Then the more specific provision of 12.5.C.5.a.(2) providing for minimizing impact on regulars - to the extent possible - by separation of all casuals. Both provisions use the same limiting language `to the extent possible' but because of the sentence construction, arguably the provision of 12.5.C.5.a.(2) could be more restrictive of any Employer discretion.

Reading both together, I do no believe a fair analysis of the language of either mandates that the employer <u>must</u> separate <u>all</u> casuals. Certainly, that is stated as a goal, to the extent that it is possible. It being possible is obviously

tied in with the need for some flexibility in staffing the facilities. That is a decision for management to make in utmost good faith, realizing the mandate of Article 12, in both sections cited above, to minimize the impact on regular employees by the separation of casuals. Once Management has made a good faith determination of the absolute lowest possible level of casual support required for operation of the reduced facility and has accordingly reduced the casual workforce, then Article 12 contemplates that excessing may proceed."

2. **Was the work done by the casuals of a limited term supplemental nature?**

C#12962* Sickles 1992 Modified

In July of 1992 the APWU submitted a grievance (Spartanburg, S.C. Post Office) which asserted that casual employees were being hired in lieu of career employees and were not being used in a supplemental manner. It was alleged that the Service had employed casuals constantly for the "last two years" and that no career employees had been hired.

The material facts were not in dispute. The question at issue was whether management violated Article 7 of the National Agreement by hiring and utilizing casuals rather than career employees, and if so, what should the remedy be.

The Union argued a violation of Article 7.1.B.1 "in that the casual employees do work which normally would be performed by part-time flexible employees." It cited a Regional Labor Relations memo concerning the "Use of Casuals."

"Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental work force needs occur. Where the identified need and workload is for other than supplemental employment the use of career employees is appropriate."

Management argued that there was no violation for the following reasons: 1. The only limitation on its right to hire casuals are the two subsections (3 and 4) of Article 7.1.B. (i.e., 5% cap and 90 day period); 2. Since the Service has hired casuals for the last five years it is now "past practice;" 3. The Service claims that the casuals do work in the clerk and mailhandler craft which part-time flexibles could not do; 4. Article 3, Management Rights, assures the Service the right to hire and assign employees as it sees fit.

"Management contends that casuals were utilized to meet high absenteeism,

unusual sick leave patterns, and so forth. But the record reflects such a consistent and repeated use of casuals that it is simply not plausible that management could not foresee the need for additional assistance over the course of the year. The employment of casuals in Spartanburg is very different than the use described in the other arbitration awards, e.g., casuals employed using a several week period to handle contest entry mail (Zumas); casuals employed while machinery is being delivered (Gamser); two casual positions used for 8 months while management determined the custodial needs of a new facility (Brandon); casual employees hired when a new payroll processing system was put in place (Dobranski). These are the types of temporary and exigent circumstances which qualify as `limited term;' the use in Spartanburg, on the other hand is clearly in lieu of regular employees."

"The grievance is sustained to the extent that the Service shall, within 45 days of this Award, take necessary action to assure that work which has heretofore been routinely performed by casual employees will be performed by career employees. Furthermore, hereafter casual employees will be employed only in circumstances which do not occur on a routine or consistent basis, but are of a temporary and/or exigent nature. This arbitrator will retain jurisdiction in this matter to resolve any disputes which may arise regarding timely compliance with the terms of this Award."

C#13672* Axon 1993 Modified

This case originated when the APWU filed a grievance against the Medford Post Office for its use of casuals on a routine and constant basis over an extended period of time. The number of casuals had risen from zero in 1986 (outside Christmas) to a high of 19. At the time this grievance was filed 12 casuals were employed. Casuals were generally hired in July of one year and served two 90 day terms before being terminated by the end of the year. The casual would then be hired a few days later for two additional 90 day periods in the next calendar year. At the same time that management was increasing the number of casuals to as high as 19, part-time flexibles were reduced from 22 to zero. The percentage of casual hours worked increased each year since 1986. During the same time period mail volume at the Medford Post Office almost doubled. It was shown that the work performed by the casuals was work formerly performed by career employees. Additionally, as of 1993 eight full-time regular positions existed at the Medford Post Office.

The issue was framed as follows: Did the Postal Service violate Article 7 of the National Agreement in the manner in which it hired and used casual employees to work at the Medford Post Office? If so, what is the appropriate remedy?

The parties agreed to a remedy period extending back approximately two years from the aw the Arbitrator that casual employees be replaced by career employees.

The record evidence established casuals in Medford were not being `utilized as a limited term supplemental work force,' but were in fact `employed in lieu of full or part-time employees' contrary to the prohibition contained in Article 7, Section 1.B."

"The Union has requested a remedy which if awarded by the Arbitrator would be punitive because of the large amount of dollars which would be necessary to satisfy the demand. None of the regulars employed during this period were shown to have missed work opportunities because of the utilization of casuals, in order to justify the substantial amount of money sought in this case. Nonetheless, the integrity of the bargaining unit has been diminished by the prolonged and extensive use of casuals in lieu of career employees. When there has been a defiance of the contract obligation, monetary relief is appropriate to correct the violation and to deter repeat violations by management in the future."

"In developing a remedy, the parties should keep in mind this decision does not stand for the proposition casuals cannot be utilized at the Medford Post Office. It is only when the utilization of casuals reaches the point where casuals are being worked in lieu of regular employees, instead of as a `Supplemental Work Force' that a contract violation is established. The Arbitrator will enter an award directing the Postal Service at Medford to discontinue the hiring of casuals when it plans to use a casual employee in lieu of a regular employee. The parties are also ordered to meet and develop an appropriate monetary settlement. The maximum amount the Postal Service shall be obligated to pay under this Award shall be no more than eight weeks pay at the straight time rate. If the Postal Service repeats its contract violation in the future, substantial monetary relief along the lines claimed by the Union - in this case - might be appropriate."

3. Were casuals being used to help make the transition to automation?

C#12960* Mathan 1991 Sustained

In this grievance, filed by the APWU in Springfield, Missouri, the issue was defined as: Did the Postal Service violate the provisions of Article 7, Section 1 B (1) of the National Agreement by employing supplemental employees instead of those attached to the regular work force?

The Springfield Post Office had employed a large number of casuals since the mid 1980s. In 1989 the APWU grieved the high number of casuals in relation

to regular employees (60 casuals compared to 53 PTFs). The grievance was denied and the explanation was that it was necessary to hold jobs open for a new facility that was being built. The Service claimed to be reducing the number of casual employees and was in the process of filling full-time vacancies with career employees. The grievance was appealed to Step 3 where it was still pending at the time of the current grievance.

The current grievance, filed in March 1991, two years after the first grievance was filed is similar to the first one filed. The new facility was put on line but the use of casuals did not decrease. There were still approximately 60 casual employees being used at the Springfield Post Office. Management was now saying that because of the implementation of automation equipment in the neighboring facility casuals were needed because excessing might occur from that facility.

The casuals were now being employed in order to provide flexibility when cutbacks would have to be made due to automation. The Union provided data showing that 30-32 of the casuals were in the clerk craft and that they were working 35-40 hours a week and in some instances up to 60 hours a week.

The Union argued that the supplemental work force was never intended to be a transitional work force. If it had, there never would have been a need to negotiate the Transitional Employee Award during national negotiations.

The Arbitrator noted the Union's argument that in each instance the Postal Service specifically stated that after the stated events the number of casuals would decrease. In each case the number of casuals stayed the same or increased. "The basic question in this case, however, is not whether management was wrong when it predicted that the number of casuals would decrease, or even whether its assertions were not made in good faith. . .the issue is whether it had the right to employ these casuals <u>at all</u> in the manner professed."

> "This is what has occurred in the present case. In effect, management is using the casual as it might have used part-time flexible employees who would be there working as PTFs in anticipation that their workload would decrease as full-time regulars have their positions reverted. Management claims that it does not want to disrupt the lives of PTFs. But these employees know they are not assured of a full work schedule. They are there to provide the flexibility management is attempting to provide with casuals. That is all right on a temporary or sporadic basis, but not over the course of five years. In this case it is local management which has rewritten the Agreement and created a class of `Transitional' employees."

Remedy

1. The Postal Service violated the provisions of Article 7, Section 1.B.1 of the National Agreement by employing supplemental employees instead of those attached to the regular work force.
2. The Postal Service shall cease and desist from employing supplemental workplace employees in lieu of full or part-time employees.
3. The Postal Service shall remove 19 casual employees performing clerk craft functions.
4. The case is remanded to the parties in order to determine other aspects of the remedy and the arbitrator will retain jurisdiction for 90 days to resolve any differences which may arise with respect to this remedy.

C#13954 O'Brien 1994 Sustained

In this recent case out of Danbury, CT the NALC filed a grievance charging a violation of Article 7, Section 1.B.1. It was shown that the installation had an authorized complement of 114 assignments and that six residual vacancies existed. Only 105 carriers were on the rolls. From October 1990 to November 1993 no career letter carriers were hired.

The Postal Service argued that: It had the right to hire casuals and that casual employees were being used to supplement the regular work force. It pointed out to the Arbitrator that casuals were being used to assist the regular work force with workloads that fluctuate and this allowed management to provide better service to customers.

The use of casual employees allowed the Service to stay current with the mail and reduce overtime. The Service noted that it has the right to determine complement and that casuals can be a part of overall complement. The casuals were hired for a short term, essentially to enable management to cope with the additional workload at Christmas. Management further argued that the positions that were vacant were held pending the impact of automation at the Danbury Post Office. All full and part-time carriers worked their maximum number of straight time hours before any casuals were utilized.

"However, once management determines what the carrier complement should be, it cannot simply fill any vacant positions with casual employees. To do so is to use the casual employees in lieu of full-time or part-time employees. This action is clearly contrary to the meaning of Article 7.B.1. (7.1.B.1.) of the National Agreement. To supplement the work force, which is the contractual purpose of casual employees, is to hire casual employees once the actual number of career employees equals the authorized number of career

employees. In the instant case management brought casual employees on board before the actual total of career carriers equaled the authorized total of carriers."

"Management's desire to defer hiring regular employees until the impact of automation on the work force could be ascertained is understandable. But this is precisely why the National Agreement provides for the hiring of transitional employees." (7.1.D)

Remedy

1. Within 30 days of the date of this Award, the Parties are directed to submit to the Arbitrator two copies of their respective positions relative to the amount of the remedy. The position statements should be specific and should include personnel involved, time frames, work performed and any other pertinent data. Upon receipt of these position statements, the Arbitrator will forward a copy to the adversary Party.
2. Within 20 days of the receipt of its adversary's position statement, each Party may, if it chooses, submit two copies of a rebuttal position paper to the Arbitrator. The Arbitrator will forward one copy of the rebuttal paper to the adversary Party.
3. The Parties are reminded that they may have no independent contact with the Arbitrator. If it is necessary to contact the Arbitrator, the Parties should utilize a conference call arrangement.
4. The Parties are further reminded that the sole question to be resolved by the Arbitrator concerns the issue of the remedy.

C#12961* Talmadge 1991 Sustained

This grievance was filed by the APWU in Binghamton, NY when a Level 2 Maintenance position became vacant and the work was done with casual employees for a period of approximately six months. Local management claimed that the position was not posted and filled because of a delay in getting permission from the MSC to fill the position.

The Union argued that Article 7.1.B.1 was violated when management continued to use casuals to cover the vacancy. The issue stipulated to by the parties was: "Did the Postal Service violate the National Agreement when it hired or utilized casual employees as custodians. . .."

"The casuals were not utilized for a limited term or heavy workload supplemental force. The Arbitrator finds a reasonable judgment to allow for the use of casuals up to a 90 day period for the running of the hiring process, while the vacancy of career custodian position was filled. The remedy

endorsed by the Arbitrator is that the overtime at the appropriate Level 2 rate is to be paid to the Union local for the hours worked by the casuals over the 90 days of the hiring grace period from January 1, 1991, until the Level 2 custodian position was staffed by a career employee. No monies will be paid for the first 90 day period from January 1, 1991. The Union is to redistribute the monies to the career custodial employees."

"Based on the foregoing, and record as a whole, it is the Award and decision of the Arbitrator that the Postal Service is to compensate the designated employees in pursuance of the above provided remedy."

C. Contractual/Handbook (other) Citations

1. National Agreement
2. Article 3 - Management Rights
   see C#12926 The service argues that Management has the right to hire and assign employees as it sees fit.
3. Article 7 - Employee Classifications
4. Article 7.1.B.1 - Supplemental Work Force
   The supplemental work force shall be comprised of casual employees. Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees.
5. Article 7.1. - Transitional Work Force - NALC
   see C#12960 Casuals used to help with transition to automation
6. Article 12 see C#12217 Regular employees were excessed from an installation while employment of casuals increased
7. Article 19
8. ELM 419.11 Casual Employee
   419.111 Definition. Casual employees are non-bargaining, non-career employees with limited term appointments. These employees are employed as a supplemental work force as described in collective-bargaining agreements to perform duties assigned to bargaining-unit positions.
9. F-21 112.4 b
   231.2
10. Article 31 - Union/Management Cooperation
    See C#123074 The Service was directed by the Arbitrator to provide information to the Union which was needed to calculate the make whole remedy.

D. Arguments

C#13954 O'Brien 1994 Sustained
The Union should identify specific harm caused by the hiring of casuals; including personnel involved, time frames, work performed, and any other pertinent data.

C#00675 Anderson 1985 Denied
The Postal Service almost always uses this Zumas Award to back up its claim that the only restrictions on hiring casuals are sub-sections 3 and 4 of Article 7.1.B. (i.e., 3. being the 5% limitation and 4. being the two 90 day term limit). The Union must point to Zumas to argue that the term "may not be employed" in 7.1.B.1 means "may not be hired" to the detriment of career employees.

C#11108 Stoltenberg 1990 Sustained
Casuals are being employed in lieu of, not supplementary to, the regular work force. In this case argued by the APWU two residual vacancies (custodial) were identified and the Union proved that two casuals were hired to fill the vacancies for a period of approximately six months. The Union was successful in its argument that once management determines a number of full-time positions it cannot fill those positions with casuals, that such a practice is not supplemental.

C#11328 Brandon 1991 Denied
It was argued that the carrier force had been reduced by attrition and that career employees were not being hired. Vacant positions had not been filled. Casuals were hired. Additionally, it was argued by the Union that there were no "dramatic shifts in the workload due to seasonal or extraordinary circumstances."

C#12911 Scearce 1993 Denied
The NALC argued "past practice" when a PTF position at a small (one city route) office was filled with a casual employee. The effort was unsuccessful and the Arbitrator stated that binding past practice "must meet rigorous criteria" the most important of which would be the "absence of contractual language."

C#12217 Harvey 1992 Sustained
An issue that the Union has had to argue in may arbitrations concerning the working of casuals is "timeliness." In this particular arbitration the Arbitrator addressed it as follows: "The first issue to dispose of is the Postal Service contention that the issues raised by the Union are untimely. I have reviewed the grievance file and find no reference to an issue of timeliness . . .prior to arbitration. As the issue of timeliness was not raised prior to arbitration, the

provisions of Article 15.3.B bar further consideration of this argument." Advocates should, in addition, be aware that when a grievance is filed may also impact the remedy. "The filing date of the grievance does, of course, limit the starting date of any remedy to 14 days prior to the filing date. Thus, it would be inappropriate to consider a retroactive remedy. The facts involved show this to be in the nature of a `continuing violation' action and thus, subject to a grievance being filed based upon the then occurring and continuing conduct."

E. Documentation/Evidence

1. Installation complement data (authorized and actual) (see C#13954)
2. Relevant 1813s (Supervisor's Daily Work Sheets)
3. Time cards/Employee Activity Reports (PSDS offices), of affected PTFs and casuals
4. PS 3996 Carrier Auxiliary Control Form
5. PS 3997 Unit Daily Summary
6. PS 3971 Request for Leave
7. Supervisor's weekly schedule
8. Seniority roster
9. Job description of assigned work to casuals
10. Relevant provisions of the Local Memorandum
11. PS 50 Notification of Personnel Action
12. On-rolls Complement Reports
13. Reports from the national level indicating the percentage of casual employees

F. Remedies

1. Cease and desist the hiring of casuals to the detriment of full and part-time carriers.
2. Monetary make whole remedy to the appropriate regular work force employees.
3. Interest at the contract rate.
4. Copies of Pay Adjustment forms PS 2240 and PS 2243 to NALC.

C#12960* Mathan 1991 Sustained

1. The Postal Service violated the provisions of Article 7, Section 1.B.1 of the National Agreement by employing supplemental employees instead of those attached to the regular work force.
2. The Postal Service shall cease and desist from employing supplemental workplace employees in lieu of full or part-time employees.
3. The Postal Service shall remove 19 casual employees performing clerk craft functions.

4. The case is remanded to the parties in order to determine other aspects of the remedy and the arbitrator will retain jurisdiction for 90 days.

C#13672 Axon 1993 Modified
"The Union has requested a remedy which if awarded by the Arbitrator would be punitive because of the large amount of dollars which would be necessary to satisfy the demand. None of the regulars employed during this period were shown to have missed work opportunities because of the utilization of casuals, in order to justify the substantial amount of money sought in this case. Nonetheless, the integrity of the bargaining unit has been diminished by the prolonged and extensive use of casuals in lieu of career employees. When there has been a defiance of the contract obligation, monetary relief is appropriate to correct the violation and to deter repeat violations by management in the future."

"In developing a remedy, the parties should keep in mind this decision does not stand for the proposition casuals cannot be utilized at the Medford Post Office. It is only when the utilization of casuals reaches the point where casuals are being worked in lieu of regular employees, instead of as a `Supplemental Work Force' that a contract violation is established. The Arbitrator will enter an award directing the Postal Service at Medford to discontinue the hiring of casuals when it plans to use a casual employee in lieu of a regular employee. The parties are also ordered to meet and develop an appropriate monetary settlement. The maximum amount the Postal Service shall be obligated to pay under this Award shall be no more than eight weeks pay at the straight time rate. If the Postal Service repeats its contract violation in the future, substantial monetary relief along the lines claimed by the Union - in this case - might be appropriate."

C#12962* Sickles1992 Modified
"The grievance is sustained to the extent that the Service shall, within 45 days of this Award, take necessary action to assure that work which has heretofore been routinely performed by casual employees will be performed by career employees. Furthermore, hereafter casual employees will be employed only in circumstances which do not occur on a routine or consistent basis, but are of a temporary and/or exigent nature. This arbitrator will retain jurisdiction in this matter to resolve any disputes which may arise regarding timely compliance with the terms of this Award."

C#12961* Talmadge 1991 Sustained
"The remedy endorsed by the Arbitrator is that the overtime at the appropriate Level 2 rate is to be paid to the Union Local for the hours worked by the casuals over the 90 days of the hiring grace period from January 1, 1991, until the Level 2 custodian position was staffed by a career employee. No monies

will be paid for the first 90 day period from January 1, 1991. The Union is to redistribute the monies to the career custodial employees."

C#12074 Epstein 1992 Sustained

The Union refers the Arbitrator to the corrective action requested in its appeal to Step 3 because the Union was able only to document some of the remedy it requested. Due to the fact that not all investigative material was given to the Union prior to filing the grievance, the Union requests that the Arbitrator retain jurisdiction after the decision is rendered so that the Union can document the full extent of the lability if the decision upholds its position.

Award

1. The grievance in this matter was timely filed.
2. The assignment of casual employees to the Grievant's work area since January 1, 1990, decreased the number of hours available for work by the Grievant in violation of the Labor Agreement between the parties.
3. The parties are directed to determine the extent of the remedy available to the Grievant based upon information which the Postal Service is directed to supply to the Union concerning the number of hours that casual employees performed services for which the Grievant was qualified and available to bring him up to a maximum of 40 hours per week during the period beginning with January 1, 1990.

C#11199* Sherman 1991 Sustained

"The Union requested as a remedy that the Grievant be made whole and that (if the need existed) management be directed to post the position for bid by a career employee. At the hearing, there was no evidence which would identify the person or persons adversely affected by management's improper action."

"The Arbitrator will not attempt to describe the remedy, in detail; instead he will direct management to discontinue the practice of hiring casuals when it knows that a permanent employee is needed. He will also direct management to do what is necessary to remedy (in some appropriate manner) the effects of the breach of contract."

C#13954 O'Brien 1994 Sustained

1. Within 30 days of the date of this Award, the Parties are directed to submit to the Arbitrator two copies of their respective positions relative to the amount of the remedy. The position statements should be specific and should include personnel involved, time frames, work performed and any other pertinent data. Upon receipt of these position statements, the Arbitrator will forward a copy to the adversary Party.

2. Within 20 days of the receipt of its adversary's position statement, each Party may, if it chooses, submit two copies of a rebuttal position paper to the Arbitrator. The Arbitrator will forward one copy of the rebuttal paper to the adversary Party.
3. The Parties are reminded that they may have no independent contact with the Arbitrator. If it is necessary to contact the Arbitrator, the Parties should utilize a conference call arrangement.
4. The Parties are further reminded that the sole question to be resolved by the Arbitrator concerns the issue of the remedy.

C#11108 Stolenberg 1990 Sustained

"The Postal Service's hiring ceiling lacks contractual authority to ignore the unambiguous terms of Article 7, Section 1.B.1. Accordingly, it must be found that the Postal Service violated the terms of the National Agreement when it used casual employees in lieu of full or part-time employees at both the McLean post Office and the Arlington Post Office. Turning to the question of relief, it is noted that while the hiring freeze occurred around June 26, 1989, the Arlington employees did not file a grievance on the matter until December 7, 1989. As such, relief in each of these facilities shall be calculated from a period of time 14 days prior to the filing of the grievances to a point in time when the full time positions . . .have been filled with career employees. Custodial employees on the overtime desired list shall receive overtime pay at the appropriate rate for the periods in time covered by these grievances. The Union shall designate to Management the appropriate full-time employees who are to receive the overtime pay."

EMPLOYEE CLAIMS

A. Case Elements

1. Employee suffers loss of, or damage to, personal property in connection with or incident to employment while on duty or on postal premises.
2. The loss or damage amounts to $10 or more.
3. Employee submits written claim within 14 days of loss or damage. PS 2146 (Employee's claim for Personal Property) is available but not required.
4. Employee supports claim with evidence such as a sales receipt, statement from seller showing price and date of purchase, etc.
5. Employee?s steward and supervisor make ecommendations.
6. Local management submits the claim to the area office within 15 days.

B. Definition of Issues

C#05754
C#01452

1. Was a claim filed within 14 days of the loss or damage?

C#03004
C#00124
C#01182
C#02686
C#04462
C#10700
C#05484
C#01373

2. Was the property which was lost or damaged personal property," excluding automobiles and their contents?

C#07760
C#03968
C#04235
C#05223
C#15832
C#17411
C#17656

3. Was the loss or damage in connection with or incident to the employee's employment while on duty or on the postal premises? Was possession of property reasonable or proper under the circumstances?

C#06482
C#01589
C#03408

4. Was the loss or damage caused in whole or in part by the negligence of the employee?

C. Contractual/Handbook (other) Citations:

1. Article 3
2. Article 5
3. Article 19
4. Article 27
5. ELM 640

D. Arguments

1. Procedural requirements were met.
2. Personal property was lost or damaged in connection with employment.
3. Possession of the property was reasonable.
4. The employee was not negligent, in whole or in part.
5. Loss or damage did not result from normal wear and tear.

E. Documentation/Evidence

1. Proof or evidence of ownership and value: e.g., sales receipt; statement from seller showing price and date of purchase; statement from seller about the replacement value.
2. Form 2146 or other written document making a claim.

F. Remedies

1. Reimbursement of lost or damaged property, taking into consideration depreciation.
2. Generally, absent evidence of depreciated value, arbitrators tend to award 50% of replacement value.

C#00795
C#01488

NOTE: A grievance is not filed at the local level in an employee claim.

employee claim attachment

employee claim attachment

employee claim attachment

employee claim attachment

employee claim attachment

employee claim attachment

HOLIDAY SCHEDULING

A. Case Elements

1. Management fails to timely post the holiday schedule.
2. Casuals and PTFs are not scheduled to be utilized to the maximum.
3. Regular volunteers are not properly scheduled.
4. The holiday pecking order is not properly followed, including pecking orders negotiated in the LMOU.
5. Management improperly mandates a regular carrier to work on a non-scheduled day, holiday, or day designated as a holiday, that could have been spared.

B. Definition of Issues

C#06775
1. Were as many regular carriers as possible allowed off C#00145 on the holiday and designated holiday?

C#03004
C#00124
2. Was the pecking order violated, were carriers improperly passed over and others improperly required to work?

C#16662
C#15832
C#17411
C#07760
3. Were PTFs and/or casuals not scheduled to be utilized to the maximum?

C#06482
C#03408
4. Was the schedule untimely posted?

C. Contractual/Handbook Citation

1. Article 3
2. Article 5
3. Article 11
4. Article 13
5. Article 30
6. Article 41
7. LMOU
8. JCAM

D. Arguments

1. Procedural posting requirements were not met.

JCAM 11.6.A

The National Agreement requires that the holiday schedule be posted as of the Tuesday of the week preceding the service week in which the holiday falls. (Our service weeks begin each Saturday and end each Friday, see Article 8.2). Therefore, the manager doing the scheduling must have determined the employees who have volunteered and determined how many carriers will be needed to perform the work for the designated holiday and holiday, completed the schedule and posted it on Tuesday.

C#10690
JCAM pg 11-4

In the event the holiday schedule is not posted until after Tuesday, the violation results in the Service paying the regular carriers scheduled to work their holiday, "holiday scheduling premium", per ELM 434.533 (an additional 50% of straight time rate). Additionally, Arbitrator Eaton in his award, sustained the Union's grievance and awarded those regular carriers on the late posted schedule, regardless of whether they volunteered or not, to work their scheduled day off an additional 50% of their straight time rate for each hour worked.

2. Pecking order was not properly followed.

Article 11, in many cases supplemented by a LMOU, establishes a "pecking order" or sequence in which employees are scheduled to work for holidays and designated holidays. These pecking orders require all carriers in one group must be scheduled before any employee in the next group, and so on.

JCAM pg.11-3

In the absence of LMOU provisions or a past practice, the minimum pecking order should be:

a) All casuals and PTFs to the maximum possible, including even if in overtime.
b) All full-time regulars, full-time flexibles and part-time regulars who volunteer to work their holiday or designated holiday by seniority.
c) Transitional employees
d) All full-time regulars, full-time flexibles, and part-time regulars who have volunteered to work to work on their scheduled day off, by seniority.
e) Full-time regular, full-time flexibles and part-time regulars who have not volunteered to work on their

non-scheduled day, by juniority.

f) Full-time regular, full-time flexibles and part-time regulars who have not volunteered to work their holiday or designated holiday, by juniority.

M00871 Holiday scheduling provisions whether found in Article 11.6 or a LMOU apply to actual as well as designated holidays.

M#00898
C#16662 Casual and PTF employees should be utilized in excess of 8 hours **before** any regular employees should be required to work their holiday, or designated holiday.

C#11116 Management should plan and schedule the casuals and PTFs to work 10 –12 hours before they schedule regular carriers that have not volunteered. Here as in Article 8 disputes, the Union must be able to clearly show that carriers work 12 hours in the unit when needed, and to do so on the holiday would not have been detrimental to the mission of the Service.

M#01275 The posted schedule must include the PTFs and casuals. The steward should obtain a copy of the schedule as it is posted. One, so they can determine if it is properly set and two, to document the schedule as posted in the event that changes are made later.

M#00340 There is no provision to schedule “best qualified” for carrier work on a holiday. The parties agreed that an employee classified as a letter carrier possesses the needed skills to perform carrier duties on a holiday, provided they meet the necessary qualifications unique to a particular route, such as being checked out in a left hand drive vehicle. Management may not ignore the pecking order based on “qualifications,” i.e. one carrier knows more routes than another so therefore will be scheduled first regardless of seniority.

This most frequently arises on the holiday that management wishes to have a crew of carriers come in and case mail, so it is up for the day after the holiday. Management may want to bring in T-6’s because they know more than one route. This would be an improper use of “qualifications” to violate the pecking order.

Be advised that “qualifications” can be successfully relied upon by management in holiday scheduling, in the case of a new probationary employee or casuals that have not had case training or may not be qualified to drive certain vehicles. The burden then

shifts to the Union to show what work they were qualified to perform that was available, that they should have been scheduled to perform on the holiday or designated holiday.

M#00366 Planning, scheduling and the resulting posted holiday schedule shall be made in accordance with Article 11 and any negotiated LMOU pecking order and not by Article 8 and the Overtime Desired List (see also JCAM page 8-12, Overtime and Holiday Scheduling). Which carriers are on the ODL can not be a factor in following the pecking order when making the holiday schedule to be posted on Tuesday.

Management frequently makes errors by resorting to the ODL for completing the schedule to be posted on Tuesday. However management must schedule per the pecking order of Article 11 and not place ODLers on the schedule because they are on the ODL. Those individuals are placed on the schedule as their names are reached per the pecking order and may not be placed on the schedule just because they are on the ODL.

When the day of the holiday or designated holiday arrives, and on the day the manager determines that the workload will require carriers working overtime, then management returns to the Article 8 rules and assigns the overtime as they would any other day with the ODL and WAL carriers.

C#06775 Management must treat regular volunteers (to work on the holiday or designated holiday) as having volunteered for 8 hours of work only, not 12 hours. If on the day of the holiday/designated holiday management determines regulars are needed to work more than 8 hours, management must resort to the Article 8 rules for the assignment of overtime.

C#04789 Additionally, National Arbitrator Gamser ruled that after the schedule is posted and circumstances change such that an employee is taken off the schedule there is no violation. He also ruled that there is no guarantee of work or pay in lieu of for the employee whose name is removed from the schedule prior to the holiday. The vigilant steward will make sure management is not playing games with this ruling and that there was a legitimate change in circumstances that caused the change in scheduling.

C#00940 National Arbitrator Gamser ruled in another case, that volunteering to work the holiday, does not guarantee you will be placed on the schedule and work the holiday. Management once

they have the list of volunteers, need only schedule the number of employees required to perform the work.

3. Regular carriers were forced to work that should have been allowed off.

JCAM pg.11-3

> "The intent of Article 11.6 is to permit the maximum number of full-time regular, full-time flexible and part-time regular employees to be off on the holiday should they desire not to work while preserving the right of employees who wish to work their holiday or designated holiday."

JCAM pg. 11-3

Article 11.6 is written to allow as many full-time regular employees off on holidays as practicable, for those wishing to have the holiday off. For a grievance on this issue to be upheld, the Union must show that management did not to the extent possible, allow off as many regular employees as they could, contrary to the overriding purpose of Article 11. When management does not comply with the provisions and intent of Article 11, but rather forces regular carriers in to work that have not volunteered to work; causes the harm that is remedied as discussed in the remedy portion.

C#20342

As Arbitrator Wooters discusses, all PTFs, casuals and available volunteer regulars were scheduled before management required non-volunteers to work. The dispute comes at this point over whether there was a need to force in non-volunteers, and if it could have been avoided if management had scheduled the hours of employees different. Arbitrator Wooters states, "I believe that if scheduling available employees for ten hours would have eliminated the need for calling in one or more volunteers, management was obligated to do so." The Union proved that had management planned to efficiently use the volunteers and PTFs and casuals to ten hours, there would have been no need to force in non-volunteers.

Our requirement is to put together a strong case showing management knew or should have known they could have completed the holiday workload without requiring carriers to work that did not volunteer. As at least one other arbitrator put it, "The Union used after-the-fact data on mail volume plus their arguments that PTFs could have been scheduled to work 12 hours and more overtime could have been utilized to conclude that the schedule could and should have been different. Could

and Should do not constitute proof of a contract violation. Could and Should may be hot topics for sports radio, but are not, in my opinion, convincing evidence of contract violations."

This may be overcome by the thorough steward using Flash or other reports that show management knows volume trends, knows what the last year's holiday volume and work hours were and that the current use of work hours and volume of mail were not out of the ordinary for the holiday in question. Management's failure to use the available tools and information is not an excuse to violate Article 11. Each carrier unit has a planned volume and work hours provided to the managers. The steward should obtain this documentation and compare it to the actual hours and volume of the day in question. This argument is very useful in those situations in which we can show over-scheduling would have been avoided if management did their job to plan work hours and route coverage based on the information they had. This is best done before the holiday violation happens. Being able to show that the steward brought to management's attention in advance, increases greatly the likelihood of obtaining monetary remedies.

C#00146

Arbitrator Leventhal in this case ordered the Service to pay 8 hours at the straight time rate to regular volunteers that had been passed over in the scheduling in violation of the LMOU. In this case the parties had negotiated for an unusual pecking order. The arbitrator said;

> A local agreement had in fact been negotiated and was in place when the events of this case occurred. No contentions were raised that the then in effect local agreement was improper or invalid and therefore its provisions are accepted, for the purposes of this arbitration as appropriate. (T)he full-time employees would have to be contacted in order to afford them the right to express their options before the other employees were scheduled…
> (B)y stipulation there were seven full-time employees identified who should have been given the opportunity to exercise their preference to work the holiday in question.
>
> The seven regulars were awarded eight hours of straight time pay for the missed opportunity to volunteer to work their holiday.

C#02975 The issue in the grievance heard by Fasser concerned the right of employees to volunteer for holiday work and thereby becoming entitled to be assigned to work on that holiday in the proper order. In Fasser's case an employee volunteered, and was available but was not worked. The Postal Service was in violation of Article 11 by assigning the work on the holiday over the volunteer who properly should have been assigned.

The Union requested that the remedy should make up to the employee that which he lost; the additional pay he would have received for working the holiday had he been properly assigned the work. The Service disagreed. The arbitrator said;

> But holiday work problems are not similar to overtime problems. A holiday not worked is lost forever. Overtime situations occur frequently and those on the "overtime desired" list have an opportunity, over the course of a calendar quarter, to work a relatively equal number of overtime hours. Moreover, an employee may desire to work on Memorial Day but not on Independence Day or some other holiday.
>
> The appropriate remedy now is to compensate the overlooked holiday volunteer for the total number of hours of work lost.

C#21409 Management failed to schedule all available volunteers (in this case those for their scheduled days off) prior to forcing a non-volunteer to work . The LMOU required management to schedule volunteers before scheduling any non-volunteers.

C#20342 Arbitrator Wooters states that management may not call in a non-volunteer regular carrier when available PTFs, casuals or regular volunteers have not been scheduled. Further he states, that management is obligated to schedule non-protected employees for ten or twelve hours before requiring non-volunteers to work.

C#13475 Management does not have to schedule ODLers to work the maximum hours before scheduling a non-volunteer.

4. The PTFs and casuals were not utilized to the maximum.

C#16662 Arbitrator Olson found that management violated Article 11 by not scheduling the casuals and PTFs to the maximum extent possible to spare as many regular non-volunteers off as possible. The arbitrator opined that while management has their Article 3 rights to assign work, this right is tempered by the provisions of Article 11, which requires management to spare as many full-time regulars as possible from working a holiday or day designated as a holiday.

Non-volunteer employees should not be required to work unless all casuals and part-time flexibles are utilized to the maximum extent possible. In this case the Union proved that pivoting was an option and used at this unit, and that had the PTFs been required to pivot the non-volunteers would not have been needed. Management's claim that pivoting is "not an easy thing to do", was unpersuasive to the arbitrator. He stated,"(t)hat is not an appropriate excuse or defense to violate the National Agreement." To support this argument if made, the steward should provide for the file documentation of other days where management intentionally left routes uncovered to pivot them.

M#00898 "We further agreed that Article 11, Section 6.B of the National Agreement **requires** that, where operational circumstances permit, casual and PTF employees should be utilized in excess of eight (8) hours **before** any regular employees should be required to work their holiday or designated holiday." (emphasis added)

C#0677 National Arbitrator Mittenthal award of January 19, 1987 he states:

> Section 6B rules as to how the schedule is to be prepared. Its main purpose is to require "full-time and part-time regulars" be given holidays off to the extent possible. It calls upon management to "excuse" from holiday work "as many…" of them "as can be spared." It nevertheless recognizes that these regulars may sometimes be required to work on their holidays. But it says this cannot happen "unless all casuals and part-time flexibles are utilized to the maximum extent possible", including overtime…"
> (Emphasis added).

In the same award Arbitrator Mittenthal rejected management's arguments that they would not have to follow the pecking order if penalty overtime was required. He states:

> This argument fails for several reasons. The object of the phrase in question (even if the payment of overtime is required) obviously was to make clear that Management could not escape the mandatory scheduling procedure in Article 11, Section 6B on the ground that strict application of this procedure would call for "overtime" pay. The pecking order had to be followed even though it caused employees to be paid time and one-half. The pecking order had to be followed without regard to labor cost considerations. Realistically viewed, this phrase simply serves to emphasize the unconditional nature of the 6B scheduling obligation. The Postal Service has never had an option in this matter. It had to honor the "pecking order" whenever it made up a holiday schedule. (Emphasis added).

C#11116 Arbitrator Levin found "that the National Agreement clearly requires the Postal Service to utilize casuals and part-time flexibles to the maximum extent possible." He refers to the ELM 432 setting forth the maximum hours that PTFs are available as twelve in a day. Because management did not use the available casuals and PTFs to the maximum thereby allowing regulars to be spared from work, he awarded the carriers who should have been off a like amount of compensatory time off.

5. Light or Limited duty carriers were improperly passed over in the pecking order.

C#22161 Arbitrator Olson ruled in a case in which the grievant was a limited duty employee who wished to volunteer for the holiday schedule but was passed over by management because of her limited duty status. This type of situation not only affects the employee with medical restrictions by losing an opportunity to work, but may cause another regular to be forced to work who did not volunteer.

In this case the Postmaster took the position that working the grievant in an overtime status on the holiday schedule was not required because he did not allow light or limited duty personnel to work

overtime. This was an erroneous position as light and limited duty employees may sign overtime desired lists (M#00795) and work overtime as long as their medical restrictions do not prohibit them from performing the work being assigned for overtime or the holiday schedule.

Arbitrator Olson found that that the contract was violated by not assigning her to work on the holiday schedule, as well as mandating a non-volunteer in to work that would have been allowed off if they had scheduled the limited duty carrier.

6. Management scheduled to avoid paying penalty overtime.

M#00859 The Service may not refuse to comply with the holiday schedule pecking order in order to avoid payment of penalty overtime. This Memo also addresses the remedy should management improperly schedule to avoid paying penalty overtime. Those improperly mandated to work receive an additional 50% of the straight time rate, and those who should have worked but were not permitted to do so, receive pay for the missed hours at the rate they would have earned if they had worked.

C#06775 Predating the above referenced Step 4 is the decision of National Arbitrator Mittenthal in which he states:

> Management could not escape the mandatory scheduling procedure in Article 11, Section 6B on the ground that strict application of this procedure would call for "overtime" pay. The pecking order had to be followed even though it caused employees to be paid time and one-half. The pecking order had to be followed without regard to labor cost considerations.

D. Documentation/Evidence

1. Holiday schedule
2. LMOU pecking order provisions
3. Volunteer list
4. Clock rings
5. Volume and work hours report
6. Flash Report
7. Seniority list
8. Work assignments and 3996s

F. Remedies

1. Cease and desist.

C#16662
C#00795
C#01488
C#03542
C#11118
C#21409
C#23042

2. A day of admin leave of their choice for those improperly required to work.

C#22665
C#21409

3. Pay at the appropriate rate for those carriers that would have received work hours that were improperly assigned to others.

C#02975

The Postal Service was in violation of Article 11 by assigning the work on the holiday over the volunteer who properly should have been assigned. The Union requested that the remedy should make up to the employee that which he lost; the additional pay he would have received for working the holiday had he been properly assigned the work. The Service disagreed. The arbitrator said;

> But holiday work problems are not similar to overtime problems. A holiday not worked is lost forever. Overtime situations occur frequently and those on the "overtime desired" list have an opportunity, over the course of a calendar quarter, to work a relatively equal number of overtime hours. Moreover, an employee may desire to work on Memorial Day but not on Independence Day or some other holiday.
> The appropriate remedy now is to compensate the overlooked holiday volunteer for the total number of hours of work lost.
> (emphasis added)

ABSENTEEISM

A. Case Elements

1. A history of being absent from work (irregular in attendance).
2. The attendance record indicates a pattern excessive unscheduled absences (approved or unapproved).
3. A showing that the employer made the employee aware of the duty to be regular in attendance.
4. A showing that by the employee/Union that the level of absence is acceptable compared to other employees.

B. Definition of Issues

1. Is the employee incapable of providing regular and dependable attendance?
2. Has management set a certain percentage of absence to be unacceptable?
3. Is the amount of absence so serious that it renders the employee undependable?
4. Is the discipline progressive?
5. Was the employee forewarned of the consequences of a continued level of absences?
6. Were the Grievant's absences under FMLA?

C. Contractual/Handbook (other) Citations

1. Article 5
2. Article 10
3. Article 16
4. Article 19 (ELM 513, 666, 667) (M-41, Chapters 1 and 2)

D. Arguments

C#2099
C#9766
C#3231
C#7544
C#8386
C#9548
C#10907

1. The level of absence does not indicate irregular attendance.
2. Grievant's absences were approved by management.
3. Grievant was never forewarned of possible discipline for excessive unscheduled absences.
4. Discipline is not corrective.
5. Grievant was due reasonable accommodation.
6. Employee was held to a different standard.
7. The employee may not be disciplined for absences covered by FMLA.

E. Documentation/Evidence

1. PS 3971 Request for or Notification of Absence
2. PS 3972 Absence Analysis
3. PS 3997 Unit Daily Record
4. LMOU
5. Medical certificates for absences (if used).
6. Relevant medical documentation for absences (if provided).
7. Statements from physician as to a prognosis and ability to work in the future.

F. Remedies

1. Rescind/Purge discipline from the file.
2. Make whole.
3. Interest at Federal judgment rate.

ABSENTEEISM

Applicable history of this topic begins, for us, with the National Arbitration Award, USPS and NALC Case No. NC-NAT-16, 285, Arbitrator Sylvester Garrett, November 19, 1979 in which Arbitrator Garrett deals with the issue of whether or not the Postal Service may properly impose discipline on employees for "excessive absenteeism" or failure to maintain a regular schedule" even though the absences upon which those charges are based are where the employee was granted approved sick leave.

(Prior to Garrett, the Union had had some success in arguing that, if an unscheduled absence was in the record as "approved" for the payment of sick leave, then that absence could not be counted against an employee for purposes of issuing formal discipline for the charge of "excessive absences." After Garrett, at least for non-preference eligible employees, that could not be argued successfully by the Union.)

The quick and dirty answer is - yes, management can use instances of unscheduled absence where the employee was granted approved sick leave as part of the basis for issuing discipline.

The issue of whether or not such absences can be used, according to Garrett is not determined by whether or not sick leave has been approved for pay purposes. Rather the issue of whether or not such absences can be used is determined, on a case by case factual basis, on whether or not the employee was, in fact, incapacitated for the performance of his/her official duties.

This factual basis of determination, according to Garrett, is a "just cause" basis (which is a useful thing from the Union's point of view and just from any point of view). What it means is this:

> The burden is on the employer to indicate, with at least a preponderance (50% +1) of persuasive evidence, that the employee was <u>not</u> incapacitated for the performance of his/her official duties.

Why so? Because with "just cause" the initial burden is on the employer to show that there was a requirement with which the employee did not comply.

While there is a requirement to be regular in attendance (ELM 666.81), there also is a promise, by the employer (Article 10, Section 5), to continue the leave program, including sick leave; that leave program is spelled out in operational detail expressly states that the purpose of sick leave is to provide protection from loss of income when the employee is incapacitated for the performance of their official duties.

Thus, even though the employee might, through illness, be less than perfectly regular in attendance, there is, on the face of it, no "just cause" for issuing discipline to an employee for availing himself/herself of one of his/her express contractual rights.

So the employee, using USPS Form 3971, claims he/she was indeed incapacitated for the performance of his/her official duties, and a supervisor approves sick leave for pay purposes. How can the employer use such an instance against the employee?

The argument runs like this:

> Just because some supervisor approved a Form 3971 requesting sick leave is not proof that an employee was, in fact, ill and incapacitated as claimed. The employee might, for example, have been lying. (On the other hand such an approved form certainly does not prove that the employee was lying. Absent other considerations, there is no evidence the employee was not incapacitated for the performance of his/her official duties.)
>
> However, if such an "approved instance of sick leave is factored in with, for example 9 other instances, one every week in a row, each falling on the Monday following a non-scheduled Sunday; and no two in a row was approved by the same supervisor, and then some supervisor, using DSIS, notices this pattern, BINGO - the employer has evidence that an arbitrator might well accept, absent any rebuttal, as persuasive proof that the employee was not always, in fact, incapacitated for the performance of his/her official duties, but was instead, sometimes at least, simply failing to meet the requirement to be regular in attendance.

Note: The employer still is several bricks shy of a load sufficient to meet the burden of issuing formal discipline.

Supervisor now goes to the files and discovers a properly citeable record that, on some specific date prior to this 10 week string, this employee had been informed of his/her requirement to be regular in attendance and advised that failure to meet it could result in formal discipline being issued to him/her.

Supervisor now plugs in M-39 115, Discipline, and calls the employee into the office. (The employee fails to trigger his/her Weingarten Rights) and, in a kindly fashion, the supervisor attempts to draw out the employee's side of the story. Did the employee have a series of therapy appointments, for example? The employee hems and haws and then says that he likes to stay up late on Sunday nights to watch re-runs of the Benny Hill show and then he likes to sleep in late on Monday

so he calls in sick and goes back to bed. He doesn't think it makes any difference to the operation. A PTF can do the work. (Perhaps, even, the employee is right about the PTF.)

At this point the employer has evidence proving the "just cause" elements: A requirement reasonably related to work; employee knowledge of the requirement, including knowledge that failure to meet it could result in the employee being issued formal discipline; and evidence that the employee, in fact, failed to meet that requirement. This is so even though the instances of unscheduled absence featured requests for sick leave which were approved by the supervisor.

There is, at least, one standard defense and loads of possible "case specific" complications.

The standard defense is worth mentioning because it has the possibility of general application.

Our contract - Article 16 - features, implicitly, the doctrine of "progressive discipline" which includes (we can and should argue) the notion that milder measures should be exhausted before reliance is placed on harsher measures.

The sick leave program contains provisions for the exercise of supervisory discretion, for absences of 3 days or less, as to whether or not to require medical certification (MC) of the employee upon return from the 3 day or less unscheduled absence. The sick leave program also contains provisions for placing an employee on a Restricted Sick Leave List (RSL), via a fast track when there is clear evidence of abuse of the sick leave negotiated right. Placement on the RSL makes the requirement for MC an automatic requirement.

We can argue that, absent application of these administrative measures, i.e., non-disciplinary, the employer has filed to meet the requirement of progressivity, i.e, of exhausting all express milder measures for correcting the employee's behavior before resorting to harsher measures. (Only a handful of particularly bad misbehavior justify leap-frogging over a step by step application of progressively more severe disciplinary measures - or so we can argue - many arbitrators would accept such an argument.)

Two things are wrong with this approach, one political, one from the point of view of legal argument.

> (1) **Political Flaw** - to grievant, the necessity of providing MC, particularly if it involves being on the RSL, can subjectively seem worse than getting a Letter of Warning. "Thanks a lot," he might say to you. "I'll remember your "help" come next election."

(2) **Legal Flaw** - by way of rebuttal, the employer could argue that, even granting our claims about progressivity, progressivity applies only to formal discipline. Administrative action, such as supervisory discretion on MC for absences of 3 days or less and/or RSL do not have to be exhausted, under the doctrine of progressive discipline, before formal discipline is issued. Under Article 3, management has the right to decide whether or not to exhaust administrative actions first, Article 16 notwithstanding, and, furthermore, prevailing practice in the installation is to issue formal discipline for the charge "failure to be regular in attendance" when there is "just cause."

A. Case Elements

1. A record of unscheduled absences.
2. A showing of the employee being made aware of his/her duty and responsibility to be regular in attendance and of being warned that failure to do so could lead to formal discipline.
3. An initial persuasive showing by the employer of irregularity - "a pattern of unacceptable attendance."
4. Failure on the part of the employee/Union to rebut that showing with persuasive evidence that the employee was, in fact, incapacitated for the performance of their official duties for enough of the instances within the employer's "pattern of unacceptable attendance" to shift it to acceptable.

B. Definition of Issues (specific to Absenteeism type disputes)

1. Is the employee incapable of providing regular and dependable attendance?

C#09548 Rentfro 1989 Denied

"It goes without saying that the grievant's attendance record is about as bad as can be imagined. The Postal Service presented uncontradicted evidence that grievant was AWOL/No Call for over 334 hours (41+ days) in a one-year period."

2. Has management set a certain percentage of absence to be unacceptable?

Absence and Leave Control Program for Postal Supervisors, page 2, paragraph 3 - this 1976 Postal program compares the Service to other industries and talks about a loss of $350 million; page 3, paragraph 3 -

> "Admittedly, since our leave program is superior to the average industry, we can never eliminate the 6% gap. But, we can and must control and reduce it by concentrating on the abuse of leave."

3. Is the amount of absence so serious that it renders the employee undependable?

C#00727 Gamser 1978 Denied
Gamser cites a case by Arbitrator Cushman: "This arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a 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."

"In such a case the employee is not being `punished' because he is ill. He is simply being terminated for irregularity and undependability for attendance."

4. Is the discipline progressive?

C#09766 Levak 1990 Modified
In this case management cited 7 and 14 day suspensions that were reduced in the grievance procedure and arbitration to letters of warning and one (1) and two (2) day suspensions.

"The failure of the Service to impose <u>and stick with</u> the 14-day suspensions necessarily had the effect of failing to effectively convey to the grievant the fact that the next series of infractions would result in removal. Such conveyance and notice is the most important element of the progressive and corrective discipline procedure."

"It seems beyond dispute that moving from that disciplinary record directly to removal, and without either an intervening 7-day suspension or a 14-day suspension, violates the corrective/progressive mandate of Article 16."

"The Service's argument in this case in that the grievant's attendance record simply was so terrible that she had to have understood that her job was in jeopardy. Such inference cannot be allowed because of the

express mandate of Article 16. Under that article, the grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal. Administrative reductions of 14-day suspensions to two-day suspension can only lead an employee to believe both that the offense was not as serious as she initially was led to believe and that the next offense would lead to a penalty less severe than removal."

5. **Was the employee forewarned of the consequences of a continued level of absences?**

C#02099 Snow 1983 Modified
The arbitrator noted that most of the absences were sick leave and had management's approval. Also, that there was no showing that the grievant had been forewarned concerning the potential impact of absences due to approved sick leave.

In analysis the arbitrator talks about Section 511.3 "Employee Responsibilities," of the ELM. While it is clear that employees are to maintain their schedule and provide acceptable evidence for absence when required: "What the regulation does not make clear is how much absence from work, due to certificated, verified illness, constitutes unacceptable absence."

"For obvious reasons, there is no clear-cut work rule concerning how much sick leave will be considered "too much" sick leave.

"The grievant's attendance, in fact was unsatisfactory. Through warning letters and suspensions, management made it exceedingly clear to the grievant that her unexcused absences simply would not be permitted. A primary problem confronted by the arbitrator, in this case, has been what to do about the grievant's absences in which she had `excused' sick leave. In this case, management has failed to place the grievant on notice that `excused' sick leave would be counted against her."

"The grievant need to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance."

6. **Were the Grievant's absences under FMLA?**
The FMLA makes it unlawful for an employer to discipline an employee for use of FMLA covered leave. The regulation is found at 29 CFR 825.220.3.b.

The USPS acknowledges this in a 1996 headquarters letter (M-01379), the USPS wrote:

> "Issue: May disciplinary action against employee include any absences covered by FMLA?"
>
> "Answer: No."

Regional Arbitrators concur:

C#14107 Lurie 1994 Sustained

"Because the grievants absence was protected leave under the provisions of the FMLA, the reliance upon that leave as a basis for her removal from the Postal Service was in violation of the Act, and is void, as a contravention of public policy and the laws of this Country. The citation of that leave was also a violation of Article 19 of the Agreement, inasmuch as the Act has been expressly endorsed by the Postal Service, and integrated into its handbooks and manuals."

C. Contractual/Handbook (other) Citations

1. Article 15
2. Article 10
3. Article 16
4. Article 19
5. Article 35
6. ELM 513 Sick Leave
7. ELM 666 USPS Standards of Conduct
8. M-41, Chapters 1 & 2

D. Arguments

1. **The level of absence does not indicate irregularity of attendance.**
2. **Grievant's absences were approved by management.**

C#02099 Snow 1983 Modified

(reinstated, without back pay and arbitration decision is "last chance").

In this case (discussed extensively under Definition of the Issue) the absences were, for the most part, approved sick leave.

The grievant, however, received no notice that medically certified absence would be counted against her. The grievant failed to receive notice that "too much" verified sick leave could cause her to be removed from the Postal Service. The point is that the failure to inform the grievant her excused absences could lead to her termination undermined

management's contention that the grievant received adequate warning.

C#00727 Gamser 1978 Denied
Gamser states that properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. He goes on to state that it is also not a grant of immunity.

"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."

C#03231 Garrett 1979 No Formal Award
"Basically, the NALC holds that, under Article 16 of the National Agreement, there can be no "just cause" for any discipline based on an employee's 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 10 of the National Agreement, as well as under application of Federal law."

"The NALC also emphasizes the obvious incongruity of trying to apply "corrective" discipline to discourage an employee from being injured or becoming ill."

"When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the . . . management cannot inhibit an employee in the exercise of his contractual right to imply sick leave in the manner contemplated to cover legitimate periods of absence due to illness or other physical incapacity."

"Whether or not the UPS 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."

3. **Grievant was never forewarned of possible discipline for excessive unscheduled absences.**

C#02099 Snow 1983 Modified
"The arbitrator notes that most of the absences were sick leave and had

management's approval. Also, that there was no showing that the grievant had been forewarned concerning the potential impact of absences due to approved sick leave.

In analysis the arbitrator talks about Section 511.3 "Employee Responsibilities," of the ELM. While it is clear that employees are to maintain their schedule and provide acceptable evidence for absence

when required: "What the regulation does not make clear is how much absence from work, due to certificated, verified illness, constitutes unacceptable absence."

"For obvious reasons, there is no clear-cut work rule concerning how much sick leave will be considered "too much" sick leave.

"The grievant's attendance, in fact was unsatisfactory. Through warning letters and suspensions, management made it exceedingly clear to the grievant that her unexcused absences simply would not be permitted." "A primary problem confronted by the arbitrator, in this case, has been what to do about the grievant's absences in which she had "excused" sick leave. In this case, management has failed to place the grievant on notice that "excused" sick leave would be counted against her.

"The grievant needed to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance."

"The point is that management failed to warn the grievant that her excused sick leave might be counted against her. For example, the restricted sick leave notice given the grievant on May 7, 1982 did not do so. The notice informed the grievant that all absences must be supported by medical certification. The notice did not inform her that future illnesses would be counted against her as reflecting a pattern of unsatisfactory attendance. It would have been reasonable for the grievant to have concluded that medically certified illnesses would not be counted against her in such a way as to lead to her discharge.

4. Discipline was not corrective.

C#09766 Levak 1990 Modified

In this case the grievant was removed for 263 hours of unscheduled leave (including sick, emergency and AWOL). The Service had previously disciplined the grievant with a 7-day suspension and a couple 14-day suspensions, but had reduced each to 1 and 2 day suspensions. The fact

that the reductions to less than five days were administrative actions meant that they were technically nothing more than letters of warning. The arbitrator found that moving directly to removal without a 7 or 14-day suspension violated the corrective/progressive mandate of Article 16.

". . .the grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal . . .administrative reductions of 14-day suspensions to two-day suspensions can only lead an employee to believe. . .the offense was not as serious as she was initially lead to believe. . .the next offense would lead to a penalty less severe than removal."

C#09548 Rentfro 1989 Denied
In this case the arbitrator outlined the steps that were taken in the removal action in his "Statement of the Case." August 1987, Letter of Warning for 76 hours of LWOP; October 1987, 7-day suspension for 64 hours of LWOP/No Call; February 1988, 14-day suspension for failure to report; May 1988, Removal for 98 hours of AWOL/No Call.

On page 5 the arbitrator outlines the steps taken by the Postal Service: Notification from the USPS "stressed to him the importance of regular work attendance". . ."urged him to meet with his supervisors in order to find a solution". . .grievant was "referred to the employee assistance program. . .refused to participate."

5. Grievant was due reasonable accommodation.

C#09929 Zumas 1990 Denied
In this case the arbitrator allowed the removal of the grievant, a PTF letter carrier, for charges of AWOL and driving without a valid state driver's license. Unfortunately, the grievant also had an attendance problem when it came to abiding by his EAP agreement. The arbitrator included the following ELM provision in his "Statement of the Facts." In his findings the arbitrator stated that the Service repeated opportunities for the grievant to participate in EAP, but the grievant did not avail himself of them until he was in the "shadow of termination."

Participation in EAP is voluntary and will not jeopardize the employee's job security or promotional opportunities. Although voluntary participation in EAP will be given favorable consideration in disciplinary action for failure to meet acceptable standards of work performance, attendance, and/or conduct problems. Further, participation in EAP does not shield an employee from discipline of prosecution for criminal activities.

In the past, this Arbitrator has not hesitated to reinstate an employee afflicted with drug or alcohol addiction, even where the rehabilitation came after termination.

Position of the Union - The Union pointed out that the grievant's dual addiction to drugs and alcohol was the basis of his termination.

The Union made the argument that the grievant "has made, and continues to make, a considerable effort to rehabilitate himself" under Article 35 of the Agreement.

6. **Employee was held to a different standard.**

C#08386 Axon 1988 Sustained
The grievant in this case was in a "last chance" agreement that was a settlement agreement stemming from a previous removal attempt for unacceptable attendance. Upon an illness during the last chance period management took the opportunity to again attempt removal. "Failure to abide by the terms of a `Last Chance Agreement.'"

The Union argued that seven (7) other carriers in the same office had worse attendance records than the grievant and were not disciplined.

The Union also argued that the "last chance" agreement did not demand perfect attendance and that the grievant had been regular in attendance.

Also, of great help to the Union in the winning of this case is the fact that the arbitrator found the "removal action is tainted." In a local program called CAN DO past elements of discipline that were cited in the removal were supposed to have been purged. Also, dates of previous discipline, contained in the removal notice were incorrect.

7. **The employee may not be disciplined for absences covered by FMLA.**
The employee may not be disciplined for absences covered by FMLA.

USPS has agreed that FMLA may be used as an effective defense against discipline.

M-1270
"In a disciplinary hearing involving just cause, the union may argue as an affirmative defense that management's actions were inconsistent with the Family and Medical Leave Act."

E. Documentation/Evidence

1. Article 10
2. Local Memorandum (if appropriate)
3. Article 35 (if appropriate)
4. Medical certification notice (if applicable)
5. Postal Forms - 3971, 3972, 3997
6. Time cards and Employee Activity Reports
7. Supervisor's notes concerning specific incidents on which discipline is based.
8. Medical certificates covering absences in question
9. Relevant medical documentation substantiating and explaining the employee's absences
10. Employee statement explaining the absences
11. Statement of physician
12. ELM Chapter 5 Employee Benefits
    - 510 Leave
    - 511.4 Unscheduled Absence
    - 513 Sick Leave
    - 514 Leave Without Pay
    - 666.8 Attendance
    - 666.82 Absence without permission
    - 666.83 Tardiness
    - 870 Employee Assistance Program (EAP)
13. EL-307 - Guidelines on Reasonable Accommodation

F. Remedies

1. Rescind and purge the discipline, make whole any lost time plus benefits, interest at the Federal judgment rate.
2. Make whole for any time grievant could have worked on limited or light duty.

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DISCARDING OF DELIVERABLE MAIL

A. Case Elements

1. There is evidence that mail has been mistreated (i.e., opened, rifled, damaged, discarded or marked for destruction.)
2. The grievant is implicated by either direct of circumstantial evidence.
3. The grievant denies, or admits in part, to mistreating the mail.

B. Definition of Issues

C#1432
1. Is the nature of the evidence direct, circumstantial or hearsay?

C#9346
C#7435
2. If circumstantial, could the grievant offer a credible

C#7112
explanation for an alternative one?

C#10628
3. Was Sanctity of the mail violated?
4. Could the service prove "willful intent"

C#10449
5. If guilty, were there mitigating circumstances.

C#7442
6. Was a proper investigation performed by management?

C#8226
C#1435

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 15
3. Article 16
4. Article 17
5. Article 19
   - M-39 115
   - ELM 660
6. Article 35

D. Arguments

1. Technical defenses.

C#1382
2. Management failed to prove grievant acted as charged.

C#7973

3. Grievant was not trained properly.
4. Someone other than grievant could have discard the mail.
5. Length of prior service.
6. Misconduct not intentiona

C#8975

7. Grievant was impaired by drugs or alcohol.
8. Rule was not enforced.

E. Documentation/Evidence

1. Removal notice and letter of decision.
2. Investigative memorandum.
3. Grievant statements.
4. Court records (if any).
5. Police reports.
6. ELM 660 Conduct
   ELM 668.27 Obstructing the Mail
   ELM 873 Reinstatement of Recovered Employees
7. Rehabilitation Act of 1973 as amended.
8. Doctor reports.
9. Statements regarding handling of UBBM in the office.
10. Time cards, etc.
11. Photocopies of test letters or discarded mail.

F. Remedies

1. Reinstate with all seniority and benefits.
2. Make whole.
3. Interest at the Federal judgment rate.
4. Grievant's personnel records purged of all records of the incident and disciplinary notice stricken from all files.

DISCARDING OF DELIVERABLE MAIL

A. Case Elements

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3. The grievant denies, or admits in part, to mistreating the mail.

B. Definition of Issues (specific to discipline for Discarding of Deliverable Mail type disputes)

1. Was sanctity of the mail violated (i.e., deliverable mail rifled, discarded, destroyed, or marked for destruction.

C#10628 Witney 1991 Denied

The specific charge in this case was: Delay of mail/Unauthorized Destruction of Mail/Violation of Ethical Code of Conduct.

It began with a customer complaining he was not receiving his mail. There seemed to be some evidence that the grievant had a conflict with the customer and was even quoted as saying, "I'm tired of this guy calling in. I'll take care of him." First class test letters were sent and their progress (or lack of) in the mail stream gave the Service its grounds for "delay of mail" charge. The grievant was also under surveillance by postal inspectors.

Additionally, the grievant gave the Postal Service more ammunition for his discharge when they began checking his UBBM-Undeliverable Bulk Mail. The Arbitrator accepted evidence that 69 pieces of bulk business mail were discarded by the grievant.

In his "Conclusion and Award," Whitney talks about his acceptance of the evidence against the grievant; also, he speaks about the impact of delaying and discarding mail on the Service and the public it serves, as well as why he could not consider reducing the discharge to a lesser penalty.

2. Were there mitigating circumstances (including, but not limited to, drugs and/or alcohol)?

C#10449 Axon 1990 Denied

The specific charge was "Mistreatment of Mail." The grievant admitted taking labels off IRS booklets and placing the booklets in the UBBM. The labels were recovered from the trash and booklets were recovered from the UBBM where they were placed with the grievant's endorsement of "waste."

Arbitrator finds grievant is guilty as charged and admits taking labels off.

Axon found the Union's argument of failure to conduct an adequate investigation "without merit." He also rejected the NALC argument that the grievant's actions were neither willful nor intentional. He did, however, give great weight to "mitigating factors of extraordinary nature" which he found provided "justification for reversing the Service's choice of the disciplinary penalty." Axon gave weight to expert testimony that for medical reasons, the grievant was suffering from a "reactive depressive process affecting his judgment."

This, coupled with the fact the grievant requested to go home sick, and the fact that the grievant made no attempt to conceal the fact he discarded mail, gave Axon reason to believe the grievant was "physically and mentally impaired" on the day in question.

Axon says "the most important factor in mitigation is" the employee's long service record and "unblemished record."

3. **Could the grievant offer a credible explanation for what happened, or was the Service able to show the grievant acted as charged with "willful intent?"**

C#07435 Leaventhal 1987 Sustained

In this case the grievant was charged with Mistreatment of Mail Matter. After returning to the office from street duties, the grievant dumped 3rd class (Advisor newspapers) into a trash dumpster.

Page 5 - USPS arguments - Page 6 - NALC arguments

In his analysis, Leventhal addresses the key element as being whether the employer was able to meet its burden of proof that the grievant willfully discard deliverable mail.

Leventhal uses the test of whether the grievant was trying to avoid work in determination of whether his actions were "willful."

Leventhal's concluded that the grievant's act was not "willful or deliberate" leads him to the next question - what is the appropriate discipline?

4. **Was a proper investigation done by the USPS?**

C#07442 Levak 1987 Sustained
In this case the grievant was charged with delivering marriage mail detached cards while bringing back the circulares and placing them in the waste hamper.

The Union was able to establish in this case that the placing of circulares in the waste hamper as the grievant did was the "customary practice" within the office. The Union was also able to establish that the way the grievant delivered the marriage mail was in line with instructions and training he had received.

While the incident in question took place on January 8, and the initial investigation by office management took place on January 9, it was not until January 14 that the Union addresses this fact on page 10.

C#08226 Lange 1988 Sustained
In this case the specific charge was Mishandling and Delay of Mail and Failure to Protect the Security of the mail.

The Union was able to establish that the Service had failed its burden of proof to establish just cause for the emergency suspension and the removal.

In addition, the Union was able to establish that the grievant's Weingarten Rights had been violated.

C#01345 Eaton 1982 Sustained
In this case the grievant was charged with the disposal of several trays of third class mail. The Postal Service was not able to establish that the mail in question had ever been entrusted to the grievant. There were no witnesses who saw the grievant with mail or that saw the grievant discard the mail. The case was therefore built on circumstantial evidence.

To add to the uniqueness of this case, no postal inspection was made and the grievant was left on duty for 13 days before any action was taken against him.

5. Is the nature of the evidence direct, circumstantial, or hearsay?

C#01432 Aaron 1976 Sustained
In this case, mail was found in the trash on the grievant's route. He was placed under the intermittent surveillance of two postal inspectors for seven days. They observed no irregularities in his conduct; however, the Service

removed the grievant on circumstantial evidence.

In this case Aaron talks about circumstantial evidence and the different between criminal and arbitration processes, and the fact that even if the grievant were acquitted in a court proceeding, the Service would not be stopped from pursuing a removal.

C#09346 Eaton 1989 Sustained
In this case the grievant was charged with discarding 4 pieces of deliverable mail into a dumpster on his route. The carrier maintained he did not throw mail into the dumpster, but may have done so "inadvertently." It had been the grievant's practice to remove trash out of a drop box on one of his swings on his park and loop route. It was surmised later that the grievant may have inadvertently thrown the third class mail in the dumpster when emptying the trash he had collected out of his satchel.

The case was built on the testimony of a patron on the route who claimed she had seen the grievant throw mail into the dumpster.

See page 7 - Report of discarding by patron; Page 8 - Inspection Service interview; Page 9 - Interview of patron by inspectors
The Arbitrator would later decide this case based on whether the grievant's actions in discarding were "willful or intentional acts." The Arbitrator did reinstate the grievant without back pay.

Page 24 - Arbitrator's Analysis. At issue during this arbitration matter of procedure.

Page 2 - first paragraph "Issues and Evidence"; Page 12 - second and third paragraphs; Page 14 - Union Motion-Exclusion of Testimony
Eaton chose to hear the testimony in the manner described

Reply brief
The Union argues that the Service indirectly coerced the witness from speaking to the representatives of the grievant.

Page 2 - "Coercion"; Page 4 - Opportunity to prepare; Page 6 - Request that witness' testimony be excluded and all other testimony be given "no weight whatsoever"' Page 7 - Snow's comments on "hearsay evidence"

C. Contractual/Handbook (other) Citations

1. Article 3 - Management Rights

2. Article 15 - Grievance and Arbitration
3. Article 16 - Discipline Procedure Particularly "Just Cause" principles
   a. Did the employer forewarn of possible consequences of conduct?
   b. Was rule of order involved, reasonably related to orderly, efficient, and safe operation of business?
   c. Before administering discipline, did employer make effort to discover whether employee did, in fact, violate or disobey rule of order?
   d. Was the employer's investigation conducted fairly and objectively?
   e. In investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?
   f. Has the employer applied its rules, order and penalties, even-handedly and without discrimination?
   g. Was the degree of discipline reasonably related to seriousness of offense and employee's record?
   h. Also include, if applicable - Merit Systems Protection Board Right - Civil Service Reform Act of 1978

4. Article 17 - Representation
5. Article 19 - (including, but not limited to)
   M-39 115.1 Basic Principle (Discipline)
   M-39 115.3 Obligation to Employees
   Domestic Mail Manual
   ELM 660 Conduct
6. Article 35 - Employee Assistance Programs

D. Arguments

1. Discipline was not timely issued.
2. Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.
3. Management's grievance representative lacked authority to settle the grievance.
4. Double jeopardy.
5. Higher management failed to review and concur.
6. Insufficient or defective charge.
7. Management failed to render proper grievance decision.
8. Management failed to properly investigate before imposing discipline.
9. Improper citation of "past elements."
10. Management refused to disclose information to the Union (including claims that information was hidden).
11. Other - Weingarten Right violations as these cases usually involved postal inspectors, and investigative interviews.
12. Management failed to prove Grievant acted as charged. (Example C#01382 - Snow - 1982 - Corvallis, OR).

13. Grievant may have acted as charged, but was provoked by another.
14. Grievant may have acted improperly, but did so as a result of lack of, or Improper training (including claims that the grievant "didn't know it was wrong"). (Example C#07973 - Goodman - 1988 - Grievant had been directed to search and remove items from "No Value Mail" - was reinstated.)
15. Grievant has long prior service, good prior record, or both.
16. Grievant's misconduct was not intentional.
17. Grievant was emotionally impaired.
18. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct). (Example C#0637 - Rentfro - 1986 - Arbitrator gave a great deal of weight to testimony as to grievant's "alcoholic black-out" and accepted the view that the misconduct was a "single, isolated event." Grievant was reinstated without back pay.
19. Grievant was disparately treated.
20. Rule grievant broke was otherwise unenforced.
21. Management failed to follow principles of progressive discipline.

E. Documentation/Evidence

1. Letter of Proposed Removal
2. Investigative Memorandum an Discharge Summary
3. Warning of Waiver of Rights - PS Form 1067
4. Statements from grievant, witnesses, etc.
5. Court records - including transcripts, settlements and/or judgements).
6. Police reports - if applicable
7. EL-307 - Guidelines on Reasonable Accommodation
8. ELM 660 Conduct
   ELM 668.27 Obstructing the Mail
   ELM 873 Reinstatement of Recovered Employees
9. United States Code, Title 18, Section 1701 (penalties)
10. EL-604 MSPB Handbook
11. Rehabilitation Act of 1973
12. Doctor's reports and dependency treatment reports
13. Psychological and therapy reports
14. Statements as to how UBBM mail is handled in the relevant office
15. Schedules and/or time cards showing if the grievant was at work during times mail was discarded.
16. Photocopies of test letters or any other evidence that management has based their decision on.
17. A list of witnesses that management has talked to.

F. Remedies

1. Reinstatement of grievant.

Discarding of Deliverable Mail

2. Purge the record of the grievant of any mention of the accident.
3. Make employee whole for all lost wages and benefits.
4. Interest at the Federal judgment rate.

EXPANSION OF STREET TIME

A. Case Elements

C#5353 1.. A reasonable standard of job performance on street.
C#7603 2. Grievant aware of standard and has failed to meet it.
3. Management has provided remedial help and time to improve.
C#5952 4. Objective evidence of a failure to meet standards.
5. Empirical evidence if employee has requested and qualified for a special inspection.

B. Definition of Issues

C#5341. 1. Was a reasonable level of street time properly established?
2. Was the employee informed of the expectation?
3. Remedial help or training? Warned of discipline?
4. Was the employee allowed a sufficient amount of time to improve?
5. What objective evidence exists to who unacceptable work?

C. Contractual/Handbook (other) Citations

1. Article 15
2. Article 16
3. Article 5
4. Article 19 (M-39 Section 115); (M-39, Chapter 2)
5. Article 3

D. Arguments

1. Technical defenses
2. Management's conclusions are based on arbitrary figures.
3. No time wasting factors proven (specific).
4. Special inspection was requested and not granted.
5. No progressive discipline.
6. Street standard can only be set thru M-39 242.321.

E. Documentation/Evidence

1. Written request for special inspection.
2. Any empirical data existing to show management's case.
3. PS 4584 Observation of Driving Practices
4. Notes of supervisors or carrier.
5. PS 3999 (or 3999X) Inspection of Letter Carrier Route
6. PS 1840 Carrier Delivery Route - Summary of Count/Inspection
7. PS 1838C Carrier's Count of Mail
8. Records or daily logs of grievant.

F. Remedies

1. Rescind/Purge discipline from the file.
2. Make whole.
3. Interest at Federal judgment rate.

EXPANSION OF STREET TIME

If the student of this type of dispute reads nothing else on the subject, she/he should study the landmark Kostch grievance, out of LaMirada, CA, USPS and NALC, C#05343, Case No. W1N-5B-D 28620, Arbitrator Carlton J. Snow, October 7, 1985, where grievant was removed for just cause (this should have a sobering effect on any carrier who thinks management cannot remove a carrier for failure to perform, on the street, up to a reasonable standard properly arrived at) and the equally important Mock grievance, out of Lynnwood, WA, USPS and NALC, C#07603, Case No. W4N-5R-D 44413 and W4N-5R-C 45036, Arbitrator Thomas F. Levak, November 30, 1987, where the employer made a mockery of the legitimate grounds for removing an employee for Unsatisfactory Work Performance/Expansion of Street Time. (This should have a balancing effect on any supervisor who thinks management can arbitrarily set the pace for street work and fire a carrier if the carrier doesn't meet the arbitrary standard.)

A. Case Elements

1. A reasonable standard of job performance for street work - for grievant.
2. Grievant - clearly informed regarding those standards.
3. Grievant - clearly informed that their performance has failed to meet those standards.
4. Grievant - clearly informed that their performance has failed to meet those standards.
5. A showing that the employer gave grievant assistance in an effort to improve his/her job performance.
6. Grievant - clearly warned of the consequences of failing to improve his/her job performance.
7. After such warning, a showing that the employer gave grievant sufficient time to raise their individual level of performance to an acceptable level.
8. Objective evidence that, during the time when grievant's performance should have improved, his/her level of performance failed to reach an acceptable level.

C#05343 Snow 1985 Denied
pages 12-14

B. Definition of Issues (specific to discipline for Unsatisfactory Work Performance/Expansion of Street Time type disputes)

1. How is a "reasonable level of job performance for street work for an employee" legitimately established? (The initial burden of proof is on management to show, on the face of it, that this has been done.)

Under the National Agreement and M-39, each carrier must be individually judged by the fair day's work that she/he accords the Service, and, specifically, route street standards are to be developed with reference to that specific carrier.

C#07603 Levak 1987 Sustained
"There are only two legitimate ways to establish a specific route street standard for a specific carrier: M-39 242,321.a. and M-39 242.321.b.
"242.31 for evaluation and adjustment purposes, the base for determining the street time shall be either:

a. The average street time for the 7 weeks random time-card analysis and the week following the week of count and inspection; or
b. The average street time used during the week of count and inspection."

The only legitimate ways to establish a specific route street standard for a specific carrier, both involve the carrier having had a formal count and inspection as per Chapter 2 of the M-39 Handbook.

2. **What constitutes the carrier being clearly informed of the** "reasonable standards of job performance for his/her street work" and being clearly informed that his/her performance fails to meet those standards?

   A legitimate specific route-street-carrier performance standard, arrived at under color of M-39 242.321, is one sub-element of this issue.

   Objective evidence that the carrier's level of productivity has fallen below that standard is another sub-element of this issue.

3. **<u>Note</u>: The initial burden of proof is on the employer to show that the carrier had been clearly informed**. There is a potential opening, here, for the defense advocate. In real shop-floor life, employer representatives sometimes express subjective dissatisfaction with a carrier's street work performance in general or, in an off-handed way, on some particular day.

   Arguably, this does not rise to the level of clearly informing a carrier of his/her failure to meet a legitimate specific route-street-carrier performance standard.

4. **What constitutes the carrier being given assistance in an effort to improve his/her job performance?**

   Remedial training in response to specific problems, objectively established, regarding a specific carrier's street work is assistance.

   C#05343 Snow 1985 Denied
   Telling a carrier to "go faster" or that his/her performance is, generally, "not acceptable," for that matter is not assistance.

5. **What constitutes the carrier being informed of the disciplinary consequences of failing to improve his/her job performance?**

   The employer may well argue that discipline issued for Unsatisfactory Work Performance/Expansion of Street Time, whether upheld or not, constitutes "informing" a carrier of the disciplinary consequences of failing to improve his/her job performance.

   C#07603 Levak 1987 Sustained
   The Union should argue that, not only should the carrier be clearly informed of possible disciplinary consequences before discipline is issued, and be given a chance to improve (see below), but also that the charge of Unsatisfactory Work Performance/ Expansion of Street Time is not one of those handful of charges that justify immediately proceeding to removal, but rather, that all the steps of progressive discipline should be taken.

6. **What constitutes a sufficient period of time for the carrier to raise their level of performance to an acceptable standard?**

   The employer, likely, will argue for a short period of time.

   The Union, likely will argue for a long period of time. Note: one arbitrator specifically mentioned a year's time as plenty long.

   C# 05343 Snow 1985 Denied
   Page 14

7. **What constitutes objective evidence that, during the time the carrier's performance should have improved, the carrier's level of productivity failed to reach an acceptable level?**

Specific dated street performance times need to be linked with objective measures of mail volume for those days and, all this is in the absence of Union rebuttal regarding special objective conditions/circumstances that served to expand those times.

Note: Burden of proof shifts back and forth. The employer, initially, must show, with persuasive evidence, that mail volumes were substantially the same as they were when the legitimate street performance standards were established and that, nevertheless, street times were substantially expanded.

C#05343 Snow 1985 Denied
Where the employer was successful and, by way of contrast C#07603, Arbitrator Levak, November 30, 1987, page 15, third point where the employer, most emphatically, was not.

The Union can/should argue that there were special circumstances that served to expand those times, but must also prove such contentions with persuasive evidence that, hopefully, winds up unrebutted.

C#07603 Levak 1987 Sustained
page 15, third point again.

C. Contractual/Handbook (other) Citations

1. Article 16, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10
2. Article 15, Sections 1, 2, 3
3. Article 5
4. M-39, Chapter 1 "Administration of City Delivery Service" Section 115
5. Article 3

   Particularly for that language in which the parties agree that management shall have the exclusive right ". . . subject to the provisions of this Agreement . . ."

6. If at all possible, obtain and cite Enterprise Wire Company (46 AL 359) - Arbitrator Carroll R. Daugherty - the classic, often quoted, clear and explicit definition of just cause principles and their intent.

   And, specifically, for Unsatisfactory Work Performance/Expansion of Street Time type disputes:

7. Article 19

8. M-39, Chapter 2, Mail Counts and Route Inspections
   See, in particular, Section 242.321 (a) and (b)
   Note: Since the language of M-39 242.321 (a) and (b) makes a formal count and inspection mandatory for establishing a legitimate, reasonable, specific carrier-route-street time base, the defense advocate should be fluently familiar with the rules governing the giving of the formal count and inspection and should use that fluency to closely scrutinize the employer's efforts in that area.

9. Article 41, Section 3, Miscellaneous Provisions, Sub-Section I

D. Arguments

In general, review NALC Defenses to Discipline, 1988 edition:

1. Technical Defenses
   a. Technical Defenses Unrelated to the Merits of the Discipline
      (Note Here: The effect of Supreme Court - Cleveland Board of Education vs Loudermill 470 U.S. 532; on Mainstream Arbitral Opinion and on the Steward's job when using Technical Defenses).
   b. It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, not only that a procedural violation has occurred, but also that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.
      1. Discipline was not timely issued.
      2. Discipline was ordered by higher management, rather than by grievant's immediate supervisor.
      3. Management's grievance representative lacked authority to settle the grievance.
      4. Double jeopardy.
      5. Higher management failed to review and concur.
      6. Insufficient or defective charge.
      7. Management failed to render a proper grievance decision.
      8. Management failed to properly investigate before imposing discipline.
      9. Improper citation of "past elements."
      10. Management refused to disclose information to the Union (including claims that information was hidden).

c. Disputes whether grievant's conduct, if proven, would constitute a proper basis for the imposition of discipline:
d. Disputes about the correctness or completeness of the facts used to justify the discipline:
    1. Management failed to prove grievant acted as charged.
    2. Grievant may have acted as charged, but was provoked by another.
e. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline at all is warranted:
    1. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").
    2. Grievant has a long prior service, good prior record, or both.
    3. Grievant's misconduct was not intentional.
    4. Grievant was emotionally impaired.
    5. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
    6. Grievant was disparately treated.
    7. Rule grievant broke was otherwise unenforced.
    8. Management failed to follow principles of progressive discipline.

E. Documentation/Evidence

1. Route inspections forms.
2. Operations forms such as 3997, time cards, PSDS carrier reports, Form 1813, expanded Form 1813.
3. Records or daily logs of grievant.

F. Remedies

1. If "no just cause" for issuance exists, <u>then</u> a remedy with the substantive sense of putting grievant back to status quo ante insofar as the contract allows.

   The familiar phrasing "rescind "the notice of formal discipline); purge it from all relevant files; and make grievant whole for all lost wages and benefits" still serves.

2. If, alas, "just cause" undeniably exists - and we are reduced to no more than mitigation of the severity - <u>then</u> a remedy with the substantive sense, at least, of making grievant whole for the difference and changing the record to reflect, in all relevant files, that the parties have agreed to a lesser level of

discipline.

FAILURE TO (PROMPTLY) REPORT ACCIDENT OR INJURY

A. Case Elements

1. Management claims grievant has had an accident or injury on the job.
2. Management claims grievant failed to report the accident or injury; or failed to report it quick enough (immediately).
3. Management claims grievant was aware of the rule to immediately report any accident or injury.

B. Definition of Issues

C#19053 1. Did grievant have an accident or injury?
C#07482 2. When did grievant reasonably first become aware he/she had an accident or injury?
C#17793
C#07685
C#09542 3. Did grievant report the accident or injury as soon as possible?
4. What attempts did the grievant make to report the accident or injury?
5. Had management made the grievant aware of the rule to immediately report accidents and injuries?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 14.2
4. Article 16
5. Article 19

PO 701 Section 261
ELM 831.4
ELM 842.2
EL 801 Section 240

D. Arguments

1. Technical defenses.
2. Management failed to prove the charge, e.g., grievant was not involved in an accident.
3. Grievant did attempt to immediately report the injury as soon as he/she reasonably became aware there was an injury.
4. Grievant was not aware of the rule requiring an immediate report.

E. Documentation/Evidence

1. Form 91 (Motor Vehicle Accident Report)
2. Form 1769 (Accident Report)
3. Form 1768 (Safe Driver Award Committee Decision)
4. Form 1700 (Vehicle Accident Investigation Worksheet)
5. OSHA 200 log
6. Accident and discipline records of other employees
7. Statement of grievant
8. Prior accident history of grievant
9. Police report
10. CA-1/CA-2
11. Witness statements or notes of steward of interview of witnesses

F. Remedies

1. Rescind/purge the disciplinary notice.
2. Purge the record of the grievant of any mention of the accident.
3. Make whole for all lost wages/benefits.
4. Interest at the Federal judgement rate.

FAILURE TO (PROMPTLY) REPORT ACCIDENT OR INJURY

A. Case Elements

1. **Management claims grievant has had an accident or injury on the job.**
2. **Management claims grievant failed to report the accident or injury; or failed to report it quick enough (immediately).**

Postal regulations require employees who suffer an injury or have an accident to immediately report it.

ELM 814.2 states:

> It is the responsibility of all employees to...immediately report any accident or injury in which they are involved to their supervisors.

M-41 852.1, under the heading of Vehicle Operations, states:

> Operators involved in accidents, regardless of the cause or the amount of damage, injury or death, shall remain at the scene until they have....notified postmaster or his designee.

PO 701 (Fleet Management) 245.3 states:

> The following instructions are to be carried out by the driver of any vehicle involved in an accident, regardless of the extent of the injury or damage, and whether or not other parties involved state that no claim will be filed...Report the accident immediately in accordance with local instructions.

CA-10 OWCP Poster, <u>What a Federal Employee Should Do When Injured At Work</u>, which should be posted at each workplace states:

> Every job-related injury should be reported as soon as possible to your supervisor.

These various provisions contain some minor incongruities. Should an accident be reported to the supervisor, postmaster, designee or in accordance with local instructions?

How does an employee immediately report an accident without leaving the scene? At least one regional arbitrator has recognized this problem.

C#09542 Britton 1989 Sustained

(Citing M-41 852) "The cited sections make no provision for the situation where the operator may be required to leave the scene in order to contact the postmaster, nor does either section specify what type of action the operator should take if neither the postmaster nor his designee is available."

However, one element is consistent in the regulations, the requirement to notify management of injuries and accidents immediately or as soon as possible. Arbitrators recognize this requirement.

C#08925 Nolan 1989 Denied
In this case, the grievant pulled his LLV under a canopy where three patrons were standing. As he exited the vehicle one of the patrons complained that he had hit her with the mirror. The other patrons were laughing about it. The grievant did not report the incident. Later, the patron made a claim of injury against the Postal Service. The arbitrator wrote:

"Every claim of personal injury exposes the Postal Service to potentially serious liability...The only way the Postal Service could protect itself from frivolous or fraudulent clams is by immediate investigation, and the Grievant's failure to report the incident deprived the Employer of that protection."

C#18326 Ames 1998 Modified
"Postal rules and regulations require that all on-the-job injuries by employees be reported immediately to supervisors. An objective analysis of the rule indicates that is reasonable and provides a mutual benefit to both the Postal Service and the employee."

3. **Management claims grievant was aware of the rule to immediately report any accident or injury.**

B. Definition of Issues

1. Did grievant have an accident or injury?
   Supervisors sometimes charge an employee with having an accident when in fact they did not. For example, an employee finishes the route, parks the vehicle and leaves; another vehicle then clips the mirror of the parked vehicle; the next morning the employee sees the damage and reports it; management charges the employee with an accident and failure to report immediately. Another example is when an employee suffers an occupational injury due to work factors over a long period of time; eventually filing a CA-2; management then charges the employee with failure to immediately report an injury.

   C#19053 Francis 1998 Sustained
   "The word 'accident' usually connotes a single, unfortunate and unexpected event, occurrence, or incident with the potential for causing injury. The policy at issue seems to use 'accident' in that sense. Thus, employees are admonished to immediately inform management when such an incident happens so that a timely investigation can be completed, any injury claims can be processed efficiently, and medical services obtained quickly. The grievant was not involved in any such incident on December 30, 1996, i.e.,

one whose circumstances placed him on notice that he should call management from the street so that management
could immediately begin an investigation. Rather, the grievant's knee condition was not unlike other conditions which develop slowly and almost imperceptibly as a result of repeated but subtle trauma and ultimately reach a point over time where symptoms are noticeable. There is no 'accident' to be reported immediately. Such was the case here. The grievant had some symptoms of possible injury, i.e., pain and discomfort after repeatedly negotiating unfavorable terrain.

2. **When did grievant reasonably first become aware he/she had an accident or injury?**

C#17793 Ames 1997 Modified
"The enforcement of postal regulation ELM Section 814.2 is clear and easily recognizable where an employee sustains an on-the-job injury resulting in immediate medical treatment and inability to continue the route. Enforcement is even clearer where an accident occurs involving a postal employee during the operation of a postal vehicle resulting in injuries to private parties or damage to postal property. In those instances reporting requirements are immediate by postal employees to allow an appropriate and proper investigation by postal authorities. However, in the instant case where a postal employee feels a slight pain or throbbing in a joint while delivering their route as a result of bumping into an object or losing one's balance but not falling, a grey area appears to exist requiring the postal employee's discretion as to whether or not an injury has occurred. This is especially true where bumping into an object or correcting one's balance does not result in immediate sustained pain or visible injury. In those cases, it appears reasonable for the employee to individually determine whether an injury has occurred or whether, as occurred with the Grievant, it is of little or no consequence."

C#07685 Render 1988 Sustained
"When the grievant fell down she was involved in an accident if that term is literally applied. She was also injured. The literal application of the regulations would have required her to report it even if she had not scratched her knee. To require each and every carrier to report each and every unforeseen and unexpected event could lead to absurd results...Inasmuch as the grievant was not seriously injured and worked the following day, it appears to the Arbitrator that she exercised fairly sound judgment in going ahead and finishing her route even though she had fallen...the Arbitrator thinks that for the employees of the Service to reach the point that they literally followed the ELM regarding each and every accident and injury, no matter how minor, would be a...disastrous result for the Service."

C#07482 Sobel 1987 Sustained
"Any reasonable interpretation of (the reporting requirements)...would indicate that in cases of work injuries they should be reported when injuries are recognized as such and they interfere with, or threaten to interfere, with the injured party's ability to perform work...
if every time a postal employee feels a twinge, he/she would interrupt work to contact supervisors, file a report, and see a doctor the results would be catastrophic to the efficiency of the Postal Service operation. In a large, if not preponderant, majority of the instances the individuals work though (sic) their back 'stitches and spasms', and with the ensuing rest report back the next day able to work in an unhampered fashion...

Any construction of the responsibility to notify the Supervisor of the work injury would define that obligation in terms of that time at which the party has a reasonable belief that the injury is sufficiently disabling to potentially warrant, both in the Employer's and the employee's long term interest, either cessation from work or not reporting in for same."

3. **Did the grievant report the accident or injury as soon as possible?**

C#09542 Britton 1989 Sustained
"The grievant has testified that when he returned from his route, there was no supervisor to whom he could report the accident, and management has presented no evidence to the contrary."

4. **What attempts did the grievant make to report the accident or injury?**

5. **Had management made the grievant aware of the rule to immediately report accidents and injuries?**

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5
3. Article 14.2
4. Article 16
5. Article 19
   - PO 701 Section 261
   - ELM 831.4
   - ELM 842.2
   - EL 801 Section 240

D. Arguments

1. Technical defenses.
2. Management failed to prove the charge, e.g., grievant was not involved in an accident.

3. Grievant did attempt to immediately report the injury as soon as he/she reasonably became aware there was an injury.
4. Grievant was not aware of the rule requiring an immediate report.

E. Documentation/Evidence

1. Form 91 (Motor Vehicle Accident Report)
2. Form 1769 (Accident Report)
3. Form 1768 (Safe Driver Award Committee Decision)
4. Form 1700 (Vehicle Accident Investigation Worksheet)
5. OSHA 200 log
6. Accident and discipline records of other employees
7. Statement of grievant
8. Prior accident history of grievant
9. Police report
10. CA-1/CA-2
11. Witness notes

Management is required by internal regulations to follow certain procedures when they become aware than an accident or injury has occurred. When discipline is issued for failure to report an accident/injury or failure to report it soon enough, stewards should review management's completion of accident report forms for inconsistencies. In this respect, Article 14.2 of the National Agreement gives an employee the right to a copy of Form 1769 whenever management has completed one, upon written request by the employee.

The OSHA 200 should be reviewed if disparate treatment is at issue.

F. Remedies

1. Rescind/purge the disciplinary notice.
2. Purge the record of the grievant of any mention of the accident.
3. Make whole for all lost wages/benefits.
4. Interest at the Federal judgement rate.

FALSIFICATION OF EMPLOYMENT APPLICATION

A. Case Elements

C#466 1. Employment application was demonstrably incorrect.

C#7950 2. Evidence exists that the employee knew that this information was incorrect.

C#76 3. The employee intended to hide the information from the employer to gain employment or other benefits.

B. Definition of Issues (specific to Falsification: Of Employment Application type cases and to Falsification cases, generally)

1. Employer must prove: incorrect statement, employee knew it was incorrect and that he/she intended to falsify.
2. It matters not how long the employer has worked for the Service. (Article 12, Section 1B)

C. Contractual/Handbook (other) Citations

1. Article 16
2. Article 15

C#7950 3. Article 3 (Privacy Act)

4. Article 19 (M-39, Section 115)

D. Arguments

1. Technical defenses
2. The disputed answer was correct based on the employee's understanding of the question.
3. The information was not material to the decision to hire.
4. Grievant simply forgot.
5. Service was aware of the incorrect answer and did not timely act.

E. The documentation that should be jointly developed/reviewed to establish relevant evidence is:

1. Allegedly falsified form.
2. Explanation of grievant (written).

F. Remedies

1. Rescind/Purge the discipline from the file.
2. Make whole.
3. Interest on back pay at the Federal judgment rate.

FALSIFICATION OF EMPLOYMENT APPLICATION

Disciplinary actions for Falsification of Employment Application rest on Art. 12.1.B:

> "The parties recognize that the failure of the employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge."

Years after hire, perhaps after the employee has given some other reason for the employer to want to discharge the employee, the employer "discovers" that some box was wrongly checked on Application Form PS Form 2591. The argument, then, can proceed as follows:

> If the employer had not been deceived, and instead had known the "truth," the employer might not have hired the employee;
>
> . . . that this is "Falsification" of Employment Application, and
>
> . . . that 12.1.B allows for discharge.

Under the strong light of the grievance/arbitration procedure, the Burden of Proof is on the employer to prove that employee falsified the application, NOT that the employer was deceived (these are two very different events).

The Burden of Proof involved in proving that the employee falsified the application is much heavier than in proving that the employer was deceived.

A. Case Elements

1. Application information, provided by applicant, which was, at the time of application, demonstrably incorrect.
2. Evidence leading to the conclusion that applicant knew, at the time she/he provided it, that the information was incorrect.
3. The presumption, at least, and, often, direct evidence that the applicant willfully intended to hide information from the employer.

   Unless, at minimum, all three of these elements are present, the employer does not normally have a viable case.

   C#00076 Schedler 1982 Sustained
   page 6 (Drawn from Black's Law Dictionary, Fourth Edition definition of "false," and cited repeatedly down the years.)

C#00466	**Rentfro**	**1983**	**Sustained**
pages 7-8			
C#07950	**Sobel**	**1988**	**Sustained**
page 16			

B. Definition of Issues (specific to Falsification Of Employment Application type cases and to Falsification cases, generally).

1. **To prove "falsification" the burden is on the employer to begin with to prove the following three points:**
   a. That an incorrect statement was made by applicant on the employment application or other documents.
   b. That the applicant knew the statement was incorrect
   c. That the applicant made the false statement with the intention of hiding information from the employer. This goes back to C#00076, Arbitrator Edmund W. Schedler, Jr., 1982, page 6.

   C#07950 Sobel 1988 Sustained
   page 16

   NOTE: The third point, can involve a shift in the Burden of Proof to the Union.

   Eminent opinion holds that "if the misconduct is established, presumed, or inferred, - culpability flows from the act itself, or can be adduced from the surrounding circumstances."

   C#00466 Rentfro 1983 Sustained
   This, generally, is not conclusive, but the burden does shift to the Union; to come forward with evidence to explain/justify and/or prove lack of willful intent level of burden of proof on the Union, at this point, often is held to be less than level of burden on employer, but should rise to "Clear and Convincing."

   C#07893 Leventhal 1988 Denied
   Leventhal, here, further elaborates the distinctions drawn by Rentfro in C#00466.

   Well settled that, if USPS can prove that the employee "falsified" Employment Application, the employer may - absent effective mitigating defense - discharge/remove the employee, even if the discovery is made after many years of good service.

C#07860 Sobel 1988 Sustained
However, if time has extended far beyond the 90-day probationary period established by Article 12.1.A, Arbitrators deny grievances, generally, only where the Service takes prompt action after it has reason to believe falsification occurred (and otherwise properly investigates and prosecutes its case).

Arbitrators, generally, sustain grievances (or mitigate discipline levels), if the Service has specific knowledge of - or good reason to believe that falsification occurred, and still chooses not to pursue the matter until a substantially later date.

C. Contractual/Handbook (other) Citations

1. Article 16
2. Article 15
3. Article 5
4. Article 19
5. M-39 Chapter 1, Section 115

   Good Union defense advocates, generally, have read and understood these cited passages for the sake of how they interlock and for the procedural restrictions they place on management's authority to issue discipline to craft. It is advisable to review these passages as one's experience and understanding increase.

   However, a warning is appropriate based on changes in mainstream arbitral opinion, based on developments in national case law, but new added burdens on Union defense advocates - from alternate stewards to NBA's.

   Supreme Court - Laudermill vs Cleveland Board of Education. It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, not only that a procedural violation has occurred, but also that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.

6. Article 3, particularly for that language in which the parties agree that Management shall be consistent in the exercise of its Management Rights" . . . with applicable laws and regulations."

   The forms involved in Falsification: Employment Application type cases,

generally, have strict Privacy Act restrictions associated with them. While engaged in investigatory hot pursuit, the employer can run afoul of these restrictions with potentially mitigatory effects on the discipline level.
C#07950 Sobel 1988 Sustained
pages 12-14

7. If at all possible, obtain and cite Enterprise Wire Company (46 LA 359) - Arbitrator Carroll R. Daugherty - the classic, oft quoted, clear and explicit definition of just cause principles and their intent.

D. Arguments

In general, review NALC Defenses to Discipline, 1988 edition:

1. Technical Defenses
   a. Technical Defenses Unrelated to the Merits of the Discipline
      (See Here: The effect of Supreme Court - Cleveland Board of Education vs Loudermill 470 U.S. 532; on Mainstream Arbitral Opinion and on the Steward's job when using Technical Defenses).

      It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, not only that a procedural violation has occurred,

      But also that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.

      1. Discipline was not timely issued.
      2. Discipline was ordered by higher management, rather than by grievant's immediate supervisor.
      3. Management's grievance representative lacked authority to settle the grievance.
      4. Double jeopardy.
      5. Higher management failed to review and concur.
      6. Insufficient or defective charge.
      7. Management failed to render a proper grievance decision.
      8. Management failed to properly investigate before imposing discipline.
      9. Improper citation of "past elements."
      10. Management refused to disclose information to the Union (including claims that information was hidden).
   b. Disputes whether grievant's conduct, if proven, would constitute a proper basis for the imposition of discipline.

c. Disputes about the correctness or completeness of the facts used to justify the discipline:
   1. Management failed to prove grievant acted as charged.
   2. Grievant may have acted as charged, but was provoked by another.
d. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline at all is warranted:
   1. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").
   2. Grievant has a long prior service, good prior record, or both.
   3. Grievant's misconduct was not intentional.
   4. Grievant was emotionally impaired.
   5. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
   6. Grievant was disparately treated.
   7. Rule grievant broke was otherwise unenforced.
   8. Management failed to follow principles of progressive discipline.

2. Specifically for Falsification: Of Employment Application type cases:
   a. Argument that the question, to which an allegedly false answer was given by grievant, was ambiguous to grievant, and that the answer given was, in fact, correct to one possible meaning:
      1. Given the wording of the question.
      2. Given grievant's educational level.

3. Given grievant's understanding of the events about which she/he was questioned.
   a. Argument that the question, to which a provable false answer was given, was, nonetheless answered correctly by grievant given his/her knowledge at the time she/he answered the question.
   b. Argument that a provable false answer was not material to hiring decisions (and was thus, perhaps, on the face of it, inadvertent and unintentional).
   c. Argument that the event, about which the question was asked, was – not unreasonably - forgotten about by grievant:
      1. Given the length of time that had elapsed between when the event occurred and when the question about the event was asked
      2. Given the probable lack of substance or gravity of the event in the eyes of a reasonable applicant
   d. Two-Part Argument:
      1. That a long time elapsed between the "falsification" and discovery of the falsification (or probably falsification (or probably falsification)

by the employer; and
2. That another "long" period of time elapsed between the employer's discovery and the employer's pursuit of the matter. An inference for the Union to pursue/investigate, here, is that the employer considers the "falsification" to be immaterial, but is pursuing the case at the time they did so for other reasons.

e. Argument that the employer's evidence of falsification was unethically/illegally gathered.
Note Here: The Forms involved in Falsification: Employment Application type cases, generally have strict Privacy Act restrictions associated with them.

C#07950 Sobel 1988 Sustained
pages 12-14

Note: The purpose of this presentation is to indicate which arguments specifically, have prospered at arbitration. Understanding which arguments have worked gives direction to the evidence gatherers. The veritable facts that are uncovered, give guidance to the advocate as to which, of the several possible arguments, fit the particular case. It can be a fruitful feed-back loop. **IMPORTANT:** Discipline cases tend to be one of a kind. Thus it is hard to give general documentation recipes.

E. Documentation/Evidence

1. The application documents on which the applicant, allegedly, made incorrect answers:
   PS 61 Appointment Affidavit
   PS 2485 Medical Examination and Assessment
   PS 2591 Application for Postal Employment
   PS 4583 Physical Fitness Inquiry for Motor Vehicle Operators (2-part set)

2. Any and all documentation developed by the employer in pursuit of establishing that the application answers were incorrect - whether it supports the employer's contention or not.
3. Any and all documentation developed by the employer in pursuit of establishing that the incorrectness of the answer(s) was known to applicant - whether it supports the employer's contention or not.
4. Any and all documentation developed by the employer in pursuit of establishing that the applicant willfully intended to hide information from the employer - whether it supports the employer's contention or not.

A summation of the time line involved in the employer's pursuit of the matter.

A Note on Access and Procedural Defect: Article 17.3 and Article 31.3 fully support Union access to such information - where necessary - in the eyes of a reasonable, knowledgeable, neutral third party - to process the grievance.

Such access should be pursued vigorously by the Union, and, if and when access is denied, such denial should be carefully documented. Denial of such access could prove to be procedural defect which substantively prejudice's grievant's ability to defend and, as such, could mitigate the level of discipline or even result in the grievance being wholly sustained. WARNING: Beware of using it, however, as a threshold issue without, at least, a good substantive case as backup.

C#07950 Sobel 1988 Sustained
pages 15 and 16

F. Remedies

1. If "no just cause" for issuance exists, then a remedy with the substantive sense of putting grievant back to status quo ante insofar as the contract allows. The familiar phrasing "rescind "the notice of formal discipline); purge it from all relevant files; and make grievant whole for all lost wages and benefits" still serves.
2. If, alas, "just cause" undeniably exists - and we are reduced to no more than mitigation of the severity - then a remedy with the substantive sense, at least, of making grievant whole for the difference and changing the record to reflect, in all relevant files, that the parties have agreed to a lesser level of discipline.
3. Interest on back pay at the Federal judgment rate.

FIGHTING

A. Case Elements

1. A proven violent altercation, on the job or closely related
2. Grievant's involvement was as aggressor or willing part.

B. Definition of Issues

C#8574 1. Grievant's involvement (aggressor, participant, self-defense.

C#2679 2. Self-defense or willing participant?

C#6503 3. Was the fighting a result of self-help?

4. Disparate treatment in penalty?
5. Provocation

C. Contractual/Handbook (other) Citations

1. Article 16
2. Article 15
3. Article 5
4. Article 3
5. Article 19

   M-39 Section 115 Discipline

D. Arguments

1. Technical defenses.
2. The grievant was provoked, acted in self-defense or was not a willing participant.
3. The level of penalty was disparate.

E. Documentation/Evidence

1. Witness statements.
2. Medical bills (if any).
3. Mitigatory facts.

F. Remedies

1. Rescind the notice/purge from all records.
2. Make whole.
3. Interest at the Federal judgment rate.

FIGHTING

A. Case Elements (specific to and always or very often found in fighting on-the-job type disputes)

1. A proven violent altercation, on-the-job or closely related to the job.
2. Grievant's affirmative involvement in the violent altercation either as clear aggressor or willing participant.

B. Definition of Issues (specific to Fighting, the fighting being done on-the-job or very closely related to on-the-job, as contrasted with off-duty misconduct, which has a different set of topic specific issues.

C#08574 Snow 1998 Modified

Page 13, for a useful, if not exhaustive five point articulation of what issues should be resolved in a proper investigation of a fight.

1. **Did grievant display "affirmative involvement" in the fight?** Was she/he a clear aggressor or willing participant, as contrasted to engaging in minimal, reasonable self-defense? The burden of proof is on the employer to show this.

2. **If the Union argues self-defense, can the Union show that the self-defense measures were necessary, reasonable, even minimal?** The burden of proof here falls on the Union.
   a. Was there a reasonable possibility of retreat instead of violence, and if so, why wasn't it implemented by grievant? Can the Union show that self-defense measures, even if initially warranted, were reasonable and minimal and did not move by degrees into willing participation?

3. **The well settled arbitral prohibition against self-help where other avenues are available is an underlying issue in most, if not all, fighting cases.**
   a. Even if the Union can show that grievant was, somehow, in the right in the dispute underlying the fight, it profits the Union case little if the Union cannot also show that grievant had no other avenues of settling the underlying dispute.
   b. Grievant could not effectively avail herself/himself of supervisory intervention.
   c. Grievant could not make use of the grievant/arbitration procedure.
   d. Grievant could not retreat from the potential violence and attempt to settle the underlying dispute later in some cooler, more rational manner.

C#02679 Leventhal 1982 Denied
page 6

4. **Disparate treatment issue where the parties to a fight are postal employees, this is a "natural" defensive issue to be examined by the Union.**
   a. If both/all parties to a fight were postal employee's and willing participants initially on the face of it, it makes little difference who was the instigator, who the willing participant(s) are, and the employer responsibility is to discipline both/all the same unless there was some substantially lesser fault in that particular altercation and/or in the relevant personnel record of one rather than the other.
   b. If the employer did not discharge both/all, why was the retained employee(s) given less discipline?
      1. Was it for good reason, i.e., for substantially lesser fault in the particular instance? or
      2. Was it, for example, for past good relations with the employer/representative or past bad relation with the employer on the part of the discharge employee? Elements unrelated to fault in the particular instance of fighting or past relevant personnel record?
   c. If the Union can show, with persuasive evidence that there was no substantially lesser degree of fault on the part of the retained employee, then the Union can make a potentially winning claim of disparate treatment and persuade the Arbitrator to reduce the level of discipline for the discharged employee.

      C#06503 Render 1987 Sustained
      page 20, where the Union showed provocation, along with grievant's attempt and failure to avoid self-help and obtain supervisory assistance, along with willing participation in the fight by an employee not disciplined at all by the employer. (A "disparate treatment" defense, implicit although not articulated by the Arbitrator.)
   d. Conversely, if the employer discharged both employees, and if the Union can show a substantially lesser degree of fault in the particular instance for one of the employees, then the Union can make a potentially winning claim that substantially different degrees of fault demand substantially different degrees of discipline and persuade the Arbitrator to reduce the leave of

discipline for the substantially less at fault employee.
C#08574 Snow 1988 Modified
page 13, for an articulation of the general principle, and

C#05972 Williams 1986 Sustained
page 3 for one example

5. **Provocation, as a mitigating factor is an issue of potential use to the Union in many fighting type cases, but it doesn't bear-up well if it is the only arrow in the Union's quiver.**

See here by way of contrast:
Where the Union prospered
C#06503 Render 1986 Sustained
page 20, where the Union showed provocation along with grievant's attempt and failure to avoid self-help and obtain supervisory assistance, along with willing participation in the fight by an employee not disciplined at all by the employer (a disparate treatment defense, implicit, although not articulated by the Arbitrator).

Where the Union did not prosper:
C#02679 Leventhal 1982 Denied
page 8, especially page 9, where the Union showed provocation, but where the evidence clearly showed no attempt to avoid self-help, but rather a macho use of it and pride in it, and where the employer terminated both willing participants (no possibility of a disparate treatment defense).

6. **Procedural issues with substance.**
   a. Was the discipline issued by the supervision most immediately involved?
   b. Was the grievance settled at the lowest possible step?

C#06782 Sobel 1986 Sustained
pages 5-8 and Appendix I.

Note: Supervision, in the person of Area Manager Joe Rivera stated, in writing, that he was familiar with the case, wanted to settle at Step 2, knew he had the authority to do so, but, after a phone call placed during the Step 2 meeting to Manager of Labor Relations Alan Bame who told him that such (weighty) cases had not been settled at so low a level, decided not to settle.

This procedural breach violative of the spirit, if not the letter of the Contract, was taken by the Arbitrator together with another lesser procedural breach, to be so damaging to both the Union and grievant as to be mitigatory in nature.

c. Did the Union attempt, and was it denied the ability to gather evidence, i.e., witness statements as quickly as possible after the altercation?
Note: While not specifically articulated in the Arbitration awards considered here, this point is implicit, both in the ephemeral nature of the incident, and in the well settled tendency for the memories of witnesses to unanticipated/unusual events to fade with time.

C. Contractual/Handbook (other) Citations

1. Article 16
2. Article 15
3. Article 5
4. Article 19
5. M-39, Chapter 1, Section 115
Good Union defense advocates, generally, have read and understood these cited passages for the sake of how they interlock and for the procedural restrictions they place on management's authority to issue discipline to craft. It is advisable to review these passages as one's experience and understanding increase.

However, a warning is appropriate based on changes in mainstream arbitral opinion, based on developments in national case law, but new added burdens on Union defense advocates - from alternate stewards to NBA's.

Supreme Court - Laudermill vs Cleveland Board of Education. It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, not only that a procedural violation has occurred, but also that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.
6. If at all possible, obtain and cite Enterprise Wire Company (46 LA 359), Arbitrator Carroll R. Daugherty, the classic, oft quoted, clear and explicit definition of "just cause" principles and their intent.

D. Arguments

In general, review NALC Defenses to Discipline, 1988 edition:

1. Technical Defenses
   a. Technical Defenses Unrelated to the Merits of the Discipline
      Note Here: The effect of Supreme Court - Cleveland Board of Education vs Loudermill 470 U.S. 532; on Mainstream Arbitral Opinion and on the steward's job when using Technical Defenses).

      It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, <u>not only</u> that a procedural violation has occurred, <u>but also</u> that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.
      1. Discipline was not timely issued.
      2. Discipline was ordered by higher management, rather than by grievant's immediate supervisor.
      3. Management's grievance representative lacked authority to settle the grievance.
      4. Double jeopardy.
      5. Higher management failed to review and concur.
      6. Insufficient or defective charge.
      7. Management failed to render a proper grievance decision.
      8. Management failed to properly investigate before imposing discipline.
      9. Improper citation of "past elements."
      10. Management refused to disclose information to the Union (including claims that information was hidden).
   b. Disputes whether grievant's conduct, if proven, would constitute a proper basis for the imposition of discipline.
   c. Disputes about the correctness or completeness of the facts used to justify the discipline.
      1. Management failed to prove grievant acted as charged.
      2. Grievant may have acted as charged, but was provoked by another.
   d. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline at all is warranted.
      1. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").
      2. Grievant has a long prior service, good prior record, or both.
      3. Grievant's misconduct was not intentional.
      4. Grievant was emotionally impaired.
      5. Grievant was impaired by drugs or alcohol (including claims that

"alcoholism" was the cause of grievant's misconduct).

6. Grievant was disparately treated.
7. Rule grievant broke was otherwise unenforced.
8. Management failed to follow principles of progressive discipline.

E. Documentation/Evidence

1. Documentation, more than with most types of cases, tends to be quite specific to each case on a case by case basis.
2. Witness statements, as fresh as possible, tend to be of great importance.

F. Remedies

1. If no "just cause" for issuance exists, then a remedy with the substantive sense of putting grievant back to status quo ante insofar as the contract allows.

   The familiar phrasing "Rescind (the notice of formal discipline); purge it from all relevant files; and make grievant whole for all lost wages and benefits" still serves.

2. If, alas, "just cause" undeniably exists, and we are reduced to no more than mitigation of the severity, then a remedy with the substantive sense, at least, of making grievant whole for the difference and changing the record to reflect, in all relevant files, that the parties have agreed to a lesser level of discipline.

3. Interest on back pay at the Federal judgment rate.

INSUBORDINATION

A. Case Elements

1. An order given by management.
2. An unqualified refusal. C#7009
3. The order was clear and understood. C#3700
4. The order related to recipient's duties tasks and functions. C#7852
5. Employee was made aware of consequences or refusal.
6. Mitigating considerations (self-defense, provocation, etc.)

B. Definition of Issues

1. Can the event be termed a FFI instead of insubordination? C#7906
2. Was the order within the ability of the employee to perform?
3. Was the order within the jurisdiction of the supervisor?
4. Would the order involve serious health, legal, moral or financial sacrifices?

C. Contractual/Handbook (other) Citations

1. Article 16.1
2. Article 5
3. Article 15
4. Article 19 (M-39 Section 115) Discipline
5. Article 3

D. Arguments

1. Technical defenses
2. The order was not clear, direct, specific.
3. The individual could not perform the order.
4. The supervisor did not have authority or jurisdiction.
5. The consequences of refusal were not stated.
6. The order was unsafe, immoral or violative of law.

E. Documentation/Evidence

1. Statement from grievant (not necessary shaped).
2. Statements from witnesses (if helpful).

F. Remedies

1. Make whole.
2. Rescind/Purge the discipline from the file.
3. Interest on back pay at the Federal judgment rate.

INSUBORDINATION

A. Case Elements

C#03700 Gentile 1983 Denied
page 7 (after Arbitrator William Rentfro, February 16, 1981.

C#07009 Sobel 1987 Denied
page 12 for an excellent current 4 point test.

1. An order given by supervision.
2. An unqualified refusal.
3. The order was clear and understood by recipient.
4. The order related to recipient's duties, tasks and functions
5. Recipient was made aware of possible/probably consequences of refusal.
6. Aggravating consideration - recipient directly challenged and confronted supervisor in front of other employees.
7. Aggravating consideration - recipient, but not supervisor, used improper language during encounter.
8. Mitigating consideration - supervisor, but not recipient, used improper language (acted in "unprofessional" manner) during encounter.
9. Mitigating/Justifying consideration - safety, health, legal considerations.
   See Here: Classic Ford Motor Company, "Spring and Upset Building and U.A.W. Local 600, 3 LA 779" (1944) (Arbitrator Dean Harry Shulman) - quoted "on point" in **C#07852**, p.23, Arbitrator Harvey Letter, March 17, 1988).

B. Definition of Issues (specific to Insubordination/Failure to Follow A Direct Order cases).

1. Can the event be properly termed Insubordination Failure to Follow a Direct Order cases or is only a lesser charge proper, for example, Failure to Follow Instructions?

Apply the first five of the case elements listed above a test of what the Employer has done by way of carrying their Burden of Proof.

If it is not proven by the Employer that a clear order, identified as such, was given . . . and/or

If it is not proven by the Employer that the recipient of the order gave an unqualified refusal . . . and/or

If it is not proven by the Employer that the recipient was made aware of the possible consequences of his/her refusal (and/or **if** it cannot be argued reasonably by management that any member of industrial society would know the consequences of refusal). . .

Then probable strong argument can be made that the event is not proven by the Employer to be Insubordination/Failure to Follow a Direct Order.

2. **Even if warning of consequences and a direct order were given, was the order within the competence/ability of the recipient to perform?**
   (. . .the "I order you to leap tall buildings in a single bound" syndrome)
   "Deliver that mail and be back before 4 p.m. or else you'll be facing formal discipline" - for example - is not unheard of type of clear direct order that may not be within the ability of the recipient to perform. Evidence that this amount of work had never been done in that amount of time before by recipient, and/or that something provable prevented him/her from doing that amount of work in that amount of time is prudent and necessary to develop for the sake of a defense based on the contention that the order was not within the competence/ability of the recipient.

3. **Did the order fall within the jurisdictional authority of the individual supervisor to make?**
   (. . . the "Damned if you do, damned if you don't" syndrome, version-1).

   C#07906 Sobel 1988 Modified
   . . . a junior supervisor issues a direct order, obedience to which would cause the recipient to go against an order or authority specifically granted to him/her by a senior supervisor.

   Evidence that senior supervisor specifically gave a direct, conflicting order/authority; and that the junior supervisor was unreasonable and unprofessional in not double checking this contention is prudent and necessary to develop for he sake of a defense based on the contention that the order was not within the jurisdictional authority of the order giver to give.

4. **Would following the order involved a serious health hazard or other extremely serious sacrifice - legal, moral, financial?**
   (. . . the "Damned if you do, damned if you don't syndrome)
   Note: A useful distinction, which arbitrators sometime make between "legitimized" insubordination and "mitigated" insubordination is as follows:
   a. Justified Insubordination (very rare - hard to prove)

See Here: the classic Ford Motor Company, Spring and Upset Building and U.A.W. Local 600, Arbitrator Dean Harry Shulman - quoted recently and "on point" in C#07852, p. 23, Arbitrator Harvey Letter, March 17, 1988).

> "The employee himself must . . . normally obey the order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey (emphasis added) to be sure, one can conceive of improper orders which need not be obeyed . . . He may refuse to obey an improper order which involves an unusual health hazard or other serious sacrifice."

b. Insubordination which, while not justified, is nonetheless embedded in facts which should mitigate (soften) the punishment.

C#07906 Sobel 1988 Modified
pages 9, 10, 11

C. Contractual/Handbook (other) Citations

1. Article 16 Section 1

   While it is true that National Agreement (N.A.) enumerates specifically that insubordination may be just cause for discipline or discharge . . .

   And while it is true that mainstream arbitral opinion holds/has held that blatant cases of Insubordination/Failure to Follow Direct Orders can be grounds for proceeding immediately to removal . . .

   It is true also 16.1 states - first - that a basic principle is "corrective rather than punitive."

   It is prudent to develop a "fall back position" along the line even if, for the sake of argument, grievant is guilty of insubordination, demonstration of the seriousness of insubordination, through relatively mild discipline, is correct. Removal takes away the possibility for grievant's behavior to be corrected and is, by definition, punitive.

   (This works best, of course, if there is no citeable prior adverse action against grievant and if the provable Insubordination is not too blatant.
2. Article 16, Sections 2, 3, 4, 5, 6, 7, 8, 9, 10
3 Article 15, Sections 1,2,3
4. Article 5
5. Article 19
6. M-39, Chapter 1, Section 115

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8. If at all possible, obtain and cite Enterprise Wire Company (46 AL 359) - Arbitrator Carroll R. Daugherty - the classic, oft quoted, clear and explicit definition of just cause principles and their intent.

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   4. Grievant was emotionally impaired.
   5. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
   6. Grievant was disparately treated.
   7. Rule grievant broke was otherwise unenforced.
   8. Management failed to follow principles of progressive discipline.

Specifically, for Insubordination/Failure to Follow Direct Order cases, consider the appropriateness of the following arguments:

1. Argument that the Employer failed to prove that the order was clear, direct, and specified exactly what the recipient was to do.
2. Argument that the Employer failed to prove that what was specified to do, could be done by the individual required to do it - discipline.
3. Argument that the Employer failed to prove that the person issuing the order had jurisdictional authority to give the order.
4. Argument that the Employer representative giving the order failed to delineate, clearly, to the recipient the consequences of refusal (and that the Employer failed to prove that the recipient could be expected to know what the consequences of refusal would be simply by virtue of being a member of industrial society).

C#07906 Sobel 1988 Modified

page 8

5. Argument that, obeying the order would have resulted in an unusual health hazard to grievant or other serious sacrifice (for example, financial).
   C#07852 Letter 1988 Sustained
   page 23
6. Argument that, the order issued by the Employer would, if followed by the Employee, clearly cause the Employee to violate substantive applicable law.
   C#03700 Gentile 1983 Denied
   page 7 where he quotes an earlier eight point test, articulated in USPS and Mailhandlers, Case No. 28M-5B-D-13078, Arbitrator William Rentfro, February 16, 1981.

7. Argument that, the order issued by the Employer was, clearly and in some direct sense, a violation of applicable laws and therefore beyond the authority of the Employer to issue (note here the distinction between being an order that is merely arguably in violation of the labor agreement between the parties and an order that is clearly in violation of applicable law. Orders which are merely arguably in violation of the agreement between the parties, will virtually always fall under the "obey now, grieve later" axiom, because the parties have agreed, jointly, to use the grievance/arbitration procedure first to settle the question of whether such orders are, in fact, in violation of the agreement).

   C#05018 Snow 1985 Sustained
   "In this particular case, however, the order issued the grievant was beyond the legal authority of the Employer. (Here Arbitrator Snow cites Ford Motor Company/Shulman to contract orders that are beyond the Employer's legal authority - (which the Employee was, in this case, justified in disobeying) with orders that are, arguably, in violation of the labor agreement between the parties - because the grievance procedure is there to settle the matter between the parties with regard to their mutual agreement))

   . . .The Employer, however, has agreed to exercise its rights in a manner consistent with applicable laws and regulations. There was no effort in this particular case to make the order issued by management consistent with the law. Arbitrators have long taken the position that a grievant should not be punished for failing to obey an order that clearly is beyond the authority of the employer. (See, for example, Dwight Manufacturing Company, 12 LA 990 (1949); Ross Clay Products Company, 43 LA 159 (1964); Equitable Bag Company, 52 LA 1234 (1969); and Marion Power Shovel Division, 72 LA 417 (1979)."

8. Avoid relying on the following argument (even though it appears, at first glance, to be attractive) that the order was a clear violation of contract.
   C#05018 Snow 1985 Sustained
   pages 22-23 quoting the classic and eminent Dean Harry Shulman (Ford Motor Company, 3 LA 779, 780-81 (1944)).

   Some individuals apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated.

   A determination of that rests in the collective negotiation through the grievance procedure.

E. Documentation/Evidence

1. If the grievant shows promise of going beyond Step 1 - whatever the arguments - the documentation/evidence should be gotten early, detailed, specific, signed and dated.
   For example:
   a. statements gathered while memories are fresh
   b. interviews reduced to readable writing (or better yet, type-script) - signed and dated
   c. prepared statements, similarly legible, signed and dated; and
   d. interviews of relevant supervisory personnel - even if they won't sign interview notes, they have obligation to be responsive to relevant questions and, if a "stone wall" is encountered, that is evidence in itself.

F. Remedies

1. If "no just cause" for issuance exists, then a remedy with the substantive sense of putting grievant back to status quo ante insofar as the contract allows.

   The familiar phrasing "rescind "the notice of formal discipline); purge it from all relevant files; and make grievant whole for all lost wages and benefits" still serves.
2. If, alas, "just cause" undeniably exists - and we are reduced to no more than mitigation of the severity - then a remedy with the substantive sense, at least, of making grievant whole for the difference and changing the record to reflect, in all relevant files, that the parties have agreed to a lesser level of discipline.

3. Interest on back pay at the Federal judgment rate.

LAST CHANCE AGREEMENTS

A. Case Elements

1. The existence of a LCA in lieu of, or in addition to, a disciplinary action.
2. An alleged violation of the LCA.

B. Definition of Issues

C#8624
C#8885
C#10214

1. A careful analysis of the language in the LCA.
2. What is the charge? What provision was allegedly violated?
3. What constitutes a violation? Satisfactory?
4. Does the LCA create a standard of performance?
5. Is "just cause" waived?

C. Contractual/Handbook (other) Citations

1. Article 5
2. Article 15
3. Article 16
4. Article 19 (M-39) Section 115)

D. Arguments

1. Technical defenses
2. Grievant has not violated the LCA.
3. No "just cause" even though the LCA is binding.
4. The conditions of the LCA are in violation of the National Agreement.
5. Employer has not proven a violation.

E. Documentation/Evidence

1. The LCA.
2. The evidence that shows an alleged violation.
3. Statements from the drafters of LCA.
4. What the grievant's understanding was of the alleged rule?

F. Remedies

1. Rescind/Purge the discipline from the file.
2. Make whole.
3. Interest per Federal judgement rate.

LAST CHANCE AGREEMENTS

This is a very sobering topic to consider, from the Union's point of view.

- Virtually all are removal cases.

- Nationally 68% of our grievances are denied; only 13% are sustained; the remaining 19% are modified.

- The enormous importance of the wording of a Last Chance Agreement cannot be over emphasized. Most Arbitrators take them (absent strong evidence to the contrary) to be new mini-Labor Contracts, freely negotiated without coercion, between the Union and the Employer, agreed to in lieu of the almost certain removal of the Employee who is the subject of the LCA's language. Arbitrators agree that LCA's may not violate or modify the collective bargaining agreement, but many arbitrators hold that LCA's may waive virtually all of the Employee's job tenure protection, including the protection of being judged on the basis of an objective "just cause" standard and even of access to the grievance/arbitration process - if the particular LCA clearly and unambiguously so states.

- This topic has to be, in part, a WARNING to Stewards and Branches. Obtain the best advice you can - preferably from the Regional Office - as to the negotiated wording of an LCA. Given the possibility of how unfavorable LCA wording <u>can</u> be to the Employee/Union, it might, from a Contract Administration point of view, be preferable to advance a weak, but no totally hopeless case, rather than agree to wording that, in effect, converts the Employee to one who, in effect, is working at the pleasure of the Employer (an "Employee at will").

A. Case Elements (which, at a minimum, will be present in Last Chance settlement type cases)

1. A Last Chance Agreement negotiated and signed by the parties and absent evidence of duress or misrepresentation.
2. A claim by the Employer that the conditions of the LCA have been violated by the Employee.
3. An action, usually some kind of notice of Removal, taken against the Employee by the Employer

B. Definition of Issues (specific to Last Chance settlement type disputes)

1. **NOTE: Most Last Chance settlements reveal, on careful analysis, a series of "if" - "then" propositions - for example**: "If Last Chance Employee fails to maintain a satisfactory level of attendance - then the result will be the Employee's Immediate Removal from the Postal Service" and so forth through, perhaps, a lengthy series of conditions.

   C#08624 Leventhal 1989 Sustained
   pages 6 & 7

2. **Thus, management action must, logically, involve: a claim that grievant failed to meet at least one condition, and; a claim that the result which Management is implementing follows, under the language of the Last Chance settlement, directly from the failure to meet the condition.**

3. **An initial issue, then, in almost all Last Chance settlement grievants is: What particular condition(s) is it being claimed that grievant failed to meet?**

   C#08624 Leventhal 1989 Sustained
   "Ballard, having been assigned the grievant after the last chance agreement, apparently wanted her "out." The last chance agreement expressly required the grievant to maintain a satisfactory level of attendance and work performance. For whatever the reasons, Ballard did not act on alleged violation of paragraph 3 (of the last chance agreement) regarding her work performance, but seized on the AWOL and tardy, later bolstered by the EAP charge, to remove (grievant)."

4. **Another important issue is what constitutes failure to meet that condition?**
   In the example given, if not ". . .satisfactory level of attendance . . ." then ". . . Removal . . ." the experienced Steward will immediately think of ELM 370, which defines the term "satisfactory" for purposes of Employee evaluation.
   a. This is an "objective" standard.
   b. It is a standard applicable to all Employees.
   c. It is not a more difficult standard, imposed on grievant because of the LCA.

What if the LCA had said, "IF Last Chance Employee is absent more than three working days within 14 calendar days, for whatever reason, until this LCA expires. . . THEN the result will be the Employee's immediate Removal from the Postal Service."

a. This is still an "objective" standard.
b. But it does not go outside the terms of the LCA. (There are no ELM criteria to cite).
c. It is a far more difficult standard imposed on grievant than on other employees. The Union can, and, perhaps, should argue that the condition is unduly harsh, but - if the parties agreed to that condition, freely and without duress or misrepresentation, and if grievant had been facing certain removal for impossible attendance at the time the condition was agreed to, the Union could well be unsuccessful.

5. **Another important issue can be, "What is the Standard by which to judge whether or not grievant has failed to meet a condition?"**
   a. Objective "just cause" Standard or in both our examples, the Standard was, clearly, objective. That is to say, grievant met, or failed to meet, the standard independent of what the Employer thought about her actions.
   b. Subjective "good faith" Standard. What if the LCA, upon analysis, showed the following if then proposition: "If Last Chance Employee fails to maintain good general work habits that are acceptable to management, . . . then the result will be the Employee's immediate Removal from the Postal Service."

C#08885 Levak 1989 Denied

pages 4, 5, 6 for the LCA and pages 9 and 10 for the distinction between objective just cause standard and subjective good faith standard

"Of equal importance is the fact that the Last Chance Agreement creates a subjective good-faith standard, as opposed to an objective just cause standard. Paragraph 3 of the Last Chance Agreement provides not only that the grievant must maintain satisfactory punctuality and attendance, but also, attendance, but also, "good general work habits that are acceptable to management." Thus, for a twelve-month period, the grievant was required to maintain general good work habits subjectively acceptable to management; she was not merely under an obligation to comply with an objective standard subject to third party scrutiny under just cause or progressive discipline standards. The subjective standard is akin to that normally granted to employees who have not completed their probationary period. As stated in Elkouri & Elkouri, How Arbitration

Works, BNA 4th Ed. at page 654, the question in such a discharge, "goes to the good faith of the Company, not to the merits of its conclusion."

". . . courts and arbitrators sometimes state that under a subjective good-faith standard, the rule to be applied is what is known as the "substantial evidence rule." Under that rule, a court or arbitrator will not set aside employer action where that action is made in good faith and where at least some evidence exists to support the employer's determination. Thus, under the substantial evidence rule, an employer need not provide its case by a preponderance (51%) of the evidence, but need only submit `substantial' evidence, which is generally deemed to be in the neighborhood of 30%."

What if the LCA, in addition said, "I know and understand that I have appeal rights to the grievance/arbitration procedure with respect to appealing a removal action against me. (But) By this agreement, signed . . ., I, (Last Chance Employee), of my own free will, waive my rights to the grievance-arbitration procedure, Equal Opportunity Commission Procedure and Merit Systems Protection Board appeal process for the period of one year."

On the one hand - some arbitrators hold that access to the grievance/arbitration procedure can be waived.

pages 5 & 6 (Levak waffles on the issue of access to arbitration, but finally arbitrates and denies the grievance using the Subjective Good-Faith Standard rather than an Objective Just Cause Standard of evidence).

Alternatively, USPS and APWU, Case No. W7C-5E-D 18199, Arbitrator William Eaton, September 6, 1990, page 4 for the LCA and pages 20 & 21 (Where Eaton out right denies access to arbitration.)

US Supreme Court, Johnson v. Zerbst, 304 U.S. 458, 463 (1958), quoted by Arbitrator Joseph Gentile in Case No. W7C-5G-D 16132, and requoted by Arbitrator William Eaton in USPS and APWU as of 5/15/91, Case No. W7C-5E-D 18199, September 6, 1990, page 17: "There the court found that a waiver of rights may exists, `If such action was the informed, intentional abandonment of a known right, free of any coercion and duress.'"

On the other hand, at least one eminent arbitrator, now on the National Panel, appears to lean strongly toward the position (which the Union should, generally, argue) that - despite the existence of a last chance agreement, where there can be any doubt as to whether or not the Last Chance Employee in fact failed to meet a condition of the Last Chance settlement, that question, at least, can be brought to arbitration.

C#10214 Snow 1990 Sustained
pages 18 and 19 (There are strong echoes here - that this writer can not fail to mention - of Professor Snow's lecture material on the subject of U.S. Supreme Court Steelworker Trilogy, authored by William O. Douglas, the central case of which established the doctrine, "when in doubt, arbitrate" and the tests: 1. Do the parties have a collective bargaining agreement with a grievance-arbitration procedure? and 2. Is this type of case excluded from that procedure by specific, not general language? If "yes" to the first and "no" to the second, arbitrate.)

Whether or not the particular LCA allows for a range of management actions. If the LCA does allow for a range of management actions, then the Standard/Criteria by which one end of the range rather than another is chosen by management becomes an issue.

C. Contractual/Handbook (other) Citations

1. Article 16
2. Article 15
3. Article 5
4. M-39, Chapter 1, Section 115

Good Union defense advocates, generally, have read and understood these cited passages for the sake of how they interlock and for the procedural restrictions they place on management's authority to issue discipline to craft. It is advisable to review these passages as one's experience and understanding increase.

However, a warning is appropriate based on changes in Mainstream Arbitral Opinion, based on developments in national case law, but new added burdens on Union defense advocates - from alternate stewards to NBA's.

Supreme Court - Laudermill vs Cleveland Board of Education. It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, not only that a procedural violation has occurred, but also that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against

charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.

5. Article 3
6. If at all possible, obtain and cite Enterprise Wire Company (46 AL 359) - Arbitrator Carroll R. Daugherty - the classic, oft quoted, clear and explicit definition of just cause principles and their intent.

D. Arguments

In general, review NALC Defenses to Discipline, 1988 edition:

1. Technical Defenses
   a. Technical Defenses Unrelated to the Merits of the Discipline
      Note Here: The effect of Supreme Court - Cleveland Board of Education vs Loudermill 470 U.S. 532; on Mainstream Arbitral Opinion and on the steward's job when using Technical Defenses).

      It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, <u>not only</u> that a procedural violation has occurred, <u>but also</u> that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.
      1. Discipline was not timely issued.
      2. Discipline was ordered by higher management, rather than by grievant's immediate supervisor.
      3. Management's grievance representative lacked authority to settle the grievance.
      4. Double jeopardy.
      5. Higher management failed to review and concur.
      6. Insufficient or defective charge.
      7. Management failed to render a proper grievance decision.
      8. Management failed to properly investigate before imposing discipline.
      9. Improper citation of "past elements."
      10. Management refused to disclose information to the Union (including claims that information was hidden).
   b. Disputes whether grievant's conduct, if proven, would constitute a proper basis for the imposition of discipline
   c. Disputes about the correctness or completeness of the facts used to justify the discipline
      1. Management failed to prove grievant acted as charged.
      2. Grievant may have acted as charged, but was provoked by another.
   d. Allegations that, because of mitigating circumstances, the discipline

imposed is too harsh, or no discipline at all is warranted

1. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").
2. Grievant has a long prior service, good prior record, or both.
3. Grievant's misconduct was not intentional.
4. Grievant was emotionally impaired.
5. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
6. Grievant was disparately treated.
7. Rule grievant broke was otherwise unenforced.
8. Management failed to follow principles of progressive discipline.

e. In particular, for Last Chance settlement type cases:

1. Upon close analysis of the specific conditions of the Last Chance settlement, which the Employer is charging have not been met by grievant, argue that the Employer has not met the burden of proving that the conditions were not met.
2. Upon close analysis of the specific conditions of the Last Chance settlement, which the Employer is charging have not been met by grievant, the Union might be able to argue that conditions are in violation of some part of the National Agreement are, on the face of it, absurd or nonsensical, are, on the face of it, unduly harsh.
   C#08624 Leventhal1989 Sustained
   page 18

E. Documentation/Evidence

1. The Last Chance settlement, itself, is of major importance. It should be carefully reviewed and analyzed.
2. Evidence, developed by the employer, to substantiate the claim that a condition of the Last Chance settlement had been violated should be reviewed together.
3. Rebuttal evidence to the above should, if possible, be developed and reviewed with the Employer.

The claim can be made by the Union - at least under the Just Cause Standard if it can be shown to apply, that the Employer had (and perhaps failed to honor) the obligation to develop exculpatory evidence regarding the charge as well as developing evidence showing that the condition had NOT been met.

4. Evidence of whether or not the Employer allowed/encouraged the Union/Grievant to seek explanation and gain understanding of the Last Chance settlement during its negotiation could be of use.

F. Remedies

1. If no "just cause" (or, alternatively, "good-faith" basis) for management action exists, - then a remedy with the substantive sense of putting grievant back to status quo ante insofar as the contract allows.

   The familiar phrasing "Rescind (the notice of formal discipline); purge it from all relevant files; and make grievant whole for all lost wages and benefits" still serves.

2. If, alas, "just cause" /good-faith basis undeniably exists - and we can at least ask for mitigation of the severity.

   Case histories do not support a hopeful outlook for this approach.

3. Interest on back pay at the Federal judgment rate.

MISCONDUCT OFF DUTY

A. Case Elements

C#8974

1. Off-duty misconduct is proven.
2. Connection between misconduct and the interests of USPS.
3. Proof the misconduct has affected the employer.
4. Postal employees have a higher degree of responsibility for off-duty conduct.

B. Definition of Issues

C#8951

1. The employee was guilty as charged.
2. Was the employer damaged by the misconduct?
3. Will the employer be damaged as a result of the misconduct?
4. Is the nexus proven?

C. Contractual/Handbook (other) Citations

1. Article 16
2. Article 19
   ELM 661.53 Unacceptable Conduct
   ELM 666.2 Behavior and Personal Habits

D. Arguments

1. Technical defenses.

C#8951

2. Off-duty misconduct did not occur.
3. No publicity occurred, or the publicity did not identify the employee with the Postal Service.
4. A nexus cannot be presumed.
5. Other employees do not refuse to work with grievant.

E. Documentation/Evidence

BP Vol. 2
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1. Disciplinary notices.
2. Police reports (if applicable).
3. Court records (if applicable).
4. P.I. Memo.
5. Public notices (if applicable).
6. ELM 660 Conduct
   ELM 873 Reinstatement of Recovered Employees
7 Witness statements
8 Employee statements
9 9 Customer statements

F. Remedies

1. Rescind and purge notice.
2. Make whole.
3. Interest at the Federal judgment rate.

MISCONDUCT OFF DUTY

A. Case Elements

1. The well settled doctrine at Arbitration that Postal Service employees have higher degree of responsibility of off-duty conduct than the employees in the private sector is always an element.
2. Proven off-duty misconduct is always an element in successful management actions.
3. Proof that there is a connection (technical term - nexus) between the employee's off-duty misconduct and the interests of the Postal Service is nearly always an element in successful management actions.

   Note 1: MSPB has held that when the off-duty misconduct is egregious in nature, a presumption of nexus may be raised, but that presumption is ". . . rebuttal and may be overcome by evidence submitted the appellant which shows an absence of adverse effect on the service efficiency."

   Note 2: Warning. Nexus bears with it the sense of accepting prospective harm to the Service, where the Service has proven that is will or very likely will happen, as "just cause" for disciplinary action; not merely harm that the Service has proven to have taken place.

   But there must be, at a minimum, unrebutted presumption of likely future harm to the Service, based on egregious off-duty misconduct; or, more strongly, actually proof, i.e., fellow workers or superiors stating they will not work with/or no longer have a necessary working level of trust in grievant due to egregious off-duty misconduct.
4. Proof that proven off-duty misconduct of employee resulted in prejudice to the interests of the Postal Service can be a sufficient element in a successful management action.

B. Definition of Issues (specific to Misconduct Off Duty type cases, generally)

1. **In order to prove there is "just cause" for the imposition of discipline for off-duty misconduct, the burden of proof is on the employer to prove the following:**
   a. Not only that allegations of misconduct exist, but also that the employee was guilty of the allegations.
   b. That proven off-duty misconduct, in fact, retrospectively, did damage to the business interests of the Service, i.e., loosing customers or receiving damage to reputation.
   c. That there is a proven nexus, past and/or future, between the proven off-duty misconduct of the employee and the efficiency of the Service.

2. **In off-duty misconduct cases, more than many other types of**

disciplinary cases, the following issues have leverage in mitigating discipline for which there is, on the face of it, "just cause" to a lower level or even to the point of no discipline at all:

a. Was a proper investigation completed prior to the employee suffering discipline, i.e., had there been enough time for the authorities to complete their investigation and formally prove/establish initial allegations as fact(s) before formal disci;line was issued and penalty suffered by grievant? And had the employer representatives established this through their own investigations and/or careful review of the investigations of others?

b. Were the employee's actions, while arguably improper, nevertheless in self-defense?

C. Contractual/Handbook (other) Citations

1. Article 16 - Discipline Procedure
2. Article 19 - Handbooks and Manuals
3. ELM 661.5 Other Prohibited Conduct
   ELM 661.53 Unacceptable Conduct
   ELM 666.2 Behavior and Personal Habits

D. Arguments

In general, review NALC Defenses to Discipline, 1988 edition:

1. Technical Defenses
   a. Technical Defenses Unrelated to the Merits of the Discipline
   b. Disputes whether grievant's conduct, if proven, would constitute a proper basis for the imposition of discipline.
   c. Disputes about the correctness or completeness of the facts used to justify the discipline.
   d. Disputes about the correctness or completeness of the facts used to justify the discipline:
      1. Management failed to prove grievant acted as charged.
      2. Grievant may have acted as charged, but was provoked by another.
   e. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline at all is warranted:
      1. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").
      2. Grievant has a long prior service, good prior record, or both.
      3. Grievant's misconduct was not intentional.
      4. Grievant was emotionally impaired.
      5. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).

6. Grievant was disparately treated.
7. Rule grievant broke was otherwise unenforced.
8. Management failed to follow principles of progressive discipline.

2. Specifically for off-duty misconduct cases, consider the following arguments:
   a. Argument the employer has failed to prove that off-duty misconduct actually occurred, an argument that splits into three possible streams:

      1. Argument (if applicable) the employer has "jumped the gun" and no one has investigated and proved off-duty misconduct in fact, but has relied, instead, on suspicion and allegation.
      2. Argument (if applicable) the Postal Inspection investigation is flawed, incomplete, and/or was not carefully considered by the employee's immediate supervisor who should have issued the actual discipline.
      3. Argument (if applicable) the employer failed to properly construe the judgement of the court.
   b. Argument the employer has failed to prove the misconduct actually damaged the employer's business retrospectively (in the past) - through loss of customer's or loss of reputation (here the burden is on the employer to show wide-spread publicity - notoriousness (notoriety).
   c. Argument the employer has failed to prove grounds for presumption of prospective (future) harm to legitimate business interests. . . or that, if they have, the Union has successfully rebutted that presumption with persuasive evidence.
   d. Argument the employer has filed to prove, directly, with persuasive evidence, the certainty/extreme likelihood of future harm to its' business interests.
   e. Argument (if applicable) the employer became so focused on proving off-duty misconduct the employer failed/refused to investigate completely before the removal took effect.

E. Documentation/Evidence

1. Letter of Proposed Removal/Removal
2. Letter of Decision (if employee is eligible for veteran's preference)
3. Notice of Suspension (if applicable instead)
4. Copy of Police Reports (if applicable)
5. Court Records (if applicable)
6. Postal Inspector's Memorandum (if applicable)
7. Public Notices (i.e., newspaper articles, record of TV coverage, etc.)
8. Relevant medical and other evidentiary documentary (if applicable)

F. Remedies

1. If no "just cause" for issuance exists, then a remedy with substantive sense of putting grievant back to status quo ante insofar as the contract allows. The familiar phrasing "rescind (the notice of formal discipline); purge it from all relevant files; and make grievant whole for all lost wages and benefits: still serves.

2. If, "just cause" undeniably exists, and we are reduced to no more than mitigation of the severity, then a remedy with the substantive sense, at least, of making grievant whole for the difference and changing the record to reflect, in all relevant files, the parties have agreed to a lesser level of discipline.

3. Interest at the Federal judgment rate.

SEXUAL MISCONDUCT

A. Case Elements

1. Grievant is charged with sexual harassment or misconduct.
2. Grievant is suspended pending an investigation of the alleged charges.
3. Service takes action to remove grievant.
4. Proof exists that sexual harassment or misconduct occurred.
5. Employee complains that sexual comments or misconduct is allowed or condoned.

B. Definition of Issues

C#1030 1. Did the Service conduct a thorough investigation?

C#10470 2. If suspended, did the Service have "reasonable cause" to believe the grievant guilty of a crime for which imprisonment could be imposed?

C#8974 3. Was the misconduct off-duty, and if so, was there a nexus between the grievant's alleged misconduct and employment with the USPS?

C#1785 4. Was the grievant proven guilty "beyond a reasonable doubt?"

C#6013 5. Were there mitigating circumstances that rendered the discipline too severe?

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 15
3. Article 16, Sections 6, 7, 8
4. Article 2
5. Article 19

ELM 661.2 Congressional Code of Ethics for Government Service
ELM 661.53 Unacceptable Conduct
ASM 224 Offenses Reported by Memorandum

6. Article 35

Sexual Misconduct

D. Arguments

C#6013
C#10470
C#08974
C#08951
C#08805
C#08449
C#08182
C#03808
C#01030

1. Technical defenses.
2. Management failed to prove grievant acted as charged.
3. Grievant has a long prior record.
4. Grievant's conduct was not intentional.
5. Grievant was emotionally impaired.
6. Grievant may have acted improperly, but did so as a result of lack of, or improper training.
7. Management did not control the work environment and allowed sexual harassment on the workroom floor.
8. No evidence of nexus.
9. Employees do not express a concern with working with grievant.

E. Documentation/Evidence

1. Removal notice and disciplinary letter.
2. Investigative memorandum.
3. Grievant's statement.
4. Witness statements.
5. Court records.
6. Police records.
7. Doctor reports (chart notes, etc.)
8. Criminal record.
9. USPS sexual harassment policy.

F. Remedies

1. Reinstate with all seniority and benefits.
2. Make whole.
3. Interest at the Federal judgment rate.
4. Grievant's personnel records purged of all records of the incident and disciplinary notice stricken from all files.

SEXUAL MISCONDUCT

A. Case Elements

1. Grievant is charged with sexual misconduct.
2. Grievant is suspended pending an investigation of the alleged charges.
3. Service takes action to remove grievant.

B. Definition of Issues (specific to discipline for Sexual Misconduct type disputes)

1. Did the Service conduct a thorough investigation?

C#01030 Rentfro 1979 Sustained

The grievant was arrested and charged with lewd and lascivious conduct with a child under 14 years of age. The grievant was in jail for two days and the charges made the local newspaper (not identified as a Postal worker). The grievant pleaded guilty to one count of corporal punishment (a felony) and was placed on probation. Approximately 5 months later the grievant's Postmaster learned of the charges and obtained the policy investigative file. Based solely on the information contained in the file, as well as the newspaper article, the grievant was immediately placed on 30-day advance notice of discharge. The Postmaster would later testify that his decision to discharge was based on concerns the grievant might molest children on his route. Also, that public trust would be impaired if it were known that the Service employed a suspected sex offender.

Page 4 The Arbitrator captions the Postmaster's handling of the discharge.

Rentfro notes the Postmasters request not to have the grievant at the Step 2 meeting, and answers to questions at arbitration.

Page 6 Rentfro talks about conducting a fair, objective, and thorough investigation, including employee's explanation.

Page 7 "Failure of management to thoroughly investigate. . .

Page 8 Rentfro: the "real heart of procedural due process. . ."

Page 9 "Turning to the facts of this grievance. . ."

Page 14 Management failed to observe even the "rudimentary" protection of due process.

Rentfro addresses the "second ground" on which management failed and that was in shouldering it's "burden of proof."

Page 15 Rentfro addresses the two major arguments made by the Postal Service.

Page 16 The Arbitrator addresses the Postmasters exclusive reliance on police files in making his decision to remove the grievant.

2. **If suspended, did the Service have "reasonable cause" to believe the grievant guilty of a crime for which imprisonment could be imposed?**

C#10470 Goldstein 1990 Denied
This arbitration did not involve the issue of removal.

Page 4 - items 1-3 - "Union asserts the issues to be:"
All four counts in the final charges the grievant with felonious penetration of sexual contact with the grievant's step-daughter (class 3 felonies). Prior to arbitration, by one week, the grievant's jury trial had produced a "not guilty" on one count and a hung jury on the other 3 counts. The grievant's attorney had made a motion for acquittal and a hearing had been scheduled later to hear motions and counter-motions. Thus, criminal charges had not been finally resolved at the time of the arbitration.

Page 6 Goldstein talks about the Service's need to establish it had reasonable cause for belief in the grievant's guilt.

Page 9 and 10 Arbitrator discusses Article 16 Section 6, A of the Agreement, "reasonable cause."

Page 10 The Service states its position concerning "reasonable cause" for indefinite suspension.

Page 11 The Service furthers its argument for "reasonable cause" to believe in grievant's guilt and "just cause" to suspend.

Page 15 The Union makes its arguments for the criteria needed by the Service to meet the requirements of 16.6.A of the Agreement.

Page 16 The Union continues its arguments concerning reasonable cause to believe....

Page 18 Goldstein discusses a previous Snow decision which addresses suspending an employee under 16, 6, A of the Agreement. "At a minimum,"

according to Snow, "The Employer should interview the employee or at least invite him/her to submit a written explanation of circumstances surround(ing) the grievant's arrest." However, in this case the grievant had refused an opportunity to talk with postal inspectors when they came to management to give his side of the story.

Page 19 Continued discussion of investigation prior to indefinite suspension-crime situation.

Page 22 Goldstein discusses accusatory instruments, etc.

Page 27 Goldstein talks about the case at hand and rejects the Union's claim that the Service did not have "reasonable cause" to believe the grievant guilty. Also, he discusses the weight he gave to items of evidence that he felt were more than mere accusatory documents.

3. **Was the misconduct off-duty, and if so, was there a nexus between the grievant's alleged misconduct and employment with the USPS?**

C#08745 Abernathy 1989 Sustained

The grievant appeared in court on 10 felony counts involving physical and sexual abuse on two minors (his daughter and step-daughter). He pleaded guilty to two of the counts and the remainder were dropped. He was placed on five years felony probation, required to pay restitution fine, and required to register as a sex offender. Sentencing was to occur later. Grievant continued to work at the Postal Service until the Area Manager obtained copies of the court hearing transcript (approximately 3 months later). An investigation was begun by Labor Relations and additional documentation used by the court was obtained. The grievant was interviewed by the Labor Relations Representative. At that point (Labor Relations) would testify later, the delivery supervisor was told to be discrete in his handling of the case.

Page 5 Includes proposed letter of removal.

Page 6 Arguments advanced by the Union.

Page 7 Judge's comments on work furlough.

USPS arguments concerning nexus.

Page 8 Union's arguments at Step 3.

Comments of Judge not in any way restricting grievant from performing

normal duties.
Page 9 and 10 Position of the Postal Service at Arbitration.

Page 11 Union's position at arbitration, 1-3.

Page 14 and 15 Employer must establish a meaningful nexus, thus the employer must be able to establish any one of the following; see items 1-4, page 15.

Page 16 Abernathy talks about a MSPB case in which it was established that when the off-duty conduct is egregious in nature, a presumption of nexus may be raised . . . but that presumption is "rebuttable."

Page 18 The Arbitrator references Bonet Fifth Circuit Court of Appeals Bonet vs. United States Postal Service.

Page 21 Abernathy summarizes on nexus

Page 22 Abernathy concludes nexus findings on case at hand.

4. Was the grievant proven guilty "beyond a reasonable doubt?"

C#1785 Snow 1981 Denied

The grievant was arrested while delivering mail on his route. The facts and sequence of events were contested by the parties, however, the following is along the lines of what the arbitrator came to accept: The husband of a female patron overheard her talking with a neighbor about the mailman who had a week prior entered her house and "touched her breasts." After hearing his wife's story, he found the grievant on his route and a verbal dispute developed. The grievant, at that time, went back to his office and told his supervisor he had been in a confrontation with a patron on his route who had accused him of fondling his wife's breasts and threatened him. The supervisor told the grievant to return to the street and avoid the patron.

Apparently, at that time another confrontation occurred. The patron and his wife say the second confrontation took place at their residence where grievant kicked the patron and pointed a gun at him (the grievant would later say that the patron was the one with the gun). The police were called and the grievant was arrested on the street a short time later. A postal patron called management about the incident and later the policy notified management the grievant had been arrested.

Page 6 The Arbitrator talks about the first verbal exchange between the patron and the grievant and the grievant's return to the office to tell his supervisor of the incident.

Page 7 Second confrontation - gun pointing.

Page 8 Union arguments.

Page 9 and 10 Snow talks, in general, about Quantum of Proof.

Page 11 Snow talks, in general terms, about altering a penalty imposed by management.

Page 12 Snow talks about evidence in the relevant case. Pointing out that there was testimony on the part of the female patron that the grievant had touched her breasts while the grievant never denied her assertions.

Page 14 Snow concludes that the grievant lost his presumed innocence when he failed to deny the female patron's allegations. "It is valid to conclude that there is evidence of improper conduct by the grievant beyond a reasonable doubt."

Page 18 Snow points to the grievant's inconsistent testimony. The grievant argued that there was one confrontation instead of 2 and that the patron was the one pointing the gun. However, when the grievant met with his supervisor, he made no mention of the physical assault and gun pointing that the patron and his wife say happened at the second confrontation. Snow draws his conclusion as to the testimony and on whether one or two confrontations took place on page 19, "Weighing all the evidence . . . it is reasonable to conclude that two confrontations occurred. . . ."

Pages 19 and 20 Snow talks about "spontaneous declaration(s)" made by the grievant at the time of arrest and heard by police officers as to his having pointed a gun at the patron. Snow gave this evidence "substantial weight."

Pages 20 and 21 Snow discusses the Service's right to take action in the form of indefinite suspension: The grievant had admitted the gun pointing at the scene of arrest.

Snow points out that the "grievant failed to rebut damaging evidence against him." "Grievant's testimony stood alone."

5. Were there mitigating circumstances that rendered the discipline too severe?

C#06013 Snow 1982 Denied
Removal was modified to 45-day suspension without pay. Grievant was reinstated with back pay and all other benefits lost. No interest was awarded.

The specific charge was "conduct unbecoming a postal employee." The grievant, during this street duties, knocked on the door of one of his delivery addresses. When asked who was there he replied, "your postal rapist." The female patron told him to leave whatever mail he had and go away (there is conflicting testimony as to whether he identified himself at the time as her regular letter carrier). As he left the area he saw the woman's husband and discussed the matter with him to some extent, asking if his wife was "paranoid." Later an unidentified police officer stopped the grievant and suggested he return and apologize to the patron. He did so, but there is conflicting testimony as to what was actually said at that time by the grievant. A couple of hours later the patron phoned the Post Office and complained to the supervisor of the offending remark. The grievant was removed 46 days later.

Page 13 Position of the Parties - A summary of the USPS arguments.

Page 14 Summary of the Union's arguments.

Page 15 The Arbitrator comments on the grievant's action.

Page 19 Defective investigation.

Page 21 Management had a reasonable basis for disciplining the grievant, but its failure to consider all evidence available to it made the discipline selected by the Employer too severe.

Post Hearing Brief
Page 12 The Union admits that some disciplinary action is justified, however discharge is inappropriate.

Page 30 "Although the employee's conduct was offensive and stupid, reason and justice do not require the supreme penalty of discharge imposed on an employee with no prior discipline."

Page 33 "Discharge is the most severe penalty that can be imposed by the Postal Service and was done for an incident which the law itself imposed no penalty."

C. Contractual/Handbook (other) Citations

1. Article 3 - Management Rights
2. Article 15 - Grievance and Arbitration Procedure
   Section 2(b) ". . . supervisor shall have authority to settle. . ."
3. Article 16 - Discipline Procedure
   Section 6 - Indefinite Suspension - Crime Situation
   Section 7 - Emergency Procedure
   Section 8 - Review of Discipline
   MSPB (Merit Systems Protection Board), Civil Service Reform Act of 1978 (if applicable)
4. Article 19
   ELM 660 Conduct
   ELM 661.2 Standards of Conduct Behavior and Personal Habits
   ELM 661.53 Unacceptable Conduct
   ASM 224 Offenses Reported by Memorandum
5. Article 35 - Employee Assistance Programs (if applicable)

D. Arguments

1. From Defenses to Discipline (unrelated to merits)
   a. Discipline was not timely issued.
   b. Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.
      C#8315 Barker 1988 Referred to Regional Panel
      Page 11 "The nature and degree of discipline to be imposed had been dictated by the MSC."
   c. Management's grievance representative lacked authority to settle the grievance.
      C#8315 Barker 1988 Referred to Regional Panel
      Page 12 "It is concluded that in this case . . . the Article 15 step grievance process fashioned by the parties, was circumvented and rendered ineffective by the absence of genuine authority of the supervisor to settle the grievance at Step 1, and a denial of due process resulted." "The grievance is sustained."
   d. Double jeopardy.
   e. Higher management failed to review and concur.
   f. Insufficient or defective charge.
   g. Management failed to render proper grievance decision.
   h. Management failed to properly investigate before imposing

discipline.

i. Improper citation of "past elements."
j. Management refused to disclose information to the Union (including claims that information was hidden).

2. Disputes about correctness or completeness of the facts used to justify the discipline.
   a. Management failed to prove Grievant acted as charged.
      C#01382 Snow 1982 Sustained

   b. Grievant may have acted as charged, but was provoked by another.

3. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline is warranted.
   a. Grievant may have acted improperly, but did so as a result of lack of, or improper training (including claims that the grievant "didn't know it was wrong").
   b. Grievant has long prior service, good prior record, or both.
      C#06013 Snow 1983 Denied
      "The grievant's past work record is free of prior discipline. Management conceded that he had been more than adequate as a worker . . . grievant is a logical candidate for corrective discipline."
   c. Grievant's misconduct was not intentional.
      C#06013 Snow 1982 Denied
      ". . . it was legitimate and appropriate for management to determine that merely uttering such a crude comment warranted discipline, management's failure to investigate the grievant's motivation, surrounding circumstances, or evidence of intent caused the investigation to be defective."
   d. Grievant was emotionally impaired.
   e. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
      C#06375 Rentfro 1986 Sustained
      Arbitrator gave a great deal of weight to testimony as to grievant's "alcoholic black-out) and accepted the view that the misconduct was a "single, isolated event." Grievant was reinstated without back pay.
   f. Grievant was disparately treated.
   g. Rule grievant broke was otherwise unenforced.
   h. Management failed to follow principles of progressive discipline.

4. Additional arguments:

C#10470 Goldstein 1990 Denied

Page 7 Union attacked the testimony of the alleged victim, the step daughter (pointing to her problems at school, theft, drugs, run ins with the law, etc.).

Page 8 Union cited grievant's good record: Elder in church, minister's license, good military record, never been arrested or in trouble with the law (arbitration did reveal proof of previous arrest).

Page 10 The Service relied on hearsay evidence, relied on court records for establishing "reasonable cause and just cause."

Page 12 Management did not talk to the grievant and give him a chance to tell his side of the story.

Page 14 There was no basis for "reasonable belief" in the grievant's guilt.

Page 15 Supervisor who issued the suspension did not talk to the grievant, nor read the investigative memorandum.

Management failed in its obligation to make a good faith determination of the facts, events, and circumstances leading to the employee's arrest, independent of the arrest itself.

Page 16 Employer did not do an investigation and grievance should be sustained on procedure.

Page 29 Indefinite suspension without pay to protect the business interest of Service is unreasonable when other options or alternatives were readily available (grievant had training to do these other tasks).

C#08974 Abernathy 1989 Sustained

Page 5 There was no evidence of adverse publicity to the USPS.

Page 11 Management failed to prove just cause in the nexus between criminal acts and the requirements of the grievant's position.

Page 12 Expert witness testified that grievant posed minimal risk, if any to children outside his family.

Page 13 Union cited the grievant's 15 years of unblemished service: management had no problems with his work, grievant had never before been disciplined, and no customer complaints.

No notoriety was proven (no nexus).

Page 20 The grievant has made significant progress toward rehabilitation.

C#08951 Rentfro 1989 Sustained

Page 3 A licensed clinical psychologist who specializes in treatment of sex offenders testified that this was a family problem and grievant posed no threat to others.

Grievant shows no sign of being a threat to children, or others he encounters, on his route; therapy has been successful.

Page 4 Arrest information that appeared in the paper did not identify the grievant as a Postal worker.

The probation officer stated the grievant could return to his job with no problem.

The grievant's wife and step-daughter (victims) testified on his behalf at the arbitration.

Page 5 The investigation by the Service looked no further than the guilty plea to the Class B felony.

Page 7 If grievant is to be considered a danger to children on his route why did management allow him to continue delivering on his route for 20 days after his arrest?

Page 8 The grievant shows remorse and has constantly taken responsibility for his offenses.

The investigation did not satisfy due process.

Page 9 Neither postal patrons or other employees would object to the grievant continuing his employment.

C#08805 Render 1989 Sustained

Page 4 Union contends management's removal is untimely and presents

double standards.
Management cites ELM Section 666.2, but does not show a nexus.

Page 5 Other carriers would not have any problem working with the grievant. Service did not produce any individual who did not want to work with him.

The risk of the grievant engaging in similar conduct with the general public is negligible.

There was no adverse publicity to the Postal Service.

Page 9 The grievant will not miss any work time because he will not have to serve any time in jail.

The Service never contacted the grievant's treating psychologist even though they knew he was under treatment.

Page 10 The Union denies there is any relationship between the work place and the off-duty misconduct in this case.

C#08449 Sobel 1988 Denied
Page 6 The Union has heard rumors that a supervisor is currently under investigation for "sexual harassment" charges and this has raised an issue of disparate treatment.

Page 8 The Union was denied documentary evidence that was relied on for the removal.

Management's representatives were denied the authority to settle at Step 1 and 2.

C#08315 Barker 1988 Sustained
Page 5 Notice of suspension was prepared at MCS level, supervisor did not want to issue the notice, was ordered to do it.

Page 8 Supervisor admitted he did not have the authority to settle.

C#08182 Bernstein 1988 Denied
Page 5 - The Service's witness(s) were not believable and demonstrated much less credibility than the grievant.

The Service failed to make a sufficient investigation, no one talked to the grievant before the notice of removal was issued, and no one contacted

possible witnesses at the scene of the alleged misconduct.

Page 6 The grievant was permitted to work for several days showing he was not considered to be a danger or a threat.

Charges against the grievant have been dropped.

C#03808 Gentile 1983 Sustained
Pages 4, 5, & 6 The Union argues that the behavior had stopped long before the notice of removal, and should be considered in the removal.

C#01785 Snow 1981 Denied
Page 6 Grievant's actions were provoked.

Page 8 Grievant did not actually do what was charged (did not touch patron's breasts).

Subsequent dismissal of charges against the grievant is relevant.

C#01030 Rentfro 1979 Sustained
Page 11 Police reports do not present a complete picture of the grievant's situation.

Psychological testing and probation evaluation show there has been recovery from problems attributable to social and alcohol problems.

E. Documentation/Evidence

1. Letter of Proposed Removal and Letter of Decision
2. Investigative Memorandum an Discharge Summary
3. Warning of Waiver of Rights - PS Form 1067
4. Statements from grievant, witnesses, etc.
5. Court records - including transcripts, settlements and/or judgements).
6. Police reports, Probation Officer reports - if applicable
7. Doctor's reports and dependency treatment reports
8. Psychological and therapy reports
9. EL-604 - MSPB Handbook
10. Public notices (newspaper articles, TV, radio, etc.)
11. Any prior criminal records, sexual misconduct records, or past disciplinary records of the grievant.
12. Sexual Harassment policy statements put out or posted by the MSC (or Area).
13. ELM 661.3 Standards of Conduct
    661.53 Unacceptable Conduct

666.2 Behavior and Personal Habits

14. M-39 115 Discipline
    115.1 Basic Principle
    115.3 Obligations to Employees
    115.4 Maintain Mutual Respect Atmosphere

F. Remedies

1. Reinstatement of grievant.
2. Purge the record of the grievant of any mention of the incident.
3. Make employee whole for all lost wages and benefits.
4. Interest at the Federal judgment rate.

THEFT OF MAIL

A. Case Elements

1. A charge that mail (or test mail items) were removed from the mail stream.
2. Charge that mail was converted to personal use.
3. Employee violated the "sanctity of the mail."
4. Charge that mail was opened, rifled, damaged, pilfered, tampered with, etc.
5. Admission of guilt in whole or in part with various mitigating circumstances; including, but not limited to, addiction to drugs or alcohol.

B. Definition of Issues

C#1382
C#8266
C#10269
C#8975
C#1726
C#7112

1. Is there evidence the employee violated the "sanctity of the mail?"
2. Does the employee admit guilt in whole or in part, to violating "sanctity of the mail?"

C#2256
C#7973

3. Did the employee convert the mail to personal use?

C#7973
C#6375
C#8975

4. Are there mitigating circumstances and do those circumstances (i.e., addiction to drugs, alcohol etc., or lax enforcement of rules) outweigh the seriousness of the misconduct?

C#7112
C#8975

5. Is there a nexus between the misconduct and the employers' ability to carry out it's mission?

C. Contractual/Handbook (other) Citations

1. Article 2
2. Article 3
3. Article 15
4. Article 16
5. Article 17
6. Article 19
   - EL-307 Guidelines on Reasonable Accommodation
   - M-39 115 Discipline
   - ELM-660 Conduct
7. Article 28
8. Article 35

D. Arguments

1. Technical defenses.
2. Management failed to prove grievant acted as charged.
3. Grievant did not convert mail to personal use.
4. Rule was not enforced.
5. Prior service.
6. Grievant was impaired by drugs or alcohol.

C#06375
C#08975

7. Grievant was treated disparately.
8. Burden of proof is "beyond a reasonable doubt."

E. Documentation/Evidence

1. Removal notice and letter of decision.
2. Investigative memorandum.
3. Witness statements.
4. Police records.
5. EL-307
6. ELM 660 Conduct
   ELM 873 Reinstatement of Recovered Employees
7. M-39 115
8. Rehabilitation Act of 1973 as amended.
9. Court records (pre-sentence report).
10. Media Reports.
11. Evidence relied upon by management.
12. Criminal record of grievant.

F. Remedies

1. Reinstate with all seniority and benefits.
2. Make whole.
3. Interest pursuant to 1990 MOU.
4. Grievant's personnel records purged of all records of the incident and disciplinary notice stricken from all files.

THEFT OF MAIL

A. Case Elements

1. A charge the mail (or test mail items) were removed from the mail stream.
2. A charge that mail was opened, rifled, damaged, pilfered, or tampered with, etc.
3. A charge that mail was converted to personal use.
4. Employee violated the "Sanctity of the mail."
5. Admission of guilt or partial guilt with various mitigating circumstances, including but not limited to, addiction to drugs or alcohol.

B. Definition of Issues (specific to Theft of Mail type disputes)

1. Is there evidence the employee violated sanctity of mail?

C#01382 Snow 1982 Sustained

Carrier was charged with "misappropriation of mail matter" (and sexual harassment). Carrier was allegedly giving deliverable mail items, including coupons, samples, magazines, etc., to a female patron on his route.

In this case the Service failed in its burden of proof

a. Union established intended harm by other employee(s), including the Postmaster.
b. Service failed to submit clear and convincing evidence that several samples had actually gone through the mail stream (one had a price tag on it).
c. The Union was able to demonstrate that witness(s) had lied.
d. Grievant's admission of wrong-doing was obtained by heavy-handed inspectors, while the steward was ordered to remain silent.
e. Some of the charges leveled at the grievant were based on testimony from witnesses that were not called to testify; whose original statements were taken 2nd or 3rd hand, and whose last names were not known.
f. The arbitrator wrote: "There was substantial evidence submitted at the hearing indicating that management conducted an unconscionably lax investigation into the charges lodged against the grievant."

The grievant, in this case, was reinstated and made whole (back pay, benefits, interest, etc.).

C#08226 Lange 1988 Sustained

The charge was "Unacceptable Conduct/Mishandling and Delay of the United States Mail and Failure to Protect the Security of the United States Mail."

In this case partially burned mail (circular and a check was brought into management by the grievant's "semi-hysterical, jilted, ex-girlfriend and the Service's case was built almost solely on her representations.

The Union was able to show:

a. The Postal Service investigation was able to prove little more than the ex-girlfriend was able to obtain a check deliverable on the grievant's route; thus there was only minimal circumstantial evidence that the grievant was guilty of failure to insure the security of the mail.
b. Inspectors had failed to re-interview the ex-girlfriend after she recanted her original sworn statement.
c. There was a violation of Weingarten Rights and Article 17. The steward was present until a supervisor asked to have him back on the workroom floor. The steward asked if the interview was over and was told it was, that the grievant just needed to complete a written statement. However, the interview continued after the steward left the room.
d. The Service in this case went on to suggest that the employee's signing of a "Warning and Waiver of Rights" constituted a Weingarten Waiver. The arbitrator did not buy this argument.

In this case, management's action was reversed on the merits; however the Arbitrator addressed the Weingarten issue saying that a violation of these rights frequently serves as a basis for reversing disciplinary action (page 9 and 10).

C#10269 Snow 1990 Sustained

In this case the grievant was charged with forging a stolen credit card application. His handwriting was "pictorially similar" to writing on the application. This conclusion was drawn by some handwriting expert and was management's most significant evidence. The Service did not have this information at the time it made its decision to remove the grievant.

While Snow gave this evidence little weight, he also let it be known, that as a general rule, subsequently discovered evidence that was available at the time of the removal decision cannot be used as the basis for justifying an earlier decision (see page 16).

In this case the employee was reinstated and made whole less 3 days pay.

C#08975 Snow 1989 Denied

In this case, grievant was charged with stealing and cashing a check taken from the mail. At the arbitration, management sought to call the grievant as its first witness.

"It is well established in arbitration that, as a general rule, the grievant need not testify until a prima facia case has been established against him or her . . . . Management has acted to remove an employee and, when challenged, should

be expected to explain its decision. Such an explanation should not present the grievant as the chief witness against the grievant." (see page 14)

C#1726 Gamser 1981 Sustained
In this case the grievant was charged with rifling and mishandling the mail. This case speaks about the standard of proof that is required in such cases of removal.

". . .the quantum of proof required to sustain a discipline need not. . . equate with the `beyond a reasonable doubt' standard required in a criminal proceeding." He goes on to talk about the serious offense involving moral turpitude. The Postal Service does bear a heavy burden of establishing with at least `clear and convincing evidence' that the rifling of the mail occurred. (see pages 4 & 5)

2. Does the employee admit guilt, in whole or in part, to violating sanctity of mail?

C#08975 Snow 1989 Denied
Does the employee admit guilt, in whole or in part, to violating sanctity of mail? In this case the grievant had already been "arraigned in a Federal District court for violating Title 18 U.S.C., Section 1709 (Theft of Mail). The court had deferred sentencing the grievant and placed him on probation. . ." (see page 9)

C#07112 Levak 1987 Denied
In this case the carrier admitted converting the contents of a test letter to her personal use (depositing a check to `bearer' into her account), but disputes taking it out of the mail stream. (see page 12)

In this case, Levak gave little credence to her story and the grievance was denied.

3. Did the employee convert the mail to personal use?

C#08975 Snow 1989 Denied
The grievant was charged with stealing a check out of the mail belonging to a deceased patron who had lived on his route. The grievant cashed the check and used the proceeds to pay bills. (see page 7)

C#02256 Rentfro 1978 Denied
Classic example of taking mail from the mailstream and converting contents to personal use. (see page 4)

C#07973 Goodman 1988 Sustained
The grievant, in this case, was removing the contents of `no value mail,' however was directed in most cases to do so by management. The grievant routinely removed items such as writing utensils, aspirin, silverware, and coffee for general use in the office. (see page 18)

In this case, the Service set up a test to show the grievant's dishonesty, but there was no evidence the employee was converting items taken from the mail to his own use. Goodman sustained the grievance and the employee was reinstated and made whole.

4. Are there mitigating circumstances and do those mitigating circumstances, (i.e., addiction to drugs, alcohol, etc., and or lax office policy) outweigh the seriousness of the misconduct?

C#07973 Goodman 1988 Sustained
It was common practice in this office to salvage and collect items from `no value mail' for general use by employees in the office. (see pages 19, 21 & 22) Goodman - ". . .This situation, however, is quite different when this same conduct is condoned, tolerated and even encouraged by supervision."

C#06375 Rentfro 1986 Sustained
The charge was that the grievant was observed writing obscenities on mail, "Bull Shit"; was observed dumping mail into trash dumpster, rifled mail was found in his vehicle, and he was found to have contents of rifled parcels on his person. After discharge he was charge in Federal Court with Obstruction of the Mail (a misdemeanor) and pled guilty. He (1) Paid a $100.00 fine, (2) Participated in an alcohol recovery program, (3) Performed community service for 100 hours. (see page 3)

His EAP supervisor characterized the grievant's situation as a "`classic case' of alcoholism" with event leading to his removal being a case of "alcoholic blackout."

Rentfro found the instant case to be a "single, isolated event" and the employee had not previously revealed an alcohol problem. Consequently, "neither the employee, nor the employer would have had occasion to seek or offer assistance in obtaining treatment."

The grievant was reinstated without back pay.

C#8975 Snow 1989 Denied
Snow talks about court and arbitration decisions concerning alcoholism as a

disease.

"More importantly, the parties have codified these principles into their collective bargaining agreement. For example, Article 3 has charged the employer with making appropriate disciplinary decisions. Article 16 has adopted the principle of discipline based on just cause. Finally, the parties have agreed, in Article 35, to treat alcoholism as a disease and to look favorably on efforts at rehabilitation." (see pages 18, 19 & 20)

Snow also addresses the chemically dependent employee as a possible "qualified handicapped individual" within the meaning of the Rehabilitation Act of 1973. (page 19)

Are alcoholics and/or drug addicts handicapped within the definition of a qualified handicapped person? Response: In Whittaker v. The Board of Education of the City of New York, 461 F. Supp. 99, the United States District Court of the Eastern District of New York agreed that alcoholism is a handicap and falls within the definition of a qualified handicapped person under the Rehabilitation Act of 1973. (see page 21)

In this case, however, the grievant was discharged for criminal misconduct and Snow ruled that the Rehabilitation Act gave him no defense.

5. Is there a nexus between the misconduct and the employer's ability to carry out its mission?

The Employee and Labor Relations Manual, Section 661 - ". . . Employees must avoid any action, whether specifically prohibited in this Code, which might result in or create the appearance of: . . . Affecting adversely the confidence of the public in the integrity of the Postal Service."

C#07112 Levak 1987 Denied
The grievant was charged with depositing a check made out to `bearer' for $5.00 into her personal account. The particular check happened to be part of a test letter sent out by the Central Testing Unit of the USPS.

In his award, Levak denied the grievance. In his opinion, he restated management's reference to the Domestic Mail Manual, Section 115. (see page 2)

C#08975 Snow 1989 Denied
In this case, Snow gave weight to the USPS argument that reinstatement of the

grievant would give management the ". . .burden of any adverse publicity that might result from reinstatement. . ." (see page 46)

C. Contractual/Handbook (other) Citations

1. Article 2, Non-Discrimination and Civil Rights
2. Article 3, Management Rights
3. Article 15, Grievance and Arbitration
4. Article 16, Discipline Procedure
5. Particularly "Just Cause Principles"
   a. Did the employer forewarn employee of possible consequences of conduct?
   b. Was rule of order involved reasonably related to orderly, efficient, and safe operation of business?
   c. Before administering discipline, did employer make effort to discover whether employee did, in fact, violate or disobey rule or order?
   d. Was the employer's investigation conducted fairly and objectively?
   e. In the investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?
   f. Has the employer applied its rules, orders, and penalties, evenhandedly and without discrimination?
   g. Was the degree of discipline reasonably related to seriousness of offense and employee's record?
6. Also include Article 16 - if applicable, Merit Systems Protection Board Rights and Civil Service Reform Act of 1978
7. Article 17, Representation
8. Article 19, Handbooks and Manuals, including, but not limited to EL-307 Guidelines on Reasonable Accommodation, Domestic Mail Manual 115.1 (Importance of Mail Security), 115.2 (Opening, Reading, and Searching Sealed Mail Generally Prohibited), Employee and Labor Relations Manual 660 (Conduct)
9. Article 28, Employer Claims
10. Article 35, Employee Assistance Programs

D. Arguments

1. From Defenses to Discipline (unrelated to merits)
   a. Discipline was not timely issued.
   b. Discipline was ordered by higher management, rather than by grievant's immediate supervisor.
   c. Management's grievance representative lacked authority to settle the grievance.
   d. Double jeopardy.
   e. Higher management failed to review and concur.
   f. Insufficient or defective charge.

g. Management failed to render a proper grievance decision.
h. Management failed to properly investigate before imposing discipline.
i. Improper citation of "past elements."
j. Management refused to disclose information to the Union (including claims that information was hidden).

2. Weingarten Right violations as these cases usually involved postal inspectors, and investigative interviews.
3. Disputes about correctness or completeness of the facts used to justify the discipline.
   a. Management failed to prove grievant acted as charged. C#01382, Snow, 1982.
   b. Grievant may have acted as charged, but was provoked by another.
4. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline at all is warranted:
   a. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong"). Example C#07973, Goodman, 1988 - Grievant had been directed to search and remove items from `No Value Mail' - was reinstated.
   b. Grievant has a long prior service, good prior record, or both.
   c. Grievant's misconduct was not intentional.
   d. Grievant was emotionally impaired.
   e. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct). Example C#06375, Rentfro, 1986 - Arbitrator gave a great deal of weight to testimony as to grievant's "alcoholic black-out) and accepted the view that the misconduct was a "single, isolated event." Grievant was reinstated without back pay.
   f. Grievant was disparately treated.
   g. Rule grievant broke was otherwise unenforced.
   h. Management failed to follow principles of progressive discipline.

E. Documentation/Evidence

1. Letter of Proposed Removal and Letter of Decision
2. Investigation Memorandum
3. Discharge Summary
4. Warning of Waiver of Rights - PS Form 1067
5. Witness statements
6. Any criminal records
7. EL-307 - Guidelines on Reasonable Accommodation
8. ELM 660 Conduct
   ELM 873 Reinstatement of Recovered Employees
9. Domestic Mail Manual
10. EL-604 MSPB Handbook

11. P-11 Handbook, Section 261.33 (Reinstatement)
12. Rehabilitation Act of 1973
13. Police Reports
14. Court Records (including transcripts, plea bargains, and judgments)
15. Dependency treatment reports
16. Psychological and therapy reports
17. Copies of newspapers reporting theft (and linking the events to grievant)

F. Remedies

1. Reinstate grievant.
2. Make whole.
3. Receive interest on all monies at the Federal judgment rate.
4. Personnel files be purged of all record of the incident.

DISCIPLINE FOR AN UNSAFE ACT

A. Case Elements

1. The Grievant is accused of committing one or more unsafe acts.
2. A specific rule or regulation was broken.
3. The grievant is issued discipline ranging from a Letter of Warning to a removal.
4. Additionally, the Grievant may be issued a suspension under Article 16.7 of the Agreement.
5. Grievant's past record (past elements) contributes to the discipline.
6. In vehicle accidents the Grievant's OF-346 may be revoked and a claim made that he/she no longer meets the requirements of their position.

B. Definition of Issues

C#01311 C#12808 C#12482B	1. Did management show "just cause" for the disciplinary action?
C#08071	2. Was a specific rule or regulation violated?
C#01311 C#12482 C#07957	3. Was the discipline progressive?
C#7957	4. Was there a disciplinary interview?
C#08071 C#08870	5. Did management present proof that the grievant acted in an unsafe manner?
C#11901	6. Did management revoke the Grievant's OF-346 and then claim he/she no longer met the requirements of their position?
C#11901	7. Did management claim the removal was an administrative (not disciplinary) action which did not require it to meet the criteria of Article 16?
C#01311	8. Did the Service discipline to discourage the filing of accident reports or compensation claims?
C#09594	9. Did the Service fail to judge each accident on its own merits?
C#07957	10. Did management fail to invoke progressive discipline in a timely manner, thus waiving its right to take action against the grievant?
C#12808	11. Was the discipline automatic because there was an accident?
C#07957	12. Was the penalty excessive:

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5 (see C#08077)
3. Article 14 (see C#11635)
4. Article 16 (see C#12357 `Corrective discipline means progressive discipline)
5. Article 17 (see C#07957 (p. 4 para. 1) when request for steward time are denied)
6. Article 19 (see Activist, Winter 1991 for manuals to cite)
   ELM Chapter 8
   EL 814 Postal Employee's Guide to Safety
   EL 801 Supervisor's Safety handbook
   EL 809 Guidelines for LJ Labor/Management Safety and Health Committee
   EL 827 Traffic and driver's safety
7. Article 21.4 "Employees covered by this Agreement shall be covered by subchapter 1 of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries."
8. Article 29 (see MOU dated July 21, 1987 - Re: Reinstatement of Driving Privileges)
9. Article 31 (see C#07957 where request for information are denied)
10. Article 35 (if applicable)

D. Arguments

1. ***Defenses to Discipline*** Sections 1, 2, 3, 4
2. Maldonado letter
3. From the Ulsaker letter dated May 15, 1981:
4. The Seven Tests of Just Cause

E. Documentation/Evidence

1. Grievant's Statement
2. EL 901 Agreement Article 16
3. Photographs of accident scene
4. Media reports of accident
5. Fitness for Duty Report

6. OWCP claims
7. EL-827 Section 460 (see 463.4 Decision Criteria)
   (see 464.1 dealing with revoking Driving Privileges)
8. ELM 666.2 "Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorable upon the Postal Service."
9. PS 1700 Postal Service Accident Report Form (worksheet)
10. PS 4584 Observation Form
11. PS 4582 Operator's Record
12. PS 4582-A Summary Driving Record
13. Motor Vehicle Operator's Identification (State license)
14. O-87 Accident Report Kit
15. SF-91 Operator's Report of Motor Vehicle Accident
16. SF-94 Witness Statement
17. SF-95 Tort Claim
18. PS 1768 Safe Driver Award Committee Decision
19. PS 1769 Accident Report
20. PS 2198 Accident Report - Tort Claim
21. PS 4565 Vehicle Repair Tag
22. PS 4570 Vehicle time card
23. PS 4585 Postal Drivers Accident Information Card
24. PS 4586 Accident Information Card
25. PS 92-A Report of Accident other than Motor Vehicle
26. PS 1593 Claims Transmittal
27. PS 1767 Report of Hazard, Unsafe Condition or Practice
28. PS 2562 Third Party Claim - Injury Compensation
29. PS 2573 Request for OWCP Claim Status
30. PS 4583 On the Job Safety Review
31. PS 4707 Out of Order Tags (Defective Equipment)
32. CA-1 Notice of Traumatic Injury
33. CA-17 Duty Status Report
34. M-41 112.4 Safety
35. M-41 133.1 Safety Practices
36. M-41 Section 852 Action to be taken at the scene of an accident

37. ELM 666.2 Behavior and Personal Habits
    ELM 814.2 Responsibilities
    ELM 810 Occupational Safety and Health Administration
    Law No. 91-596
    Occupational Safety and Health Act of 1970

38. PO-701 Drivers Responsibility

F. Remedies

1. The Grievant be made whole for all wages and benefits.
2. The Grievant to receive interest (at the Contract rate) on all monies due him/her (i.e., the employer provide interest at the Federal judgment rate as required by the Memorandum of Understanding signed by the parties in the last period of negotiations).
3. All references to the disciplinary action to be rescinded and purged from the Grievant's personnel file.

DISCIPLINE FOR AN UNSAFE ACT

Note: Substitute the words "driving privileges" for OF-346 in this document and all manuals.

A. Case Elements

1. The Grievant is accused of committing one or more unsafe acts.
2. A specific rule or regulation was broken.
3. The grievant is issued discipline ranging from a Letter of Warning to a removal.
4. Additionally, the Grievant may be issued a suspension under Article 16.7 of the Agreement.
5. Grievant's past record (past elements) contributes to the discipline.
6. In vehicle accidents the Grievant's OF-346 may be revoked and a claim made that he/she no longer meets the requirements of their position.

B. Definition of Issues

1. Did management show "just cause" for their disciplinary action?

C#01311 Levak 1982 Sustained

The grievant was removed for excessive accidents and injuries. Progressive discipline of discussions, warnings and suspensions was not used. The USPS argued that the removal was an administrative act. NALC argued that the removal was subject to the just cause provisions of Article 16.

"The Arbitrator concludes that the Service has failed to establish by clear and convincing evidence that the Grievant was removed for just cause."

"The Service may properly charge an employee with physical inability to perform assigned duties, with psychological inability to perform duties or with specific acts of negligence or violations of established safety standards. However, the Service is not entitled to concoct a bastardized form of infraction order to remove employees it considers to be accident prone.

C#12808 Baldovin 1993 Sustained

The Grievant was removed: the "CHARGE" is found on page 2.

"You are charged with demonstrated unreliability and inability to perform the duties of your position in a safe and efficient manner - Unsuitable for Postal Service work environment - thereby creating frequent personal injuries."

> "Throughout the processing of this grievance, at steps 2 & 3 the Postal Service refers to Grievant's inability to perform his duties in a safe accident free manner. Yet, Grievant has never been disciplined for violation of any safety rules, regulations or procedures. It is safe to conclude then that the accidents were not caused by Grievant's failure to follow safety rules, regulations and procedures. Thus, the accidents were pure and simple accidents without any contributory negligence on Grievant's part.
>
> If Grievant did not violated any safety rules, regulations or procedures, the basis for his removal must fail for lack of just cause in that progressive discipline was not applied."

". . .a letter of warning is given first. If that does not get the employee's attention then a 7 day suspension, a 14 day suspension and finally a removal if the lesser disciplines do not correct the problem. Finally, "just cause" requires that an employee be placed on notice that conduct on his part could if it continues result in removal. Obviously, this was not done in this case."

C#12482B Lurie 1992 Denied

Grievant had several accidents, the most recent of which revealed a prior accident that had not been reported. Testimony at arbitration showed the Grievant knowingly violated rules and regulations concerning the driving of his vehicle.

"The reasonable apprehension, by the Service, of undue risk of liability constitutes just cause for removal. The burden of proof, of course, resides with the Service. As a factual test, the Service must prove that it had reasonably concluded, from Grievant's conduct, that he was beyond rehabilitation; that his judgment could not be relied upon to either operate a motor vehicle safely, or to comply with Postal safety regulations."

"Given that the Grievant has conceded, to the Arbitrator, that prior to the April accident he was aware of 1) the prohibition against entering private driveways, 2) the prohibition against situating his vehicle so as to require he back up," . . . "The Arbitrator does not find that the Grievant's shortcomings were attributable to inadequate safety training by the Service. Rather the Arbitrator finds that the Grievant had a full awareness of the pertinent safety rules and regulations; he repeatedly exercised faulty judgment in disregarding those rules" . . . "Such poor judgment does not lend itself to rehabilitation; and threat of injury to persons or property from Grievant's operation of a Postal vehicle is unreasonably high."

2. Was a specific rule or regulation violated?

C#08071 Sobel 1988 Sustained
The grievant was issued a seven (7) day suspension for re-injuring his hand.

"Prior to the inception of the hearing, the parties, through their respective advocates reduced the seven (7) day suspension to a Letter of Warning. Not withstanding this settlement which awarded back pay to the grievant, the Union elected to grieve the altered penalty, contending no discipline was warranted."

". . .this arbitrator, as well as the Employer's own internal policies, have established the principle that a work accident by itself cannot constitute a basis for discipline unless some specific infraction can be linked to the accident."

"The Postal Service policy regarding the nexus between work accidents and discipline was articulated in April 1980 by Assistant Postmaster General Carl Ulsaker's memorandum "Discipline for Safety Rule Violations" addressed to all Regional Direct(ors) of EL/R."

Sobel quotes Arbitrator J. Earl Williams from S4W-3W-16770, 1986. "Prohibiting an employee from having accidents is asking an employee not to be human. It is not a generally accepted employment standard. Employees will have accidents from time to time. Discipline is appropriate only when an employee violates a safety rule or practice. Barring such a determination of rule violation, discipline cannot be imposed under the just cause standard."

3. Was the discipline progressive?

C#01311 Levak 1982 Sustained
The grievant was removed for excessive accidents and injuries. Progressive discipline of discussions, warning and suspensions was not used. The USPS argued that the removal was an administrative action. NALC argued that the removal was subject to the just cause provisions of Article 16.

"The reason given by the Service for the removal of the Grievant is both void for vagueness and an obvious attempt to discharge the Grievant for being "accident prone," a non-offense."

"Where the Service believes that an individual accident or incident involves negligence or a violation of safety rules and regulations, the Service must invoke the progressive discipline procedures of the National Agreement in a

timely manner, and its failure to do so constitutes a waiver of its right to take action against the employee."

". . .whether the Service believed that the Grievant was working in a careless manner or whether the Service believed the Grievant was malingering of falsifying injuries, the Service was bound to apply the precepts of progressive discipline set forth in the National Agreement."

C#12482 Lurie 1992 Denied
Grievant had several accidents, the most recent of which revealed a prior accident that had not been reported. Testimony at arbitration showed the Grievant knowingly violated rules and regulations concerning the driving of his vehicle.

"The Arbitrator finds the Service's position to be persuasive; the Grievant's withholding of the information of the April accident deprived the Service of the opportunity to administer, and Grievant the opportunity to receive discipline or remedial safety training therefore. The Grievant could not thereafter justly claim that he had been denied progressive discipline for a successive act of motor vehicle negligence."

C#07957 Williams 1988 Sustained
The Grievant kicked a stool during a safety talk because management was failing to control dust on the top of cases. The stool fell on the floor without coming near anyone or injuring the Grievant. Management claimed that the carrier willfully kicked the stool and in so doing was guilty of an "unsafe act." The discipline was a seven (7) day suspension.

"Employees who neglect their job duties expect to receive progressive discipline beginning with a written warning, followed by suspensions before discharge is appropriate. These careless employees are provided with an opportunity to correct their mistakes under the just cause doctrine. On the other hand, employees who intentionally, willfully, or recklessly engage in misconduct designed to cause property damage, personal injury or disregard management authority expect to receive severe discipline including immediate discharge."

"Management must show: (1) The alleged conduct is generally recognized as a disciplinary offense; (2) The Grievant knew or should have known the alleged conduct was a disciplinary offense; (3) The Grievant actually engaged in the alleged misconduct and; (4) The discipline administered complied with the steps of progressive discipline or the offense warranted severe immediate discipline."

4. Was there a disciplinary interview?

C#07957 Williams 1988 Sustained
The Grievant kicked a stool during a safety talk because management was failing to control dust on the top of cases. The stool fell on the floor without coming near anyone or injuring the Grievant. Management claimed that the carrier willfully kicked the stool and in so doing was guilty of an "unsafe act." The discipline was a seven (7) day suspension. The carrier was immediately taken out on the back dock (platform) and told that his conduct was not acceptable. He was then returned to work. At no time was there a mention of possible future discipline. The Union would contend that no pre-disciplinary interview was conducted. The argument was not accepted by the Arbitrator.

"In this case the platform discussion was sufficient to serve as a pre-discipline interview. Since everyone observed the Grievant's conduct on the floor, no questions needed asking except whether he was sufficiently calm to return to work."

5. Did management present proof that the grievant acted in an unsafe manner?

C#08071 Sobel 1988 Sustained
The grievant was issued a seven (7) day suspension for re-injuring his hand.

"In fact, neither supervisor Eames, nor any other member of the supervisory staff saw the incident, and the former in his testimony clearly indicated his belief that an actionable breach must have been committed because an accident had taken place. In addition, Eames contended that the grievant's four industrial accidents over a three year period clearly showed he must have been doing something wrong."

"The grievant was not only chastised by Eames for attempting to handle too much mail, but also for failing to inform his Supervisor of the weakness in his hand. Those arguments are fallacious. The grievant had been reinstated to full duty by the Service's own doctor the day of the incident and there is no evidence that the tray, which the grievant dropped in re-injuring his arm, either was overloaded or was abnormally heavy. In fact, he had previously loaded the tray into the hamper he was using to load the truck. Thus, the accident and re-injury to the grievant's hand could not be anticipated and if an error transpired, to is that the (grievant's) restoration to full duty by the Service medical officer before his thumb was fully healed."

C#08870 Bello 1989 Sustained
"Management argues that the grievant alleged he injured his back" . . ."while lifting a bag of mail onto the top of a relay box. They maintain that this was a violation of safety rules which require that no parcel be lifted over head height without help."

"While the grievant is charged with a failure to work in a safe manner, the letter of charges fails to specifically identify what transgression he made. Management's witness, Supervisor Brady, testified that the grievant violated two safety rules on this occasion, first that no bag should weigh more than 35 pounds and second, no employee should lift a sack over his head."

". . .management failed to present any proof that the grievant had lifted a sack over his head. The Union presented uncontroverted proof that the relay boxes are 52 inches high. This being the case, I hardly see how lifting a bag on top of the box can be over the head of even the shortest individual."

6. Did management revoke the grievant's OF-346 and then claim he/she no longer met the requirements of the position?

C#11901 Rentfro 1992 Sustained
The Grievant's OF-346 was revoked by the Service after she had three (3) accidents. Management determined her to be "unable to meet the requirements of her position."

"The Service has asserted that after conducting a complete investigation of the March 13, 1991, accident and carefully reviewing Grievant's on-duty driving record, it determined that Grievant was an unsafe driver and revoked her OF-346. However, the Arbitrator finds that the evidence presented by the Service is clearly inadequate to support its decision to revoke Grievant's license. The Service should have applied the criteria set out in Section 463.4 of the EL-827 to determine whether or not revocation was appropriate under the circumstances."

EL-827

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

considered. The preventability or non-preventability of an accident as determined by the Safe Driver Award Committee is NOT a factor to be considered in the suspension or revocation of driving privileges. The decision of the Safe Driver Award Committee is for contest purposes only."

464 Special Cases

"464.1 Consideration of Suspension or Revocation. At a minimum, supervisors and/or other officials in charge will consider the suspension or revocation of an employee's driving privileges and/or other appropriate action as documented in the driver's Forms 4582 and 4584 when the on-duty driving record indicates the following:

a. A driver has had two or more at-fault accidents within a 12-month period;
b. A driver has been convicted of two or more moving traffic violations by civil authorities within a 12-month period;
c. A driver continues to violate postal driving regulations and/or safe driving practices, rules, and regulations after being individually warned or instructed; or
d. Retaining the employee on duty may result in damage to USPS property, loss of mail or funds, or the employee may be injurious to himself or others."

7. Did management claim the removal was an administrative (not disciplinary) action which did not require it to meet the criteria of Article 16?

C#11901 Rentfro 1992 Sustained
The Service removed the grievant under Article 3 after revoking her OF-346 under Article 29 and subsections of the EL-827 (462.1 & 2).

462 For Unsafe Driving
"Section 462.1 of the EL 827 states in relevant part: `An employee's driving privileges may be suspended or revoked when the on-duty record shows that the employee is an unsafe driver.'"

"Part (c) provides: `A driver continues to violate postal driving regulations and/or safe driving practices, rules and regulations after being individual warned."

"Finally the Union emphasizes that although the Service argues that the removal was not a disciplinary action, but was rather a termination due to Grievant's failure to qualify for the position for which she was hired, Article 16

requires any discharged to be subject to the principles of just cause. The Service revoked Grievant's OF-346 and removed her without any prior warning and no prior discipline. A basic principle of just cause is that an employee be made aware of the rule and what the ramifications are if the rule is broken. Such was not done in the instant case. Consequently, the removal action can only be considered non-progressive, non-corrective, and without just cause."

8. Did the Service discipline to discourage the filing of accident reports or compensation claims?

C#01311 Levak 1982 Sustained
The grievant was removed for excessive accidents and injuries. Progressive discipline of discussions, warnings, and suspensions was not used. The USPS argued that the removal was an administrative action. NALC argued that the removal was subject to the just cause provision of Article 16.

Levak includes the Ulsaker letter in the arbitration under "V. DISCUSSION, REASONING AND CONCLUSIONS."

" . . .it must be fully understood that postal policy prohibits taking any action which discourages the reporting of an accident or the filing of a claim for compensable injury with the Office of Workers' Compensation Programs."

9. Did the Service fail to judge each accident on its own merits?

C#09594 Sobel 1989 Sustained
The grievant in this case had 11 accidents or injuries in a four and a half year period. The employee was removed for failure to perform the duties of the position in a safe and efficient manner (summary of accidents on pages 3& 4).

Sobel addresses the Service's charge of accident prone: "In the contest of the instant grievance the Employer has based its charge upon its assignment to the Grievant's safety record an undefined term, name., `accident prone.'"

"The eleven instances, cited in the Notice, constitute the full description of the accidents, the injuries incurred, the medical categorization of each incident, and the time, if any lost from work. When these accidents are analyzed either individually or in their collective impact, they fail to sustain the Employer's charge of `failure to perform the duties of your position in a safe and efficient manner."

"Three of the incidents were definitely non-events" . . . "two vehicle accidents in which the Grievant's vehicle was struck by another vehicle while stopped. . .

."

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

10. Did management fail to invoke progressive discipline in a timely manner, thus waiving its right to take action against the grievant?

C#07957 Williams 1988 Sustained
The Grievant kicked a stool during a safety talk because management was failing to control dust on the top of the cases. The Union made an argument that the discipline was not issued in a timely manner. The Arbitrator did not accept the argument and it was not part of his reasoning for sustaining the case.

"The discipline was not issued for (6) weeks, but no harm was indicated. The purpose of prompt discipline policies is to protect the parties from stale evidence which is not shown in this case" . . . "These procedural due process contentions do not bar the administration of discipline in this case."

11. Was the discipline automatic because there was an accident?

C#12808 Baldovin 1993 Sustained
The grievant was removed from the Service for unreliability, inability to perform duties in a safe and efficient manner. The grievant had frequent personal injuries. The supervisor saws the removal as disciplinary while the concurring official saw it as administrative. Management failed to cite any violations of rules and discipline was arbitrated to be without just cause and was not progressive. The grievant resigned to collect retirement funds but was given back pay between removal and resignation (was also given annual leave and any overtime lost).

"The grievance is sustained. Accidents even when in a manager's view excessive, are not in themselves an appropriate basis for discipline in the absence of any violation of Postal Service rules or regulations. Just cause did not exist to remove the grievant."

12. Was the penalty excessive?

C#07957 Williams 1988 Sustained

The Grievant kicked a stool during a safety talk because management was failing to control dust on the top of the cases. The stool fell on the floor without coming near anyone or injuring the Grievant. Management claimed that the carrier willfully kicked the stool and in so doing was guilty of an `unsafe act.' The discipline was a seven (7) day suspension.

"Management has proven that: (1) Kicking a stool is a generally recognized safety offense; (2) The Grievant knew or should have known his alleged conduct was a disciplinary offense; (3) The Grievant actually engaged in the alleged misconduct. The evidence certainly supports these findings. The only question remaining is whether the discipline should have followed the steps of progressive discipline or the offense warranted immediate severe discipline. Safety offenses typically are progressive discipline offenses because such employees merely are careless. They have no intent of recklessness designed to cause property damage or personal injury. In this case the Grievant did not engage in intentional, willful or reckless misconduct designed to cause property damage or personal injury. His offense warranted progressive discipline, not severe immediate discipline. The Grievant should have received such a warning, not a suspension.

C. Contractual/Handbook (other) Citations

1. Article 3
2. Article 5 (see C#08077)
3. Article 14 (see C#11635)
4. Article 16 (see C#12357 `Corrective discipline means progressive discipline)
5. Article 17 (see C#07957 (p. 4 para. 1) when request for steward time are denied)
6. Article 19 (see Activist, Winter 1991 for manuals to cite)
   - ELM Chapter 8
   - EL 814 Postal Employee's Guide to Safety
   - EL 801 Supervisor's Safety handbook
   - EL 809 Guidelines for LJ Labor/Management Safety and Health Committee
   - EL 827 Traffic and driver's safety
7. Article 21.4 "Employees covered by this Agreement shall be covered by subchapter 1 of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries."
8. Article 29 (see MOU dated July 21, 1987 - Re: Reinstatement of Driving Privileges)

9. Article 31 (see C#07957 where request for information are denied)
10. Article 35 (if applicable)

D. Arguments

1. ***Defenses to Discipline*** Sections 1, 2, 3, 4
2. The Maldonado letter dated July 1993:

Prior to Discipline:

1. No demonstration of a thorough investigation.
2. No identification of a specific unsafe act which led to the accident.
3. Grievant's due process rights were violated.

<u>Management failed to ask itself the following questions:</u>

4. The nature and seriousness of the infraction, including whether the offense was intentional, inadvertent or was committed maliciously?
5. Past disciplinary record (overall and similar offenses)?
6. Consistency of the penalty for similar offenses (disparate treatment)?
7. History of past accidents (or unsafe acts)?
8. Adequacy and effectiveness of a lesser penalty?
9. The clarity with which the employee was on notice of any safety rules?
10. Whether management was partly responsible for the accident in any way? Did we follow our own rules and regulations? Did we require the use of unsafe equipment?

<u>The discipline was arbitrary and capr</u>

- Management failed to prevent unsafe acts before an accident happened.
- Management failed in its burden of proof.
- Additionally, Maldonado has instructed managers that they need a preponderance of evidence. The NALC argument would be that evidence beyond a shadow of a doubt is needed.
- Management did not identify a specific "unsafe act" in its charges.
- Management's charges are improper.
- Management failed to show the Grievant committed an unsafe act.

- Management only demonstrated that an accident occurred.
- Management failed to do a thorough investigation.

- Management failed to specifically identify what the Grievant did wrong.
- Management did not take the appropriate corrective action.
- Management has disciplined the Grievant out of proportion to the offense.
- Management did not take into consideration the Grievant's long previous record for completely satisfactory service.
- Management failed to make a responsible decision that a less severe penalty would suffice.

3. From the Ulsaker letter dated May 15, 1981:
"It must be fully understood that postal policy prohibits taking any action which discourages the reporting of an accident or the filing of a claim for compensable injury with the Office of Workers' Compensation Programs.

In a safety connected disciplinary situation the actions of a manager, supervisor, or employee which violate postal service safety rules or regulations must be cited. Such disciplinary actions are independent of whether or not an accident is involved.

Supervisors and managers are always expected to take effective action to correct unsafe practices. Our safety and health program cannot be effective without this supervisory and management attention."

4. The Seven Tests of Just Cause

C#10738 Caraway 1991 Sustained
Grievant reinstated after second roll-away accident. Carrier was reinstated and her OF-346 restored. Back pay for 90 days was ordered.

page 11 Grievant "stated that she could not turn the vehicle against a curbing because there was no curbing at this location. She could not use the hand brake as it did not work" . . . "She had reported this problem a number of times, even submitting a written request but it was never repaired."

"Mr. Moore, the Vehicle Operations Maintenance Assistance, stated that at times when the jeep is put in park it will jump out of park."

C#10985 Britton 1991 Sustained
Grievant had a history of six accidents in six years. Upon having a roll-

away he was removed from the service. The discipline was reduced to a 30-day suspension and the Grievant was otherwise made whole.

"The truck" . . . (the grievant) . . ."was driving had bad transmission linkage and an improper adjusted emergency brakes as reported by" . . . "Vehicle Maintenance. . . ."

"The Union takes the position that the Employer failed to provide the charges against the Grievant. The Union contends that the prior incidents in which the Grievant was involved were not `preventable accidents. . . ."

page 11 The Union was able to show the Arbitrator: " . . . that on several prior occasions, including one just two days prior to the accident, the Grievant was told by the officer in charge not to shut off the vehicle, since it was experiencing battery and carburetor problems; and the Grievant had earlier reported to management that the parking brake would to hold the vehicle in place."

C#10785 Eaton 1991 Sustained

"In not being interviewed prior to the issuance of the Removal Notice, the Grievant was deprived of his due process rights."

"On the key charge of testing the weight of the relay sack, Supervisor Jackson stated that he concluded that an unsafe act had occurred based simply on the Grievant's past performance."

Management cited a 14 day suspension that had been reduced to 7 days which the Union used to show a lack of a thorough investigation.

"Postal Service regulations require that a specific act or rule be cited as having been violated where discipline is assessed for a safety violation.

"Even if the Grievant was at fault, there is shared responsibility in this case." "Supervisor Frazier had been there only a few days as a 204B, and the Grievant made her aware of potential problems with the relay sacks, but she took no action as a result."

". . . the penalty is excessive in that it does not follow the line of progression required in progressive discipline. The Grievant's 14 day

suspension had been reduced to seven days. Therefore, the very most he should have received in this instance would have been a two week suspension. . . ."

"It is undisputed that the Grievant was injured. He was not injured as the result of an unsafe act, only as a result of an unfortunate occurrence."

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

C#01311 Levak 1982 Sustained

The Grievant was removed for excessive accidents and injuries. Progressive discipline of discussion, warnings, suspensions was not used. USPS argued that the removal was an administrative action. NALC argued that all removals are subject to the just cause provisions of Article 16. The Arbitrator took the Union's point of view.

"The Grievant has not been charged with violating identifiable safety regulations, but for an accumulation of legitimate accidents sustained over a period of years while performing duties in accordance with the work rules of the Postal Service. The charge itself does not constitute a basis for removal as it does not fall within the just cause concept of Article 16 of the National Agreement."

"In addition, the Grievant was not charged with negligence or safety infractions. The testimony is uncontradicted that the Grievant has never been charged, disciplined, nor had a step increase withheld for a safety violation in conjunction with any of the accidents or injuries that he experienced." (Management admitted that the grievant was removed because of the "potential for future accidents.")

"To remove an employee for an accident without prior progressive discipline for safety infraction or accidents, constitutes punitive action rather than corrective action. Too, the Grievant has never been informed that he could be disciplined or charged for simply having too many accidents.

"It is interesting to note that the Service has made every effort to date to

controvert the Grievant's claim for OWCP benefits contending that the accident didn't happen, as well as removing the Grievant from the Service on the grounds that the accident did happen.

page 15 From the Ulsaker letter dated May 15, 1992
". . . it must be fully understood that postal prohibits taking any action which discourages the reporting of an accident or the filing of a claim for compensable injury with the Office of Workers' Compensation Programs."

C#05993 Walsh 1982 Denied
Grievant was removed for three different charges, among them safety violations. The previous discipline record was extensive and management was upheld.

It was argued that the Grievant did not intentionally violate safety rules: ". . .Grievant may have unintentionally lifted without first having bended his knees. . . ."

". . .several of the disciplines which were imposed on the Grievant in the past were rescinded. . . ."

C#02164 Haber 1984 Modified
The Grievant, with a fairly extensive discipline record, was put on emergency suspension and removed when she left hr work area and went to the rest room. Since there was no lock on the rest room door used by male and female employees she used a chair to stop the door for privacy. She was charged with failure to follow safety rules (obstructing and blocking an exit or passage) and leaving her place of assignment without permission. The Union of course argued that the discipline was punitive and not corrective. The Grievant was returned to work without pay.

The Arbitrator ". . . is aware of the claim that the grievant is not a pliant employee, that she occasionally loses her cool, talks out of turn, is slow in responding, and could be much more accommodating. This is probably true. A discharge, however, built on a propped up chair against the lavatory door is, in the Arbitrator's judgment, a claim which is as unstable as the chair, and hardly a basis for termination."

C#06683 Snow 1986 Sustained
An employee with less than a good safety record was placed on

Emergency Suspension. The Union was able to show that there was no emergency and that the employer was using 16.7 as discipline for a series of events that it failed to take corrective action on in the past. The Service contended that its action was administrative rather than disciplinary. Grievant was made whole.

The issue stipulated to was: Was this placement of the grievant in an off duty status proper?

"Article 16.7 of the parties' agreement has given management the right to take immediate action in case of an emergency. Management, however, may not create an emergency by failing to have taken corrective action earlier. The Employer may not ignore its obligation under the agreement to take corrective disciplinary action. It may not allow a series of infractions to go unnoticed and, then, argue that an emergency exists by virtue of the accumulated incidents. By definition, an "emergency" requires immediate action because of the severity of the incident and the fact that it is non recurring.

Even if one accepted the Employer's understanding of the facts of the case, management's action still would not withstand scrutiny. The picture that emerged from the facts was one custom made for progressive discipline. IF an employee fails to follow instructions, disciplinary action is appropriate.

"If none of the alleged problems warranted action at the time of occurrence, it is difficult to understand how, taken as a group, they have become larger than the sum of their parts. Not having acted earlier, management now has taken a position that the problems justify what amounts to a lengthy immediate suspension. It is reasonable to conclude that either the seriousness of the past incidents has been greatly magnified to support the present action or that management, having failed to take appropriate disciplinary action in the past, now is trying to circumvent the requirement that discipline be progressive by characterizing the situation as an "emergency." Either conclusion is inconsistent with the collective bargaining agreement of the parties."

In addition to the issues management used a Fitness for Duty report to support its suspension action. The Union argued that the FFD was conducted after the suspension was implemented.

"No weight has been placed on the psychiatric examination submitted into evidence by the Employer. As with the supervisor's notes about the

grievant, the psychiatric examination occurred several weeks after management's decision had been made."

C#06671 Eaton 1986 Modified
The Grievant, not having cased a dog card and not carrying halt, was bitten by a dog on his route. Grievant initially received a 14 day suspension, which during the Step 2 meeting management unilaterally reduced to a 4 day suspension with the Grievant having to serve in a non-pay status. This was contrary to the National policy of being reduced to a Letter of Warning. The Arbitrator reduced the discipline to a Letter of Warning and made the Grievant whole. (The NALC & USPS have agreed that suspensions of less than five days shall result in a letter of warning - page 7).

"No witness testified who had investigated the matter prior to the suspension being assessed."

"As the event occurred, having `halt' in his possession would not have been helpful, therefore his failure to have it is irrelevant. The charge is failure to follow instruction `resulting in an unsafe act.' The act in this case did not result from the Grievant's failure to carry `halt' but from the fact that the dog came up quietly and unnoticed."

"Moreover, the Grievant has testified credibly that he was sent back to work on the same day, still without a functional can of `halt'."

In addition, the Union argued that management did not cite specific safety rules or regulations that had been violated.

C#12482B Lurie 1992 Denied
In this case the Grievant was involved in a accident while driving his LLV by failing to stop at a stop sign. he entered an intersection and hit another car. During the investigation a witness came forward and testified that the Grievant had also hit her $50,000 Mercedes when backing out of a driveway on an earlier occasion (Grievant admitted the accident had not been reported).

The situation put the Grievant in the position of having two (2) or more at fault accidents in 12 months in addition to not reporting an accident. The charges were: Failure to operate his vehicle in a safe manner as well as failure to report an accident. Also, 666.2 of the ELM was cited as Grievant was said to be rude and abrupt with the victims of the accident.

". . .the Supervisor did not have the ability or authority to settle the grievance...."

page 5 The union argued that the Grievant's accidents were attributable in part to emotional stress from personal domestic problems.

The Union contended that the Grievant's removal was punitive rather than corrective, it argued that disciplinary steps short of removal were available which could have served to correct the Grievant's driving inadequacies.

"The Service, by its neglect, created a monster for which it must share some responsibility."

page 6 In the situation where the Grievant was backing out of a driveway and made contract with another car it was argued that there was "nothing to report." In short, the touching of two vehicles was an incident, but it was not an accident of sufficient consequence to warrant reporting.

C#11901 Rentfo 1992 Sustained

The grievant in this case was removed after having her OF-346 revoked. She was determined by the service to be unable to meet the requirements of her position. The Union was able to argue successfully that the Service must be "reasonable" in removing a carrier's OF-346, and in this case was not.

"The Union contends that the Service failed to determine even the minimum considerations required by Section 464.1 of the Handbook EL-827 when it considered revoking the Grievant's OF-346: (a) The grievant did not have `two or more at-fault accidents within a 12 month period;" her two at-fault accidents occurred 26 months apart. (b) Grievant has not been convicted of two or more moving traffic violations by civil authorities within a 12 month period." (c) Grievant did not "continue to violate . . . safe driving practices . . . after being individually warned or instructed."

"The Union argues that the Grievant has been treated in a disparate manner." Rentfro cited the following from Arbitrator Sobel and declared that disparate treatment was found in the instant case.

". . . Equally significant in this regard is that some carriers, as established by the testimony, have had two or more accidents

within a year, some deemed more serious than the Grievant's, without either having their SF-46's revoked or being brought up for charges . . . Thus, while a difference in treatment between individuals does not necessarily prove disparateness, since individual circumstances can boar significantly, the Employer's explanation failed to develop an acceptable and credible rationale for its differentiation."

"The Union argues that even if the Arbitrator determines that Grievant's license was properly revoked, the Service has an affirmative obligation under Article 29 of the National Agreement to make every reasonable effort to assign Grievant to non-driving duties in the letter carrier craft or other crafts."

"Finally the Union emphasizes that although the Service argues that the removal was not a disciplinary action, but rather a termination due to Grievant's failure to qualify for the position for which she was hired, Article 16 requires any discharge to be subject to the principles of just cause."

"Finally, the Service has not demonstrated that retraining Grievant on duty will be injurious to herself or others."

"Such a careless investigation on the Service's part only serves to minimize the gravity of this particular accident in the view of the Arbitrator, and accentuate the arbitrariness of Management's subsequent action revoking Grievant's license.

"Grievant deserves a chance to demonstrate success in remedial training on the LLV before she can be determined an unsafe driver."

"However, there is substantial merit to the Union's argument that an employee should be specifically informed of the contents of her record and warned of the possible consequences of any future violations of Company policy."

C#12713 Abernathy 1993 Denied

After having a vehicle accident the grievant failed to promptly report the incident and additionally filed a false report. The grievant was placed in an Emergency off-duty status without pay under Article 16.7. The Union argued lack of just cause, disparate treatment, and procedural errors (in the review and concurrence) as well as requesting leniency. The Union arguments are detailed beginning on page 19.

C#12389 Sobel 1992 Sustained

The grievant was cited for backing and driving on a one way street the wrong direction. This charge coupled with citations of past discipline for matters other than safety was used to remove the grievant. The Union argued that the grievant was not being removed for improper backing, but for the fact that he was backing at all. The Arbitrator addresses this matter on page 10 in noting that carriers are not prohibited from backing, but rather instructed to avoid backing up if possible. On the charge of going the wrong way on a one way street the Union was able to show that it was a long standing practice by employees and no one had ever been disciplined for doing it.

"This Arbitrator who has heard numerous grievances on `improper backing up' notes that there are few specific references to backing up in the regulations and none cited among those in the charges. Carriers are instructed to avoid backing up if possible but there is no ban of such a practice. Brandon (manager issuing discipline) from his vantage at considerable distance never alleged that the grievant used improper backing procedures. He was questioning the grievant's judgment in backing up at all. Given the position of the grievant's vehicle, at the time he made his decision to back into Carter Allen, his decision to back up could not be faulted."

"There is no doubt that the grievant violated local traffic regulations when he proceeded in the wrong direction in the face of a visible sign. That violation, which the employer argued was sufficiently grave to have tipped the balance in favor of removal might have provided the basis for some adverse action short of removal, had the route not been a short cut leading to the parking lot of the station, which all the carriers seem to take with impunity. Driving the wrong way on Fain Court was a long standing practice by employees for which no carrier had ever been discipline."

E. Documentation/Evidence

1. Grievant's Statement
2. EL 901 Agreement Article 16
3. Photographs of accident scene
4. Media reports of accident
5. Fitness for Duty Report

6. OWCP claims
7. EL-827 Section 460 (see 463.4 Decision Criteria)
   (see 464.1 dealing with revoking
   Driving Privileges)
8. ELM 666.2 "Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorable upon the Postal Service."
9. PS 1700 Postal Service Accident Report Form (worksheet)
10. PS 4584 Observation Form
11. PS 4582 Operator's Record
12. PS 4582-A Summary Driving Record
13. Motor Vehicle Operator's Identification (State license)
14. O-87 Accident Report Kit
15. SF-91 Operator's Report of Motor Vehicle Accident
16. SF-94 Witness Statement
17. SF-95 Tort Claim
18. PS 1768 Safe Driver Award Committee Decision
19. PS 1769 Accident Report
20. PS 2198 Accident Report - Tort Claim
21. PS 4565 Vehicle Repair Tag
22. PS 4570 Vehicle time card
23. PS 4585 Postal Drivers Accident Information Card
24. PS 4586 Accident Information Card
25. PS 92-A Report of Accident other than Motor Vehicle
26. PS 1593 Claims Transmittal
27. PS 1767 Report of Hazard, Unsafe Condition or Practice
28. PS 2562 Third Party Claim - Injury Compensation
29. PS 2573 Request for OWCP Claim Status
30. PS 4583 On the Job Safety Review
31. PS 4707 Out of Order Tags (Defective Equipment)
32. CA-1 Notice of Traumatic Injury
33. CA-17 Duty Status Report
34. M-41 112.4 Safety
35. M-41 133.1 Safety Practices
36. M-41 Section 852 Action to be taken at the scene of an accident
37. ELM 666.2 Behavior and Personal Habits
    ELM 814.2 Responsibilities
    ELM 810 Occupational Safety and Health Administration
    Law No. 91-596
    Occupational Safety and Health Act of 1970
38. PO-701 Drivers Responsibility

F. Remedies

1. The Grievant be made whole for all wages and benefits.
2. The Grievant to receive interest (at the Contract rate) on all monies due him/her (i.e., the employer provide interest at the Federal judgment rate as required by the Memorandum of Understanding signed by the parties in the last period of negotiations).
3. All references to the disciplinary action to be rescinded and purged from the Grievant's personnel file.

C#06671 Eaton Modified 1986

"Just cause has been shown for disciplinary action against the Grievant. The Postal Service determined unilaterally that the disciplinary suspension to be assessed should be reduced to four days. This brings the suspension with the nationally agreed upon policy that suspensions of less than five days shall be reduced to letters of warning, absent exceptions which are not present in this dispute.

The Grievant's suspension shall therefore be reduced to a letter of warning, and he shall be made whole for all lost time."

C#07957 Williams Sustained 1988

The Grievant kicked a stool during a safety talk because management was failing to control dust on the top of cases. The stool fell on the floor without coming near anyone or injuring the Grievant. Management claimed that the carrier willfully kicked the stool and in so doing was guilty of an "unsafe act."

The discipline was a seven day suspension.

"The Grievance shall be sustained in accordance with the Opinion. The Grievant's suspension shall be deleted from his record and he shall be compensated for all lost earnings. His record shall show he received a written warning for committing an unsafe act. . ."

Threats

Joint Statement

THREATS

A. Case Elements:

1. The grievant is alleged to have threatened other craft/management employees.
2. The grievant's alleged words/conduct, and the context in which they were used, indicated an intent to carry out the threat.
3. The grievant possessed the ability to carry out the alleged threat.
4. The recipient of the alleged threat found the words/conduct to be threatening.
5. The grievant is suspended/removed under Article 16.

Black's Law Dictionary

"Threat. A communicated intent to inflict physical or other harm on any person or on property. A declaration of an intention to injure another or his property by some unlawful act. State v. Schweppe, Minn. 237 NW 2d 609, 615. A declaration of intention or determination to inflict punishment, loss, or pain on another, or to injure another by commission of some unlawful act. U. S. v. Daulong, D.C.La., 60 F.Supp. 235, 236. A menace, especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent. A declaration of one's purpose or intention to work injury to the person, property , or rights of another, with a view of restraining such person's freedom of action.

The term, "threat" means an avowed present determination or intent to injure presently or in the future. <u>A statement may constitute a threat even though it is subject to a possible contingency in the makers control</u>. The prosecution must establish a "true threat," which means a serious threat as distinguished from words uttered as mere political argument, idle talk, or jest. In determining whether words were uttered as a threat the context in which they were spoken must be considered." (emphasis added)

"Assault. Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, or striking, or doing bodily harm , to the person of another. State v. Murphy, 7 Wash. App. 505, 500 P.2d 1276. 1281."

"Self Help. Taking an action in person or by a representative outside of the normal legal process with legal consequences, whether the action is legal or not;"

Self Help is a doctrine sometimes referred to by Arbitrators in which the employee resorts to his/her own means of handling a conflict, rather than using the customary channels available such as reporting problems to management or going through the grievance procedure.

Arbitrator Taylor speaks to the subject of an employee resorting to `self help' in C#14944: (the grievant, Rosenthal, made the following remarks about his supervisor: "I could have strangled her. I came this close. If she keeps it up I might just do it.") "Mr. Rosenthal must understand and accept the premise that management has the responsibility for directing the work force and for assuring that Postal Operations are carried out efficiently and effectively. He must understand that he is obligated to comply with a supervisor's order that does not involve personal safety or an illegal act. If, however, he believes the order to be unjust or violative of the National Agreement, then the grievance procedure should be invoked as an avenue of protest. This follows the precept of `obey now, grieve later.' If Mr. Rosenthal takes it upon himself to directly challenge legitimate supervisor orders, then most surely he will face further discipline for insubordination. If the Employee cannot live by this principle then his continued career with the Postal Service will be short-lived, indeed.

The Grievant certainly has not strengthened his defense in this case by completely bypassing the Contractually prescribed grievance procedures. Although he did participate in several jointly filed grievances (the subject matter was not disclosed), at no time did he individually grieve any alleged improper action or alleged impropriety on the part of the Station Manager. When queried by the Arbitrator, Rosenthal responded by stating that he did not like nor trust the Union Shop Steward. This is an unacceptable explanation. The grievance procedure is mandated in the National Agreement. When an Employee bypasses this procedure because he does not like the Shop Steward or for any other reason, whatever position he takes, whatever the issue, they are severely undermined and weakened at the very outset.

B. Definition of the Issue

1. Did the grievant's words, and/or actions, constitute a threat or threatening conduct?

C#1771 Gentile 1980 Modified

"Threats" are generally defined as an expression by a person of the intention to inflict injury or damage upon a person or object. The "conduct" aspect relates to any physical movements a person may engage in which reasonably indicate an intent to carry out the expressed "intent" to inflict bodily harm or damage."

In evaluating factual situations which involve this area of employee behavior and the resultant disciplinary context, certain factors are given careful consideration by

arbitrators in determining the presence or absence of "just cause":

1. the Grievant's use of any gestures or conduct which indicated an "intent" to carry out the alleged threats;
2. the Grievant's high emotional state at the time;
3. the Grievant's lack of propensity to engage in physical violence (such as in the Grievant's case where he had a twelve plus year history with the Service without incident);
4. the words which the Grievant used to express his alleged threat;
5. the context in which the words were used by the Grievant in (4) above;
6. the triggering element which caused the Grievant to use the words which he used or engage in the conduct which he did (timing may be important);
7. the Grievant's present ability to carry out his threats;
8. the response and reaction of the recipient of the alleged threat (which would indicate whether the person truly found the words and/or conduct to be "threatening"); and
9. the Grievant's subsequent conduct (remorse, concern, desire to correct) with respect to the incident in which the alleged threats were made.

The above list is neither intended to be an exhaustive enumeration of factors, but those arbitrators evaluate very carefully, nor a listing by order of importance.

Based on the above, the Arbitrator concluded that the Grievant did not "threaten" bodily harm" to certain named persons, as the word "threaten" has been defined above, but exercised very poor judgment in his use of language to members of the supervision; thus, "just cause" can not be found in this evidentiary record to sustain the degree of disciplinary action which was administered.

C#13627 Goldstein 1994 Sustained

"The real question is whether Management proved its case in the current dispute now before me. I have consistently held in several cases involving this same issue that critical to a finding of the <u>existence</u> of a threat is the <u>context</u> of the situation, as well precise wording of the alleged statement. What must be considered is the <u>entire</u> verbal exchange between the supervisor and the employee, I believe. Where it is unreasonable to find that a threat was actually intended or perceived, or where it is found there was provocation or other affirmative defenses present, I have overruled Management and sustained grievances on at least several occasions. See, for example, USPS and NALC, Richard Gerard, Grievant, Case Nos. C1N-4B-D 3937, 3938, 4857, 4858, and 4867 (Royal Oak, Michigan, issued July 6, 1982) (Removal -- allegations of verbal assaults and threats on supervisors by Union Steward -- finding that statement `we will burn your ass' was no threat of assault or physical harm, but a `prediction' that a particular grievance would result in a Union victory)."

"Important to that decision was my determination that context and tone of voice may change the apparent meaning of words and turn seemingly innocent statements to threats or vice versa." When a statement like that uttered by Bock is immediately explained as being innocently intended, or as meant to convey only the `threat' of permitted legal action, to claim a continuation of fear of physical harm may reflect a `thin skinned' complainant, rather than a reasonable supervisor whose assessment of the situation must be respected, I believe. For an employee to be terminated based on his or her words alone, the response of the Employer to the entire situation must be considered under a `reasonable person' standard, and not on what the actual supervisor alone believes, I held in Bock. The same rationale applies here.

C#13560 Rentfro 1994 Denied

"It cites Case No. W7C-5HD 1502 (1988) in which Arbitrator John Abernathy discussed the factors to be considered in assessing whether or not a threat has been made in the employment context:

a. It must be future oriented
b. It may be made directly to the person threatened or to others outside the presence of the person threatened.
c. An employee's statement or conduct is more likely to be viewed as a threat if the employee has a history of violent, abusive or disruptive behavior and particularly if the employee had made prior threats.....
d. The employee's statement is more likely to be perceived as a threat if it is made in anger rather than in a joking or off-hand manner.
e. The statement is more likely to be viewed as an actual threat if it is specific rather than general.....
f. Generally, the employee need have no prior record of performance problems or discipline problems in order to be discharged for making a threat to a supervisor.
g. A threat by an employee may merit discharge because of management's view of its effect on the safety of the workplace. This is particularly true if the threat is specific.....
h. If the threat is made to a supervisor, it may be viewed both as a safety concern and as a challenge to management authority. A threat made to a supervisor for the purpose of restraining the supervisor's freedom of action is a challenge to the authority structure of the employer's organization, and may be regarded as insubordination. Thus, if a true or serious threat is made to a supervisor, it is doubly serious since both the safety consideration and the challenge to management authority are at issue.
i. If a threat is made to a supervisor in the presence of other employees, it adds seriousness to the threat for it is a public challenge to management's authority. A public threat to a supervisor that is designed to embarrass the supervisor before other employees would be regarded as an even more serious challenge to

the authority of management."

"In case No. W7C-5E-D 26967 (1991) Professor Carlton Snow discussed the effect of a threat upon a supervisor in the workplace. In that case, the threat upon the supervisor was made by the employee to his psychotherapist who informed the supervisor as required by state law. In his award, Professor Snow states:

The words, then, became a threat to Supervisor Brown because Dr. Reed had been compelled to report them under law. At that moment, it became unimportant whether grievant had a subjective intent to act on his words or not. The words themselves were an act. They had an effect on Supervisor Brown and her ability to perform her job. They disrupted the workplace. It became necessary for management to judge them by an objective, rather than a subjective criterion.....

It is important to stress, however, that the possibility of future violence is not the main issue is this case. The fundamental issue is the egregious act by the grievant, namely the threat against Supervisor Brown. It is rational behavior for management to take threats seriously, and in Article 14 the parties have committed to provide safe working conditions in the workplace and develop a safe group of employees. Moreover, employees have been put on explicit notice that threats in the workplace are impermissible.

Arbitrators have long recognized that some misconduct merits summary removal and does not require progressive discipline."

C#14944 Taylor 1995 Modified

"While the Employee's threatening comment, which he does not deny making, was, indeed, `inappropriate' (he could never pass an airport Security checkpoint uttering such threats), I am not at all persuaded that his threat to strangle the Bright Station Manager was any more than an emotional reaction resulting from various disputes as well as the confrontation with the Manager earlier in the morning.

I cannot conclude that his comment was life threatening. In fact, most of us have voiced a similar threat on some previous occasion, but certainly there was never any real thought of committing a violent act against a particular individual. Likewise, the evidence indicates that the threat was an isolated incident and had not been a pattern of his behavior."

"I am also persuaded that there was at least some overreaction to the threat."

C#14762 Meredith 1994 Denied

"The Postal Service has carried its burden of proving the grievant did act in an inappropriate manner toward Jennings when he was presented with a letter of

warning. He argued with Jennings over the letter and spoke in a raised voice. The Postal Service presented a witness who observed the exchange and testified that while the grievant was speaking loudly, he did not hear Jennings' voice. The testimony offered by the grievant and his wife indicated that as soon as Jennings walked away from this heated exchange, the grievant turned to his wife and started to talk about hunting. Both admit that he said something like, `They should all be killed,' but they argue that he was speaking of deer. This is not a very likely thing for a sportsman to say about the animals who provide the sport. It is also not credible that the grievant and his wife exchanged no comments about the explosive conversation with Jennings.

C#15178 Fisher 1996 Denied

"It is particularly significant that the testimony regarding the Grievant having chanted `Edmond, Edmond, Edmond, Oklahoma' was not refuted. The mention of that location has particular significance in the Postal Service because of the tragic incident which occurred there. Therefore, in view of all of the evidence, it is held that there was just cause for issuing the emergency suspension and the notice of removal. The grievances are without merit.

FEDERAL EMPLOYEES NEWS DIGEST June 24, 1996

Removal upheld in bullet incident

"The US Court of Appeals for the Federal Circuit has upheld the firing of a letter carrier who allegedly removed three bullets from a drawer at his postal work station and dropped them into his hand one-by-one in the presence of other postal employees following a work hours dispute with his supervisor.

The US Postal Service's `strong policy' against acts of violence and acts that put other employees in fear of violence' merited his removal even though a charge of threatening a supervisor was dismissed, the employee had long service and customers had expressed satisfaction with his work, the court ruled.

Although three of the original five charges against the employee were dropped, the court said removal was warranted on the remaining two, including the bullet-related unacceptable conduct allegation and his alleged use of profanity. (Case No. 95-3574, June 12, 1996)

The Labor Lawyer Vol. II., 1995

II. Profile of a Violent Employees: The Warning Signs

"Although there is no single profile or precise method for predicting violent

conduct, research into incidents of workplace violence discloses that the extremely enraged employee exhibits several of the characteristics listed below:

1. a history of violent behavior, including family history of violence;
2. fascination with guns or other weapons and discussion of them at work;
3. making direct or veiled threats such as: `Someone is going to pay'; `They will get their theirs' or `The postal worker who killed his supervisor was right;'
4. serious personal or family problems such as divorce, death of a close friend or relative, or bankruptcy;
5. significant change in behavior - mood swings, outbursts, insubordination;
6. deterioration of work performance - a good employee starts to have performance problems;
7. substance or alcohol abuse;
8. being a loner;
9. becoming paranoid about others; and
10. anger, without an outlet to vent the anger."

2. Did the Service have Just Cause for the Disciplinary Action?

Article 16 Section 7 of the National Agreement
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 and 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 that thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

USPS Western Regional Office
November 27, 1991
Subject: Potentially Violent Employees
To: General Managers/Postmasters

THREAT <u>FLOW CHART</u>

Make an intelligent determination of whether or not there is an immediate danger.

If there appears to be no immediate danger, employees involved should be separated from each other and isolated for interviewing.

If there is immediate danger, order the employee out of the facility immediately.

If the employee refuses to leave the facility, have Postal Security or local police remove the employee from the premises.

Contact Postal Inspectors.

Contact Field Director, Human Resources.

Contact local union official.

Follow up with a memorandum of Postal Inspectors as required by the Administrative Support Manual, Section 222.4

"It is not necessary to provide an employee with advance written notice prior to invoking Article 16.7. However, the employee must receive written notice within a reasonable period of time following invocation of article 16.7. Normally, within the next two days if possible.

II. USE OF INDEFINITE SUSPENSION OR EMERGENCY PROCEDURE VETERANS' PREFERENCE ELIGIBLE VS NON-VETERANS

A. When circumstances involve a crime situation where there is reasonable cause to believe that a sentence of imprisonment may be imposed, veterans' preference eligibles should be issued a proposed notice of indefinite suspension when appropriate. This notice must include the employee's appeal rights under the grievance/arbitration procedure. This requires a minimum of a seven-day advance notice during which time the employee remains on the job, or in a pay status, before the indefinite suspension is effected. This proposed notice must contain the employee's grievance rights. After the employee responds to the proposed notice, a decision letter must be issued. This decision letter must contain the employee's appeal rights to the Merit Systems Protection Board.

When circumstances do not involve a crime situation, you may use the emergency procedure only if the alleged misconduct involves those criteria spelled out in Article 16.7. If a veterans' preference eligible is off duty via the emergency procedure for more than 14 calendar days, it then becomes an adverse action appealable to the Merit Systems Protection Board. Do not allow this to happen. Conduct the necessary investigation as quickly as possible. Remember when the danger is removed, quickly allow the employee to return to pay status.

Do not confuse the emergency procedure with indefinite suspension.

Do not allow emergency placement to go beyond what is necessary to eliminate an

immediate danger.
Do not allow placement in a non-duty status under the emergency procedure to exceed 14 calendar days for a veterans' preference eligible.

B. NON-VETERANS

Non-veteran employees are not issued proposed notices of indefinite suspension or proposed removal notices. Instead, they are issued notices of indefinite suspension or notices of removal.

C#12452 Abernathy 1992 Denied
The grievant was alleged to have said that supervisors were all alike, were nit picky, and that she would "get a machine gun and blow all the supervisors away."

"The Employer cites the February 1990 award on Arbitrator Axon in Case No. W7C-5H-D 15378, in which the arbitrator observed that Article XVI Section 7 provides a method to remove the employee from the property where the allegation concerns offenses that present an immediate risk to Postal Service property, people or funds. He found that the Employer need not have just cause to use Article XVI Section 7, but rather must have a `reasonable basis to believe the employee is guilty of the alleged offense.' Violation of Article XVI Section 7 occurs when the Employer acts in an arbitrary or capricious manner, Arbitrator Axon found.

"The Employer also cites the August 1990 National level award of Arbitrator Mittenthal in Case No. H4N-3U-C 58637 and H4N-3A-C 59518. There Arbitrator Mittenthal considered the appropriate level of proof under Article XVI Section 7. He found that if emergency action under Section 7 constitutes discipline for misconduct then it requires just cause. If the emergency action under Section 7 is not disciplinary because it is not prompted by misconduct, the just cause standard does not apply. Rather, the Employer must show only reasonable cause or reasonable belief, Arbitrator Mittenthal stated.

"The record contains little or nothing to support the Union's position that management intended the placement on off-duty status to be disciplinary in nature. Accordingly, management's action is not subject to the just cause standard."

"If the circumstances are such that management feels compelled to act `immediately,' for example for safety reasons, it may not have time to conduct a thorough investigation and reach a full and final conclusion on a factual matter. In such a case, arguably it would be preferable to take the more prudent approach of removing the employee from the premises rather than risk the safety of the unit. Therefore, in evaluating management's action, I find that an arbitrator need only to determine whether management had reasonable grounds for its decision at the time

that the action was taken."

"In other words, under the circumstances was it reasonable for the Postal Service to act on the basis of Mr. Lucas's report of what the grievant had said to him about getting a machine gun and blowing all the supervisors away?"

"In my judgment, this clearly demonstrates that management took the matter seriously. Moreover, the evidence is clear that management acted promptly as soon as Mr. Lucas reported the threat, contacting the Postal Inspection Service, Labor Relations, potential employee witnesses, and attempting to contact the grievant. All of these actions demonstrate that management regarded the threat as legitimate and serious."

C#14841 Axon 1994 Modified

Award: "Postal Service acted pursuant to Article 16, Section 7, Emergency Procedure, when it placed the Grievant on off-duty status without pay. Postal Service violated Section 7 when it unnecessarily delayed the decision to return the Grievant to work after the investigation was concluded. Postal Service is directed to reimburse Grievant for all pay and benefits lost after the lapse of seven calendar days from April 21, 1994, until he was returned to paid status."

"The Arbitrator finds that Postal Service acted in conformance with Article 16, Section 7, Emergency Procedure, when it placed Grievant Niver in an off-duty status on April 21, 1994. The justification for the emergency placement was supported by sufficient factual evidence necessary to place Grievant in an off-duty status. The Arbitrator further finds Postal Service kept Grievant in a non-pay status for an excessive amount of time after the investigation had been concluded. Accordingly, the grievance will be denied in part and sustained in part."

"Section 7 is clearly a permissible variation from the conventional disciplinary suspensions contemplated by the parties under the National Agreement.

Moreover, the level of proof necessary to impose a Section 7 emergency placement in off-duty status is less than would normally be required under other disciplinary provisions of the contract. Since Section 7 grants management a right to place an employee `immediately' in a non-duty, non-pay status because of an `allegation' of certain misconduct, the burden of proof must be held to less than the traditional standard necessary to support a just cause suspension or discharge. Further, Section 7 expressly authorizes the placement of the employee in off-duty status where retention of the employee `may' result in certain harmful consequences to the Postal Service. In the judgment of this Arbitrator, the choice of the word `may' indicates an intent that the Postal Service has the option to utilize Section 7 procedures where it has something less than clear and convincing evidence of

employee misconduct. Adoption of an interpretation which would hold management to a strict burden of proof before it may enforce the Section 7 procedure would nullify the clear and unambiguous right of the Postal Service to take `immediate' action under the emergency circumstances designated in Section 7."

"Applying these principles discussed above to the facts of the instant case, the conclusion is inescapable that Postal Service had sufficient justification to place the Grievant on off-duty status without pay."

"The removal of an intemperate and potentially violent employee from the workplace while an investigation is conducted into the alleged threat is precisely the type of situation authorized by Article 16, Section 7."

"A primary purpose of Article 16, Section 7, is to allow management to act quickly to protect itself even when there may be doubt concerning the full extent of the problem."

"The Arbitrator does share the concern of the Union that the investigation into the matter took an unnecessary amount of time."

C#10708 Lange 1991 Modified

"The Grievant had been placed on administrative leave, i.e., a non-disciplinary, paid leave of absence, on August 30, 1989. He was on administrative leave when the emergency suspension was implemented on September 23, 1989. The emergency suspension concluded on October 6, 1989. The administrative leave was reinstated and continued until December 1, 1989, when the Removal became effective."

"A review of the testimony, evidence, and arguments in this matter leads to the conclusion that the emergency suspension action was inappropriate and that it must be reversed on several grounds.

"While the September 20 phone calls certainly were `unnecessary' and might well have been `obnoxious,' or `offensive,' or perhaps even `disruptive' to Noorda or the Service, the Service was unable to show that they conveyed any credible threat that would sanction the unusual action of an emergency suspension where the employee had already been removed from the workplace and placed on administrative leave."

The Postal Service did not have just cause to place the Grievant on an emergency suspension from September 23, 1989, to October 6, 1989.

3. Were there mitigating circumstances?

C#15178 A&B Fisher 1996 Denied
"The record discloses that the Grievant had been saddened by the death of her brother on Labor Day and the subsequent death of her mother. After that, she received grief counseling. However, her grief is not a mitigating factor which would justify her making a threat to kill a co-worker."

C#14523 Duda 1995 Modified
An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings.

"Grievant was under a great deal of stress at the time of incident. Grievant was also under a medical disability that has just recently been diagnosed. Since becoming aware of these conditions Grievant has made great strides to rehabilitate himself through counseling and prescribed medication for a chemical imbalance." Union argument at Step 2.

Arbitrator Duda alludes to language in Article 35 concerning problems other than drugs and alcohol: "That language targets alcohol and drug addiction, not biochemical problems, but the intent could be understood to apply to problems stemming from other than alcohol or drugs."

It should be noted that there is now new language in the 1994-1998 AGREEMENT, specifically the bolded phrase in the last sentence of Section 1. Programs, which reads: **"and other family and personal problems"**

C#14043 Leibowitz 1994 Modified
"In so concluding, I credit the Grievant's statement that he felt afraid and threatened when he was surrounded by his fellow employees."

"In his testimony, the Grievant admitted that bringing the bread knife to work was wrong, and that he would never do so again. Further, the Grievant conceded that he acted improperly when he took matters into his own hands and threatened his co-workers with the knife. The Grievant testified that he should have left his work area and sought help from a supervisor and a shop steward when he felt threatened."

"This supports the conclusion that the Grievant's reaction was an isolated instance in response to what he reasonably believed was provocation."

C#14289 Sirefman 1995 Modified
"During the four days of hearings there was extensive testimony from sixteen witnesses, and the introduction of numerous documents. This record presents a shocking picture of an employee, Brian McDermott, who harassed and threatened a

number of fellow employees frequently and in a variety of ways over a sustained period of time. One need not even consider the third charge. The evidence is persuasive that Grievant is guilty of the other charges, and represents sufficient cause to suspend and remove him, despite some twenty-four years as a Service employee.

The unacceptability of creating a stressful and offensive working atmosphere for fellow employees speaks for itself. That it was so continuous, so intense, so unrelenting, not only at work but after hours as well, places McDermott's conduct beyond the pale and argues for removal by definition.

Nonetheless, there are other factors present which convince me that the Last Chance reinstatement, under conditions set forth in the Award, is the appropriate remedy. Without cataloguing the `horror story' in full detail, I conclude that while Grievant was the initiator of a series of untoward and repulsive actions, several of his accusers themselves engaged in retaliatory acts against him, inspiring further noxious acts against them. Thus, there was unleashed a long lasting cycle of `tit for tat' reciprocation, which on occasion involved local police. While I remain convinced that McDermott was the initiator and a tenacious harasser, certain other employees who participated in the mutual abuse also went beyond the limits of acceptable conduct, but were never charged.

In addition, it is clear that local management was aware that things were out of control, but did not intervene. Nothing really happened until a new management team came on the scene. The open and notorious problem without any meaningful management response signaled a free hand for ever more bizarre and disturbing behavior. There is also concern that managers, who were ultimately transferred because of unrelated problems, may well have been treated with more leniency than was a member of the bargaining unit, despite the seriousness of their offenses.

C#14650 Duda 1995 Denied

"That afternoon, Grievant punched out at 3:00 p.m., but returned to her case and engaged in work connected activities with mail for her route. At about 3:05 p.m. Richard LaVere returned from his route. He met Tony Pagnozzi, an alternate steward at Westside Station who said Grievant was working at her case after she had punched out. LaVere felt it was his duty as Steward to investigate whether Grievant was `working off the clock' and he wanted to ascertain this from her but he was afraid to engage her without a witness. He asked Letter Carrier Ben Watkinson to accompany him as a witness. Atkinson [sic] is a T-6 who carried the Grievant's route on her day off day and knew her quite well. He probably got along with her less inharmoniously than the other carriers.
Accompanied by Ben, LaVere went to Grievant's case. As he walked up Grievant was holding several bundles of flats, totaling almost a foot of mail., between her two

hands. Lavere asked Grievant if she was working off the clock. She said, `Who are you to ask me if I'm working off the clock'? He said, `I am the shop steward.' Grievant immediately said `I don't have to answer to a little fucking twerp like you.' Simultaneously she threw the mail at him; mail struck him in the face and elsewhere on his body. Without answering, LaVere and Atkinson went directly back to their cases. Grievant followed them--telling LaVere `Don't fuck with me.' Loudly she said, `I know where you live and I'll fucking kill you.' Both LaVere and Adkinson took her very seriously and were frightened.. Neither replied to her. Several more times she repeated that she was going to kill LaVere.

LaVere left the workroom floor and went to Supervisor Keith Nelson in an office. LaVere hurriedly told Nelson that the Grievant had thrown mail in his face and threatened to kill him.

Grievant had seen LaVere go to the supervisor's office. Following, Grievant stood just outside the open office doorway and heard LaVere's report. She immediately hollered `Yes, I said it and I mean it. I'll fucking kill you. I'm on prozac and I'm unstable and I'll fucking kill you.' She shouted the same statement several times. Nelson tried to calm her down and asked her to come with him outside the office away from LaVere.

LaVere went back to his case. A few minutes later Grievant came back to his case. She said, `Lets settle this outside in the parking lot.' According to LaVere she said `Let's settle this man to man.' Grievant confirms that she made such a statement but said the words she used was a Spanish phrase (`mano y mano') having the same kind of meaning."

"Outside in the parking lot Grievant waited. A number of employees came out of the building into the parking lot. She told several of them to `Stick around if you want to see me kick that scrawny S.O.B.'s fucking ass."

"This Arbitrator is very sensitive to the removal of a 29 year employee, even in the face of very serious misconduct. Even the Joint Statement, policy letters, and manuals do not require discharge in all cases. Thus there may be some cases where discharge for a murder threat would be mitigated when made by a very long service employee with an otherwise clean record; whether mitigation is appropriate depends on the specific facts in specific cases. This Arbitrator has sustained a grievance protesting discharge of a long service employee who threatened to kill his supervisor after considering the facts of that case. A number of factors would deserve consideration. One key consideration would be the mind set of the employee. For example, a single threat made as a spontaneous reaction and without deliberation, although serious, might not reasonably merit discharge. Such a case is not before us. Here Grievant directly struck LaVere, then engaged in a

series of threats over a period of time, even after LaVere left her, and after Supervisor Nelson took her away from LaVere."

"By her own admission these actions by Grievant were not an uncontrollable, spontaneous brief reaction which merits consideration for mitigation based on long service."

4. Was the Grievant treated disparately?

C#1760 Rentfro 1980 Modified

"The Union cites two similar situations in which the employees involved were issued only letters of warning (Letter of Warning to Ray D Holman, dated December 4, 1979 [Union Exhibit 1]; and Letter of Warning to Henry Culbreth, Jr., dated December 19, 1979 [Union Exhibit 2]. Both of these cases occurred within a few days of the Grievant's confrontation with Price. It appears to the Arbitrator that in these similar situations the conduct of the employees involved was as serious as the Grievant's conduct in this case. In the Holman situation the employee used profanity and his physical actions of slamming down the chair and jerking the door open with such force that the door handle was driven into the wall evidenced more serious misconduct. The mere fact that the supervisor in the Holman and Culbreth situations did not feel threatened as Supervisor Price, doesn't justify the difference in discipline in the two situations."

"The Union also cites situations dating back to December of 1977 in which employees were not discharged for conduct ranging from fights with fellow employees to threats against supervisors. (Union Exhibit 3)."

"As noted in How Arbitration Works by Elkouri and Elkouri at pages 643-44: [Fourth Ed.]

> `It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variation in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees).'

The parties herein are well aware of the general rule that disparate treatment--unequal discipline for similar misconduct--is not looked upon with favor by any arbitrator. Unequal discipline imposed, even by a well meaning but somewhat disorganized employer, will consistently be overturned as discriminatory when appealed to arbitration. Further, there is evidence in this case that management picked this case to draw the line and change a former policy of leniency to one of

discharge for such threats to supervisors. The policy can and has been changed by a clearly announced intent, but not before the incident giving rise to this arbitration."

5. Was the Grievant's right to Due Process violated?

C#14872 Lurie 1995 Denied

"The Union charged that the Postmaster did not independently investigate the charges prior to concurring in the discipline. The

Postmaster testified that he conducted an independent investigation of the charges, including a personal visit to the site and a canvassing of the residents in that neighborhood in an attempt to find any witnesses to the incident.

The Union's charge is an affirmative defense, for which it bore the burden of proof. The Arbitrator finds Postmaster Wright's testimony of his investigatory efforts to be credible and unrefuted, and therefore holds that the Union has not sustained its burden."

"The Union charged that, when the Grievant was placed on administrative leave, he was not informed of what rules he was charged with having broken, and that he did not ascertain the charges until he received the Notice of Emergency Suspension. However, the Union has not presented any contractual or regulatory provision requiring notification of the reasons why an employee is placed on an administrative leave, non-duty with pay status, and the Arbitrator finds that, in fact, no such provision has been shown to have been violated."

"The case law relied upon by the Union to support its claim of insufficient prepatory time was the US Court of Appeals, District of Columbia Circuit decision by Judge Ruth Ginsburg, U.S.P.S. v. NLRB and APWU (1992) [Joint ex. 3]. That case held that Weingarten rights extended to pre-interview consultation between the employee and his union representative. Judge Ginsburg reasoned that, since Weingarten entitles the employee to representation by a `knowledgeable union representative,' the representative must be afforded the opportunity to become knowledgeable of the matter under investigation before the interview commences." However, Judge Ginsburg went on to note:

"Significantly, in the only court case declining to extend the section 7 right confirmed in Weingarten to a plea for pre-interview consultation, ample time had been provided after notice, and before the interview, to allow the employees subject to investigation to arrange a conference. See cite Climax Molybdenum Co. vs. NLRB 584 F.2nd 360,363 (10th Cir. 1978): (15 1/2 hours distanced time employees were advised of pending investigation and time it took place.) The court therefore held: `Thus, we do believe that Weingarten requires that the

employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representatives in advance thereof on his own time.'

The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus, we do believe that Weingarten requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time.

In the case before us.....no time at all had been allowed for a conference."

"That Management controlled the agenda of, and the questions asked at the interview did not constitute a violation of Weingarten, nor did Management's insistence that the Union not attempt to have such question rephrased or withdrawn because they were purportedly irrelevant. As noted by Judge Ginsburg in the above-cited case:

> `The Court in Weingarten spoke of protection against interference due `legitimate employer prerogatives,'....and observed that `[a] knowledgeable union representative could assist the employer...[in] getting to the bottom of the incident occasioning the interview, `without' transform[ing] the interview into an adversary contest.'

The claim of a denial of due process is an affirmative defense, for which the party asserting the claim bears the burden of proof."

6. Was the discipline too harsh?

C#14289 Sirefman 1995 Modified

While I remain convinced that McDermott was the initiator and a tenacious harasser, certain other employees who participated in the mutual abuse also went beyond the limits of acceptable conduct, but were never charged. In addition, it is clear that local management was aware that things were out of control, but did not intervene. Nothing really happened until a new management team came on the scene. The open and notorious problem without any meaningful management response signaled a free hand for ever more bizarre and disturbing behavior. There is also concern that managers, who were ultimately transferred because of unrelated problems, may well have been treated with more leniency than was a member of the bargaining unit, despite the seriousness of their offenses.

Award The Service had just cause to suspend Grievant. It had just cause to discipline him. However, removal is too severe under these particular circumstances. Therefore, Grievant is to be reinstated under conditions in the Award.

C#15240 DiLauro 1996 Modified

"The facts of the case are not in dispute. The grievant became involved in a verbal altercation with another employee, near the end of his shift on December 1, 1994, which ended with him grabbing that employee by his shirt causing two buttons to pop off the employee's shirt."

"Where the agreement fails to deal with the matter, the right of the arbitrator to change or modify penalties, found to be improper or too severe, may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause. (Elkouri and Elkouri, How Arbitration Works, BNA, 4th Ed. [1985]). In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. Therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe under all the circumstances of the situation. Such right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him.

There are a number of circumstances which mitigate against the ultimate industrial death penalty of discharge in the instant case. First, the grievant was provoked by Mr. Rogowski's statements. Second, although he grabbed Mr. Rogowski by his shirt, he did not engage in any fisticuffs. Third, he immediately released Mr. Rogowski when Supervisor Bowes simply placed her hand on his wrist and told him that was enough. Fourth, he immediately left the workroom floor when Ms. Bowes ordered him to do so. Fifth, although references were made about the grievant's alleged problems with other employees, the only element of the grievant's past record considered in removing him from service was a letter of warning issued on August 2, 1994 for conduct unbecoming a postal employee. Sixth, the grievant voluntarily sought help for his problems, although he did so after the incident.

Based on the foregoing circumstances, the discipline of discharge appears to be too harsh and inappropriate for the offense. Having said that, it should be noted that the grievant's actions in this case were a serious infraction of workplace rules and regulations. Physical aggression cannot be tolerated in the workplace. It is uncivilized behavior which disrupts the operations and undermines the efficiency and morale of the employees. The grievant should realize that he cannot continue to engage in this type of conduct and expect to retain his position with the Postal Service."

In returning the grievant to service within thirty days of the date of this award, without back pay or benefits, but with seniority unimpaired, the grievant must submit to and pass a fitness-for-work physical examination and continue to participate in the EAP by attending counseling sessions at least once a week for at least a one year period as conditions of his reinstatement to service."

C. Contractual/Handbook (other) Citations

1. Article 3 Management Rights
2. Article 14 Safety and Health
3. Article 15 Grievance-Arbitration Procedure
4. Article 16 Discipline Procedure
5. Article 19 Handbooks and Manuals
6. ELM 660 Conduct
   - 661.11 Code of Conduct
   - 661.3 Standards of Conduct
   - 666 USPS Standards of Conduct
   - 666.2 Behavior and Personal Habits
7. ASM 222.4 Assaults or Threats
   - 222.5b Postal employee threatened with death or bodily injury
   - 228 Assaults
   - 228.11 Inspection Service Investigations
   - 228.13
8. Joint Statement on Violence and Behavior in the Workplace
9. Article 35 (EAP) Employee Assistance Program

D. Arguments

C#13924* Jacobs 1994 Modified

[this case was cited by the National and will be used to illustrate some of the Technical Arguments from Defenses to Discipline, an overview of the case is provided in the "CHARGE" below]

From the CHARGE:
"On November 28, 1992, at about 10:20 AM Acting Supervisor, R Simonetti, received an anonymous phone call from a concerned citizen on Holsman Street advising that the regular letter carrier was being threatened by another letter carrier.

On November 28, 1992 at approximately 8:45 AM you had an argument with carrier S. Silva this continued when you followed Silva into the men's room. Again you continued to threaten this carrier on the rear platform at approximately 9 AM while Mr. Silva was loading his vehicle for delivery. At this time you called him a `Faggot pussy,

motherfucker and that you were going to kick his butt' trying to provoke a fight. However, Mr. Silva walked away and into the building.

Further investigation revealed that on Holsom St. at approximately 10 AM this day you jumped form your postal vehicle wielding a baseball bat and started to shout and threaten carrier Silva. This behavior continued as the letter carrier tried to calm you down and walked away.

However, you followed him for a period of time as you continued to shout and threaten his life. Your behavior was witnessed by a number of postal customers.

Discipline was not timely issued.
C#13924* Jacobs 1994 Modified
"Thus, in considering the instant matter, I am primarily concerned with the effect of an unreasonable delay between the offense and its punishment on the industrial scene. The most significant observation I can make is that one of the most important justifications for discharging an employee is the necessity to remove him because he is a threat to the orderly operation of the work place. Accordingly, immediate action for the duration, not just the remainder of the Tour, would certainly have been a basis for Wilkerson's discharge. However, Management chose to send the Grievant home after the incident, brought him back on the job for four days thereafter, and then put him on administrative leave and waited two months to impose discipline. In so doing it not only indicated its lack of concern with his nefarious deeds, but it also waived its right to discharge him. The concept of holding up action upon fully explored events is inherently unfair and deprives an employee and the Union of the opportunity to comprehend and properly prepare a defense while the evidence is fresh. I find harmful error and a due process violation -- it would have been reasonable for the Service to take no more than two weeks to investigate."

Discipline was ordered by higher management.
C#13924* Jacobs 1994 Modified
"On the one hand the Arbitrator is faced with unrefuted evidence that at first Supervisor Balady told Wilkerson that he did not wish to discharge him and agreed to send him for counseling until he received a phone call from higher level Management that caused him to reverse his position and issue the Removal."

Management's grievance representative lacked the authority to settle the grievance.
Defenses to Discipline p15 "Article 15 specifically confers upon management's grievance representatives full authority to resolve any grievance. Where it can be demonstrated that management's representative lacked the authority, discipline has sometimes been overturned."

Double Jeopardy
C#13924* Jacobs 1994 Modified
"On this question, the instant Arbitrator defined the doctrine of double jeopardy in Case No. N7C-1Q-D-36708, Mt. Vernon, N.Y., which is equally applicable here, as follows:

`Double jeopardy is a legal concept which prohibits the exaction of a second penalty for an act already punished with the imposition of a previous penalty. Charging the Grievant in a removal for an identical incident in a prior grievance already adjudicated is considered double jeopardy.'

Double jeopardy does not apply where the preliminary action taken may not reasonably be considered final. Elkouri and Elkouri, How Arbitration Works, 3rd Ed. (1973) p. 637 and cases cited therein at note 124.'

Double jeopardy is a proper defense in disciplinary cases, and is not in point here. Since the Emergency Suspension action taken against Mr. Wilkenson on Saturday, November 28, 1992, was not already adjudicated nor final, the Removal cannot be considered a case of double jeopardy."

Higher management failed to review and concur.
C#13924* Jacobs 1994 Modified
"The Service errors in its contention at the hearing and in its brief page 5 that the Letter of Decision dated February 10, 1993 is the concurrence for the Notice of Proposed Removal dated January 26, 1993. The National Agreement mandates that concurrence to discipline must be met by a higher level authority before the charges are imposed by the Supervisor who has made an independent decision to do so."

Insufficient or defective charge.
Defenses to Discipline "Article 16 requires that management give a letter carrier a written notice of charges when imposing a suspension or discharge. Implicit in this requirement is that the notice of charges describe and explain the basis for the discipline with sufficient specificity that the letter carrier may make a defense."

Management failed to render a proper grievance decision.
Defenses to Discipline "Article 15 requires that management state certain information in its Step 2 and Step 3 grievance decisions. Failure by management to state that information has sometimes resulted in overturning of the contested discipline."

Management failed to properly investigate.
C#13924* Jacobs 1994 Modified
"The just cause standard requires the Postal Service to show that the removal was imposed after an objective pre-disciplinary investigation is held resulting in proof of the Grievant's infraction of a clearly enunciated rule reasonably communicated to the said Grievant consistent with the National Agreement, the offense, and his past employment record. In considering this argument, I am satisfied that a thorough investigation was performed by Management of the River Street Station and the agents of the Inspection Service, the investigatory arm of the Postal Service, that included interviews of customers, Carriers, Mr. Silva, and the Grievant. On this basis, the Union's argument with regard to improper investigation must be rejected."

Improper citation of `past elements'.
Defenses to Discipline "It is improper for management to cite discussions as past elements in support of another disciplinary charge. It is also improper to cite discipline which has been grieved but not finally settled or adjudicated as a past element. When these are cited, arbitrators sometimes order the present discipline rescinded or modified."

Management refused to disclose information to the Union (including claims that information was hidden).
Defenses to Discipline "Management must disclose to NALC all relevant information concerning the discipline."

C#13924* has been used to help illustrate the Technical Defenses addressed in Defenses to Discipline. Below are some of the Arbitrators conclusions:

C#13924* Jacobs 1994 Modified
"After all is said and done, it cannot be determined whether Wilkerson was the aggressor or not. He was never charged with physical assault nor that he touched Silva. What we do know is that the Grievant was out of bounds and engaged in egregious conduct while in uniform -- he was loud, abusive, and out of control. An employee cannot resort to self-help and threaten a fellow employee with harm or violence even if he has no intention of following through on that threat. Although he now regrets the incident, his conduct was totally unacceptable and worthy of discipline.

The remaining question then is whether the penalty of Removal is justified. Based upon all the facts and circumstances of this case as a whole I find that Management's administration of the discipline that followed is far from acceptable, simply because the precepts of fundamental fairness were just not met and raise serious doubt concerning the procedural and substantive integrity of the action against the Grievant. As a result of Management's intense reliance on defective hearsay testimony and Mr. Silva's

unbelievable rendition of what happened, the Arbitrator is left with the Grievant's admission and Mr. Jacobs' testimony to base the discipline on. Therefore, it is found that the process falls short of the requirements of Article 16.8 and deprives Mr. Wilkenson of just cause for the extreme penalty of discharge. Furthermore, I do not find any past elements involving threats, verbal abuse, assaults or altercations of any nature whatsoever. In fact, I find an otherwise clean record.

In exercising the discretionary powers conferred upon me by the Contract, I am not prepared to accept Management's failure to meet some of the required procedural norms nor to wash out the Grievant's misdeeds. An Arbitrator in a discipline case does not sit as a judge in a criminal case, and is not required to apply constitutional and criminal standards because the Grievant's liberty is not at stake, but his right to his job is. Since he is found guilty of deplorable conduct, I do not feel constrained to exonerate him solely on the basis of insufficient evidence or the technical dereliction of the Postal Service. Yet, to uphold the instant discharge would be to ignore Management's misfeasance by not allowing it to affect the outcome and encourage due process failures in the future. The Union agrees and the Grievant admits that he should not have been on Silva's route. That leads the Arbitrator to the conclusion that the Grievant violated the Code of Conduct with which he is charged and that a penalty short of discharge is more appropriate because of the irregularities found which will not only have the effect of applying corrective discipline to the Grievant but will also serve notice on the other employees that this kind of action cannot be tolerated."

Award "Mr. Wilkerson is to be reinstated to his position, forthwith. He is subject to a six month disciplinary layoff without pay and shall receive back pay for the remainder of the discipline, less interim earnings. His seniority and fringes remain unimpaired. The Grievant is admonished that any similar behavior at any time in the future can lead to more serious discipline, including discharge."

C#14365 Rentfro 1995 Sustained

"The Union argues that the Postal Service has failed to show just cause for discharging the Grievant. Because of the serious nature of the charge involved, the Postal Service has the burden of proving the charge `beyond a reasonable doubt.' Even so, the Postal Service has failed to prove its case even by a preponderance of the evidence.

The Union contends that the Postal Service did not conduct a full and fair investigation into the alleged threats. Barnes, the supervisor who issued the Notice of Proposed Removal, did not interview any of the witnesses, particularly Grievant, except for a short conversation with McFarland on April 6, 1994. Instead, Barnes relied on witness statements made to Inspector Mullins and Cossette. Moreover, Barnes had been at the Station less than two weeks when the alleged threats occurred, and he hardly knew Grievant or McFarland. Barnes clearly could not have made a fair assessment of the case under these circumstances.

The Union maintains that it was a violation of due process for Barnes not to give Grievant an opportunity to defend himself -- to explain his side of the story -- and to not even ask him to write a statement. Jan Hiatt wasn't asked to write a statement, either. Although Mullins testified that both Grievant and Hiatt refused to write a statement, he also testified that it is his usual procedure to request written statements from all witnesses, yet he could not recall what he specifically did in the investigation of the Grievant's case. On the other hand, Hiatt and Grievant would have better recollection of what specifically was said at their interviews, since being interviewed by a postal inspector was an unusual experience for them.

Turning to the merits of the case, the Union contends that Grievant never threatened McFarland; rather McFarland felt belittled by Grievant on April 6 and was tired of Grievant complaining to management about him and his practice of dropping tubs of mail at the Grievant's case. After McFarland saw Grievant talking to Supervisor Barnes shortly after the incident on April 6, he decided he had enough, and, in an attempt to `get even' with Grievant, told Barnes that Grievant had threatened him. If Grievant had really threatened McFarland and McFarland was afraid as he claims to be, he would have reported it to management right away. Instead, he didn't report the alleged threats until Barnes approached him for the <u>second time</u> that morning, long after the incident.

The Union argues that there are many inconsistencies between McFarland's various statements and Hoff's various statements, the two persons who claim to have heard Grievant threaten McFarland. Hoff also failed to report the alleged threat to management on April 6.

Moreover, the Postal Service has largely relied on the Postal Inspector's conclusion that a threat(s) was made by Grievant. However, the Inspector cannot recall the manner in which Hiatt `acknowledged' the threat, and his handwritten notes from the investigatory interview fail to clarify this point. On the other hand, Hiatt consistently denies that she heard Grievant threaten McFarland on April 6; and, being Grievant's case partner, is the only witness that could hear what was said.

The Inspector also asserts that both Grievant and Hiatt refused to make a written statement, but his notes of the interviews do not indicate that either employee was ever asked to make a written statement or that they refused to do so.

In sum, the Union contends that serious doubt has been cast on the credibility of McFarland, Hoff, and the postal inspector, the persons upon whose statements the Postal Service made the decision to terminate a 20-year employee with a good work record. Furthermore, if the Postal Service really perceived Grievant as a threat, he should have been placed on emergency suspension immediately; he was placed on administrative leave five days later on April 11, 1994.

Alternately, the Union would argue that if the Arbitrator concludes form the evidence that Grievant did threaten McFarland, the Arbitrator should consider that a lot of joking about guns went on at the Station in which McFarland participated. Moreover, the Postal Service has engaged in disparate treatment, because another employee, Winkler, who made threats to kill a co-employee in May 1994, was not discharged or even suspended. The fact that Winkler did not make the threat to the co-employee's face does not make it less egregious.

Accordingly, the Union would ask the Grievant be reinstated and made whole for all lost wages and benefits, with interest, and the Notice of Removal be removed from the Grievant's record."

Discussion and Conclusion
[the Arbitrator] "..is persuaded that the Postal Service failed to prove that the discharge was for just cause based on the evidence presented."

"Although the Arbitrator will not go so far as to require that the Postal Service prove its case `beyond a reasonable doubt,' The Arbitrator does believe that `clear and convincing' evidence that the Grievant did make the alleged threat is required. Allegations that an employee threatened another individual's life are as serious , or more serious, in nature as allegations of theft or dishonesty in that all involve moral turpitude and can result in criminal charges. As stated by Arbitrator Russell A. Smith in Kroger Company, 25 LA 906, 908, (1955), and quoted in Elkouri and Elkouri, How Arbitration Works at pp. 662-663 (4th ed. 1985):

> It seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused.

With that standard in mind, a careful review of the evidence reveals several weaknesses in the Postal Service's case against the Grievant. One such weakness is the Postal Service's failure to consider all the relevant facts in making its decision to take the most severe form of disciplinary action against Grievant."

C#12031 Abernathy 1992 Denied
Grievant denies making the threat.
Disciplinary action is punitive and not corrective.

C#14822 Dietsch 1995 Modified
Previous discipline cited in removal has been grieved.

Testimony against grievant lacks credibility.
Discipline is procedurally flawed.

C#15200 Searce 1996 Modified
The service allowed the grievant to continue working after the incident.
Grievant has a long and good service record.

C#14108 Stephens 1994 Sustained
USPS decided to remove the grievant before doing a thorough investigation.

Threatened persons actions were inconsistent with claim of fear for life.

C#14480 Britton 1995 Sustained
Management cited past elements of past record unrelated to incident.
Action taken was unsupported by factual evidence grievant is guilty.
Employee witness statements were solicited.
Person grievant is charged with threatening says there was no threat.
Management's actions are punitive, arbitrary and capricious, absent just cause.
Other threats by other employees received no action taken.
Discipline was not progressive.
Grievant poses no danger to himself or others.
At no time did management offer to help grievant through EAP.
Grievant was responding to a hypothetical question.

C#15068 Laurie 1996 Sustained
The grievant was denied his Weingarten Rights.

C#14437 Alsher 1995 Denied
Supervisor did not actually hear the threats.
The suspension is procedurally defective.
Other parties in incident were not suspended.
No proof of threats.
Previous record is free of threats.
Grievant is more credible than witness.

C#11318 Barker 1991 Sustained
Management waited to suspend, showed no real worry about grievant.

C#1200 Seidman 1982 Modified
Testimony against grievant is not consistent.
Grievant did not intend to act on his words.
Discipline was dictated from higher level.
Grievant was under great emotional trauma.

Grievant was talking to himself, not others.
Grievant threatened to shoot up building, not people.
Discipline was too harsh.

C#14853 Helburn 1995 Modified
Grievant had a medical problem.

C#14287 Klein 1995 Denied
One error in judgment is not deserving of discharge.
Grievant is remorseful and acknowledges mistake.

C#13745 DiLauro 1994 Modified
Grievant was provoked by racial remarks.
Grievant denies part of charges (that he was loud).
Grievant was not the aggressor in the incident.
Grievant claims he did not act as charged.

C#11665 McCaffree 1992 Denied
Union argued for a higher standard of proof.
The Service created a bad atmosphere.
Grievant was a steward and able to be aggressive.

"Steward behavior and conduct in the processing of a grievance are privileged, for the most part. Language can be `tit for tat,' aggressive, and strenuously in support of a grievance, and not be considered abusive or insubordinate. This is not the case in a discussion between a supervisor and an employee. Work place authority places the supervisor in charge. Employees are expected to follow all reasonable orders and directions of supervisors. Failure to do so is the self-help doctrine, a principle upon which an employee may not rely with impunity."

C#14659 Klein 1995 Denied
There were no witnesses to the incident.
There is no evidence that the grievant acted as charged.
There was no investigation by management - relied on the Inspection Service.
Untimely, management waited over two months to discipline.

C#15142 Duda 1996 Denied
Grievant was told statements to EAP would be confidential.
EAP encouraged grievant to vent anger.
Grievant did not have intent or ability to hurt anyone.
Grievant was provoke by harassment.

C#13924 Jacobs 1994 Modified

There were due process violations.
Grievant was not the aggressor.
Double Jeopardy.

C#13560 Rentfro 1994 Denied
The discipline was not properly concurred.
The Union was denied information.

C#14289 Sirefman 1995 Modified
Management did not do anything to prevent what happened.
Management's lack of response signaled a free hand.
Disparate treatment of craft vs. managers.
Discipline was punitive and not corrective.

C#14944 Taylor 1995 Modified
Grievant's remarks were inappropriate, not life threatening.
The treating physician has cleared the grievant for work.
Grievant's work record is excellent.
The grievant suffers from depression and is under a doctors care.

C#10708 Lange 1991 Modified
Quotes of grievant's words were incomplete and out of context.
The grievant's words did not constitute a threat.
The Service should have used a FFD to determine if grievant was a threat.
The grievant was already on admin. leave when given a suspension.
Management is to blame for problems in the facility.
Some of the charges are untimely.
Double jeopardy.
Grievant is not a violent or dangerous person.
Management's charges are based on innuendo, rumor and untruths.
Management lacked just cause for the indefinite suspension.
Discipline was not reviewed and concurred upon.
The discipline was too harsh.
The restrictions of Article 16.7 were not met.
Administrative leave is not disciplinary.
The disciplinary notice was not factual.
The charges, separately, or in total do not constitute just cause.
The charge was untimely (delayed), and disparate.

Improper citation of past elements (Article 16.2)
Grievant was told he could not be disciplined for an off duty conduct.
Service compiled a series of minor charges to support a discharge.
Alleged threats were not acted on.

C14043 Leibowitz 1994 Sustained
There were mitigating circumstances.
The grievant admits error.
The grievant has no prior discipline.
Grievant's action was an isolated instance in response to provocation.
Removal was too harsh.

C#14523 Duda 1995 Modified
Like incidents by supervisors are not treated as harshly.
While loud and boisterous, grievant did not threaten.
Discipline was disparate.
Grievant's condition is biochemical and now being treated.
Grievant is now attending counseling to rehabilitate.
Grievant's actions were not volitional.

C#14872 Lurie 1995 Denied
Alleged target of threat did not show fear.
Service waited to place grievant in non-duty status.
Grievant has been harassed by the alleged victim of the threat.
Grievant's testimony has the ring of truth.
Mitigating circumstances (provocation).
The penalty is too harsh.
Management violated Weingarten rules.

E. Documentation/Evidence

1. Grievant's statement
2. Witness statements
3. Investigative Memorandum
4. EAP Counselor reports or statements
5. Police records if relevant.
6. Prior criminal or civil court records (if any).
7. Form 1767 Report of Hazard or Unsafe Condition
8. Records of past discipline or misconduct or long and good service record.
9. Any Service statements posted on bulletin boards in the facility concerning threats or assault, and or copies of letters sent to employees on conduct and threats.
10. Character references pertaining to the grievant (seek professional, clergy, or long term relationships).

11. Statements of co-workers who are hesitant (or not) to work with the grievant.
12. Doctor's reports, prognosis, medical histories, care schedule, medications, releases for work, etc. (if applicable).
13. Fitness for Duty reports (if applicable).

F. Remedies

1. Remove the discipline from all files.
2. Make the Grievant whole for all benefits and lost wages.
3. Interest at the Federal Judgment Rate
4. Memorandum of Understanding (found on page 170 of the 1994-1998 Agreement) 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 Transitional Employees.)

   C#14365 Rentfro 1995 Sustained
   For the reasons set forth above, the Arbitrator finds that the Postal ice did not have just cause to issue the Notice of Proposed Removal against Grievant, Kenneth Morse, on May 9, 1994 for "Unacceptable Conduct\Threatening a Co-Worker." Mr. Morse is reinstated to his former position with full back pay and benefits, plus interest pursuant to the Joint Memorandum, less any earnings received by him since the effective date of his discharge.

   C#14523 Duda 1995 Modified
   "Grievant's misconduct on January 24, 1994 cannot go unrecognized. He committed an extremely serious violation. The successful EAP/Rehabilitation aspect causes this Arbitrator to view his offense as `correctable' and justifying that Grievant be given be allowed `one last chance to show that he will fulfill all his obligations as an employee.' He must also understand he has had his opportunity to be rehabilitated; that avenue or excuse will not [be] available to him in the future if he fails his duty."

PERFORMANCE RELATED DISCIPLINE

A. Case Elements

1. A employee is facing discipline for a "Unacceptable Performance"charge.
2. The Grievant receives a notice of discipline for:
3. Management imposes a arbitrary or vague performance expectation upon an employee.
4. Management accuses an employee of engaging in a slow down or demonstrates time-wasting practices.
5. Harassing route-reconstructions based on alleged time discrepancies.
6. Management does not grant a Special Inspection (271.G) stating the performance was not acceptable during the qualifying time frame (6 weeks).

B. Definition of issues

1. Has the regular had sufficient time to be familiar with the route or T-6 string?
2. Are the route times (office and street) based on a week of count and inspection, with no substantial changes to the route or volumes? And is the same carrier who performed the last count and inspection still on the same assignment?
3. Is DUVRS (Delivery Unit Volume Recording System) the deciding factor as to the amount of work performed? (Has management based their actions on lineal volume or on actual piece count or End of Run Reports?)
4. Was the employee placed on notice that their normal or demonstrated performance was not acceptable? When and how?
5. Employee given training and time to improve. Were clear expectations, as to the level of improvement required, given to employee?
6. Has management objectively proven (burden of proof) that the employee has performed unsatisfactorily?
7. Were variable factors (weather, volume, vehicles, etc..) taken into consideration?
8. Has the grievant or union previously challenged the size of the assignment or portions of it?
9. Does the grievant's prior record demonstrate there has been a

change?

10. Do other employees, by comparison, perform at an acceptable level on the same assignment?

C. Contractual/Handbook (other) Citations

1. National Agreement
   Article 3
   Article 5
   Article 16
   Article 19
   Article 34
   Article 35- EAP if applicable
   Article 41
2. Handbooks and Manuals.
   ELM
   M-41 1
   M-39

D. Arguments

1. Technical Defenses

C#05343
C#01011
C#05982
C#07603
C#10763
C#16742

2. Management did not follow the procedure articulated by the consensus of arbitrators in proving unacceptable performance or expansion.

C#05952
C#07603
M-00398

3. The expectations, either street or office were not set to the employee receiving the proposed discipline or attention.

M-00829

4. The times the employee is judged against were not established in

C#05952
C#01163

M-00304

5. Management is attempting to hold carrier accountable to a arbitrary

M-00360
M-00209

standard or pace.

M-01233
C-04547 6. Management may not base discipline solely on Linear measurement
M-00272 of the mail.
M-00364
M-00005
M-00498
C#16742 7. Management does not consider variables in delivering street portion.
C#16742

C#03554 8. The times or standards are not agreed to by the carrier or the union,
C#10763 and are being or have been challenged through the grievance procedure, therefor management is premature in taking action.
C#10763 9. The service has not met their burden of proof in actually proving the
C#01011 grievant is actually guilty of wrongdoing.
C#01038
C#01163
C#03554
C#03616
C#05343
C#05952
C#07603
C#08091
C#10763
C#13521
C#15387
C#16742

10. The charge cited in the discipline is vague and undefendable with no specific rule or provision violated.

E. Documentation/Evidence

1. Previous six day count and inspection data utilized to adjust route to its current status.
2. Time card analysis, and other data showing size of route, both office portions and street portion.

3. Documentation to demonstrate or explain as to why the route's time may have varied.
4. Statements from patrons as to Grievant's on route diligence and good work ethic who will testify if needed at arbitration.
5. Previous awards.
6. Inspector's Investigative Memorandum (IM) if the inspectors were involved.
7. Interview notes from management which might include patron interviews, and other employee interviews or statements.
8. Review of Grievants OPF and in station personal file. Any and all supervisor notes which relate to the Grievant.
9. A documented request for "Any and all information utilized to arrive at the decision to discipline the Grievant".
10. Copies of the EL-307 handbook, if relevant. The EL-307 is the "Guidelines on Reasonable Accommodation", a USPS handbook.
11. Statements and interviews from participating managers, along with the issuing manager's Request for Discipline.

F. Remedies

1. Rescind the discipline action purging the notice of discipline.
2. Make employee whole for all lost wages and benefits.
3. Reinstatement of the grievant.
4. Interest at the Federal judgement rate.
5. Cease and desist and correctly reestablish the proper times in accordance with the M-39 and M-41 as well as the applicable memoranda.

PERFORMANCE RELATED DISCIPLINE

"Unacceptable Performance" is a vague charge, but a charge carriers are increasingly being issued discipline for. Under the umbrella of "Unacceptable Performance" management has disciplined carriers in an attempt to increase production, sometimes even further then humanly possible. Management attempts to do this by using progressive discipline including removal in some instances. The results are mixed. When management arbitrarily arrives at a preconceived expectation or standard without solid foundation, most Arbitrators are reluctant to uphold discipline. However, some Arbitrators (a small group) feel once Management makes a Prima-facia case of some variance in performance the burden shifts to the Employee/Union to prove the Employees innocence.

This chapter of ALERT is to be used in the defense of accused carriers who are vaguely charged with failing to perform up to some type of desired expectation. While this chapter covers many contractual cites and outlines many arguments it should not be considered exhaustive as each case is based on particular fact circumstances and we do live in a increasingly changing work environment. Any questions on Performance Based Discipline should be directed to the NBA office for assistance.

A. Case Elements

1. A employee is facing discipline for a "Unacceptable Performance"charge.
2. The Grievant receives a notice of discipline for:
   a. Unacceptable performance.
   b. Expansion of street time.
   c. Failure to meet demonstrated performance. (benchmark)
   d. Unauthorized overtime.
   e. Failure to perform duties conscientiously and effectively.
   f. Failure to accurately estimate auxiliary assistance.
   g. Unsatisfactory effort.
   h. Failure to meet office standards.
3. Management imposes a arbitrary or vague performance expectation upon an employee.
4. Management accuses an employee of engaging in a slow down or demonstrates time-wasting practices.
5. Harassing route-reconstructions based on alleged time discrepancies.

6. Management does not grant a Special Inspection (271.G) stating the performance was not acceptable during the qualifying time frame (6 weeks).

B. Definition of Issues

1. Has the regular had sufficient time to be familiar with the route or T-6 string?
2. Are the route times (office and street) based on a week of count and inspection, with no substantial changes to the route or volumes? And is the same carrier who performed the last count and inspection still on the same assignment?
3. Is DUVRS (Delivery Unit Volume Recording System) the deciding factor as to the amount of work performed? (Has management based their actions on lineal volume or on actual piece count or End of Run Reports?)
4. Was the employee placed on notice that their normal or demonstrated performance was not acceptable? When and how?
5. Employee given training and time to improve. Were clear expectations, as to the level of improvement required, given to employee?
6. Has management objectively proven (burden of proof) that the employee has performed unsatisfactorily?
7. Were variable factors (weather, volume, vehicles, etc..) taken into consideration?
8. Has the grievant or union previously challenged the size of the assignment or portions of it?
9. Does the grievant's prior record demonstrate there has been a change?
10. Do other employees, by comparison, perform at an acceptable level on the same assignment?

C. Contractual/Handbook (other) Citations

1. National Agreement
   a. 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. 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.
   c. Article 15 Grievance and Arbitration Procedure section 2(b) "The supervisor shall have the authority to settle..."
   d. 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.

e. 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, believe**s** 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 transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated 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 transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.

f. Article 34 Work and/or Time Standards

1. The principle of a fair day's work for a fair day's pay is recognized by all parties to this Agreement.

2. The Employer agrees that any work measurement systems or time or

work standards shall be fair, reasonable and equitable. The Employer agrees that the Union concerned through qualified representatives will be kept informed during the making of time or work studies which are to be used as a basis for changing current or instituting new work measurement systems or work or time standards. The Employer agrees that the National President of the Union may designate a qualified representative who may enter postal installations for purposes of observing the making of time or work studies which are to be used as the basis for changing current or instituting new work measurement systems or work or time standards.

3. The Employer agrees that before changing any current or instituting any new work measurement systems or work or time standards, it will notify the Union concerned as far in advance as practicable. When the Employer determines the need to implement any new nationally developed and nationally applicable work or time standards, it will first conduct a test or tests of the standards in one or more installations. The Employer will notify the Union at least 15 days in advance of any such test.

g. Article 35- EAP if applicable
h. Article 41 Section 3
F. A newly appointed carrier or a carrier permanently assigned to a route with which the carrier is not familiar will be allowed a reasonable period to become familiar with the route and to become proficient.

G. The Employer will advise a carrier who has properly submitted a Carrier Auxiliary Control Form 3996 of the disposition of the request promptly after review of the circumstances at the time. Upon request, a duplicate copy of the completed Form 3996 and Form 1571, Report of Undelivered Mail, etc., will be provided the carrier.

I. Carriers shall not finger mail when driving, or when walking up or down steps or curbs, when crossing streets, or at any time it would create a safety hazard to the carriers or the public. Consistent with the efficiency of the operation, mail shall be placed in the delivery sequence in a bundle(s) during strapping out. The Employer shall not be required to conduct a special count or route inspection as a result of this Agreement.

M. The NALC will be informed concerning changes in existing regulations relating to the duties and functions of city letter carriers. Further, it is agreed that when changes of a substantive nature are made they will only be made in accordance with the contractual obligations already binding upon the parties under Article 34, "Work and/or Time Standards."

N. Letter Carriers may cross lawns while making deliveries if customers do not object and there are no particular hazards to the carrier.

S. City letter carrier mail counts and route inspections and adjustments shall be conducted in accordance with Methods Handbook M-39, Management of Delivery Services, as modified by the parties' Memorandum of Understanding dated July 21, 1981 and October 22, 1984 (incorporated into December 24, 1984 Award).

2. Handbooks and Manuals.
   a. ELM 661.21.3 Give a fair day's labor for a full day's pay; giving to the performance of duties earnest effort and best thought.
   b. ELM 661.3 Employees must avoid any action, whether or not specifically prohibited by this code, which might result in or create the appearance of:
   c. Impeding Postal Service efficiency or economy.
   d. ELM 666.2 USPS Standards of conduct.
   e. ELM 666.51 Employees will obey the instructions of their supervisors.
   f. M-41 112.1 Provide reliable and efficient service.
   g. M-41 112.21 Obey the instructions of your manager.
   h. M-41 112.24 Display a willing attitude and put forth a conscientious effort in developing skills to perform duties assigned.
   i. M-41 112.28 Do not loiter or stop to converse unnecessarily on your route.
   j. M-41 112.29 Return to the delivery unit immediately on completion of assigned street duties and promptly clock on.
   k. M-41 121.11 Route or case all classes of mail. The accurate and speedy routing of mail is one of the most important duties of a carrier; you must be proficient at this task.
   l. M-41 121.12 Time standards for carrier office work represent the minimum acceptable performance standards.
   m. M-41 122.11 Deliver mail along a prescribed route, on a regular schedule.
   n. M-41 123.2 Report to unit manager all unusual incidents of conditions relating to mail delivery.
   o. M-41 131.31 Do not deviate from your route for meals or other purposes unless authorized by your unit manager.
   p. M-41 131.35 Unless otherwise instructed by a unit manager, deliver all mail distributed to your route prior to the leaving time for that trip and complete delivery within scheduled time. It is your responsibility to inform management when this cannot be done.

q. M-41 131.41 It is your responsibility to verbally inform management when you are of the opinion that you will be unable to case all mail distributed to the route, perform other required duties, and leave on schedule or when you will be unable to complete delivery of all mail.
r. M-39 111.2(a.) Determine if carriers reporting, leaving, returning, and ending time is consistent with established schedules.
s. M-39 115. Discipline. (The provisions of section 115 spell out managements obligations in proposing discipline and should be thoroughly reviewed when any discipline is issued.)
t. M-39 122 Scheduling Carriers
u. M-39 122.3 Authorizing Overtime and Auxiliary Assistance. (A careful review of this section along with section 280 of the M-41 is advised if assistance was granted or requested.)
v. M-39 134 Street Management
w. M-39 134.2 Techniques
134.21 The manager must maintain an objective attitude in conducting street supervision and discharge this duty in an open and above board manner.

134.22 The manager is not to spy or use covert techniques. Any employee infractions are to be handled in accordance with the section in the current National Agreement that deal with these problems.
x. M-39 141.16 Minor Adjustments
y. M-39 242.12 Basic Standards
z. M-39 242.2 Analysis of Irregular Performance
aa. M-39 242.3 Evaluating the Route

242.321 Street Time: For evaluation and adjustment purposes, the base for determining the street time shall be either:

a. The average street time for the 7 weeks random time card analysis and the week following the week of count and inspection;
or
b. The average street time used during the week of count and inspection.

bb. M-39 270 Special Inspections

D. Arguments

In general, review NALC Defenses to Discipline, 1988 edition:

1. Technical Defenses

a. Technical Defenses Unrelated to the Merits of the Discipline (Note Here: The effect of Supreme Court - Cleveland Board of Education vs Loudermill 470 U.S. 532; on Mainstream Arbitral Opinion and on the

Steward's job when using Technical Defenses).

b. It is now prudent to develop arguments and evidence, from Step 1 of the grievance procedure on, not only that a procedural violation has occurred, but also that the procedural violation, in some substantial way, has prejudiced grievant's ability to defend himself/herself against charges, and has caused grievant to suffer punishment before having had a chance to fairly defend against charges.

    1. Discipline was not timely issued.
    2. Discipline was ordered by higher management, rather than by grievant's immediate supervisor.
    3. Management's grievance representative lacked authority to settle the grievance.
    4. Double jeopardy.
    5. Higher management failed to review and concur.
    6. Insufficient or defective charge.
    7. Management failed to render a proper grievance decision.
    8. Management failed to properly investigate before imposing discipline.
    9. Improper citation of "past elements."
    10. Management refused to disclose information to the Union (including claims that information was hidden).

c. Disputes whether grievant's conduct, if proven, would constitute a proper basis for the imposition of discipline:

d. Disputes about the correctness or completeness of the facts used to justify the discipline:
    1. Management failed to prove grievant acted as charged.
    2. Grievant may have acted as charged, but was provoked by another.

e. Allegations that, because of mitigating circumstances, the discipline imposed is too harsh, or no discipline at all is warranted:
    1. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").
    2. Grievant has a long prior service, good prior record, or both.
    3. Grievant's misconduct was not intentional.
    4. Grievant was emotionally impaired.
    5. Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).
    6. Grievant was disparately treated.
    7. Rule grievant broke was otherwise unenforced.
    8. Management failed to follow principles of progressive discipline.

2. **Management did not follow the procedure articulated by the consensus of arbitrators in proving unacceptable performance or expansion.**

C#05343 Snow 1985 Denied

Performance of other carriers on Route 21: . . .In other words, evidence submitted by the parties makes it reasonable to conclude that Route 21 clearly is capable of being carried within the time frame set by the route check of June 25-30, 1984.

Arbitral Guidelines in cases of inadequate performance: There are a number of straightforward steps to be followed in testing the propriety of a termination for inadequate performance. First, it is necessary to determine whether an employer's standards of job performance for the terminated employee have been reasonable and whether the standards were similar to those expected from other employees. The evidence set forth in this case clearly has established that the standards are reasonable, have been met by the grievant and other employees, and currently are being met by those who carry the route. Second, it is essential to establish that management clearly has informed an employee regarding the standards of job performance that attach to a particular job as well as that the employee's performance has failed to meet those standards.

A fourth criterion in testing the propriety of removing an employee for inadequate performance involves determining whether an employer gave the employee assistance in an effort to improve his or her job performance.

A fifth principle in testing the propriety of a removal action in such cases is to determine whether an employer clearly informed the employee of the consequences of failing to improve the individual's job performance. Sixth, after such notice, did the employer provide sufficient time for the employee to raise the individual's level of performance to an acceptable standard? . . .Finally, it is imperative for an employer to provide objective evidence that, during the time when the grievant's performance should have improved, the individual's level of productivity failed to reach an acceptable level.

It is important to stress, in this case, there has been no allegation that the grievant was unable to maintain reasonable production standards because of age or physical disability. Arbitrators have been disinclined to uphold the termination of employees for inadequate performance when such performance has been traced to reduced productivity due to increased age or physical disability. (See, for example, Hawaiian Telephone Company, 44 LA 218)

See also C#01011, C#05982, C#07603, C#10763, C#16742

3. **The expectations, either street or office were not set to the employee receiving the proposed discipline or attention.**

C#05952 Levak 1985 Sustained

. . .the starting point is National Agreement Article 34.A-C. The basic principle established by those provisions is that each employee is to be individually judged by the fair day's work that he accords the Service and that any work standards must be fair, reasonable and equitable. As noted in the Findings of Fact, it was stipulated by the parties that there are no specific street time standards. Accordingly, it is clear that street time standards must be established in accordance with M-39.

An overall reading of M-39, Chapter 2, leads the Arbitrator to the inescapable conclusion that route street standards can only be developed with reference to a specific individual carrier. That is, an evaluation must be based upon the performance of an individual carrier while giving a "fair day's work." That is, if a carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for the route must be adjusted and set according to this individual abilities.

The fact that a previous carrier on the route may have possessed greater ability to carry the route in a lesser amount of time, or the fact that the individual carrier himself, as a younger or lighter person, may have carried the route faster, is irrelevant. At any time that the six consecutive week period requirement of M-39 Section 271.G is met, a requested special route inspection must be conducted, and the route is subject to readjustment to meet the then-existing abilities of the individual carrier. It should be noted that the reference in Section 271.G to otherwise satisfactory work performance necessarily relates to "improper practices" as that term is used in M-39, Chapter 2, and not to comparisons between the carrier and other carriers or between the carrier and himself at an earlier stage in his life.

That in evaluating a route for the purpose of setting time schedules, only the time used by the carrier is considered, and not that of other carriers who occasionally carry the route.

C#07603 Levak 1987 Sustained

Basic principles applicable to an expansion of street time case. The Arbitrator hereby reaffirms the principles he first set forth in Case No. W4N-5B-D 3530, grievant C. Santos, on December 19, 1985, to wit: that under the National Agreement and the M-39, each Letter Carrier must be individually judged by the fair day's work that he accords the Service and that route street standards

are to be developed with reference to that specific carrier. That is, where a carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for his route must be adjusted and set according to his individual abilities.

M-00398
. . .this case clearly establishes that the grievant's route was evaluated on the basis of the performance of another employee who was carrying the route at the time. . .On the basis of the information presented, we concur that the grievant's route is not properly adjusted.

4. **The times the employee is judged against were not established in compliance with section 242.321 of the M-39, that is a six day count and inspection or the 1840B 8 week analysis.**

M-00829
The question raised in this grievance is whether management may discipline a letter carrier for expansion of street time and/or authorized overtime using data obtained by management during a one day inspection of the carrier's route.

In this instance, the parties agree that a one day count and inspection may not be used as the sole basis to establish a standard against which a carrier's performance may be measured for disciplinary purposes.

C#05952 Levak 1985 Sustained
As Walters conceded on cross-examination, M-39 Section 242.321 establishes only two methods of evaluating and adjusting street times. Neither of those was utilized in the case of the Grievant.

Also see C#01163

5. **Management is attempting to hold carrier accountable to a arbitrary standard or pace.**

M-00304
In keeping with the principle of a fair day's work for a fair day's pay, it is understood that there is no set pace at which a carrier must walk and no street standard for walking.

M-00360
In keeping with the principle of a fair day's work for a fair day's pay, it is understood that there is not set pace at which a carrier must walk and no street standard for walking.

M-00209
It is recognized that changes in work and time standards will be initiated only at the national level.

M-01233
Inasmuch as management asserts that the "Workload Assessment" process will not be used for purposes of discipline and route inspection, the parties agree the issue is moot.

6. **Management may not base discipline solely on Linear measurement of the mail.**

C#04547 LeWinter 1984 Sustained
It is quite clear that the parties dealings show an intent that DUVRS is to be eliminated as a consideration in the determination of discipline. Not only is the linear method of measurement of mail load imprecise in and of itself, but the DUVRS tapes does not take into consideration the mail in the grievant's case from the prior day casing nor does it show the type of quality of mail as to that which may require more handling than others.

M-00272
Reference volumes do not constitute the sole basis for determining a carrier's leaving time.

M-00364
The question in this grievance involves the methodology used in a local office to establish a route and/or unit reference volume under DUVRS.

The Delivery Unit Volume Recording System is a management tool to estimate each carrier's daily workload. DUVRS is not a precise measurement to determine whether standards are met. Accordingly, in city delivery units, daily volume estimation recorded in accordance with postal policy will not constitute the sole basis for disciplinary action for failure to meet minimum casing standards by an individual carrier.

M-00005
Data from the counts were not, nor will they be, used as a basis for disciplinary action.

M-00498
DUVRS evaluations should not be the basis for a discussion concerning the letter carrier's efficiency held pursuant to Article 16, Section 2., since the efficiency of a letter carrier can more appropriately be determined by a mail count pursuant to 141.2, M-39 Handbook.

7. **Management does not consider variables in delivering street portion.**

C#16742 Olson 1997 Sustained
There are so many variables that may effect performance that it is almost impossible to determine quantitatively how much delay, if any, is due to the Grievant. There is no dispute that the Grievant at the time the inspection was conducted was in his mid-50s and had a 30% service connected disability.

Furthermore, this Arbitrator notes that the parties on October 31, 1995, entered into an agreement after pre-arbitration discussions were held involving Case No. H1N-1N-D36894 and Case No. H1N-1Q-D34997, which in pertinent part established it was "understood that there is no set pace at which a carrier must walk and no street standard for walking."

By all means, this Arbitrator is of the opinion that rather than arbitrarily selecting a lower street time, the Employer should have authenticated an actual time savings by informing the Grievant of the observed alleged incorrect methods of delivery on the street, and provided appropriate instructions to correct the methods in question. Thereafter, the Employer could have reinspected to validate true savings, if any.

8. **The times or standards are not agreed to by the carrier or the union, and are being or have been challenged through the grievance procedure, therefor management is premature in taking action.**

C#03554 Dennis 1983 Sustained
The Postal Service appeared to be bent on reducing the street time on Route 9 below the six hours-one minutes level by whatever means it could.

The record reveals that despite the fact that a grievance had been filed alleging that improper procedures were followed in setting the street time for Route 9, the Postal Service continued to enforce the five hours and 38 minute time limit and disciplined the Grievant twice for not meeting the standard. The Service also indicated to the Grievant that if he failed to meet the standard, he might be terminated from his job. The zeal with which the Service pursued the Grievant is not reasonable.

It is patently unfair for an employee to be disciplined for not meeting a standard that is being challenged by a grievance. While the proper street time for Route 9 is not a subject of this arbitration, it is clear from the record that there is at least a reasonable chance that the proper procedures for establishing street time were not followed. Until the grievance contesting the establishment of the street time issue is settled, discipline should not be administered for not meeting the contested standard.

C#10763 Marx Jr 1991 Sustained
Because of earlier difficulties, the grievant had requested and received a Special Route Inspection. The Arbitrator does not conclude that the results of the inspection were fully accepted by the grievant and/or the Union. The Union pointed out, largely without contradiction, that the consultation following the inspection did not follow the prescribed procedure. There is ample reason to believe that a territorial change was offered by the Postal Service, apparently in recognition of the circumstances resulting from the inspection. For whatever reason, this offer or promise was withdrawn, and temporary help as needed or possibly as available was substituted.

9. **The service has not met their burden of proof in actually proving the grievant is actually guilty of wrongdoing.**

C#10763 Marx Jr 1991 Sustained
The Arbitrator finds that disciplinary action under Charge No. 1 is not for just cause. "Extension of street time" may be the result of some deliberate action by a letter carrier, such as extended break time or failure to work at a normal pace. There is no showing that this is the case here. The Postal Service rests its judgment on the fact that the street time exceeded the standard of 5.80 hours, without more. This, in turn, means that the street time was "extended" by the carrier only if it can be shown that the standard on which the letter carrier is measured has been properly formulated.

As a result, it is simply not proven that the extra time taken and/or required on the specified dates was in fact a "failure to properly perform . . .duties."

The Postal Service's responsibilities in such circumstances was fully reviewed in three awards by Arbitrator Bernard Cushman, cited by the Union. In Case No. RA-8147D-75 (Hamm, May 26, 1979), Arbitrator Cushman stated:

The efficiency of the Postal Service is, of course, a legitimate objective of the Postal Service. The Postal Service is not required to suffer incompetence on the part of the letter carriers. Nor is the Service required to permit "unsatisfactory effort." When, however, the Postal Service claims either

incompetence or unsatisfactory effort, it must prove those claims. Unsatisfactory effort means that the carrier did not try or did not try hard enough. For the reasons set for the above, such proof does not lie solely in a comparison of posted route times and the actual time used by a carrier. Nor does such proof lie in a comparison with other routes manned by other carriers. In such limited comparisons, without more, it may fairly be said that the thinkers don't count and the counters don't think. Mere statistics so limited are not meaningful. If the Postal Service wishes to show that he loiters or he does not seek to get receipts for certified mail or he spends one half hour playing ball with the children on his route and the like. Incompetence may be shown by continuing deliveries to the wrong addresses, by failures to deliver mail he has cased and has in his bag, by not receiving receipts for registered mail or in numerous other ways. If his route has had a six day evaluation while he worked the route, or course, that is one relevant consideration if his time seriously exceeds the posted time, if his volume and kinds of mail have in fact been counted by supervisors, if all the variables such as weather, traffic and the like are also objectively considered. If his work has been observed by supervisors and if all of these and other objective facts are proved to be incompatible with reasonable expectations in the light of the provisions of the applicable Handbooks and accepted practices, and in their totality may fairly be said to show lack of effort or where the facts so demonstrate, incompetence, then the carrier is clearly subject to discipline.

See also C#01011, C#01038, C#01163, C#03554, C#03616, C#05343, C#05952, C#07603, C#08091, C#10763, C#13521, C#15387, C#16742

10. **The charge cited in the discipline is vague and undefendable with no specific rule or provision violated.**

E. Documentation/Evidence

1. Previous six day count and inspection data utilized to adjust route to its current status.
   a. 1838Cs, 1838s, 1840 front and back, 1840B and time calculations used to establish representative times, 3999, 3999X, 3996s, 1571s, Examiners notes along with carrier comments.
   b. If the carriers route received a territorial adjustment you will need the same information as number A1 above except for the other routes which traded territory with the route in question.
   c. Maps of the carriers route.

2. Time card analysis, and other data showing size of route, both office portions and street portion.

a. Employee AP Analysis Reports for time frame in question..
b. Route AP Analysis reports for time frame in question.
c. Workhour Transfer Reports for time in question, along with 3996s, and 1813s or 3997s to insure accuracy.
d. Time card rings, EARs (Employee Activity Report) printout for the grievant and other comparison employees.
e. Vehicle time card, along with service appointments, and fueling dates.
f. Statements from other employees who carry the grievants assignment, stating the size of route and all possible variables they have encountered.
g. Statements from station clerks as to the type of mail and inaccuracy of linear volume.
h. In DPS stations the End of Run Report indicating DPS volume, also any Error Reports for returned DPS or misrouted DPS.

3. Documentation to demonstrate or explain as to why the route's time may have varied.
   a. AM and PM Volume Reports, 1571s, 3996s, 1813s, 3997s, electronic volume reporting (several different types depending on your location), FLASH reports, USPS volume announcements, grievant's own notes as to grievant's count of mail.
   b. Accountables for dates in question, and type along with number of parcels and address where delivered including possible customer statements. 3849s for these deliveries need to be requested.
   c. Weather factors, snow, heat, rain, etc., and evidence such as weather reports to establish the fact for a later date.
   d. Any incidents which would explain a significant variance, such as construction, trains, pickets, difficult deliveries.
   e. Grievant's health might not have been up to par, or grievant may be suffering from a protected disability. However, there must be some conclusive evidence.
   f. Comparison data to establish that others varied as well.

4. Statements from patrons as to Grievant's on route diligence and good work ethic who will testify if needed at arbitration.
5. Previous awards.
6. Inspector's Investigative Memorandum (IM) if the inspectors were involved.
7. Interview notes from management which might include patron interviews, and other employee interviews or statements.
8. Review of Grievants OPF and in station personal file. Any and all supervisor notes which relate to the Grievant.
9. A documented request for "Any and all information utilized to arrive at the decision to discipline the Grievant".

10. Copies of the EL-307 handbook, if relevant. The EL-307 is the "Guidelines on Reasonable Accommodation", a USPS handbook.
11. Statements and interviews from participating managers, along with the issuing manager's Request for Discipline.

F. Remedies

1. Rescind the discipline action purging the notice of discipline.
2. Make employee whole for all lost wages and benefits.
3. Reinstatement of the grievant.
4. Interest at the Federal judgement rate.
5. Cease and desist and correctly reestablish the proper times in accordance with the M-39 and M-41 as well as the applicable memoranda.

PERFORMANCE RELATED DISCIPLINE IN THE POST ENVIRONMENT

A. Case Elements

1. A Letter Carrier is accused/harassed of unacceptable work performance and the alleged evidence is POST (Projected Office Street Time) DUVRS (Delivery Unit Volume Recording System) or PCRS (Piece Count Recording System) data.
2. Letter carriers have their route adjusted or expectations (benchmark) set utilizing POST data.
3. Carriers are disciplined, issued LOWs, suspended or removed citing "unacceptable performance" or "expansion of street time or office time" or other similar charge, and Management attempts to use POST to validate the charges.

B. Definition of issues:

1. Managements actions, discipline or otherwise, are premised on the POST, DUVRS, PCRS, or similar programs.
2. Management's charges of wrong doing are based solely on **DATA** not on witnesses or other probative evidence, (such as pictures or postal inspector reports).
3. Management attempts to document time wasting practices or unacceptable conduct which inevitably will lead to a "unacceptable performance" type charge.
4. Accused carrier denies any wrong doing or fault **and** can explain away the accused performance issues and alleged inconsistencies.
5. The issues the carrier/union takes exception to are based on faulty computer based data **not** accepted as accurate by the union or carrier.
6. The carrier has been given prior instructions on expectations in regards to performance.

C. Contractual/Handbook (other) Citations

1. Article 3
   Article 5
   Article 8
   Article 19
   Article 30
   Article 41
2. National Labor Relations Act
3. Applicable Memoranda

4. M-39 Supervisors Handbook

Performance Related Discipline in the Post Environment

Section 115 (who, what, where, when. etc..)
Section 121 Office Routine
Section 125 Street Routine
Chapter 2 Mail Counts and Route Inspections
M-41 Carriers Handbook
Chapter 1 Carrier Duties
Chapter 2 Office Time
Chapter 3 On Route
Chapter 9 Mail Count and Route Inspection

5. J-CAM
6. Chapter 3 of the September, 1992 Memoranda

D. Arguments

C#06146 C#08612 1. Managements relied upon data is flawed. The POST programs and others that preceded it and others that will follow it have been plagued with errors (both human and computer). A recent comparison (October 1999) showed a vast contrast in the automated volume recording system and the actual manually counted mail during a six day count and inspection process.

C#04547 C#08461 C#07368 C#01456 C#08342 C#05343 C#05942 C#07603 2. Management bears the burden of proof and the alleged performance misconduct has not been proven. Suspicion is no substitute for proof.

C#03213 C#16742 C#03207 3. The measurement (benchmark) which management compares the accused to was arbitrarily set, or altered.

4. Technical glitches have skewed the data.

C#14535 5. Linear conversion is in error, including the conversion factor is wrong.

6. End Of Run (EOR) Report is not accurate.

7. Mail was missed and not counted, or mail was recorded more

then once.

8. Mail was credited to the wrong route.
9. DPS errors or mis-sequencing caused severe delays on the street or P.M. office times.
10. Returned DPS or regular mail was not accredited to the route.
11. Management has admitted or the Union can prove the computer generated piece counts and linear counts can be wrong.
12. Line items and street factors change on a daily basis.
13. Office and street assistance calculations are not accurate.

E. Documentation/Evidence

1. "Any and all" documentation management used to reach this conclusion.
2. The last route count and inspection results on the route and the regular accused. (1840s, 1840B, 1838s, 3999, 3999x, edit sheets)
3. POST and DOIS data for the time frames referred to in the notice. (Both for the establishment of a route factor and the days management is questioning). Conversion rates, Daily Projected Office and Street Time report, Daily Actual vs Projected report.
4. 1571s, 3996s, 1813, 3997, 3921, EOR reports, and DCD download reports (complete with edit trails if they exist).
5. Actual volume reports (prior P.M. and day in question), with parcels, accountables, SPRS, marriage mailers, full coverages, mark ups, etc...
6. Statements as to abnormal office or street factors on the days in question. (snow, construction, problem parking, accountables, dogs, etc..)
7. Route maps with delivery patterns and form 1564-A.
8. Statements from carriers and patrons as to the accused work practices.
9. Training records.
10. Computer files.
11. Vehicle time cards, and driver observation reports.
12. Management instruction PO-610-1998-3, management instructions for the Piece Count Recording System (PCRS).

F. Remedies

1. Cease and desist, comply with all manuals and CBA cites.
2. Purge and rescind discipline, make whole.
3. Possible Joint Statement ramifications.

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IN THE POST ENVIRONMENT

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   Article 5
   Article 8
   Article 19
   Article 30
   Article 34
   Article 41.3.F
   Article 41.3.G
   Article 41.3.I
   Article 41.3.S
2. National Labor Relations Act
3. Applicable Memoranda

4. M-39 Supervisors Handbook
   Section 115 (who, what, where, when. etc..)
   Section 121 Office Routine
   Section 125 Street Routine
   Chapter 2 Mail Counts and Route Inspections
   M-41 Carriers Handbook
   Chapter 1 Carrier Duties
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The POST programs and others that preceded it and others that will follow it have been plagued with errors (both human and computer). A recent comparison (October 1999) showed a vast contrast in the automated volume recording system and the actual manually counted mail during a six day count and inspection process.

The most recent comparable data demonstrated the following:

	MANUAL ROUTE COUNT		**POST DATA COUNT**	
	LETTERS	**FLATS**	**LETTERS**	**FLATS**
10-25-99	812 2081	535	1495	
10-26-99	595 1253	352	1610	
10-27-99	1880 1094	1496	1208	
10-28-99	1562 1716	1305	1668	
10-29-99	1180 2423	2017	2300	
10-30-99	739 1158	1847	1600	

7

	MANUAL PIECE COUNT	**POST DATA**	**VARIANCE**
10-25-99	2893	2030	70.1%
10-26-99	1848	1962	106.1%
10-27-99	2974	2704	90.9%
10-28-99	3278	2973	90.6%
10-29-99	3603	4317	119.8%
10-30-99	1897	1600	84.3%

In this actual comparison, according to managements own physical count of the mail during inspection week, the POST data was from 30% to light to 20% to heavy. According to the erroneous POST data management on Monday the 25th would **erroneously** tell the carrier they should leave the office 110 minuets before the **actual** (according to 18 and 8 and 70 pieces a minute for pull down) leaving time.

On Friday the 29th with management accrediting **too much mail** to the route they would inform the carrier their leaving time was 31 minutes **after** the actual leaving time.

This type of example has been repeated in every comparison test we have been able to authenticate. As one can see the old adage of "garbage in, garbage out" is totally applicable. This information, if needed, may be obtained by writing the National Business Agent's office.

Without an actual total piece count of the mail, arbitrators have been extremely reluctant to uphold discipline, and Arbitrator Irvin Sobel in ruling on a prior DUVRS case ruled:

C#06146 Sobel 1986 Sustained

"The Union cited another violation of the Agreement and the employer's own regulations when it argued that Manager Sykes in his imposition and subsequent use of DUVRS, not only failed to justify his four (4) foot of mail standard, but also applied it in a manner which controverted his own instructions, as well as the Agreement. The employer's own memo, sent to all the SC Managers/Postmasters and titled `Uses of Delivery Volume Recording System (DUVRS) states:

> 2. Volume recording information will <u>not</u> be used in lieu of a count of mail on a carrier's route for the purpose of determining the carrier's office time or if the carrier is meeting minimum casing standards, and will <u>not</u> be used as the basis for a corrective disciplinary action for the above-mentioned infraction.' (Page 3, Item #2, DUVRS Handout #1).
>
> This office is in receipt of complaints and grievances indicating that some managers are converting the daily linear measurements to pieces, and converting the resulting piece estimate to minutes. They are then using these time calculations to advise the carriers as to the quality of their performance, and to deny auxiliary assistance. In at least two instances, the complainants have produced charts prepared by management showing the rates to be used for converting linear measurements and piece counts to minutes, using a local conversion rate.
>
> These practices violate the original intent of this program. Please note from the above quotation that linear data is not to be used in any way to determine a carrier's office time, since a linear measurement is but an estimate. Any computation of office time pertaining to a carrier's performance must be based on an actual count of the mail.

The requirements for sustaining disciplinary action in the above cited circumstances under the Agreement M-39 and M-41, and the various Memoranda of Understanding are quite clear. The employer cannot use failure to case a given specified linear volume of mail as proof that minimum standards have not been met. It must make some physical count of the mail before it can argue that the individual concerned has not reached minimum casing standards (the eighteen by

eight minimum stated in the LMRA). Even if the physical count fails to conform to minimum standards, management must account for the failure either by proving misconduct, lack of effort, inattention to work, and/or failure to follow sound proscribed work practices, for which the grievant had been adequately instructed and trained.[1] In the instant grievance the linear estimate was apparently used as a basis for estimating what the grievant should have cased, and another even more inexact linear estimate, devoid of any semblance of even the slightest modicum of attempt at precise measurement, was used to establish the basis for the grievant's failure to perform satisfactorily.

Moreover, in basing discipline substantially upon an estimated linear standard and an even more questionable approximation of the amount of work performed, the employer did not conform to the Agreement, and related regulations, when it failed even to attempt to verify its estimates through direct measurement. In its failure to observe either misconduct, lack of effort and attention to duty, and/or improper work practices, to sustain its action, the employer failed to conform to the LRMA, the appropriate Postal Service Manuals, and its own memoranda of understanding with the Union."

While reference volume may aid a supervisor in calculating the gross work needs of the unit it adds little value to a Arbitrator.

C#08612 Williams 1989 Sustained

"Charge 2's essential thrust was, `[Y]our route, as determined by count and inspection showed a demonstrated ability, by you, to case and carry a reference volume of four (4) feet of mail in seven (7) hours. Since the route inspection you have consistently requested auxiliary assistance on your route when the record clearly shows, by your demonstrated ability, that you should case and deliver your route in eight (8) hours, or clearly need not the assistance you have requested. (The charged then goes on to list the feet of mail for the days listed above.)

Charge 3 alleged he had `consistently worked overtime without authorization when, based on your route evaluation and mail volume, auxiliary assistance and/or overtime was not needed...'

What is last said was limited to Charge 1 but it can also be applied to Charges 2 and 3 in the sense that much ado has been made about nothing,really. It is unnecessary to take a large amount of space to explain why this is said. It need

[1] This arbitrator in two recent cases of a similar nature, has sustained discipline for the same charges stated herein. In the first case the employer proved inattention, and frequent conversation with fellow employees during which the grievant repeatedly turned his back to his case. In the second, after a count of the mail cased in which the grievant fell short of the minimum, the employer's witness showed by specific examples that the grievant used a lot of wasted motion despite repeated instruction on the proper procedure.

only be said that the 2 charges are buttressed on Delivery Unit Volume Recording System (DUVRS) and that it is too well established to need serious or lengthy discussion that the parties have agreed that the use of the System for determining performance on which to base disciplinary action is not what they had in mind when the System was established. The Employer is to be charged with knowledge of that agreement eve if its supervisors were unaware of it. Accordingly Charges 2 and 3 should be, and the same hereby are, dismissed."

While the POST program counts mail by the piece off some of the automated equipment at the plant, the supervisor still must visually estimate the amount of linear mail that remains and then use a standard conversion rate (not accepted by the NALC) to convert the linear count to piece count. Managements instruction manual (Carrier Piece Count & POST) verifies this on pages 6 and 7 when it states:

> "Per these instructions, all cased letter and flat mail must be recorded separately and entered in linear measurement by rounding to the *nearest* quarter-foot increment. When identifying mail to be measured in DUC-supported units, it is critical to ensure any mail that was finalized on automated equipment not be measured and recorded. This mail should be tagged as `NLM' by the plant (try labels, placards, etc.) or by other means if further breakdown occurred locally to indicate no linear measurement was needed. Measuring this mail will cause `double counting' since this volume is electronically downloaded to the DUC."

2. Management bears the burden of proof and the alleged performance misconduct has not been proven. Suspicion is no substitute for proof.

The M-39 sets out the correct way to measure a carriers performance utilizing two methods, a one day special count per the M-39 Section 141.2 or a week of count and inspection as outlined in Chapter 2 of the M-39 and Chapter 9 of the M-41.

For years carriers and supervisors have gone round and round over how much time is required to perform the work on any given day. In the 1970s through the late 1990s managements internal measurement system was DUVRS (simple linear measurement). The NALC has national agreements with the service that discipline will not be issued solely on the grounds of DUVRS data.

M-00304
"There is no set pace at which a carrier must walk and no street standard for walking. See Also M-00305 and M-0036."

M-00379
"The union's request that the number of paces per minutes be used an as observation and not as a specific criterion or standard of performance by the

grievant is sustained."

M-00017
"When a regular special office count is conducted, it will be accomplished in accordance with the applicable provisions of Handbook M-39."

M-00385
"The proper stipulated manner for determining the efficiency of an employee and whether or not the employee is, in fact, meeting standards, is to conduct a one-day count as provided in Handbooks M-39 and M-41."

M-00111
"A one (1) day count of mail should be utilized for the purposes intended by the M-39 Handbook and local officials are to ensure that one (1) day counts are not used for the purpose of harassment."

M-00005
"Data from the (one day) counts were not, nor will they be, used as a basis for disciplinary action."

M-00829
"Under Article 16, no employee may be disciplined except for just cause. In this instance, the parties agree that a one day count and inspection may not be used as the sole basis to establish a standard against which a carrier's performance may be measured for disciplinary purposes."

M-01181
"When conducting a one-day mail count, the appropriate form to record the carrier's performance is on PS Form 1838-C. The PS Form 1838-C does not specifically measure the carrier's performance by pieces per minute."

M-00464
"Local management can properly request letter carrier employees to estimate their work load, to the best of their ability, when the employees request overtime or auxiliary assistance. The information obtained by the carrier's estimation is not intended to be used to discipline carriers or to set work standards."

M-00498
"DUVRS provide the supervisor with an estimate of a letter carrier's normal daily work-load and may be one of the factors considered by a supervisor when discussing a letter carrier's work performance. This does not mean that such a discussion will be of the type referred to in Article 16, Section 2, 1981 National Agreement. It can be merely a work-related exchange between the supervisor and the carrier with the DUVRS evaluation as a focus. DUVRS evaluations should not be the basis for a discussion concerning the letter

carrier's efficiency held pursuant to Article 16, Section 2., since the efficiency of a letter carrier can more appropriately be determined by a mail count pursuant to 141.2, M-39 Handbook."

M-00394
"Daily volume estimations recorded for individual routes in accordance with these procedures (linear measurement) will not constitute the basis for disciplinary action for failure to meet minimum casing standards."

M-00364
"The Delivery Unit Volume Recording System is a management tool to estimate each carrier's daily work-load. DUVRS is not a precise measurement to determine whether standards are met. Accordingly, in city delivery units, daily volume estimation recorded in accordance with postal policy will not constitute the sole basis for disciplinary action for failure to meet minimum casing standards by an individual carrier. See also M-00376 and M-00523."

M-00048
"It is the position of the Postal Service that DUVRS provides the supervisor with an estimate of a letter carrier's normal daily work-load and may be one of the factors considered by a supervisor when discussing a letter carrier's work performance."

C#04547
"It is quite clear that the parties dealings show an intent that DUVRS is to be eliminated as a consideration in the determination of discipline. Not only is the linear method of measurement of mail load imprecise in and of itself, but the DUVRS tape does not take into consideration the mail in the grievant's case from the prior day casing nor does it show the type or quality of mail as to that which may require more handling than others."

M-00813
"The National criteria for development of office time is explained in the M-39 Handbook and methods for recording volumes are contained in Management instructions. Daily volume estimations recorded for individual routes in accordance with appropriate provisions will not constitute the basis for disciplinary action."

M-01233
"Inasmuch as management asserts that the Workload Assessment process will not be used for purposes of discipline and route inspection, the parties agree the issue is moot."

M-01290
"There are currently various methods used to determine the appropriate reference volume, No specific methodology has been mandated. While not a precise measurement of the mail, the use of linear volume estimations is an

accepted management tool to assist in estimating a carrier's daily workload. In addition, it is further understood that the minimum casing standards currently remain at 18 letters per minute and 8 flats per minute."

M-00600
"Reference volume alone, without additional evidence to substantiate wrongful expansion of street time, cannot sustain a disciplinary action."

M-00394
"Daily volume estimations recorded for individual routes in accordance with these procedures (linear measurement) will not constitute the basis for disciplinary action for failure to meet minimum casing standards."
M-00269
"The Delivery Unit Volume Recording System is not the established criteria for the development of office time, as this development is governed by Methods Handbook, Series M-39. See also M-00579."

The carriers local struggles didn't end with these agreements (although they should have) and problems continued and some carriers were even disciplined and DUVRS data was introduced through the grievance procedure in an attempt to bolster the charges. Experienced NALC/USPS Arbitrators, after reviewing the cases ruled that mere accusations established off of linear measurements would not suffice.

C#08461 Collins 1988 Sustained
"There is no question that during the Special Mail Counts at issue the grievant failed by a very wide margin to meet the `18 and 8' casing standards. However, in a 1977 Step 4 grievance settlement in case NC-NAT-6811 then Postal Service Grievance Division Manger James G. Merrill and Union President J. Joseph Vacca agreed as follows:

> . . . Management may not charge or impose discipline upon a carrier merely for failing to meet the 18 and 8 casing standards. Any such charge is insufficient. Under the Memorandum of Understanding of September 3, 1976, the only proper charge for disciplining a carrier is `unsatisfactory effort.' Such a charge must be based on documented, unacceptable conduct which led to the carrier's failure to meet the 18 and 8 criteria. In such circumstances, management has the burden of proving that the carrier was making an `unsatisfactory effort' to establish just cause for any discipline imposed.

That settlement agreement is of course binding on this Arbitrator. Furthermore, the need for documented, unacceptable conduct is recognized in Part 242 332 of the M-39. The question then is whether there was `documented, unacceptable conduct which lead' to Radzivilla's failure repeatedly to meet the 18 and 8 standard.

> . . . Radzivilla's immediate supervisor and who conducted the Special Mail

Counts, testified essentially that the grievant was simply a slow worker, whose casing pace was no different during the Special Counts than at all other times. Manzoeillo thought that the grievant wasted steps and motions, but he gave no testimony that would indicate the grievant was malingering or in any other way abusing his responsibilities. The testimony of John T. Quinn, the Superintendent of Postal Operations at Ossining, was essentially to the same effect: the grievant was simply a slow worker who, despite repeated attempts at assistance by management, could not improve his efficiency. Qinnn did not believe Radzivilla's slowness was purposeful. The Arbitrator finds then that there is no `documented, unacceptable conduct which led' directly to the grievant's failure to meet the 18 and 8 standard. The Postal Service argues, though, that the grievant had a long history of inefficiency. The Arbitrator does not believe, however, that the grievant's past record can be used to provide the evidence of `documented, unacceptable conduct' required by the 1977 settlement agreement, and the M-39 Handbook."

C#7368 Nolan 1987 Sustained

"But is it at all reasonable to expect the deciding supervisor to be so unprejudiced as to be able to conduct a fair review of his or her own decision? That is asking too much of human nature. I therefore must hold that Postmaster Tolbert's wearing of his Step 2 representative's hat denied the Grievant his right to a fair hearing at that stage of the grievance process.

The burden of proof in disciplinary cases rests with management, however. The Union has no obligation to show that the Grievant was perfect; it need only demonstrate that management failed to prove that he was unsatisfactory. Since the sole documentary evidence of his performance is unreliable, it follows that the Postal Service has failed to meet its burden of proof.

3. Finally and perhaps most importantly, Postmaster Tolbert impermissibly based the suspension solely upon the Grievant's failure to meet numerical standards. This is but the latest skirmish in the long-running war over standards. No doubt it would be convenient for management to have a simple test to apply to employees suspected of loafing, and perhaps the 18 and 8 standard is a fair test. Whatever that standard's merits, the parties have agreed not to use it as the basis for discipline.

In 1975, in case NB-NAT-3233, national level arbitrator Sylvester Garrett ruled that, because management had unilaterally changed the meaning of the 18 and 8 standard by adjusting the size and configuration of carriers' cases, it could no longer use the standard for discipline. The parties implemented his award with a Step 4 settlement on July 11, 1977. That settlement prohibited discipline "merely for failing to meet" the 18 and 8 standard; instead, a supervisor had to charge an employee with `unsatisfactory effort' and to document that charge with specific incidents of unacceptable conduct. The Postal Service later embodied the same requirement in its Handbook M-39, Section 242.332. It is far too late now to ignore those agreements and rules, yet Postmaster Tolbert cited not a single specific flaw in the suspension letter

he sent the Grievant. If for no other reason, the discipline would have to be overturned because the Postmaster did not even comply with the Postal Service's own requirements for evaluating an employee's work."

C#1456 Dobranski 1980 Sustained

"To the extent that this charge was based on the Form 1838's and 1840 (Employer Exhibits 8a-f) for the days of the inspections other than the actual inspection day, I also find the charge to be without merit.

All these documents indicate is that the grievant failed to make standard for the days in question. However, mere failure to make standard is not sufficient for disciplinary action. To justify discipline, management must show unsatisfactory effort on the part of the grievant. Nothing on the forms exists from which such an effort can be inferred. There is nothing in the forms that justifies a conclusion that the failure to make standards was due to excessive talking, tapping letters or unfamiliarity with the case separation. Guell's presumption of such conduct and the resulting conclusion that this was due to unsatisfactory effort is thus based on conjecture and speculation."

C#08342 Ables 1988 Sustained

"The underlying dispute is the relation of workload to the amount of time to perform that work, in circumstances where the union emphasizes increased workload with no additional time and management emphasizes improved system, equipment and procedures by which work production can be increased without the need for additional time.

In deciding to discipline the grievant, the supervisor seems clearly to have had in mind the amount of mail the grievant should have handled during his regular shift. Twice in his letter of warning to the grievant, the supervisor referred to the volume of `reference' mail to be handled each day.[2]

Documents in evidence suggest most strongly that estimates of the volume of mail to be handled daily shall not be used as a basis for discipline.[3]"

In the mid 1970s the M-39 was modified in section 242.332 to read:

> "Management may not charge or impose discipline upon a carrier merely for failing to meet the 18 and 8 casing standards. Any such charge is insufficient. Under the Memorandum of Understanding of September 3, 1976, the only proper charge for disciplining a carrier is `unsatisfactory effort.'

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[2] For example, in the letter of warning dated February 2, 1988, the supervisor stated: `...he was not meeting his reference volume for the day.'

[3] In a related grievance concerning management posting the time it takes to sort mail on each carrier's case, the parties, at the national level, settled the grievance, including an understanding that: `Daily volume estimations recorded for individual routes in accordance with appropriate provisions will not constitute the basis for disciplinary action.' Joint letter, September 17, 1987.

The September 3, 1976 memorandum referenced in this settlement has been incorporated into the M-39 Handbook as Section 242.332. M-39 Section 242.332 states:
No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet standards.

Arbitrators Snow and Levak set the criteria in future performance related discipline in the 1980s with the following three landmark cases.

C#5343 Snow 1985 Denied

"C. The Grievant's Past Performance:
There was persuasive evidence that the grievant had performed adequately on the same route in the past. Mr. Foncannon, formerly postmaster at the LaMirada Facility, testified without rebuttal that he had examined forty days of time cards for the grievant's route covering a period from December, 1983 through February, 1984. From those forty days, Mr. Foncannon calculated an average street time for the grievant of five hours and thirty-one minutes.

Additionally, the grievant accumulated a street time that averaged six hours when the Union randomly selected weeks and averaged times in an effort to gain an estimate of the grievant's street time. The point is that the grievant herself has carried Route 21 in a time of six hours or less in the past and has done so on a regular basis. Such evidence established clearly that the grievant had the ability to perform the work as dictated by work performance standards for the route.

D. Performance of Other Carriers on Route 21:
Other carriers have met the performance standards for Route 21. ...In other words, evidence submitted by the parties makes it reasonable to conclude that Route 21 clearly is capable of being carried within the time frame set by the route check of June 25-30, 1984.

E. Arbitral Guidelines in Cases of Inadequate Performance:
There are a number of straight forward steps to be followed in testing the propriety of a termination for inadequate performance. First, it is necessary to determine whether an employer's standards of job performance for the terminated employee have been reasonable and whether the standards were similar to those expected from other employees. . . .Second, it is essential to establish that management clearly has informed an employee regarding the standards of job performance that attach to a particular job as well as that the employee's performance has failed to meet those standards.

A fourth criterion in testing the propriety of removing an employee for inadequate performance involves determining whether an employer gave the employee assistance in an effort to improve his or her job performance.

A fifth principle in testing the propriety of a removal action in such cases is to determine whether an employer clearly informed the employee of the consequences of failing to improve the individual's job performance. Sixth, after such notice, did the employer provide sufficient time for the employee to raise the individual's level of performance to an acceptable standard?

> ...Finally, it is imperative for an employer to provide objective evidence that, during the time when the grievant's performance should have improved, the individual's level of productivity failed to reach an acceptable level.
>
> ...It is important to stress, in this case, there has been no allegation that the grievant was unable to maintain reasonable production standards because of age or physical disability. Arbitrators have been disinclined to uphold the termination of employees for inadequate performance when such performance has been traced to reduced productivity due to increased age or physical disability. (See, for example, Hawaiian Telephone Company, 44 LA 218).

This is a case in which production standards have been clearly articulated by the employer, and circumstances surrounding the grievant's deficiency has not adequately explained her inability to maintain the standards set by management. ...It is a case in which the grievant's length of service and work record have received careful consideration. ...Finally, it is a case in which warnings and progressive discipline have been used by the employer prior to the discharge."

C#05952 Levak 1985 Sustained

"With regard to Charge #1, the starting point is National Agreement Article 34.A-C. The basic principle established by those provisions is that each employee is to be individually judged by the fair day's work that he accords the Service and that any work standards must be fair, reasonable and equitable. As noted in the Findings of Fact, it was stipulated by the parties that there are no specific street time standards. Accordingly, it is clear that street time standards must be established in accordance with M-39.

An overall reading of M-39, Chapter 2, leads the Arbitrator to the inescapable conclusion that route street standards can only be developed with reference to a specific individual carrier. That is, an evaluation must be based upon the performance of an individual carrier while giving a "fair day's work." That is, if a carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for the route must be adjusted and set according to his individual abilities.

The fact that a previous carrier on the route may have possessed greater ability to carry the route in a lesser amount of time, or the fact that the individual carrier himself, as a younger or lighter person, may have carried the route faster, is irrelevant.

That a Carrier must be judged upon his own personal abilities and work

performance has been established in numerous other Regular Regional arbitration cases. For example, see case (C#1035) #NC-S-16 271-D, Grievant Clarence E. Hamm, Arbitrator Bernard Cushman, May 28, 1979; (C#1011) NC-S-14 859-D, Grievant Jerry DiBello, Arbitrator Bernard Cushman, March 19, 1979; NC-S-16 327-D and (C#1038) NC-S-16 328-D, Grievant B.L. Wier, Arbitrator J. Fred Holly, April 10, 1979.

In the Hamm case (C#1035), arbitrator Cushman noted that the gravamen of the Service's case was that during the period in question, Hamm had used more street time to deliver his route than did other carriers who serviced his route when he was not on duty, and that on times when he was accompanied by management, he used a lesser amount of time. Cushman found that those facts were insufficient to establish that the Grievant's efforts to deliver the mail on his route were not diligent or conscientious as charged. Cushman noted that the Grievant had never been caught doing anything wrong on his route. He further held:

> That in evaluating a route for the purpose of setting time schedules, only the time used by the carrier is consider, and not that of other carriers who occasionally carry the route.

Cushman overturned the imposed discipline ruling, holding that it was improper for management o discipline a Carrier solely for the reason that the Carrier exceeded either the posted office time or the posted street time or both."

C#07603 Levak 1987 Sustained

"Basic principles applicable to an expansion of street time case. The Arbitrator hereby reaffirms the principles he first set forth in Case No. W4N-5B-D 3530, grievant C. Santos, on December 19, 1985, to wit: that under the National Agreement and the M-39, each Letter Carrier must be individually judged by the fair day's work that he accords the Service and that route street standards are to be developed with reference to that specific carrier. That is, where a carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for his route must be adjusted and set according to his individual abilities.

Arbitrator Snow noted that the Service had met all of the ordinary steps to be followed in testing the propriety of the termination for inadequate performance: standards were clearly established and were reasonable; management had informed the Carrier of those standards, had warned her and had given her another opportunity to meet the standards; the Carrier had received remedial training; the Carrier had been informed of the consequences of failing to improve; and, the Carrier was given sufficient opportunity to improve, and she failed to do so. Snow thereafter cited numerous common-law, non-Service arbitration decisions in support of those basic principles.

One other evidentiary matter should be covered. An analysis of all of the cases cited, and particularly that of Arbitrator Snow, has convinced the Arbitrator that where proper foundation is shown - e.g., evidence of a properly

established street time, evidence that there has been no substantial change of conditions on the route, evidence of volume on the specific days at issue, as well as the days the other Carriers carried the route, and evidence that a grievant has previously normally carried his route within properly established times - that the average performance of non-exceptional Carriers may be offered into evidence as a means of establishing that it is reasonable to conclude that the Grievant should be able to carry his route within the appropriate time frame. However, such evidence should not be received before a proper foundation is laid, since to do so could be highly prejudicial. Further, absent evidence of time-wasting practices, an intentional slowdown, or other improper practices, such evidence would have to be given very limited or no weight."

3. **The measurement (benchmark) which management compares the accused to was arbitrarily set, or altered.**

C#03213 Gamser 1973 Modified

"It must be observed that the nature of the work performed by the carrier involves so many variable which enter into the day-to-day performance of the job, it is impossible to measure with great accuracy a perfect 8-hour route."

C# 16742 Olson 1997 Sustained

"There are so many variables that may effect performance that it is almost impossible to determine quantitatively how much delay, if any, is due to the Grievant. There is no dispute that the Grievant at the time the inspection was conducted was in his mid-50s and had a 30% service connected disability.

Furthermore, this Arbitrator notes that the parties on October 31, 1995, entered into an agreement after pre-arbitration discussions were held involving Case No. H1N-1N-D36894 and Case No. H1N-1Q-D34997, which in pertinent part established it was "understood that there is no set pace at which a carrier must walk and no street standard for walking."

By all means, this Arbitrator is of the opinion that rather than arbitrarily selecting a lower street time, the Employer should have authenticated an actual time savings by informing the Grievant of the observed alleged incorrect methods of delivery on the street, and provided appropriate instructions to correct the methods in question. Thereafter, the Employer could have reinspected to validate true savings, if any."

C#03207 Aaron 1979 Sustained

"The issue in this national level case was whether management violated the National Agreement and applicable M-39 provisions when it reduced a carrier's office time to less than standard office time on the grounds that the carrier had been regulating his performance. In sustaining NALC's grievance arbitrator Aaron wrote as follows:

`Conclusions that an employee is regulating his performance are in their nature subjective; there are so many variables that may

affect performance that it is almost impossible to determine quantitatively how much delay, if any, is due to the deliberate attempt by a worker to slow down. The evidence adduced by the Postal Service to support its conclusion that [the carrier] was, in effect, soldiering on the job during the week of the special count and inspection, is insufficient to sustain its burden of proof.

> Even if it had sustained that burden, however, it seems clear that the only course available to it was to discuss the problem with [the carrier], as provided in section 242.211 of the M-39 Manual, and to reduce the allowable office time to the average standard allowable time, as provided in Section 242.213. What the Postal Service actually did was unilaterally to change a current work or time standard without advance notice to the Union, in violation of Article 34 of the National Agreement.'"

M-00792

"When a route requires permanent adjustment to place the route on as nearly an 8-hour basis as possible, permanent relief will be afforded. The amount of daily relief will be identified by management in advance and such relief will be permanent relief and documented on Forms 1840 or a minor adjustment work sheet for the assignments being adjusted.

The afforded permanent relief may be provided by reducing carrier office and/or street time using any of the methods provided for in part 243.21b of the M-39 Handbook, Transmittal Letter 11, November 15, 1985.

Permanent relief will not be provided by giving auxiliary assistance or by requiring the regular carrier to work overtime.

The parties acknowledge management's right to provide the cited relief in the most efficient and economical manner."

M-00398

"The information of record presented in this case clearly establishes that the grievant's route was evaluated on the basis of the performance of another employee who was carrying the route at the time. It is also evidenced that the employee on whom the evaluation was based was substantially younger than the grievant. Additionally, available information presented subsequent to our Step 4 meeting indicates that the grievant is using assistance both in the office and on the street, overtime, and curtailing mail on almost a daily basis. On the basis of the information presented, we concur that the grievant's route is not properly adjusted. To this extent, we find the grievance is sustained."

M-00571

"Any procedure which automatically establishes the lightest mail volume day (or any other specific day) as the basis for route adjustments is incorrect and

must be changed to conform with the provision of the M-39 Handbook."

M-00396
"On the basis of the amount of curtailed mail and the amount of assistance utilized on the grievant's route since the count and inspection, it is apparent that the route is overburdened as currently constituted."

Routes are supposed to be initially entered into the computer program utilizing the most recent route and inspection however the Instructors manual permits for the initial route profile to be established off of any arbitrary time. For example see the quote from the managerial Instructor's Manual.

Carrier Piece Count Process
In the POST training manual Enduser Text-Participants Guide (supervisor training manual) April 1999 supervisors are given the ability to alter the data daily.

"... during the most recent route inspection, (actual or adjusted and either the actual, from the PS Form 1840, or agreed upon street time for each route)."

The street time will be increased by one minute for every 100 residential possible deliveries. The street time will also be increased 1.5 minutes for every parcel over the base parcel post volume."

Carrier Piece Count Process
"Allows the user to view or change which carrier is assigned to which route in POST, what the Percent to Standard is and the ability to change it."

4. **Technical glitches have skewed the data.**
POST enduser training manual even admits (pages 55-80) that computer and technical problems will occur, so much so they have published a large "Trouble Shooters Guide" also.

Carrier Piece Count Process
"Investigating Problems
When then automatic file transmission process works as it should, it makes the management of the delivery unit easier. When it does not work as it should, we need to investigate the problem and find out what the cause, so it can be corrected. Otherwise, users will become frustrated with the process and simply find ways to work around the problem such as manually inputting the data.

A comprehensive Troubleshooting Manual has been provided to you for this purpose. Please refer to it any time problems occur in the process.

The Piece Count Coordinator must know what is going on and what problems

the sites are having. If communications break down, then a problem that could easily have been solved at the beginning may cause a more extensive problem.

Secondly, the sites are expected to monitor the downloads from the plant. The sites must ensure that they are receiving the automated mail volumes from the plant through DSIS.

And finally, the sites need to periodically verify the volume figures from the downloads against the actual mail. This spot check should be done occasionally as a quality check.

Erroneous Data
The final area to address in DSIS is erroneous data. Once reason for erroneous data can be found in processing. ...Copies of the EOR's should be compared to what was transmitted into DSIS, and any discrepancies should be corrected or explained. Also, any large discrepancies (5% or greater) should be investigated and rectified."

5. **Linear conversion is in error, including the conversion factor is wrong.**
Management themselves differ over how many pieces of mail are in a normal foot of mail.
Management Instruction PO-610-79-24 1979
A. "Recording Letter Volume
   1. Record volumes received that have differing conversion rates in separate columns. Letter mailings that would cause distortion of piece volumes and which have any of the following characteristics will be recorded separately and will be given a special conversion:
   a. A postcard mailing of at least three linear inches. (.25 foot)
   b. A thin letter mailing of at least six linear inches. (.50 foot)
   c. A thick letter mailing of at least six linear inches. (.50 foot)

All postcard mailings are converted at the rate of 100 pieces per linear inch. All letter mailings not considered unique are recorded in columns to be headed by the appropriate National Conversion rate. National Conversion rates are 225 pieces per foot for Third Class letters and 290 pieces per foot for mixed First Class letters."

Memorandum for District Managers in Western Area 2-7-1996
"On March 28, 1995, procedures were established for the recording of DUVRS volume within the Western Area. This instruction included a change in the recording of DPS volumes, from a linear measurement at the carrier case, to a calculated footage using piece counts from the "End of Run" (EOR) Reports, divided by 250 pcs/ft."

Of course management errors in counting, adding and then converting to piece count occur daily and management has been known to over count volume to drive budget or performance. Not accepting the proper amount to a particular

carrier also aids management in stating a carrier isn't working to fullest ability.

The history of errors or falsification is sure to continue and management seems to accept the possibilities in their own carrier piece count process when in their Enduser Guide to the new POST computer program they write:

"Linear Measurement - Presently there are 8,800 DUC sites in the Postal Service. Unfortunately, there have been many different methods of recording volume around the country. This allowed for many types of errors, just from the inconsistency of procedure. And, as pointed out by a recent Postal Inspection Service audit, this breeds poor quality of methods and inaccuracy. The latest Postal Inspection Service audits continue to show inflation of volume.

The Inspection Service has determined that after the information is collected, it isn't always used to make operational decision. This along with the various methods used to accrue the information makes this just extraneous information.

Given these situations, it definitely is time for a change.
Piece Count Recording System - Why change? Why do we need to change the way we count the mail? The last 3 Postal Inspection Service audits have identified high levels of inflation. It is not believed that any of the identified inflation is intentional, but reflects different operational procedures, in some instances the quality of the dispatches received from the processing facility and human error. The most accurate and reliable information is the piece count from our automated processing equipment. Ultimately, we want to increase the Accuracy and Reliability of the daily mail volume, establish consistency in the way the mail is counted across the country and provide accurate data to delivery management.

Full Coverage Mail - Cased - In the past we have always linearly counted full coverage mailings regardless of the size of the mail piece. This gave us extreme swings in mail volume, because of the thickness of different mail pieces. Full coverage mailings that require casing will no longer be linearly counted. This will give us an accurate piece count of these types of mailings."

C#14535 DiLauro 1995 Sustained
"The problem with this `evidence' is that it is based upon volume and/or the length of mail, as well as an assumption of performance standards. Delivery Analyst Andy Parker testified that the proper way to determine office efficiency is to count every piece of mail. He noted that DUVRS information and linear measurement could be used as a guide to determine efficiency but that the mix of mail can throw off volume and length estimates. Furthermore, the Postal Service stipulated the DUVRS information and/or linear measurements are not used by it for purposes of discipline. Consequently, the use of such information as the basis for discipline in these cases must be disregarded as evidence of poor work performance and failure to put for the a satisfactory

effort.

The Postal Service's case against the grievant was built on a foundation of assumptions, appearances and conclusions that the grievant's work performance was poor and that he failed to put forth a satisfactory effort. The route performance chart (PS-1) put together by Mr. Hudson is an example of attempting to prove a point by making all sorts of assumptions to each a conclusion that the grievant's performance was poor and unsatisfactory. As noted by Delivery Analyst Andy Parker, the best comparison to be made would be comparisons of past performance of the grievant, something which was not done in these cases."

In the perfect world, management's plan listed below just might work, but read on, management plans for problems and errors. (Chapter Two)

6. **End Of Run (EOR) Report is not accurate.**
Piece Count Recording System (PCRS), Management Instructions PO-610-1998-3
"The process begins when the Plant collects finalized mail counts from all the automated equipment processing letters and all the flat sorting equipment that sort to at least the carrier route level. If the mail is finalized, to at least this level, a piece count per route can be determine.

If remote-processing equipment such as CSBCS or DBCS equipment is used in the sortation of a unit's mail, totals from those pieces of equipment must also be sent to the plant. The piece counts from the remote sites are combined with the Plant totals by route to update the carrier piece counts.

At the Plant, the End of Run (EOR) computer server updates carrier piece count files every 15 minutes. These updates include all sources of information from both the Plant and Remote sites. No matter when the piece count information arrives at the local office, it is current and accurate. In other words, the local delivery unit receives the absolute latest information from all piece count sources.

The local delivery unit will receive all of the piece count information automatically according to locally pre-determined times. Ideally, all the information will be transmitted electronically to the delivery unit before supervisors or carriers arrive each day.

Some mail that is not DPS will still be included in the piece count totals. This mail, which still requires casing, will be discussed a little later. It will be identified by special markings."

Where else but the post office will you find a trouble shooters manual the same size as the installation guide?

Chapter Two - DSIS

Trouble Shooting DSIS
"The credibility of what we are doing depends on all of these being correct. Since this is our goal, the most logical begin point each day is verification of the volume in DSIS. There are three main things in DSIS that can create problems for us. The first is missing data. This seems to be the most common. Second, is partial data. Either all types of volume are not present, or some routes have missing volume. The third area is bad data. This can mean double data, or it could mean extra or short data.

Erroneous Data
The final area to address in DSIS is erroneous data. One reason for erroneous data can be found in processing. The way we process mail can have an effect on the EOR counts. Usually, extra data can be attributed to either a mapping problem in EOR, or multiple runs of the same volume. Copies of the EOR's should be compared to what was transmitted into DSIS, and any discrepancies should be corrected or explained. Also, any large discrepancies (5% or greater) should be investigated and rectified.

7. **Mail was missed and not counted, or mail was recorded more then once.**
   Management Instruction PO-610-1998-3
   Form 3921 - Per these instructions, all cased letter and flat mail must be recorded separately and entered in linear measurement by rounding to the nearest quarter-foot increment. When identifying mail to be measured in DUC-supported units, it is critical to ensure any mail that was finalized on automated equipment not be measured and recorded. This mail should be tagged as "NLM" by the plant (try labels, placards, etc.) or by other means if further breakdown occurred locally to indicate no linear measurement was needed. Measuring this mail will cause "double counting" since this volume is electronically downloaded to the DUC.

8. **Mail was credited to the wrong route.**

9. **DPS errors or mis-sequencing caused severe delays on the street or P.M. office times.**
   Quality Problems Cited in Automation - Operational Chief Officer Williams Henderson 8/11/97 ***Federal Times***
   "City letter carriers regularly complain about the quality of delivery point sequenced mail, and some of their criticism has been on target.

   In the beginning, the quality was a bit erratic. . .and I think the carriers are very conscientious about quality.

   So they're in essence out on the route making sure that it's sorted right. And then when they find it out of sequence, I think carriers on their own, in the interest of quality, would backtrack to delivery mail.

   A supervisor might not like that...but I tell you that's a devotion to quality that

you certainly want and admire in your employees."

M-01225
DPS Implementation: A Training Guide for Delivery Management in Part 4.6 contains specific information concerning what to do if quality deteriorates after attaining the quality threshold (follows).

4.6 What to Do if Quality Deteriorates After Attaining the Quality Threshold
Errors that occur in the DPS mail stream will probably be detected on the street. The intent is to ensure that DPS mail taken directly to the street without casing is properly prepared so that customers continue to receive the quality of service to which they are accustomed. While incidental decreases in the level of DPS quality cannot be traced easily or monitored daily, significant decreases are more easily identified. Further, some errors may be the result of a one-time occurrence, e.g., a sweeping error that causes mail to be out of sequence on one day. Nonetheless, when management determines through carrier input that correctable errors are present it is expected that the errors will be corrected as soon as possible. When significant consistent errors cannot be corrected the route(s) or portions of the route(s) that are experiencing the errors should be removed from the DPS sort plan until the problems are resolved.

If a carrier notified management that errors are consistent, uncorrectable and of such magnitude that they create service and overtime problems, then the delivery manager must review those errors.

If the carrier brings back from the street, the delivery manager must review those errors and determine the cause of them.

4.6.1 Multiple Mailpiece Errors
If an address range out of sequence or a multiple mailpieces for a single address problem exists, the above trouble shooting guide indicates that there is a loading, sweeping or sort plan problem.
If a loading or sweeping problem is diagnosed, contact the plant immediately. These problems are likely to be one time occurrences, but the plant still needs to know to make sure that corrective action is taken.

4.6.2 Single Piece Problems
There are many potential types of problems. It is unlikely that any one type of problem will generate enough errors to affect service. Once mail goes to the street, 98 percent is no longer the issue; service improvement is. Single piece errors problems are hard to diagnose. That is why if single piece errors are numerous, it is probably best to call in a quality improvement specialist to help identify and resolve them.

4.6.3 Other Things to Do
There are several other things delivery mangers can do to prevent errors from

creeping into the DPS process. Perhaps the most important is to keep the PS Form 1621 process up-to-date. (And of course, carriers know it's nearly impossible to get management to address errors)

10. **Returned DPS or regular mail was not accredited to the route. (1571?)**
Completing Form 1571's each day for returned mail and maintaining a copy is to the carriers advantage to guard against discipline.
Undelivered Mail
441 Processing Undelivery Mail
442 Completing Form 1571
441.1 After return from trip, obtain Form 1571, **Undelivered Mail Report** (see exhibit 442.1) from unit manager
442.2 Add any mail which was not delivered but was returned to the office
442.3 Sign the form and give it to a unit manager

The National Agreement provides:
41.3 G. The Employer will advise a carrier who has properly submitted a Carrier Auxiliary Control Form 3996 of the disposition of the request promptly after review of the circumstances at the time. Upon request, a duplicate copy of the completed Form 3996 and Form 1572, Report of Undelivered Mail, etc., will be provided the carrier.

11. **Management has admitted or the Union can prove the computer generated piece counts and linear counts can be wrong.**

12. **Line items and street factors change on a daily basis.**

13. **Office and street assistance calculations are not accurate.**

E. Documentation/Evidence

1. "Any and all" documentation management used to reach this conclusion.
2. The last route count and inspection results on the route and the regular accused. (1840s, 1840B, 1838s, 3999, 3999x, edit sheets)
3. POST and DOIS data for the time frames referred to in the notice. (Both for the establishment of a route factor and the days management is questioning). Conversion rates, Daily Projected Office and Street Time report, Daily Actual vs Projected report.
4. 1571s, 3996s, 1813, 3997, 3921, EOR reports, and DCD download reports (complete with edit trails if they exist).
5. Actual volume reports (prior P.M. and day in question), with parcels, accountables, SPRS, marriage mailers, full coverages, mark ups, etc...
6. Statements as to abnormal office or street factors on the days in question. (snow, construction, problem parking, accountables, dogs, etc..)
7. Route maps with delivery patterns and form 1564-A.
8. Statements from carriers and patrons as to the accused work practices.

9. Training records.
10. Computer files.
11. Vehicle time cards, and driver observation reports.
12. Management instruction PO-610-1998-3, management instructions for the Piece Count Recording System (PCRS).

F. Remedies

1. Cease and desist, comply with all manuals and CBA cites.
2. Purge and rescind discipline, make whole.
3. Possible Joint Statement ramifications.

FAILURE TO SCAN, OR FALSIFICATION OF SCANS OF, MANAGED SERVICE POINTS

A. Case Elements

1. Management claims grievant failed to scan one or more MSP, or;
2. Management claims grievant falsified scan of one or more MSP.
3. Management claims grievant was aware of rule to scan, or rule prohibiting falsification of scan.
4. Management issues discipline.

B. Definition of Issues

1. What evidence does management have that a scan was (or scans were) missed?
2. Does grievant dispute he/she missed the scan or scans?

C#21211 3. Is there evidence of history of scanner malfunctions?
C#22006

4. Is there evidence of history of scanner report errors?
5. Was the grievant properly trained on scanner/MSP requirements?
6. Does the discipline involve scan points before or after lunch?
7. What evidence does management have that a scan was (or scans were) falsified?

C#23710 8. Does grievant dispute he/she falsified scan?

C. Contract/Handbook Citations

1. Article 3
2. Article 5
3. Article 16
4. Article 19
   i. M-39 171.36
   ii. M-39 126.5
5. Article 41 (JCAM 41-49)
6. Step 4 Settlement M-1458
7. Managed Service Points Training Materials, October, 2000
8. Handheld Scanner Training User Guide 20 February 2001

D. Arguments

1. Technical defenses.
2. Management relied solely on the MSP data to issue discipline.
3. Management failed to prove charge, e.g., grievant did not fail to scan, rather scanner didn't work or Missed Scan Report was in error.
4. Grievant was not properly trained.

E. Documentation/Evidence

1. Missed Scan Report for Station for date of charged failure/falsification.
2. Supervisor's written report/explanation for all missed scans on above report.
3. Printout of Managed Service Points locations/scheduled times for route involved.
4. Printout of Managed Service Points actual times for date/route involved.
5. Printout of Managed Service Points actual times for date involved/other routes appearing on Missed Scan Report.
6. Statement of grievant.
7. Statements of other carriers regarding malfunctioning scanners, scanner report errors, disparate treatment, etc.
8. Statement (or steward's interview notes) of supervisor regarding malfunctioning scanners/scanner report errors, disparate treatment, etc.
9. Grievant's training records.

F. Remedies

1. Rescind the discipline and remove it and all records of it from all postal files.
2. Make the grievant whole.
3. Pay interest at Federal Judgment rate.

FAILURE TO SCAN, OR FALSIFICATION OF SCANS OF, MANAGED SERVICE POINTS

A. Case Elements

1. **Management claims grievant failed to scan one or more MSP.**
   Management generally has authority to determine the number and placement of scan points on a city carrier route and require carriers to scan them. However, Headquarters management has agreed in Step 4 M-1458 that MSP data may not constitute the sole basis for disciplinary action.

2. **Management claims grievant falsified scan of one or more MSP.**
   While the specific facts in any given case will vary, Arbitrators commonly consider falsification a serious infraction.

   C#23710 Suardi 2002 Denied
   In this case, the grievant had scanned an MSP around the assigned time, however, he did not deliver to the address at that point, but rather split the relay and delivered the address later. The Arbitrator wrote:

   "(F)alsification of a record or document is a serious offense, one which denies Management access to relevant information and places an errant employee's trustworthiness and reliability in serious doubt. So viewed, the Arbitrator agrees that the gravity of the current offense is more akin to the false express mail receipt than to a failure to follow instructions."

3. **Management claims grievant was aware of rule to scan, or rule prohibiting falsification of scan.**
   The Managed Service Points Training Materials, dated October, 2000, provides that carriers are trained through carrier handouts and Stand Up Talks.

4. **Management issues discipline.**

B. Definition of Issues

1. **What evidence does management have that a scan was (or scans were) missed?**
   If management relies solely on the Missed Scan Report as evidence to support the discipline, then the Union should argue that management has agreed in Step 4 M-1458, found at page 41-49 of the JCAM:

   "MSP data may not constitute the sole basis for disciplinary action. However, it may be used by the parties in conjunction with other records

to support or refute disciplinary action issued pursuant to Article 16 of the National Agreement."

If management holds an investigative interview and the grievant recalls that he/she did make the scan, and management simply relies on the Missed Scan Report, and has no other evidence, the discipline should fall.
If, on the other hand, the grievant acknowledges he/she missed the scan, then other factors in a just cause determination will control.

2. Does grievant dispute he/she missed the scan or scans?
If grievant directly disputes or acknowledges missing the scan, see above. In some cases, particularly if management questions the grievant a long period of time after the date of alleged failure, the grievant may not have a firm memory of making a specific scan point. Management may argue the lack of firm memory is corroborating evidence of the Missed Scan Report.

Branches should train their members to always scrupulously scan all points, so that they can answer questions about whether they made a scan in the affirmative.

3. Is there evidence of history of scanner malfunctions?
When there is a dispute about whether a grievant actually did fail to scan, Arbitrators may weigh evidence of prior scanner malfunctions in the grievant's favor.

C#21211 Bahakel 2000 Sustained
"The evidence showed that in the past there had been problems with the scanner not scanning or with it making the sound that it makes when properly scanned, but then not showing up as scanned when it was downloaded at the station…(T)he Union presented numerous statements from the carriers… and each of them stated that they had encountered numerous problems with the scanner not working properly. …(I)t is my determination that the Postal Service did not have just cause to issue the Grievant a Letter of Warning based on numerous and similar problems with the wands by several different carriers."

C#22006 Ridle 2001 Sustained
In this case, Management's witness testified that since the scanner worked on the other scan points (collection boxes in this case), there was no problem with the scanner at the missed point. However; "*Under cross-examination, Billeiter explained there had been problems with wands from time to time, but never with the particular one the grievant uses."* The Arbitrator sustained the grievance, finding that Management's actions *"were based on assumption and not fact.*"

4. Is there evidence of history of scanner report errors?

Scanner report errors could result from any point along the continuum – scan MSP, record data in scanner, maintain data in scanner until download, download, print.

5. **Was the grievant properly trained on scanner/MSP requirements?**
The Managed Service Points Training Materials, dated October, 2000, provides that carriers are trained through carrier handouts and Stand Up Talks. A copy of the handout and the Stand Up Talk is included at the end of the Training Materials.

Was the grievant present during the Stand Up talk, or did management otherwise provide the handout and Stand Up Talk to the grievant?

The Stand Up Talk included in the Training Materials notes:
"All letter carriers will receive a detailed listing of where the Service Point bar coded (sic) *have been placed, so that you know the specific address, as well as having the listing posted at the carrier case. Please share this information whenever you are provided street assistance so that the carrier providing the assistance can work towards delivering the 'piece' at/about the same time as the customer normally receives mail delivery.*

6. **Does the discipline involve scan points before or after lunch?**
The Postal Service has agreed in the JCAM at page 41-49, referencing M-1458:

> *When letter carriers leave their office and begin delivery before or after their normal leaving time, they may reach the point at which they are authorized to leave their route for lunch at other than the time they are authorized to leave based on the current Form 1564-A. The parties should continue to handle those situations as they have in the past. The settlement states that "City letter carriers will scan MSP scan points as they reach them during the course of their assigned duties." This means that the "lunch" scans are to be treated no differently than any other scans on a route. They should simply be scanned whenever the carrier reaches them.*

7. **What evidence does management have that a scan was (or scans were) falsified?**

8. **Does grievant dispute he/she falsified scan(s)?**
Arbitrators generally impose a three-part burden on Management to prevail in a charge of falsification.

C#10164 Gentile 1990 Denied
"As defined in a host of arbitral decisions which address the subject of "falsification," the pivotal elements which must be established and proved are found in this definition: an intent to deceive or misrepresent a fact or

event by knowingly and willfully making inaccurate or erroneous statements for some type of personal benefit or gain.

Thus, in a charge of falsification of scans, the Union should closely examine the facts to determine if these three elements are present: 1) the grievant did it, 2) the grievant intended to deceive or misrepresent the fact of the scan , and 3) grievant did it for some personal benefit. Absent all three elements, the charge of falsification should fail.

C. Contract/Handbook Citations

1. Article 3
2. Article 5
3. Article 16
4. Article 19
   - i. M-39 171.36
   - ii. M-39 126.5
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