UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HAYWARD FLEMING, Appellant, v. UNITED STATES POSTAL SERVICE Agency.	DOCKET NUMBER AT07528510197 DATE: February 28, 1986

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The Postal Service petitions for review of an initial decision which ordered cancellation of its removal action against appellant and substitution of a letter of reprimand.[1] For the reasons set forth in this opinion, the Postal Service's petition is GRANTED, under 5 U.S.C. § 7701(e)(1), and the initial decision is AFFIRMED in part and REVERSED in part. Appellant's removal is sustained.

Background

Appellant filed a timely appeal from his removal as Postal Service Clerk based on the charge of continued failure to be regular in attendance and absence without leave (AWOL).

1/ In its petition, the Postal Service requests an opportunity for oral argument. Because the issues have been thoroughly addressed and developed in the pleadings that request is DENIED.

In an initial decision issued February 27, 1985, a presiding official of the Board's Atlanta Regional Office found that part of the charges pertained to absences for which leave had been approved and, therefore, was not sustainable;[2/] and, that only one of the four remaining absences was proven to be AWOL. She further found that the Postal Service would not have removed appellant based on the single sustained charge of AWOL and determined that a letter of reprimand was the maximum reasonable penalty.[3/]

The Postal Service contends: 1) that, in the Postal Service, an adverse action may properly be based on use of approved leave pursuant to an arbitral interpretation of its collective bargaining agreement; 2) that the presiding official erred in refusing to sustain two of the charged AWOL incidents; and 3) that the presiding official improperly substituted her judgment for that of the Postal Service in assessing the appropriate penalty for the one sustained AWOL incident. Appellant opposed the Postal Service's petition.

ANALYSIS

Applicability of 5 U.S.C. Chapter 63 and 5 C.F.R. Part 630 to the United States Postal Service.

In Webb v. United States Postal Service, 9 MSPB 749 (1982), the Board held that an adverse action based on approved leave is ". . . precluded by the laws (5 U.S.C. Ch. 63) and regulations (5

2/ Of the thirty-nine absences cited in the Notice of Proposed Removal, leave had been approved for thirty-five. Tab 6; Initial Decision at 2.

3/ The presiding official further found that appellant's claims of handicap discrimination based on alcoholism and high blood pressure were without merit.

C.F.R. Part 630) that entitle an employee to use annual and sick leave within prescribed circumstances and limitations." Id. at 753. Further, the Board stated that to discipline an employee for use of approved leave is not for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a).

The Postal Service correctly asserts that 5 U.S.C. Chapter 63, and 5 C.F.R. Part 630, are inapplicable to the Postal Service.

The term "employee" is defined in 5 U.S.C. § 2105(e):

> Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title.

In addition, in enacting the Postal Reorganization Act of 1970, Pub. L. No. 91-375, Congress did not include 5 U.S.C. Chapter 63 among those laws specifically applicable to the Postal Service.4/ Since 5 U.S.C. Chapter 63 is not made applicable to the Postal Service by 39 U.S.C. § 410, and because 5 U.S.C. § 2105(e) specifically excludes Postal Service employees from Chapter 63, we conclude that Postal Service employees have neither a statutory nor regulatory entitlement to use of annual or sick leave under those provisions. Accordingly, Webb is

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4/ 39 U.S.C. § 410(a) provides:

> § 410. Application of other laws
>
> (a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of Title 5, shall apply to the exercise of the power of the Postal Service.

MODIFIED to reflect our conclusion that 5 U.S.C. Chapter 63 and 5 C.F.R. Part 630 are inapplicable to the Postal Service.

Applicability of the 1979 National Arbitration Award

The Postal Service claims that a "national level arbitration decision" dated November 19, 1979, "affirmed the Postal Service's right to discipline employees for excessive absenteeism and failure to maintain a regular schedule, even when absences are ones for which leave has been approved." Postal Service Petition for Review (PFR) at 11-12. The referenced 1979 arbitration decision stated the issue as:

> Whether, under the 1975 or 1978 National Agreements, USPS may properly impose discipline upon employees for 'excessive absenteeism' or 'failure to maintain a regular schedule' even though the absences upon which the charges are based, are absences where
> (1) the employee was granted approved sick leave;
> (2) the employee was on continuation of pay due to a traumatic on-the-job injury; or
> (3) the employee was on OWCP approved workmen's compensation.[5/]

In conjunction with this claim, the Postal Service alleges, without supporting evidence, that certain provisions of the 1981 National Agreement[6/]

> regarding leave, grievance-arbitration procedures, and discipline were extended

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5/ Decision of Sylvester Garrett, Arb., Case No. NC-NAT-16.285, Issued November 19, 1979 (Attachment 2 to PFR), at 1. We do not agree that the issue presented herein is the same as that addressed by Arbitrator Garrett. Appellant's absence due to his failure to obtain reliable transportation is certainly distinguishable from the types of absences addressed in the 1979 arbitration.

6/ Attachment 1 to PFR, Agreement between United States Postal Service and American Postal Worker's Union, AFL-CIO, National Association of Letter Carriers, AFL-CIO, effective July 21, 1981, through July 21, 1984.

> until the successor agreement went into effect on December 24, 1984. (In any event, those provisions remain unchanged in the successor agreement).7/

[Emphasis added]

For the purpose of determining what applicability the 1979 arbitral decision may have to the instant removal, the above assertion is unavailing. Any reliance on the 1979 arbitration interpreting the 1975/78 National Agreements would have to be based on similarities between the 1975/78 National Agreements and the 1981 National Agreement. The Postal Service makes no allegation to this effect, nor does the record afford a proper basis for drawing this conclusion.8/

Assuming, *arguendo*, that both the issue and contractual language addressed in the 1979 arbitration are the same as that here presented, the question yet remains whether the succeeding 1981 National Agreement, *considered and interpreted as a whole*,9/ had and maintained the interpretation urged by the Postal

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7/ PFR at 10, fn. 8.

8/ In American Postal Workers Union Columbus Area Local v. United States Postal Service, Case C-2-80-33 (S.D. Ohio, May 16, 1983), aff'd on other grounds, 736 F.2d 318 (6th Cir. 1984), Robert M. Duncan, J., in an unpublished memorandum and order (unnumbered attachment to PFR), noted at 3 that "the parties agreed in their 1981-84 National Agreeement to those precise provisions concerning 'approved sick leave' which had been contained in the 1978-81 National Agreement." This is insufficient to conclude that the referenced 1979 arbitral decision was operative at the time of appellant's removal under a successor agreement. See discussion, *infra*.

9/ Elkouri and Elkouri, How Arbitration Works, 352-353 (4th ed., 1985). "It is said that the 'primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties . . . ' Similarly, 'Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. * * * The meaning of each paragraph and sentence must be determined in relation to the contract as a whole.'"

Service. While the leave provisions considered by Arbitrator Garrett may have remained the same from one agreement to the next, the reasonable possibility exists that another provision may have been added, deleted, or modified during renegotiation to the effect that the interpretation or application permitted in 1979 was no longer operative in 1984. The record, however, does not contain the 1975/78 National Agreements interpreted in the 1979 arbitral decision and, therefore, we are unable to make this comparison.

Thus, the 1979 arbitral decision advanced by the Postal Service is not persuasive authority upon this record.

Unscheduled Absences as a Basis For Discipline

Assuming, *arguendo*, applicability of certain provisions of the 1981 National Agreement, we note that Article 16, "Discipline Procedure," provides, in part, that "[n]o employee may be disciplined or discharged except for just cause . . . ." Appellant was specifically notified in the proposal letter that the reasons for the removal included "unscheduled absences" in context with the charge of "continued failure to be regular in attendance and AWOL." Tab 6.

In addition to the foregoing contractual "just cause" standard, 5 U.S.C. § 7513(a) permits adverse action "only for

such cause as will promote the efficiency of the service."[10/] We find that both are met in this case.

We note particularly the Postal Service's consistent counseling of the employee regarding the gravity of his irregular attendance and the likelihood of discipline for continued infractions. Specifically, as early as 1976, appellant had been issued a letter of warning for unacceptable lateness. Tab 13-V. This was followed two months later, in January, 1977, by another letter of warning for AWOL, Tab 13-U, and a suspension later that month for unauthorized absence from his operation. Tab 13-S. In 1978, appellant received a letter of warning for unscheduled absences, Tab 13-G, and a suspension for being absent from his work assignment. Tab 13-P. In 1979, he was suspended again for AWOL. Tab 13-O. In 1980, he received a letter of warning for unscheduled absences, Tab 13-M, and a notice of proposed removal for absence from his work assignment; the Postal Service subsequently reduced the removal to a twenty-one day suspension. Tab 13-K. In January, 1982, the Postal Service again proposed to remove appellant for unscheduled absence and AWOL but reduced the

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10/ Fourteen years after passage of the Pendleton Act, which established a Civil Service Commission charged with promulgating Federal civil service rules and establishing competitive examinations, President McKinley ordered that "no removal shall be made from any position subject to comprehensive examination except for just cause and upon written charges." Exec. Order No. 101 (1897), reprinted in 18 U.S. Civil Service Commission Ann. Rep. 282 (1902). Subsequent orders defined "just causes" as those that would promote the "efficiency of the service," See, e.g., Exec. Order No. 173 (1902), reprinted in 19 U.S. Civil Service Commission Ann. Rep. 76 (1902) (defining "just cause" as "any cause, other than one merely political or religious, which will promote the efficiency of the service"). This standard was incorporated in the Lloyd La Follette Act of 1912. Act of Aug. 24, 1912, Ch. 389, § 6, 37 Stat. 539, 555 (codified as amended at 5 U.S.C. § 7513 (1982).

removal to a ten-day suspension. Tab 13-J. In August, 1982, appellant was again suspended for AWOL, Tab 13-I, and in December, 1982, another proposal to remove him for AWOL was reduced to a sixty-two day suspension. Tab 13-F. In 1983, appellant received two letters of warning for failing to report for scheduled overtime. Tab 13-G, 13-H.

Both the proposal and the decision to remove appellant emphasized the unscheduled nature of the numerous absences. Significantly, Postal Service Form 3971 (Request for, or notification of absence), Tab 13 D, E, requires the leave-approving official to indicate whether the approved absence is "scheduled" or "unscheduled." The employee is thus aware from the outset that unscheduled absences are considered different from scheduled absences. An employer faced with an unscheduled absence is doubly burdened; once for the loss of the employee's services and, again, for the loss of the opportunity to plan for the absence.

We therefore hold that while an employee may not be disciplined[11/] on the basis of approved leave, *per se*, it is yet permissible to predicate discipline on failure to follow leave-requesting procedures, provided the employee is clearly on notice of such requirements and of the likelihood of discipline for continued failure to comply. We emphasize the responsibility supervisors bear in this regard. The efficiency of the service

11/ We do not include in this concept those removal actions, non-disciplinary in nature in the sense they are neither punitive nor corrective, which stem from an employee's obvious physical or mental incapacity to perform. Reliance on approved leave in such actions is appropriate for the purpose of showing the employee's unavailability.

is not promoted when employees are led to believe, through leave approvals, that their attendance patterns are acceptable - only to discover later that the approved leave is used as a basis for subsequent discipline. Confronted with an unscheduled absence, a supervisor, concluding that discipline is appropriate, must mark the employee AWOL or, if leave is approved, must make clear to the employee that the failure to schedule the leave in advance is not being disregarded.12/

Here, the Postal Service properly removed appellant on the basis of the unscheduled nature of his thirty-five absences and the consequent deleterious effect on the efficiency of its operations in context with repeated and clear counseling regarding the probability of punishment for continued offenses.

AWOL Charges

The Postal Service also contended that even if appellant's removal could not be based on approved leave, the charges of AWOL were sufficient to warrant his removal, and that the presiding official erred in failing to sustain two of the three other AWOL charges. The Postal Service references Villela v. Department of the Air Force, 727 F.2d 1574 (Fed. Cir. 1983), which held an absence without leave of only four hours sufficient to justify a removal.

The two incidents of AWOL which the presiding official did not sustain, and which the Postal Service appealed, relate to appellant's tardiness due to automobile problems on December 21

12/ This can be be accomplished by annotating the leave request form to such effect or by adopting a form similar to Postal Service form 3971 (requiring checking of "scheduled" or "unscheduled" boxes).

and 30, 1983. She properly determined that the Postal Service was not required to excuse appellant's chronic personal transportation problems. However, since she found the Postal Service had inconsistently handled other similar incidents, the presiding official found that the Postal Service had failed to prove the propriety of denying appellant leave on the two occasions in question. We do not concur in this analysis regarding these latter two incidents. There was only one occasion, prior to the date of the first of these charges, when appellant's transportation-related tardiness had not resulted in AWOL. On that occasion, appellant had been required to document his absence to avoid AWOL. See Tab 13-D. Further, appellant was clearly on notice that the Postal Service considered his continued chronic tardiness due to automobile problems subject to discipline. See Tab 13-H.

The presiding official stated that the Postal Service had excused appellant's lateness due to automobile or taxi problems in January, May, and July, 1984, and concluded that this treatment was "inconsistent" with the prior charges of AWOL. However, Ms. Hall, the Leave Control Supervisor, testified that AWOL had been imposed on December 21 and 30, 1983, because she found appellant's explanations on those latter dates to be particularly inadequate. Ms. Hall testified that she had counseled appellant repeatedly regarding his attendance problems, and that her acceptance of some of his excuses had been an attempt to work with him towards rehabilitation. We find that appellant was properly charged with AWOL on those dates. The

Postal Service's attempt to rehabilitate appellant, by an exercise of leniency on occasion, should not result in a waiver of its right to discipline for conduct for which appellant had been previously disciplined and/or counseled. The charges of AWOL for December 21 and 30, 1983, are sustained.

PENALTY

The Board will review a penalty to determine whether it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable. Douglas v. Veterans Administration, 5 MSPB 313 (1981). In making such determination, the Board must give due weight to management's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness. Id. at 329. After noting that a penalty should be selected only after the relevant factors have been weighed, the Board held that the purpose of its review is to assure that management conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. Id. at 332, 333.

The most relevant factors in the instant case are the nature and seriousness of the offenses, the employee's past disciplinary record, the clarity with which appellant had been warned about the conduct in question, and mitigating circumstances surrounding the offenses.

The presiding official found that the Postal Service properly relied on appellant's past disciplinary record in deciding upon removal, but held that the removal could not be sustained because it was based on approved leave rather than AWOL. She noted that the Postal Service took no action at the times the AWOL occurred, and concluded that, had the subsequentl approved absences not occurred, appellant would not have been disciplined for the AWOL of December 21 and 30, 1983.

We find that, under the circumstances of this case, the Postal Service's delay in taking the removal action against appellant does not affect the reasonableness of its choice of penalty. Further, removal is within the limits of reasonableness, in view of the three sustained charges of AWOL and the unscheduled nature of the thirty-five charged absences.

CONCLUSION

Accordingly, the initial decision is AFFIRMED with respect to the one sustained incident of AWOL, and REVERSED with respect to the remaining two charges of AWOL, which are SUSTAINED; and appellant's removal is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a

petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER was sent by certified mail this date to:

Joseph L. De Shields, Jr.
U.S. EEOC
P.O. Box 56342
Atlanta, Georgia 30343-0342

Hayward Fleming
4403 Pleasant Point Drive
Decatur, Georgia 30032

by regular mail service to:

Jimmy L. Fleming
U.S. Postal Service
Main Post Office
3900 Crown Road
Atlanta, Georgia 30304-9402

Merit Systems Protection Board
Atlanta Regional Office

Office of Personnel Management
Appellate Policies Branch
1900 E Street, N.W.
Room 7459
Washington, D.C. 20415

by hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

3/6/86
(Date)

Dick Chung for
Robert E. Taylor
Clerk of the Board

Washington, D.C.

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Washington, D.C. 20210

JUL 14 1999

File Number:

Mr. Sidney L. Brooks
American Postal Workers Union, AFL-CIO
1300 L Street, N. W.
Washington, D. C. 20005

Dear Mr. Brooks:

I am writing in reply to your letter of June 30, 1999, regarding the interpretation of 20 C.F.R. 10.506 by the Postal Service. I had also received a letter dated June 23, 1999 from Lu-Ann Glaser on this same subject. A memorandum of January 21, 1999, from Larry Anderson of the Postal Service to his staff, was attached to Ms. Glaser's letter. I am enclosing a copy of Ms. Glaser's letter, with the attachment, to this letter for your reference.

By letter of this date, I have advised Mr. Anderson of the Postal Service that all telephone, personal, and written communication, regardless of how it is transmitted, including FAX, email, or any other form of transmitting a request, between agency personnel and a physician or members of his or her staff, is covered by 20 C.F.R. 10.506. I have asked Mr. Anderson to instruct his staff accordingly.

A copy of my letter to Mr. Anderson is enclosed for your reference. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

Sheila M. Williams

SHEILA M. WILLIAMS
Acting Director for
Federal Employees' Compensation

Enclosures

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Washington, D.C. 20210

JUL 14 1999

File Number:

Mr. Larry B. Anderson, Manager
Safety and Risk Management
U.S. Postal Service
475 L'Enfant Plaza
Washington, D. C. 20260-4232

Dear Mr. Anderson:

A copy of your January 21, 1999 memorandum, regarding the new FECA Regulations, addressed to all Human Resource Managers and all Injury Compensation Area Analysts, was provided to me by the American Postal Workers Union. Your memorandum addresses the provisions of 20 C.F.R. 10.506, which prohibits telephone or personal contact with an employee's attending physician by the employer, and limits written communication from agency personnel to a physician to the subject of work limitations.

Your memorandum states that this FECA Regulation neither limits communication by FAX or email nor prevents a physician from initiating telephone or personal contact with the Postal Service. You also state that you can contact a physician by telephone to see if a FAX has been received or to ascertain the status of a request for information.

This is to advise you that communications by FAX or email most certainly are written communications and are subject to the limitations outlined in 20 C.F.R. 10.506. The Regulations do not distinguish between various methods of transmitting a request. The obvious intent is to limit the communication between agency personnel and physicians to written requests for information necessary for an agency to assess an employee's ability to perform full or light duties. Written communication, regardless of how it is transmitted to the physician, is limited to information regarding fitness for duty.

In addition, a copy of all written communications to and from a physician must be provided to OWCP and the employee. If a communication is sent by FAX or email, and the employee is not able to receive their copy by the method through which the original is transmitted, they should be provided with a copy through the U.S. Mail.

Any and all telephone contact initiated by the agency, regardless of the subject, is entirely prohibited. There is no exception made for follow up requests. Telephone or personal contact with members of a physician's staff is considered contact with the physician, and is also prohibited.

Please instruct your staff to cease all telephone communication with employee's physicians; to limit all written communications, whether transmitted by FAX, email, U.S. Mail, or any other means, to information regarding fitness for duty; and to provide a copy of all written communication to and from an employee's physician to OWCP and the employee. Your prompt documentation that this correction has been made would be appreciated.

Sincerely,

SHEILA M. WILLIAMS
Acting Director for
Federal Employees' Compensation

SAFETY AND RISK MANAGEMENT

UNITED STATES
POSTAL SERVICE

January 21, 1999

MANAGER, HUMAN RESOURCES (ALL AREAS)
AREA ANALYSTS (INJURY COMPENSATION)

SUBJECT: New Regulations Governing the Administration of the Federal Employees' Compensation Act

The Office of Workers' Compensation Programs (OWCP), U. S. Department of Labor issued new regulations governing the administration of the Federal Employees' Compensation Act (FECA) effective January 4, 1999. The Postal Service is in the process of revising its manuals and handbooks to comply with the new regulations. However, there is one specific change to the regulations that has an immediate impact on our administration of the program for which we find it necessary to issue interim compliance guidance.

The specific regulation is 20 CFR 10.506, which limits contact with the injured employee's physician to written communications concerning work limitations. The new rule specifically prohibits phone or personal contact initiated by the employer with the physician. Therefore, effective immediately, the Postal Service will cease initiating direct telephone contact or personal contact with the employee's treating physician when information is needed concerning the employee's duty status. This change does not limit communications by FAX or email, nor does it prevent the physician from initiating telephone or personal contact with the Postal Service. All requests for information should be sent via FAX or email to the physician's office.

Further, telephone contact with the physician's staff to determine if a FAX has been received or to ascertain the status of a request for information do not appear to be prohibited. Copies of FAX and email messages must be maintained in the claim file and provided to OWCP in the same manner as other pertinent information. Finally, any telephone or personal contact initiated by the employee's physician should be documented in writing and provided to OWCP.

If you have any questions concerning this instruction, please contact Richard Bauer at extension 3678.

Larry B. Anderson
Manager
Safety and Risk Management

cc: Yvonne D. Maguire
George Butler
Neva Watson
Richard Murmer

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4232
202 268-3675
FAX: 202 268-2206

LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

March 1, 1995

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

This letter is in regard to your correspondence of February 2 regarding the removal of employees who submitted Forms CA-2 that were subsequently denied by the Office of Workers' Compensation (OWCP).

It is not the Postal Service's position to discharge an employee for reporting an on-the-job injury or for the filing of an OWCP claim. However, employees may be discharged for reasons such as excessive attendance problems, working excessively in an unsafe manner, absent without leave, or the filing of false information concerning an employee's physical condition for the purpose of obtaining or continuing OWCP benefits. Case Number H9C-IC-D 93031615 dealt with the attendance deficiencies of an employee, therefore, distribution of this decision should not be construed by the field as supporting the removal of employees for submitting Forms CA-2.

If there are any questions regarding the foregoing, please contact Thomas J. Valenti of my staff at (202) 268-3831.

Sincerely,

Frank X. Jacquette III
Acting Manager
Contract Administration (APWU/NPMHU)
Labor Relations

cc: Managers, Human Resources (All Areas)

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

February 23, 1995

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

This letter is in response to your correspondence of February 2 regarding the removal of employees who submitted Form CA-2 that were subsequently denied by the Office of Workers' Compensation.

Your inquiry is being investigated. Upon completion, you will be apprised of the results.

In the interim, if there are any questions regarding the foregoing, please contact Thomas J. Valenti of my staff at (202) 268-3831.

Sincerely,

Frank X. Jacquette III
Acting Manager
Contract Administration (APWU/NPMHU)
Labor Relations

FEB 1995

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

American Postal Workers Union, AFL-CIO
1300 L Street, NW, Washington, DC 20005

February 2, 1995

Dear Tony:

Information recently received reveals that postal officials are initiating disciplinary action, including removal, against postal employees who file claims for on-the-job injuries. In Atlanta, Georgia employees have been issued removals for submitting Form CA-2 that were subsequently denied by OWCP. Based upon the OWCP denials, management assumed that the claims were fraudulent and issued a removal based in part on the submission for Compensation.

Recent discussions with union officials at the Remote Encoding Centers reveal that Transitional employees are routinely being removed from employment for reporting injuries.

In support of this activity, the Postal Service has responded in case #H9C-1C-D 93031615 that the filing of OWCP claims is not "protected activity". The distribution of this decision will further support the practice of taking disciplinary action in retaliation for the filing of OWCP claims.

I understand the law prohibit taking of disciplinary action against an employee for the filing of a OWCP claim, including the imposition of a $500 fine or one year in prison for an official who participates in such activity.

I would hope that we can resolve this matter and issue appropriate instructions to apply the OWCP regulations as intended.

Thank you for your attention to this matter.

Sincerely,

William Burrus
Executive Vice President

Anthony Vegliante, Manager
Grievance and Arbitration Division
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260

WB:rb

William Burrus
Executive Vice President
(202) 842-4246

UNITED STATES
POSTAL SERVICE

Mr. James McCarthy
Assistant Director
Clerk Craft Division
1300 L Street N.W.
Washington DC 20005-4128

Re: H90C-1C-D 93031615
N. CARTER
WILMINGTON, DE 19850-9993

Dear Mr. McCarthy:

On April 8, 1994, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The union contends that the grievant was issued a notice of removal as reprisal for filing a claim of on the job injury (CA-1), and that such filing constitutes "protected activity" as described in Section 10. d. of the Memorandum of Understanding between the USPS and the APWU, re: Transitional Employees.

It is our position that no national interpretive issue involving the terms and conditions of the National Agreement is fairly presented in this case. However, inasmuch as the union did not agree, the following represents the decision of the Postal Service on the particular fact circumstances involved.

The grievant received a notice of removal for her attendance deficiencies. The Memorandum of Understanding between the USPS and the APWU, re: Transitional Employees states in Section 10:

a. The parties recognize that transitional employees will have access to the grievance procedure for those provisions which the parties have agreed apply to transitional employees.

b. Nothing herein will be construed as a waiver of the employer's obligation under the National Labor Relations Act. Transitional employees will not be discharged for exercising their rights under the grievance-arbitration procedure.

c. Such employees will not be protected by the "just cause" provision of Article 16. However, the employer cannot retaliate against transitional employees for filing grievances or invoking applicable contractual rights.

475 L'Enfant Plaza SW
Washington DC 20260

d. In any arbitration case concerning a discharge of a transitional employee, the union will bear the burden of proof in establishing that the employer's chief motivation for such discharge was for retaliation for protected activity.

The "protected activity" referenced in "d" above, is that defined in "b... Transitional employees will not be discharged for exercising their rights under the grievance-arbitration procedure." As such, the filing of a CA-1 does not constitute "protected activity" as intended by the parties in the MOU.

In view of the foregoing, this grievance is denied.

Time limits were extended by mutual consent.

Donna M. Gill
Grievance and Arbitration
Labor Relations

1/31/95

SENIOR ASSISTANT POSTMASTER GENERAL
EMPLOYEE AND LABOR RELATIONS GROUP
Washington, DC 20260

February 15, 1974

MEMORANDUM FOR: Assistant Regional Postmasters General
Employee and Labor Relations

SUBJECT: Letters of Warning

By memorandum dated November 13, 1973, there was established as USPS policy the utilization of letters of warning in lieu of suspensions of less than five (5) days. This same policy is effective throughout the grievance process where consideration is being given to a reduction in discipline imposed. If a suspension of five (5) days or more is reduced administratively, the reduction should be to a letter of warning rather than a suspension of four (4) days or less, unless such short suspension constitutes an agreed upon settlement of the grievance.

Please review your existing discipline cases to insure that this policy is operative and take the necessary corrective action where necessary to insure compliance.

Sincerely,

Darrell F. Brown

SETTLEMENT AGREEMENT

The American Postal Workers Union and the Postal Service agree to settle Grievance A8-W-0052 on the following basis:

1. The Postal Service acknowledges that "discussions" referred to in the second unnumbered paragraph at the beginning of Article XVI are not disciplinary in nature and should not be referenced in letters of warning. Should a letter of warning contain a reference to a discussion, the employee or the Union may object to the reference, and the Postal Service will reissue the letter after removing the reference.

2. The Union withdraws its request for arbitration in Case No. A8-W-0052.

KENNETH D. WILSON
Administrative Aide
Clerk Craft
American Postal Workers Union,
AFL-CIO

MASON D. HARRELL, JR.
Attorney
Office of Labor Law
United States Postal Service

February 27, 1980

UNITED STATES POSTAL SERVICE

Washington, DC 20260

DA: November 17, 1982

REF: LR300:WEHenry:ltd:4130

JECT: Letters of Information/Letters of Concern

Regional General Managers
Labor Relations Division

Directors and General Managers
Labor Relations Department

It has come to our attention through grievances appealed to step 4 that local managers in some areas are issuing "Letters of Information" or "Letters of Instruction" to employees, bringing to their attention matters of concern to local management about possible improprieties on the part of the employees. Such a procedure is highly suspect and is an attempt to avoid the discussion process provided in Article 16 of the National Agreements.

The use of such letters serves no useful purpose as an element for consideration in future actions against an employee, particularly when Article 16, Section 2, places the responsibility on management to discuss minor offenses with the employee.

Letters of Instruction and Letters of Information or similar type missives are not appropriate and will be discontinued immediately.

James C. Gildea
Assistant Postmaster General
Labor Relations Department

August 17, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Dear Mr. Burrus:

This is in response to the issues you raised in your letter of December 18, 1987, and Step 4 grievance (H7C-NA-C 21, dated June 29, 1988) concerning the maintenance of employee disciplinary records, as well as the Step 4 grievance (H4C-5R-C 43882) challenging the management practice of including in past element listings of disciplinary actions the original action issued and the final action resulting from modification of the original action.

In full and final settlement of all disputes on these issues it is agreed that:

1. All records of totally overturned disciplinary actions will be removed from the supervisor's personnel records as well as from the employee's Official Personnel Folder.

2. If a disciplinary action has been modified, the original action may be modified by pen and ink changes so as to obscure the original disciplinary action in the employee's Official Personnel Folder and supervisor's personnel records, or the original action may be deleted from the records and the discipline record reissued as modified.

3. In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modification is the result of a "last chance" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met.

Please indicate your agreement by signing and returning a copy of this letter.

Sincerely,

Stephen W. Furgeson
General Manager
Grievance and Arbitration Division

DATE 8/17/88

William Burrus
Executive Vice President
American Postal Workers Union, AFL-CIO

DATE 8/17/88

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

April 29, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers Union,
AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Dear Mr. Burrus:

This is in further response to your March 18 letter regarding the applicability of certain memoranda which had appeared in prior USPS-APWU/NALC National Agreements.

We concur that the two memoranda you specifically identify, i.e., the Memorandum of Understanding regarding the Discipline Tracking System and the Letter of Intent relating to Maximization are still in effect. As Bruce Evans discussed with you, such concurrence concerning these two memoranda would not address either parties' position as to application or interpretation.

As an aside, the Letter of Intent you have referenced was not printed in the USPS version of the 1984 Agreement.

Sincerely,

Joseph J. Mahon, Jr.
Assistant Postmaster General

American Postal Workers Union, AFL-CIO
1300 L Street, NW, Washington, DC 20005

December 18, 1987

Douglas C. Holbrook
Secretary-Treasurer
(202) 842-4215

Dear Mr. Downes:

Pursuant to our discussion at the Task Force meeting of December 16, 1987, this is intended to set forth the issue that appears to be in dispute within the regions throughout the country. Regional and local Human Resource managers have taken a contrary position than that intended by the parties in agreeing to resolution of the issues raised in my correspondence of June 8, 1982, responded to in Jim Gildea's letter of November 26, 1982 and incorporated into the 1984 National Agreement through the Memorandum on the Discipline Tracking System.

Management has taken the position that these agreements refer only to the official Form 50 and does not apply to separate disciplinary records kept by supervisors. This is not consistent with the Union's intent in agreeing to resolution of the initial dispute and subsequent negotiations of the Discipline Tracking System.

It has been the Union's intent and interpretation that the only record of disciplinary action that will be maintained in the official OPF and other records maintained for other than statistical purposes will be the final disciplinary action imposed on an employee.

Please review and advise my office.

Sincerely,

William Burrus
Executive Vice President

William Downes
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

WB:rb

American Postal Workers Union, AFL-CIO
1300 L Street, NW, Washington, DC 20005

March 18, 1988

William Burrus
Executive Vice President
(202) 842-4246

Dear Mr. Mahon:

Following the 1987 National negotiations the parties agreed on the format and content of the printed agreement. Phil Tabbita was the APWU representative in discussions leading to agreement on the final product. It was agreed in the discussions that several memorandums that appeared in prior contracts would not be included in the 1982 printed agreement even though the parties did not negotiate the elimination of the prior agreements. I am advised that the specific understanding reached was that the parties jointly recognized the continued application of the removed memorandums.

The applicability of these memorandums have surfaced as a dispute between our respective representatives at local and regional levels, includng contentions in arbitration that their omission from the contract supports a position that their terms are no longer applicable.

The letter of intent appearing on page 208 of the 1984 Agreement and the Memorandum of Understanding regarding Discipline Tracking System appearing on page 181 are the major areas of concern. Each of these agreements refer to specific implementation of agreements and it was decided that the terms had been complied with and it was unnecessary to continue them as addendums to the contract.

Each of these agreements also contain ongoing commitments that the parties have not agreed to revoke. The American Postal Workers Union maintains that those agreements embodied in the excised (Memorandum and Letter of Intent) are still in effect and are agreements between the parties.

This letter is to inquire as to the position of the Postal Service on the applicability of these provisions.

Sincerely,

William Burrus
Executive Vice President

Joseph Mahon
Asst. Postmaster General
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

WB:rb

National Association of LETTER CARRIERS
Vincent R. Sombrotto
President

100 Indiana Avenue, N.W. Washington, D.C. 20001
Telephone: (202) 393-4695

January 10, 1989

Mr. Moe Biller, President
APWU
1300 L Street, N.W., 6th Floor
Washington, D.C. 20005

RE: H4N-5G-C-7167
C. Nietzel
Bakersfield, CA

Dear Moe:

Enclosed is a prearbitration settlement of the above referenced grievance which was scheduled for January 11, 1988 and which you had notified the Postal Service that you planned to intervene.

Sincerely,

LAWRENCE G. HUTCHINS
Vice President

LGH/ss
opeiu #2
encl.

cc: President V.Sombrotto

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

Mr. Lawrence G. Hutchins
Vice President
National Association of
Letter Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, DC 20001-2197

Re: C. Nietzel
Bakersfield, CA
H4N-5G-D 7167

Dear Mr. Hutchins:

On December 14, 1988, a meeting was held with the NALC Director of City Delivery, Brian Farris, to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is the extent to which prior discipline may be utilized under the terms of Article 16.10 of the National Agreement.

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

Accordingly, we agreed to remand this case to the parties at Step 3 for further processing, including arbitration if necessary.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

Arthur S. Wilkinson
Grievance & Arbitration
Division

Lawrence G. Hutchins
Vice President
National Association of Letter
Carriers, AFL-CIO

(Date) 1/5/89

This is to advise that the American Postal Workers Union interprets the "make whole" provisions of the contract as including step deferrals when overturned on appeal. In the event that the Postal Service disagrees with the Union's interpretation, I request a rationalization and interpretation of contractual provisions relied upon.

Sincerely,

William Burrus
Executive Vice President

Tom Fritsch
Labor Relations
U.S. Postal Service Headquarters
475 L'Enfant Plaza, SW
Washington, D.C. 20260-1100

WB:rb

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

June 16, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Dear Mr. Burrus:

This letter will confirm our telephone conversation of June 10. During our conversation, we agreed that in accordance with condition number 1 of the Purge of Warning Letters Memorandum, a Letter of Warning must have been issued prior to the effective date of the National Agreement. Therefore, a Letter of Warning which was issued prior to September 10, 1987, (the operational date for purposes of the MOU) and which complied with all other applicable conditions, could ultimately be purged from an employee's personnel folder in the year 1988.

The dissemination to our field installations of the Memorandum of Understanding and the recent letter regarding our discussion of number 3 in the Memorandum of Understanding, served as our instruction to the field on this issue.

Sincerely,

for Anthony J. Vegliante

William J. Downes
Director
Office of Contract Administration

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

April 1, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers Union,
AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Dear Mr. Burrus:

This is in regard to our discussions concerning the MOU on Purging of Warning Letters agreed to during the 1987 National Negotiations.

As discussed, I agree that if a disciplinary action is modified by the parties or an arbitrator resulting in a letter of warning, such letters of warning will not be considered to have been issued in lieu of a suspension or a removal action pursuant to Item 3 of the MOU.

Sincerely,

Michael J. Harrison /for

Bruce D. Evans
General Manager
Negotiations Planning and
Analysis Division

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

November 26, 1982

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
817 14th Street, NW
Washington, DC 20005

Dear Mr. Burrus:

This is in further response to your letter of September 29, and to a subsequent meeting that you had with Bob Yoder and Frank Jacquette of my staff, regarding the use of PS Form 50 in disciplinary actions.

The Postal Service is prepared to physically remove Form 50 from the Official Personnel Folder (OPF) in situations where suspension actions are overturned on appeal.

This is an interim measure pending the development and adoption of a proposal to eliminate the necessity of issuing Form 50's to record suspension actions.

We feel that this proposal satisfactorily addresses those issues raised in your correspondence of September 29. Please advise Frank Jacquette (245-4731) of your views on this matter.

Sincerely,

James C. Gildea
Assistant Postmaster General
Labor Relations Department

American Postal Workers Union, AFL-CIO
817 Fourteenth Street, N.W., Washington, D.C. 20005 • (202) 842-4250

WILLIAM H. BURRUS
General Executive Vice President

September 29, 1982

Mr. James C. Gildea
Assistant Postmaster General
Labor Relations Department
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

Dear Mr. Gildea:

This is in response to your most recent correspondence regarding the retention of Form 50's. The issue I raised in my letter of June 8, 1982 has not been addressed in your recent correspondence.

The language of the National Agreement is specific in providing for "restitution" in discipline and discharge cases, subject to the grievance/arbitration procedure. The union interprets the intent of this language and the authority of postal officials and the arbitrator to include the authority to expunge the record. Employees have not been made whole if a record continues to exist showing the unsubstantiated charge.

The American Postal Workers Union interprets the intent of "to make whole" as including the removal from the employees record all references to the action taken. In the event the Postal Service disagrees with the union's interpretation please respond so that we may take the necessary action.

I am available to discuss this issue with appropriate officials and may be reached at 842-4250.

Sincerely,

William Burrus,
Executive Vice President

USPS
WB:mc

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

August 13, 1982

Mr. William Burrus
General Executive Vice President
American Postal Workers
Union, AFL-CIO
817 Fourteenth Street, N.W.
Washington, DC 20005

Dear Mr. Burrus:

This is in reference to your letter of August 6, and to our previous correspondence, concerning the retention of Form 50 in an employee's personnel record despite the issuance of an arbiter's award overturning disciplinary action that was taken against the employee.

The retention of Form 50 in such circumstances was, in fact, pending arbitration as stated in my June 15 response to your earlier letter on this topic. The case involved was withdrawn from arbitration pursuant to a letter dated June 21 from Mr. Kenneth D. Wilson, Administrative Aide, Clerk Craft.

I assume that the "personnel record" referred to in your letters is the Official Personnel Folder (OPF) which is established and maintained as the official repository for prescribed records and forms in accordance with instructions contained in Chapter 6 of Handbook P-11, Personnel Operations. The authority to withdraw OPF copies of Form 50 in unique or extraordinary circumstances rests with the Regional Directors, Employee and Labor Relations, and with the Postal Service Records Officer as stated in 614.921 of Handbook P-11.

Accordingly, I suggest that your Regional Coordinators contact the Regional Directors, as appropriate, when situations develop which they believe would warrant

withdrawal of a Form 50. Should an individual employee want to request the correction, amendment, or withdrawal of a Form 50, the instructions in 353.43 of the Administrative Support Manual should be followed.

Sincerely,

James C. Gildea
Assistant Postmaster General
Labor Relations Department

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

March 15, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-3399

Mr. Francis J. Conners
Vice President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2197

Gentlemen:

This is in regard to our discussion regarding the purging of cancelled step deferments from Form 50 records.

This is to advise you that when a Form 50 is processed to initiate a step deferral and when such deferral is subsequently cancelled, appropriate action will be taken to ensure that reference to the cancelled action does not appear in the employee's Official Personnel Folder or in the history section of subsequent Form 50s. Appropriate instructions will be furnished to field installations no later than May 1, 1988.

If you have any questions regarding the foregoing, please contact Frank Jacquette (268-3823) at your convenience.

Sincerely,

William J. Downes, Director
Office of Contract Administration

American Postal Workers Union, AFL-CIO
1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

October 9, 1987

Dear Mr. Fritsch:

Through exchange of correspondence culminating in USPS letter of January 15, 1983 the parties reached agreement that when suspension actions are overturned or modified on appeal the subject Form 50 will be removed from the official OPF. In the 1984 negotiations agreement was reached to eliminate the use of Form 50's when recording disciplinary action to effectuate the policy of restricting access to the modified disciplinary action.

It is my understanding that step increase deferments continue to be recorded on Form 50's and in those circumstances where such deferments are overturned or withdrawn on appeal, reference to the improper action is maintained on the Form 50.

My original correspondence of June 28, 1982 addressed the intent of making an employee "whole" in the disposition or improper action. The purging of all references to improper step increase deferrals would be included in making an employee whole. Under the Privacy Act employees are entitled to insist that such references be purged upon request.

This is to advise that the American Postal Workers Union interprets the "make whole" provisions of the contract as including step deferrals when overturned on appeal. In the event that the Postal Service disagrees with the Union's interpretation, I request a rationalization and interpretation of contractual provisions relied upon.

Sincerely,

William Burrus
Executive Vice President

Tom Fritsch
Labor Relations
U.S. Postal Service Headquarters
475 L'Enfant Plaza, SW
Washington, D.C. 20260-1100

WB:rb

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

April 18, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4107

Mr. Francis J. Conners
Vice President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2197

Gentlemen:

This is in reference to your discussion regarding the purging of canceled step deferments from Form 50 records.

This is to advise you that when a Form 50 is processed to initiate a step deferral and when such deferral is subsequently canceled, appropriate action will be taken to ensure that reference to the canceled action does not appear in the employee's Official Personnel Folder or in the history section of subsequent Form 50s.

Field personnel will be provided with appropriate instructions on how to purge the information from the employee's history file no later than May 1.

If you have any questions regarding the foregoing, please contact Frank Jacquette (268-3823) at your convenience.

Sincerely,

William J. Downes

William J. Downes, Director
Office of Contract Administration

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260-0001

88

RECEIVED
FEB 13 1985

Settlement

Mr. James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

FEB 13 1985

Re: M. McFaddin
Dallas, TX 75260
H1C-3A-C 10914

Dear Mr. Connors:

On February 4, 1985, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The question in this grievance is whether discussion notations can be kept on Form 1017.

During our discussion, it was mutually agreed that without prejudice to the position of either party regarding the timeliness of this grievance, the following would represent a full settlement of this case:

> Discussions will be in private and there will not be any notes relating to a discussion listed on the subject form.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to settle this case.

Sincerely,

Daniel A. Kahn
Labor Relations Department

James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

January 5, 1981

Daniel B. Jordan, Esq.
Attorney at Law
American Postal Workers Union,
AFL-CIO
817 14th Street, NW
Washington, DC 20005

Re: E. Andrews
Washington, D. C.
A8NA-0840

Dear Mr. Jordan:

On November 14, 1980, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure with regard to disputes between the parties at the national level.

The matters presented by you, as well as the applicable contractual provisions, have been reviewed and given careful consideration.

At issue in this case is whether the Cleveland, Ohio post office has adopted and enforced a policy whereby employees using sick leave in excess of three percent of their scheduled hours will be disciplined.

During our discussion, several points of agreement were reached. They are:

1. The USPS and the APWU agree that discipline for failure to maintain a satisfactory attendance record or "excessive absenteeism" must be determined on a case-by-case basis in light of all the relevant evidence and circumstances.

2. The USPS and the APWU agree that any rule setting a fixed amount or percentage of sick leave usage after which an employee will be, as a matter of course, automatically disciplined is inconsistent with the National Agreement and applicable handbooks and manuals.

3. The USPS will introduce no new rules and policies regarding discipline for failure to maintain a satisfactory attendance record or "excessive absenteeism" that are inconsistent with the National Agreement and applicable handbooks and manuals.

The above constitutes our national position on such matters. We do not agree that a three percent policy as stated in your grievance has been implemented in the Cleveland, Ohio post office.

The Union bases its argument on several factors. First, they feel that the content of several internal management memos clearly indicates that a three percent rule was implemented. In my review of the said documents, I do not find such clarity. Further, the authors of the documents say they had no intention of establishing a three percent rule for individual attendance. Their concern was a three percent reduction in the sick leave usage for the entire office.

Second, the Union has presented affidavits from several employees who attest that they were told by their supervisors and/or in step one grievance proceedings that if they used more than three percent sick leave they would be disciplined. The supervisors referred to have all submitted statements stating that they did not tell employees that there was a three percent rule.

Third, the Union states that the number of disciplinary actions taken with regard to excessive sick leave usage substantially increased after the memos were written. Though numbers were quoted, no documentation was submitted. The Cleveland office has submitted substantial documentation that certainly indicates that if a three percent rule was the policy, it was not being enforced. The Cleveland staff surveyed the attendance records of over seventeen hundred employees. Over 559 employees in that number had used more than three percent of their sick leave during the period January 1980 to July 1980, but were not disciplined. These statistics certainly belie the extence of a three percent rule. Management acknowledges that there has been increased emphasis on attendance, but not based on a three percent rule.

Notwithstanding those listed items to which we can agree, it is our position that in light of the fact circumstances of this case, no policy to discipline employees who used more than three percent of their sick leave existed in the Cleveland post office.

It is further our opinion, that no definitive dispute exists between the parties concerning the contractual provisions for the administration of discipline with regard to failure to maintain satisfactory attendance.

Sincerely,

Robert L. Eugene
Labor Relations Department

87 C

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

FEB 2 8 1984

Mr. James Conners
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
817 - 14th Street, N.W.
Washington, D.C. 20005-3399

Re: APWU - Local
Seattle BMC, WA 98003
H1C-5D-C 17110

Dear Mr. Connors:

On February 3, 1984, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The question raised in this case is whether the placement of letters of warning and letters of sick leave restriction in an employee's Official Personnel Folder violates Article 19 of the National Agreement.

It is our mutual understanding that letters of warning and letters of sick leave restriction are clearly temporary records as defined in Handbook P-11, Section 621.431. As such, these documents are maintained on the left side of the Official Personnel Folder.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to settle this case.

Sincerely,

Margaret H. Oliver
Labor Relations Department

James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO

-APPENDIX-

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

June 16, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Dear Mr. Burrus:

This letter will confirm our telephone conversation of June 10. During our conversation, we agreed that in accordance with condition number 1 of the Purge of Warning Letters Memorandum, a Letter of Warning must have been issued prior to the effective date of the National Agreement. Therefore, a Letter of Warning which was issued prior to September 10, 1987, (the operational date for purposes of the MOU) and which complied with all other applicable conditions could ultimately be purged from an employee's personnel folder in the year 1988.

The dissemination to our field installations of the Memorandum of Understanding and the recent letter regarding our discussion of number 3 in the Memorandum of Understanding, served as our instruction to the field on this issue.

Sincerely,

William J. Downes
Director
Office of Contract Administration

Scheme Training Deficiencies Bar Removal of MPLSM Trainees

Arbitrators Dash and Parkinson have ruled that defects in USPS instruction of MPLSM trainees who failed to qualify on their schemes constituted sufficient reason for reinstating the employees for retraining. Among the many training deficiencies noted as problems by Arbitrator Dash, the arbitrator found major violations to be the Service's failure to afford trainees 20 hours of manual scheme distribution work prior to training on the MPLSM and to set break and training times to conform with requirements in the M-5 Manual and P-49 Handbook. Arbitrator Parkinson relied exclusively on the Service's noncompliance with the Scheme Training Instructor's Guide to provide the trainee with needed "special assistance." In addition to these rulings, other arbitration awards have overturned removals for scheme failure on the basis of training procedure violations (see AIRS #823, #5034, #5336, #6771, #7966, #10714, #200205, #200405, #200595, and #200654) and poor training room conditions (see #11214 and #12154).

See Text, Page Nos. 26 & 28

USPS Improperly Assigned Clerks' Work to Small Town Postmasters

In a decision addressing a Sectional Center practice of diverting bargaining unit work to smaller post offices and supervisory officials in those offices, Arbitrator Levak held that Level 11 Postmasters could not be assigned second class mail correction work (3579 work) which had been performed by window, mark-up and distribution (CMO) clerks. In reaching his decision, Arbitrator Levak was not persuaded by USPS assertions that considerations of efficiency and prevention of excess overtime at the Sectional Center (SC) permitted a shift in SC 3579 work to Level 11 Postmasters. The arbitrator's decision, recognizing the extreme narrowness of exceptions of Article 1.6.B's prohibition against supervisors performing bargaining unit work at smaller postal installations, rested primarily on a careful review of Postmasters' job descriptions which did not expressly authorize these officials to perform distribution work on mail from outside their own offices.

See Text, Page No. 12

Revisions to Automation Impact Statements

In a recent letter to William Burrus, Executive Vice President of the APWU, Anthony J. Vegliante, General Manager of the Programs and Policies Division, Office of Contract Administration, stated that the USPS will issue revised automation impact statements when the impact of new mechanization or equipment on affected employees is considered "significantly greater" than projected in original impact statements.

See Appendix, Page No. 36

Clarification of Memorandum on Purge of Warning Letters

William J. Downes, Director, Ofice of Contract Administration, in a June 16 letter to William Burrus, Executive Vice President of the APWU, confirmed that Letters of Warning issued prior to September 10, 1987 and meeting the other criteria of the USPS/Joint Bargaining Committee's Memorandum of Understanding, p. 197 of CBA, would be purged from an employee's personnel folder in 1988. Director Downes' correspondence with

VIEWPOINT

New Issues: Some Are Resolved, Others Await Resolution

The ratification process recently completed finalizes the 1987 negotiations procedure. As previously reported, the membership approved the contract by a vote of 105,786 in favor to 26,851 opposed. On a percentage basis, 80% of the members voting and 90% of the locals approved the tentative agreement. With that action, contractual activities that began upon receipt of the 1984 arbitrated contract and included preparation, the actual negotiations, contract ratification and the signing ceremony have now been completed. Our responsibility for the 40-month duration of the contract will be to police and enforce its provisions.

President Biller signed the new agreement on September 10, 1987, officially putting in place the new national contract.

There are many new issues that must now be defined in greater detail; and over the next several weeks, meetings will be conducted between the unions and the Postal Service to clarify specific terms of the new contract. To date, several of these issues have been resolved, as follows:

- *The new contract provides for an increase in the annual leave carryover from 240 hours to 320 hours. The parties agree that employees may carry 320 hours of annual leave accumulated in the year 1987 into leave year 1988. Such employees who discontinue service for any reason (resignation, retirement, death) will only be eligible for payment for 240 hours of annual leave during leave year 1987. Beginning the first day of the 1988 leave year, employees will be eligible for payment of up to 320 hours of earned annual leave.*
- *The effective date of the contract was agreed to as follows: "The 1987 USPS/APWU/NALC National Agreement is effective as of July 21, 1987, and the economic provisions are to be retroactive to include back pay. The application of the new work rule provisions will not be retroactive but rather their applications will be effective as of the signing date (September 10, 1987) of the 1987 agreement unless otherwise provided for or agreed to at the national level."*

Further Discussions to Be Held

The discussions that will transpire at the national level during the next several weeks will identify in detail those issues referred to above "as otherwise provided for or agreed to at the national level."

Among the issues to be discussed are:

1. The effective date of letters of warning to be purged in accordance with the 1987 contract;

2. Clarification of the use of L
small increments in conjunct
approved sick and annual le
3. Whether or not employees
for transfer by installations
required to qualify on require
schemes prior to transfer to
installation;
4. The use of casual employe
changeably between the mai
and APWU/NALC National
ment-covered employees;
5. Clarification that protecti
hazardous and toxic materia
medical samples;
6. Access to Form 1769 (A

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

FEB 29 1984

Mr. James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
817 - 14th Street, N.W.
Washington, D.C. 20005-3399

Re: Class Action
Memphis, TN 38101
H1C-3F-C 27044

Dear Mr. Connors:

On February 3, 1984, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

This grievance involves the disposition of copies of cancelled letters of warning.

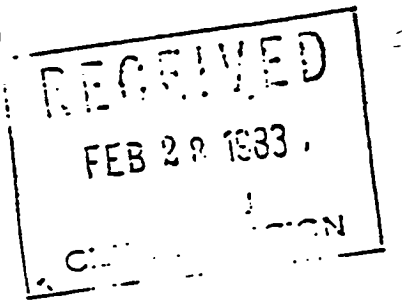
During our discussion, we agreed to resolve this case based on our mutual understanding that copies of cancelled letters of warning are removed from Official Personnel Folders and these letters cannot be used in subsequent disciplinary actions.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to resolve this case.

Sincerely,

Margaret H. Oliver
Labor Relations Department

James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO



UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

February 27, 1984

Mr. James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
817 - 14th Street, N.W.
Washington, D.C. 20005-3399

Re: G. Fuller
Fairfield, CT 06430
H1C-1J-C 23689

Dear Mr. Connors:

On February 3, 1984, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

This grievance involves a request for a union representative during a discussion.

During our discussion, we agreed that a union representative is not allowed to be present during the kind of discussion described in this grievance. We also agreed that an employee's request for a union representation following a discussion is not to be unreasonably denied.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to settle this case.

Sincerely,

Margaret H. Oliver
Labor Relations Department

James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO

#38 SEE NO. 98

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
AMERICAN POSTAL WORKERS UNION, AFL-CIO

This memorandum addresses the time limits that must be met in order to grieve a proposed removal.

1. For the purpose of grievance procedure appeals, the time limits of Section 2 of Article 15 of the National Agreement shall run from the proposed removal notice, not from a decision letter on the proposed removal.

2. Once a grievance on a notice of proposed removal is filed, it is not necessary to also file a grievance on the decision letter.

3. Receipt of a notice of proposed removal starts the 30 day advance notice period of Section 5 of Article 16 of the National Agreement.

William J. Downes
Director
Office of Contract
Administration
Labor Relations Department

DATE 7/31/91

William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO

DATE 8-12-91

UNITED STATES POSTAL SERVICE

Washington, DC 20260

DATE: February 25, 1994

OUR REF: LR400:TJValenti:cmv:20260-4125

SUBJECT: Union Requests for Supervisory Records

TO: Human Resources Managers (All Areas)
Human Resources Managers (All Districts)

On August 4, 1993, you were sent a memorandum which included an attachment that addressed the issue of union requests for supervisory records. On page 4 of the attachment, there was a recommendation to have the union sign a confidentiality agreement.

This memo is to clarify that the National Labor Relations Board (NLRB) settlement agreement does not require the union to sign a confidentiality agreement in order to obtain supervisory records that they are entitled to under the necessary and relevant criteria.

The utilization of supervisory records has been discussed with the American Postal Workers Union. I have been assured that the union will instruct their locals that supervisory records obtained pursuant to the NLRB settlement agreement must be used only for the purpose for which these records were obtained.

If there are any questions regarding the foregoing, please contact Thomas J. Valenti of my staff at (202) 268-3831.

William J. Downes
Manager
Contract Administration (APWU/NPMHU)
Labor Relations

On August 3, 1993, the APWU and the USPS entered into a settlement agreement with the National Labor Relations Board providing for the release of supervisory records, if requested by union representatives. Recent instructions have been issued by USPS legal counsel governing conditions under which such information should be provided to the union. Following is the union's legal interpretation as to a union representatives entitlement to supervisory records.

Such request for information must meet a standard of "relevance" to the purpose for which it is intended to be used. Unlike requests for information concerning bargaining unit employees, which are presumed to be relevant, information about supervisors requires a demonstration of relevance. Such relevance test includes the following:

1. The union must be willing to demonstrate that there is a "reasonable" basis for requesting the information. The factors involved will vary with each such request but may include:

a. A statement by the union explaining the postal policy or rule that is being applied and the information requested is to determine if its application is uniformly applied to supervisors and bargaining unit employees.

b. Did the suspected supervisory violation involve the same or similar policy.

c. Was the suspected supervisory violation during the same general time frame.

d. The source of the unions suspicion that a supervisor was engaged in similar conduct. The union must have a "factual basis" for believing that a supervisor committed a similar infraction -- "mere suspicion" that the requested records will reveal evidence of misconduct will not suffice. The factual basis need not be the first-hand knowledge of the requesting union official. Reports from employees or similar objective information is a sufficient foundation.

After reviewing requested supervisory records, the union is entitled to request and receive other internal postal documents relating to action taken against supervisors. e.g., memorandums, letters or documents (including Inspection Service Memorandum if they exist) relating to the decision for the action taken against the supervisor. You are not limited to copies of disciplinary action taken if other documents exist containing the rationalization for the final action.

You are not required to sign a confidentiality agreement certifying that the use of the requested documents will be limited for the purpose described in the original request. The settlement agreement between the parties does not require the union to sign a "confidentiality agreement" to gain access to the requested information.

Supervisory records received should not be used for any other purpose including publicizing the conduct or action taken against a supervisor. These limitations for use of the information include local or state newsletters, papers and/or bulletins.

When it is intended to use supervisory violations of rules or policy to show either disparate treatment or inconsistencies in discipline for the same or similar infractions, the issue/s should be raised at the earlier steps of the grievance procedure. Article 16 is the appropriate contractual provision to allege violation. Allegations of Article 2 violations should be limited to issues of discrimination as provided in the specific language of the contract.

It is anticipated that, at arbitration, the Postal Service will resist the introduction of evidence about supervisors, contending that, by definition, they are not similarly situated to bargaining unit employees. The attached cases support the unions position that such information is admissable. U.S. Postal Service, 289 NLRB No. 123 (1986), enf'd 888 F.2d 1568 (11th Cir. 1989) and arbitration decision by Arb. Patrick Hardin (S4M-3E-D 42104, et al., Oct 24, 1990).

O'Donnell, Schwartz & Anderson
Counselors at Law
1300 L Street, N.W. Suite 200
Washington, D.C. 20005
(202) 898-1707
FAX (202) 682-9276

ASHER W. SCHWARTZ
DARRYL J. ANDERSON
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LEE W. JACKSON*
ARTHUR M. LUBY
ANTON G. HAJJAR**
SUSAN L. CATLER
AUDREY SKWIERAWSKI***

*PA. AND MS. BARS
**ALSO MD. BAR
***WISC. BAR ONLY

JOHN F. O'DONNELL
(1907-1993)

60 East 42nd Street
Suite 1022
New York, N.Y. 10165
(212) 370-5100

M E M O R A N D U M

To: Moe Biller
Bill Burrus
Tom Neill

From: Anton Hajjar

Date: August 16, 1993

Re: "Supervisory Information" NLRB Settlement

Attached is a copy of the signed NLRB settlement agreement concerning the Union's right to information about supervisors. In this agreement, the USPS gives up on its Privacy Act defense. The last page is the text of the notice. This notice will be posted in the post offices where the cases arose, but the scope of the settlement is nationwide. The USPS is required to distribute the settlement terms to managers throught the U.S. An official "blue" notice form will come in about a week. The posted notice will be signed by a USPS official, and we will get a copy.

Of course, the USPS is also obliged to provide the various locals with the information which was denied them, and which resulted in the issuance of these complaints. The Postal Service also withdrew its Privacy Act exceptions to ALJ decisions pending on appeal to the Board, withdrew its civil suit to vacate the Snow Award on information about supervisors, and settled several other pending cases. It also sent out a directive to field law offices instructing the staff to desist from pleading Privacy Act defenses to information requests about supervisors.

The below-listed Charging Parties are being sent copies:

Pittsburgh Metro Area Postal Workers Union
APWU Local 2013
Des Moines BMC Local 7027
Kilmer GMF Area Local 149
Trenton Metro Area Local 1020
North Jersey Area Local
Las Vegas Area Local 761

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 22

UNITED STATES POSTAL SERVICE

and

Cases 6-CA-24756(P) and
6-CA-24792(P)

AMERICAN POSTAL WORKERS UNION,
PITTSBURGH METRO AREA POSTAL WORKERS
UNION, AFL-CIO

* * *

UNITED STATES POSTAL SERVICE

and

Case 6-CA-24800(P)

AMERICAN POSTAL WORKERS UNION,
LOCAL 2013, AFL-CIO

* * *

UNITED STATES POSTAL SERVICE

and

Case 18-CA-12410(P)

DES MOINES BULK MAIL CENTER,
LOCAL NO. 7027, AMERICAN POSTAL
WORKERS UNION, AFL-CIO

* * *

UNITED STATES POSTAL SERVICE
(KILMER GENERAL MAIL FACILITY)

and

Case 22-CA-17009(P)

KILMER GMF AREA LOCAL NO. 149,
AMERICAN POSTAL WORKERS UNION,
AFL-CIO

UNITED STATES POSTAL SERVICE

and

Case 22-CA-17769(P)

TRENTON METROPOLITAN AREA LOCAL 1020
AMERICAN POSTAL WORKERS UNION, AFL-CIO

* * *

UNITED STATES POSTAL SERVICE
(FRANKLIN OFFICE)

and

Case 22-CA-18007(P)

NORTH JERSEY AREA LOCAL, AMERICAN
POSTAL WORKERS UNION, AFL-CIO

* * *

UNITED STATES POSTAL SERVICE

and

Case 22-CA-18544(P)

NORTH JERSEY AREA LOCAL, AMERICAN
POSTAL WORKERS UNION, AFL-CIO

* * *

UNITED STATES POSTAL SERVICE

and

Case 28-CA-11627-2(P)
28-CA-11627-3(P)

AMERICAN POSTAL WORKERS UNION,
LAS VEGAS AREA LOCAL 761, AFL-CIO

INFORMAL SETTLEMENT AGREEMENT

In settlement of the above matters and subject to the approval of the Regional Director for the National Labor Relations Board, it is hereby stipulated and agreed by and between the United States Postal Service (herein "Respondent"), the American Postal Workers Union, AFL-CIO (herein "APWU"), on behalf of the charging party locals of the APWU and counsel for the General Counsel of the National Labor Relations Board as follows:

POSTING OF NOTICE: Upon approval of this Agreement the employer will post immediately in conspicuous places in and about its facilities, including all places where notices to employees are customarily posted, and maintain for 60 days from the date of posting, copies of the attached Notice, said Notice to be signed by a responsible official of the employer.

COMPLIANCE WITH NOTICE: The employer will comply with all the terms and provisions of the Notice.

REFUSAL TO ISSUE COMPLAINT: In the event the Charging Parties fail or refuse to become parties to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Board's Rules and Regulations if a request is filed within 14 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of all allegations in the subject complaints regarding the employer's refusal to furnish supervisory records or the entire complaint where no other allegations are contained therein, as well as the related portions of any answers filed in response.

PERFORMANCE: Performance by the employer with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Parties do not enter into this Agreement, performance shall commence immediately upon receipt by the employer of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE: The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of approval of this Agreement. In the event the Charging Parties do not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and

provisions hereof, no further action shall be taken in these cases with regard to the supervisory information allegations.

NON-ADMISSIONS: It is understood that Respondent, by entering into this Informal Settlement Agreement does not admit that it has violated the National Labor Relations Act, the Postal Reorganization Act, or any existing collective bargaining agreements between the parties.

All parties agree to an informal settlement agreement pursuant to the NLRB's Rules and Regulations to fully resolve all individual cases to which this settlement pertains as reflected in the case captions and numbers above on the following basis:

1. Respondent will not refuse to bargain with the APWU by refusing to furnish information regarding supervisors which is necessary and relevant to the union's duties as exclusive collective bargaining representative of employees in the units for which it is recognized.

2. Respondent will not affirmatively defend a refusal to furnish supervisory records which are necessary and relevant to the union's duties as collective bargaining representative on the grounds that the release of such records is barred by the Privacy Act of 1974, as amended, and its presently existing implementing regulations.

3. The Postal Service will ensure that this Informal Settlement Agreement is transmitted to the responsible management officials, including all responsible Human Resources personnel throughout the U.S. Postal Service.

4. SCOPE OF THE AGREEMENT: This Settlement Agreement settles only the unfair labor practices alleged in the cases referenced herein and does not constitute a settlement of any other case. It does not preclude persons from filing, or the National Labor Relations Board from prosecuting, unfair labor practice charges based on events which precede the date of the approval of this Agreement. The General Counsel shall have the right to use the evidence obtained in the investigation of these cases in the litigation of any other unfair labor practice cases; and any judge, the Board or any other tribunal may rely on such evidence in making findings of fact or conclusions of law.

UNITED STATES POSTAL SERVICE

For Respondent — Date: 8/3/93

AMERICAN POSTAL WORKERS UNION, AFL-CIO

William Burrus
For APWU Charging Parties — Date: 8-2-93

NATIONAL LABOR RELATIONS BOARD

J. Michael Lightner
Counsel for the General Counsel — Date: 8-3-93

APPROVED:

William A. Pascarell
Regional Director, Region 22 — Date: 8-9-93

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain with the **AMERICAN POSTAL WORKERS UNION, AFL-CIO AND ITS LOCALS OR ANY OTHER LABOR ORGANIZATION** by refusing to furnish them with requested information concerning supervisors which is relevant and necessary to the unions' collective bargaining duties.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the union or its locals, as applicable, information concerning supervisors which is described or referred to in each of the complaints issued in the subject cases.

UNITED STATES POSTAL SERVICE
(Employer)

Dated:_____ By:_____
(Representative) (Title)

O'Donnell, Schwartz & Anderson
Counselors at Law
1300 L Street, N.W., Suite 200
Washington, D.C. 20005
(202) 898-1707
FAX (202) 682-9276

ASHER W. SCHWARTZ
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*PA. AND MS. BARS
**ALSO MD. BAR
***WISC. BAR ONLY

JOHN F. O'DONNELL
(1907-1993)

60 East 42nd Street
Suite 1022
New York, N.Y. 10165
(212) 370-5100

M E M O R A N D U M

To: Bill Burrus

From: Anton Hajjar

Date: July 30, 1993

Enclosed is the final version of a settlement agreement by which the Postal Service is agreeing to drop its defense that the Privacy Act prohibits disclosure to the Union of information involving supervisors. This settlement is nationwide in scope. It also requires the Postal Service to transmit it to "responsible management officials, including all responsible Human Resources personnel throughout the U.S. Postal Service." I request that you recommend it for signature by the appropriate APWU principal.

Although the NLRB and 3 courts of appeals, in individual cases, have ruled that the Privacy Act is not a valid defense, the Postal Service has refused to acquiesce in these rulings, and has continued to assert this defense. The NLRB, unfortunately, has refused the APWU's invitation to apply "issue preclusion" principles, and we have had to relitigate this issue in case after case.[1] At the Union's request, the NLRB General Counsel sought a way out of this bind by consolidating all known complaints presenting this issue and seeing a nationwide remedy -- that is the consolidated complaint we are settling now.

While the agreement does not recite this, the Union has also insisted that the USPS drop this defense in all pending cases, and the Postal Service has done so. In particular, the USPS withdrew its lawsuit to vacate Arbitrator Snow's award holding that information about supervisors is available under Articles 17 and

---

[1] Generally speaking, the rule for private litigants is that an issue, once decided in a given case, cannot be relitigated in subsequent cases. The USPS takes the position that, as part of the federal government, it cannot be prevented from relitigating issues lost in other cases. This principle is applicable to the government generally, but the issue of whether it also extends to the Postal Service has not been decided by the courts.

31, and withdrew its exceptions in the only case pending before the NLRB which raises this issue. In addition, the USPS will have to provide the specific information which is the subject of the consolidated complaints (i.e., it has dropped all defenses in these cases), and will post a notice in each of the 10 cases which are consolidated here.

I should add that the NALC and Mailhandlers are the beneficiaries of the APWU's successful strategy, because one case involving each union was initially consolidated with the 10 APWU cases. Because they had nothing to do with getting the NLRB to issue a nationwide complaint, I thought that their inclusion in a single agreement was inappropriate. Therefore, I had the NLRB sever those cases to be settled separately.

The General Counsel of the NLRB, Jerry M. Hunter, has requested a meeting with a representative of the APWU and USPS at his office, 1717 Pennsylvania Ave., NW, Room 1001, to personally thank the parties for reaching this agreement. For this reason, I request a signature on or before that date.

The other nationwide information cases, pending in Region 5, are close to settlement too. These involve the USPS's defense that Locals cannot request information, and that Locals are not labor organizations, as well as some peripheral issues. When it is settled, I recommend appropriate publicity in the APWU media.

cc. Moe Biller
Darryl Anderson
Lee Jackson

On August 3, 1993, the APWU and the USPS entered into a settlement agreement with the National Labor Relations Board providing for the release of supervisory records if requested by union representatives. Recent instructions have been issued by USPS legal counsel governing conditions under which such information should be provided to the union. Following is the union's legal interpretation as to a union representative's entitlement to supervisory records.

Ordinarily a union request for information concerning supervisors arises in the context of a discipline grievance, and the union's effort to demonstrate disparate application of the rule in question.

A request for information must meet a standard of "relevance" to the purpose for which it is intended to be used. Unlike requests for information concerning bargaining unit employees, which are presumed to be relevant, information about supervisors requires a demonstration of relevance. The NLRB has established the following test:

> Requests for information relating to persons outside the bargaining unit [such as supervisors] require a special showing of relevance. Thus, the requesting party must show that there is a logical foundation and a factual basis for its information request. The standard to be applied in determining the relevance of information relating to nonunit employees is, however, a liberal "discovery type standard." ... And in applying this standard, the Board need only find a probability that the requested information is relevant and would be of use to the union in carrying out its statutory responsibilities.

The NLRB will find a "logical foundation" for the union's request if both employees and supervisors are subject to the same or similar rule or policy. The union must also have a "factual basis" for believing that a supervisor committed a similar infraction -- "mere suspicion" that a search of records containing information about supervisors will turn up evidence of misconduct will not do. The factual basis need not be the first-hand knowledge of the requesting union official. Thus, reports from employees that supervisors have violated the same rules, or similar objective information, is a sufficient foundation. These issues are judged on a case-by-case basis. Generally, the more specific the information the union already possesses as to the nature of the infraction, the rule violated, and the time frame in which the offenses occurred, the more likely it is that the NLRB will find that the information must be provided.

After reviewing requested supervisory records, the union is entitled to request and receive other internal postal documents relating to actions taken against supervisors, e.g., memorandums (including Inspection Service investigatory memorandums), letters, or documents relating to the conduct of the supervisor. You are

not limited to copies of disciplinary action taken if other documents exist containing the rationale for the final action (or non-action).

Information about supervisors should be used only for the purpose for which it was originally requested. It should not be used for any other purpose, including publicizing the conduct of or action taken against the supervisor. This includes local or state newsletters, papers, and/or bulletins. However, the union is not obliged to sign a confidentiality agreement to obtain access to such records. The NLRB has consistently rejected the Postal Service's confidentiality claims in such cases.

When it is intended to use supervisory violations of rules or policy to show either disparate treatment or inconsistencies in discipline for the same or similar infractions, the issue(s) should be raised at the earlier steps of the grievance procedure. Article 16 is the appropriate contractual provision to allege. Allegations of Article 2 violations should be limited to the issues of discrimination as provided in the specific language of the contract.

It is anticipated that, at arbitration, the Postal Service will resist the introduction of evidence about supervisors, contending that, by definition, they are not similarly situated to bargaining unit employees. U.S. Postal Service, 289 NLRB No. 123 (1986), enf'd, 888 F.2d 1568 (11th Cir. 1989) was the first NLRB case finding that the Postal Service was obliged to turn over information about supervisors who, in that case, were involved with bargaining unit employees in a gambling activities). In a subsequent arbitration (S4M-3E-D 42104, et al., Oct. 24, 1990), Arbitrator Patrick Hardin relied on evidence of disparate treatment provided in response to the Board's enforced order to partially sustain the grievances of disciplined employees. Although this was a Mail Handler case, it will be useful to cite in reply to USPS objections to the introduction of evidence of disparate treatment.

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UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

AUG 16 1984

Mr. James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Re: Class Action
Des Moines, IA 50318
H1C-4K-C 26345

Dear Mr. Connors:

This supercedes the Step 4 decision letter dated July 26, 1984.

On August 9, 1984, we met to rediscuss the above-captioned case at the fourth step of the contractual grievance procedure.

The question raised in this grievance involved whether management is required to release attendance records of supervisory personnel when requested by the union.

After further review of this matter, we mutually agreed that no national interpretive issue is fairly presented in the particulars evidenced in this case. We further agreed that if the local union can substantiate that the subject information is relevant to establish desparate treatment, the information requested will be granted. However, this can only be determined after full development of the fact circumstances involved in this case. Therefore, this case is suitable for regional determination.

Accordingly, as we further agreed, this case is hereby remanded to the parties at Step 3 for further processing if necessary.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Sincerely,

Daniel A. Kahn
Labor Relations Department

James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Douglas C. Holbrook
Secretary-Treasurer
(202) 842-4215

March 16, 1992

Mark Dimondstein, Local President
Greater Greensboro Area Local
P. O. Box 20591
Breensboro, NC 27420

Dear Brother Dimondstein:

Thank you for your letter dated January 26, 1992 concerning the rights and obligations of stewards. I have asked our General Counsel's Office to give me some guidance in answering your letter, and this letter reflects the guidance they provided.

Stewards often receive confidential information when they are representing individuals either in the grievance procedure or otherwise as part of their responsibilities in enforcing the collective bargaining agreement. Stewards have a qualified privilege not to reveal information they have received in the course of their responsibilities as stewards. If the Postal Service interrogates stewards about what they have learned, such interrogation violates the National Labor Relations Act because it interferes with the performance of their union responsibilities.

The Code of Ethical Conduct under the Employee and Labor Relations Manual applies to Shop Stewards. It does not, however, give the Postal Service a right to interrogate Shop Stewards about what they learn as Shop Stewards. A distinction must be made, however, between information obtained by Shop Stewards acting in their capacity as stewards and information they obtain in other ways not resulting from performance of their union duties. Shop Stewards have no more privilege against cooperation with official investigations than any other employee, unless the Postal Service is seeking to obtain information the steward possesses because of the steward relationship with a member or members of the union.

The Privacy Act does not apply to the Union. This is not to say that there are no privacy considerations in information obtained by the Union or by its stewards. Individuals in our society have a right of privacy and that right should not be invaded without justification. In any revelation of information concerning individuals, the individual's dignity and right of privacy should be respected.

Finally, although your letter did not raise the question, I want you to know that stewards who obtain information concerning criminal conduct in the course of the performance of their duties as stewards are not privileged to refuse to disclose that information in response to a subpoena from a federal or state grand jury. If confronted by legal process issued by or under the auspices of a court, stewards do not have the right to assert the type of professional privilege asserted by doctors or lawyers. Thus, it is possible for stewards to be placed in a difficult circumstance or even compelled to provide testimony against fellow union members if they hear confessions or receive incriminating evidence and are later subpoenaed to testify about what they know or heard.

I hope these comments sufficiently answer your questions.

With best wishes,

Yours In Union Solidarity,

Douglas C. Holbrook
Secretary-Treasurer

DCH:mjm

American Postal Workers Union, AFL-CIO

Greater Greensboro Area Local 711, P.O. Box 20591, Greensboro, NC 27420

1/26/92

Doug Holbrook
Secretary-Treasurer
American Postal Workers Union
1300 L Street, N.W.
Washington, D.C. 20005

Dear Brother Holbrook,

I hope this short letter finds you well as we head into the new year.

Could you please advise me on the matter of the Privacy Act obligations of Shop Stewards. If a steward is told something in confidence what are the legal obligations of that steward regarding the matter? Are there any aspects of the National Labor Relations Act that apply to the relationship of the steward to the grievant regarding disclosure of information? What are the ramifications if there are?

Furthermore, does the Code of Ethical Conduct under the ELM apply the relationship of Shop Steward and grievant?

Your answers to these questions would be most appreciated as well as any other thoughts you have on the above matter.

Fraternally,

Mark Dimondstein
Local President
Greensboro Area Local

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

December 12, 1988

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4107

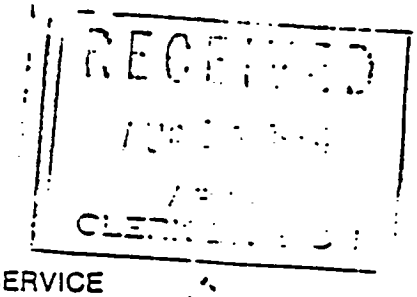
Dear Bill:

This letter is in response to your correspondence of October 20 regarding a previous letter of inquiry of the U.S. Postal Service's intent to modify its regulations to comply with a National Labor Relations Board's (NLRB) decision in Case 32-CA-4640 (P).

It is the policy of the U.S. Postal Service to comply with its contractual and legal obligations. In Pacific Telephone & Telegraph v. NLRB, 711 F. 2d 134, the Ninth Circuit Court of Appeals (which covers California and several other western states) held that an employee is entitled to consult with his representative prior to an investigative interview. Since preinterview consultation is the law in that circuit, and the U.S. Postal Service's policy is to comply with that law, no policy modifications will be made. The U.S. Postal Service will continue to comply with applicable provisions of the National Agreement, with regard to this matter, in installations not covered by the Ninth Circuit Court.

Sincerely,

for William J. Downes
Joseph J. Mahon, Jr.
Assistant Postmaster General



98 98

17

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

AUG 8 1984

Mr. James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Re: Young
Charleston, WV 25301
H1C-2M-C 7183

Dear Mr. Connors:

On July 10, 1984, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether the grievant was entitled to have a union steward present during a discussion under Article 16, Section 2, of the National Agreement.

After further review of this matter, we agreed that there was no national interpretive issue fairly presented as to the meaning and intent of Article 16 of the National Agreement. This is a local dispute over the application of Article 16, Section 2, of the 1981 National Agreement as discussions of this type shall be held in private between the employee and the supervisor. However, in cases where a reasonable basis exists for the employee to believe that the discussion will result in disciplinary action, a steward may be present. The parties at the local level should apply the above understanding to the specific fact circumstances in order to resolve this case.

Accordingly, we agreed to remand this case to Step 3 for further consideration by the parties.

Please sign and return the enclosed copy of this decision as acknowledgment of our agreement to remand this grievance.

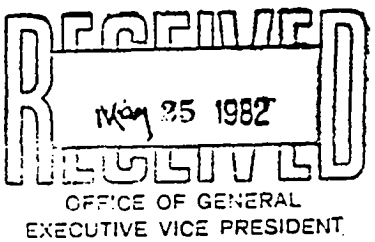
Time limits were extended by mutual consent.

Sincerely,

Thomas J. Lang
Labor Relations Department

James Connors
Assistant Director
Clerk Craft Division
American Postal Workers
Union, AFL-CIO

CHIEF POSTAL INSPECTOR
Washington, DC 20260



May 24, 1982

Mr. William Burrus
General Executive Vice President
American Postal Workers Union, AFL-CIO
817 14th Street, N.W.
Washington, DC 20005

Dear Mr. Burrus:

This replies to your May 10, 1982, letter to Senior Assistant Postmaster General Joseph Morris concerning the role of stewards or union representatives in investigatory interviews. Specifically, you expressed concern that the Inspection Service has adopted a policy that union representatives be limited to the role of a passive observer in such interviews.

Please be assured that it is not Inspection Service policy that union representatives may only participate as passive observers. We fully recognize that the representative's role or purpose in investigatory interviews is to safeguard the interests of the individual employee as well as the entire bargaining unit and that the role of passive observer may serve neither purpose. Indeed, we believe that a union representative may properly attempt to clarify the facts, suggest other sources or information, and generally assist the employee in articulating an explanation. At the same time, as was recognized in the Texaco opinion you quoted, an Inspector has no duty to bargain with a union representative and may properly insist on hearing only the employee's own account of the incident under investigation.

We are not unmindful of your rights and obligations as a collective bargaining representative and trust that you, in turn, appreciate the obligations and responsibilities of the Inspection Service as the law enforcement arm of the U. S. Postal Service. In our view, the interests of all can be protected and furthered if both union representative and Inspector approach investigatory interviews in a good faith effort to deal fairly and reasonably with each other.

Sincerely,

K. H. Fletcher

April 24, 1986

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Dear Mr. Burrus:

Recently, you met with Sherry Cagnoli, Office of Labor Law, in prearbitration discussion of case number H1C-NA-C 96, Washington, D.C. The parties mutually agreed to a full and final settlement of this case as follows:

> The parties agree that the right to a steward or union representative under Article 17, Section 3 applies to questioning of an employee who has or may have witnessed an occurrence when such questioning becomes an interrogation.

Please sign and return the enclosed copy of this letter acknowledging your agreement to settle this case, and withdrawing H1C-NA-C 96 from the pending national arbitration listing.

Sincerely,

George S. McDougald
General Manager
Grievance and Arbitration
Division
Labor Relations Department

William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO

4-24-86
(Date)

Enclosure

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

August 28, 1984

Mr. William Burrus
Executive Vice President
American Postal Workers Union,
AFL-CIO
817 14th Street, N. W.
Washington, D. C. 20005-3399

Re: M. Biller
Washington, D. C. 20005
H1C-NA-C 96

Dear Mr. Burrus:

This is in response to your August 3 letter requesting clarification of our August 1 letter concerning the above-referenced grievance.

Our August 1 letter to you was not intended to imply that if an employee who is meeting with the Inspection Service as a witness believes that he is being interrogated, that employee may request representation. Talking with a witness is an interview, and does not fall within Article 17, Section 3, that requires Union representation to be provided upon request during the course of an interrogation.

I hope that this response will serve to clarify the matter.

Sincerely,

George S. McDougald

George S. McDougald
General Manager
Grievance Division
Labor Relations Department

98R
American Postal Workers Union, AFL-CIO

817 Fourteenth Street, N.W., Washington, D.C. 20005 • (202) 842-4246

WILLIAM BURRUS
Executive Vice President

August 3, 1984

Robert Eugene
Labor Relations Department
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

Re: M. Biller
Washington, D.C. 20005
HIC-NA-C 96

Dear Mr. Eugene:

This is in regard to your decision of August 1, 1984 in the above referenced grievance. I do not fully understand the employer's interpretation of the right of employees to union representation. You state that "we agree that the right to representation under Article 17 and that provided by Weingarten are not necessarily the same."

My understanding of the above is that in those circumstances when "an employee" believes that the interview has become "an interrogation" such employee may request representation and it will be provided consistent with the contractual provisions.

Please clarify that the union may determine whether or not to appeal the employer's decision.

Sincerely,

William Burrus

William Burrus,
Executive Vice President

WB:mc
Enc.

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

AUG 1 1984

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Re: M. Biller
Washington, D.C. 20005
H1C-NA-C 96

Dear Mr. Burrus:

On May 24, 1984, we met to discuss the above-referenced national level grievance which requests the Postal Service's interpretation of Article 17, Section 3, of the 1981 USPS/APWU-NALC National Agreement, which sets forth an employee's right to Union representation during Inspection Service interrogations.

The national level grievance takes issue with an August 19, 1983, memorandum from E. E. Flanagan, Assistant Regional Chief Inspector - Criminal Investigations, Northeast Region, discussing a Step 3 settlement. That grievance concerned the denial of a request for representation by an employee who was being interviewed by Postal Inspectors as a witness to an occurrence. Inspector Flanagan's position was that the employee was not entitled to union representation under those circumstances, and the Inspector also expressed his understanding of the origin and limits of the Article 17 provision.

The Union has expressed its disagreement with the Inspector's interpretation, stating that "Article 17 is clear in its intent" and that the parties did not intend "to restrict the right of representation to only those circumstances generating Weingarten rights."

The Postal Service agrees with the Inspector's position that an employee who is being interviewed as a witness is not entitled to union representation under Article 17. In that circumstance, the employee is not the subject of a criminal investigation and, hence, is not being interrogated. This distinction between interrogations and interviews has been consistently applied by the Inspection Service. It also is supported by the bargaining history of the representation provision in Article 17, Section 3.

Early during the 1973 contract negotiations, the Union proposed the following language:

> 3. When the Inspection Service interviews or interrogates an employee, a steward or union representative shall be present (Emphasis added).

The version finally agreed upon, however, did not refer to "interviews." Rather, the language incorporated in the 1973 Memorandum of Understanding and, subsequently, in the 1978 Agreement, was as follows:

> If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted.

Hence, the Article 17 right to representation is limited to interrogations and does not extend to all interviews by the Inspection Service.

The Union's March 12, 1984, grievance letter does not expressly challenge this position, but rather focuses on the interplay of Article 17 and Weingarten representation rights. In this regard, we agree that the right to representation under Article 17 and that provided by Weingarten are not necessarily the same. For example, as noted above, Article 17 is limited in scope to interrogations rather than "investigatory interviews." We note, however, that as a practical matter, the two bases for representation frequently produce the same result.

In conclusion, we believe that our policy with respect to the

union representation provision of Article 17, Section 3, is correct based on the language of that provision and the parties' bargaining history and practice.

Sincerely,

R. L. E.

Robert L. Eugene
Labor Relations Department

98E

American Postal Workers Union, AFL-CIO

817 Fourteenth Street, N.W., Washington, D.C. 20005 • (202) 842-4250

MOE BILLER
President

March 12, 1984

James C. Gildea
Assistant Postmaster General
Labor Relations Department
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

H1C-NA-C 96

Dear Mr. Gildea:

The attached letter from the Assistant Regional Chief Inspector, E.E. Flanagan, interprets provisions of Article 17, Section 3 of the National Agreement. The union disagrees with this interpretation. Our notes of the 1978 negotiations do not reflect that the parties intended to restrict the right of representation to only those circumstances generating Weingarten rights. The language of Article 17 is clear in its intent and the union interprets such language as applying at all times during the course of an interrogation by the Inspection Service.

In accordance with provisions of Article 15 the union submits this issue as an interpretive dispute.

Sincerely,

Moe Biller
President

MB:WB:mc
Enc.

DRAFT LETTER TO POSTAL INSPECTOR WHO IS DEMANDING TESTIMONY FROM STEWARDS

Dear Inspector _____:

I am writing in response to your request that I provide you a formal statement concerning the actions of grievant _____ _____, who is the subject of a removal action by the United States Postal Service. Because the information you are seeking was obtained by me in the course of the performance of my duties as a Union steward, I consulted a National Officer of the American Postal Workers Union, AFL-CIO concerning my responsibilities. I have since been advised by them, and by the National Union's General Counsel's Office, that I may not lawfully be asked to disclose information obtained by me in the course of my performance of my duties as a steward. Under decisions of the National Labor Relations Board, particularly Cook Paint & Varnish Co., 258 NLRB 1230 (1981), stewards may not lawfully be asked by employers to give testimony against individuals based upon information obtained by stewards in the performance of their duties as stewards. Accordingly, I respectfully refuse to provide you the evidence you are seeking against grievant _____ _____.

For your information, I am enclosing with my letter a recent excerpt from the Report of the General Counsel of the National Labor Relations Board. As you will see, pages 9 through 11 of that Report discuss these principles. The case commented upon by the General Counsel is one in which a grievant allegedly uttered threats against the plant manager in the presence of a steward who was assisting the grievant on proposed discipline for other reasons. The General Counsel found it unlawful for the employer to request a statement from the steward about the alleged threats.

On the basis of this information, I hope you will agree that it would be inappropriate for me to provide you a statement in this matter.

Sincerely,

~~158~~ 98

April 7, 19~3

Letter No. 93-5

PERSONAL ATTENTION

All Regional Clef Inspectors All Inspectors In Charge

Right of Bargaining Unit Employee to a Pre-Interview consultation with Union Representative.

The United States Court of Appeals for the District of Columbia Circuit affirmed a National Labor Relations Board's Decision and Order which had found that a bargaining unit employee of the Postal Service being interrogated by a Postal Inspector is entitled to a pre-interview consultation with the employee's union steward as part of the employee's Weingarten rights.

This decision overrules the ISM instructions, Contained in Section 432.333 (ISM, TL-1, 06/06t91), which permit pre-interview consultation only in noncriminal interviews, but not in criminal interviews. The Court of Appeals decision allows the employee and a steward to consult prior to any investigatory interview which may result in disciplinary action being taken against the employee.

The new Section 432.333 follows:

432.333 Pre-interview Consultation. In any investigatory interview which qualifies for the presence of a union representation under Weingarten, the employee must be permitted to consult privately with the union representative prior to the interview. This right for a pre-interview consultation arises only when the employee will be interviewed, has requested a union representative, and the union representative will be present during the interview. The employee or the union representative must ask for a pre-interview consultation. If the employee is arrested prior to the interview, the Inspector should maintain control of the Prisoner but also attempt to accommodate a request for privacy to the extent possible.

Of greater interest to the investigating inspector is the Court's comment that a union representative's discussion with a bargaining unit employee is not privileged communication. The Court stated, "A steward, unlike a lawyer, can be compelled to testify in court as to his knowledge of criminal conduct, and postal employees are obligated, by (postal) regulation, to report to USPS misconduct of vhich they are aware." Thus, it would be permissible to interview the steward regarding admissions the employee may have made during the consultation. Moreover, if the steward is not cooperative, the steward should be reminded of an employee's obligation under ELM section 666.6 to cooperate in an official investigation.

One event would require the inspector to interview a union representative. It occurs when, following consultation, the employee refuses to be interviewed by the inspector. The union

representative should be interviewed regarding the advice provided to the employee and the basis for the advice. The principal concern of the Inspection Service, in denying pre-interview consultations in criminal investigations, was belief that the union representative would interfere with legitimate investigatory interests by counseling the employee to refuse to be interviewed.

The Postal Service had argued before the Court that the postal unions had a practice of frustrating management interviews. The Court, however, found that insufficient evidence had been introduced for it to conclude there was a policy of noncooperation, but it reserved for later consideration the issue of whether the NLRB must excuse an employer from granting pre-interview consultations where there is a union-enforced policy of noncooperation. Therefore, the discovery of any evidence of such a policy of noncooperation by any postal union should be referred in writing to the attention of the Independent Counsel of the Inspection Service.

The new Section 432.337 instruction is the following:

432.337 Interview of Union Representative. If, following consultation with a union representative, the bargaining unit employee declines to be interviewed, the Inspector should interview the representative to ascertain what advice was given the employee to cause the declination. The Inspector should attempt to determine if the representative was instructed by or following a policy of the union to dissuade the employee from cooperating with the interviewing Inspector. The interview of the representative should be conducted in an area separate from the employee, or at a later time. The comments of the union representative should be sent, in writing, to the attention of the Independent Counsel of the Inspection Service.

/s/K. J. Hunter

K. J. Hunter

THIS ABL WILL REMAIN IN EFFECT UNTIL INCORPORATED IN ISM 432.

158

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

June 14, 1991

OFFICE OF LABOR RELATIONS DEPT.
91 JUN 18 PM 2:41

RE: H7C-NAC-89

Dear Ms. Cagnoli:

By letter of April 20, 1990 the Union initiated a step 4 grievance protesting the employer's administrative authority of postmasters to change the terms of local memorandums. Despite the Union's request, the employer has failed to respond.

Pursuant to provisions of Article 15 of the National Agreement the Union appeals this dispute to arbitration. We protest the employer's refusal to discuss this issue pursuant to contractual provisions which requires the employer to apprise the Union of its position.

Your prompt attention of this matter is appreciated.

Sincerely,

William Burrus
Executive Vice President

Sherry A. Cagnoli
Asst. Postmaster General
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

WB:rb

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

REPORT OF THE GENERAL COUNSEL

This report covers selected cases of interest that were decided during the period from March through September 30, 1994. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

Frederick L. Feinstein
General Counsel

getting the Employer to either sign a bargaining agreement or cease doing business. The Union admitted as much when it told the Employer that the "games would stop" if the Employer would sign a contract. In addition, the evidence of unprotected substantial slow-down and sabotage activities supported the conclusion that the Union was engaged in an aggressive campaign to use the unprotected conduct of partial strikes to achieve its goals. The Union's campaign ultimately succeeded in closing down the Employer.

We further decided that, since the striking employees had to have known that they were participating in a strategy of intermittent strikes, each employee's conduct was unprotected regardless of whether he or she engaged in one, two, or all three of the unprotected stoppages. As the Board stressed in Pacific Telephone, supra, 107 NLRB at 1550, the employer there, faced with intermittent strikes that were totally disrupting its business, "was not required to pause during the heat of the strike to examine into the degree of knowledge of each [striker], all of whom were [acting on behalf] the same Union. It was sufficient . . . that each of the [strikers] was a participant in the strike strategy..." 107 NLRB at 1551-1552. Accordingly, we decided to dismiss the charges.

Discipline of Union Steward for Refusing to Cooperate with Employer Investigation

In another case considered during this period, we concluded that an employer could not lawfully discipline a union steward for refusing to provide it with a written account of an employee's conduct witnessed as a result of her performance of her duties as steward.

The Employer's plant manager had requested the steward to attend a meeting, along with an employee and the employee's supervisor, concerning possible discipline of the employee. At the end of the meeting the employee was terminated and the group left the office. As they walked into the adjoining hall, the employee allegedly told the plant manager that he was "a rotten, no good bastard, [and if the employee] had his money right now [he'd] drag [the manager] outside and kick his _____." The plant manager told the supervisor and the steward that he wanted statements from them setting forth what the employee had said. When the steward objected she was advised that she would be subject to discharge if she did not provide the

statement. The steward thereupon submitted the statement as directed.

We concluded that the threat of discharge unlawfully interfered with the individual's protected right to serve as union steward. Although the discharged employee's intemperate remarks may not have been protected, the steward would never have witnessed the outburst but for her role as steward. The outburst, which occurred as the parties were leaving the plant manager's office, was not viewed as separable from the events for which the steward's attendance had been required, but rather, was considered as part of the "res gestae of the grievance discussion." Cf., Thor Power Tool Company, 148 NLRB 1379, 1380 (1964), enf'd., 351 F.2d 584 (7th Cir. 1965). Further, even if the disciplinary meeting were found to have ended prior to the outburst, the steward's role was considered a continuous one, inasmuch as the discharged employee still had a right to file a contractual grievance protesting his discharge, and the steward would likely be involved in that process. It was therefore concluded that the threat occurred during a time when the individual was acting as steward.

Further, the threat was deemed to have a chilling effect on the steward's right to represent the dischargee and other employees in an atmosphere free of coercion. A requirement that stewards, under threat of discharge, prepare written reports on the conduct of employees they have been requested to represent, clearly compromises the steward's obligation to provide, and an employee's right to receive, effective representation. Employees will be less inclined to vigorously pursue their grievances if they know that the employer can require their representative to prepare reports on their conduct at such meetings, including spontaneous outbursts which may or may not be protected. The Board has also recognized that employer efforts to dictate the manner in which a union must present its grievance position may have a stifling effect on the grievance machinery and could "so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances." Hawaiian Hauling Service, Ltd., 219 NLRB 765, 766 (1975), enf'd., 545 2d 674 (9th Cir. 1976) (employee discharged for calling the general manager a liar during a grievance meeting on the employee's prior discipline.) By placing the steward under threat of discharge if she refused to supply the statement the Employer was deemed to have stifled vigorous opposition to its grievance/discipline decisions and to have heavily weighted the grievance process in its own favor.

While acknowledging that a union steward does not enjoy absolute immunity from employer interrogation, the Board, in its decision on remand in Cook Paint and Varnish Co., 258 NLRB 1230 (1981), held that an employer had unlawfully threatened to discipline a steward for refusing to submit to a pre-arbitration interview and refusing to make available notes taken by the steward while processing the grievance that was being arbitrated. The Board noted that the steward had not been an eyewitness to the events, and that his involvement occurred solely as a result of his processing the grievance as union steward. The Board then noted that the notes sought by the employer were the substance of conversations between the employee and the steward, and that such consultations were "protected activity in one of its purest forms." The Board concluded that to allow the employer to compel disclosure of such information under threat of discipline manifestly restrained employees in their willingness to candidly discuss matters with their representative. The Board added that such employer conduct cast a chilling effect over all employees and stewards who seek to communicate with each other over potential grievance matters and also inhibited stewards in obtaining needed information since the steward would know that, upon demand of the employer, he would be required to reveal the subject of his discussions or face disciplinary action himself.

We concluded that while there were factual differences, Cook Paint is consistent with a finding that the Employer's threat to the steward in the instant case violated the Act. Thus, while Cook Paint involved employer attempts to discover the contents of employee communications to a steward, both cases involve the sensitivity of a steward's status vis-à-vis the employees he/she represents. Thus, like the steward in Cook Paint, the steward herein was not involved in the misconduct that was the subject of the meeting or that occurred immediately thereafter, was present solely because of her status as steward, and was compelled under threat of discharge to provide a written account of an event to which there were other witnesses, making her version merely cumulative. If an Employer were permitted to threaten stewards with discipline for failing to cooperate in employer investigations in circumstances such as these, it would place a steward in a position of sharp conflict of interests, having to choose between protecting his job and providing effective and strenuous representation to the employee he was chosen to represent.

Accordingly, we authorized the issuance of an appropriate Section 8(a)(1) complaint.

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

June 27, 1997

Dear Brother Reichert:

This is to respond to your inquiry regarding the history of the USPS policy on violence in the work place and the reasons why the American Postal Workers Union was not a signee of the final policy establishing "Zero Tolerance".

Following the Oklahoma City and Michigan tragedies where postal employees assaulted their fellow workers, I initiated discussions with postal management at the headquarters level to discuss solutions to this serious problem. Several exploratory meetings were held between APWU and headquarters postal management with the parties discussing a wide range of ideas. During these meetings the Postal Service unilaterally implemented a review of all employee records ostensively to identify background information that fit within a general profile. APWU vigorously objected to the background checks and meetings were temporarily discontinued.

During this hiatus, postal management invited all of the postal unions and management associations to convene and discuss postal violence and a joint approach to the problem. The American Postal Workers Union did not agree with the concept that the interest of all postal organizations would be served by a collective effort to address the problem and participated in these meetings only as an observer and during this period meetings continued between APWU and USPS representatives to develop a separate approach to violence. The APWU representatives believed that the interest of postmasters and supervisors, who had the authority to discipline bargaining unit employees, was sufficiently diverse from that of our union that any final action beyond public statements would be applied disproportionally to bargaining unit employees. The history of the Zero Tolerance Policy document that was adopted without the concurrence of APWU has proven that our concerns were well founded as the policy has been unevenly imposed for speech and supervisors perceptions and applied exclusively to bargaining unit employees.

The policy adopted by the Committee on Violence was signed by all of the postal employee organizations with the exception of APWU. We vigorously opposed the language of the signed document, forwarding to postal management a letter expressing the union's position that APWU bargaining unit employees would not be covered by the agreement to which we were not a part. We continued separate meetings with USPS officials which lead to the printing of an APWU manual for use by local representatives on the subject of violence.

The American Postal Workers Union has consistently maintained that the Zero Tolerance policy does not apply to APWU employees as the policy and controlling document were created through an agreement in which APWU did not concur or sign. The provisions of Article 16 of the national agreement represent the sole basis for discipline agreed to between the American Postal Workers Union and the United States Postal Service.

Thank you for communicating with my office on this issue. If I can be of further assistance, please don't hesitate to contact me. With regards, I remain

Yours in union solidarity,

William Burrus
Executive Vice President

Ted Reichert, President
Erie Area Local
PO Box 10231
Erie, PA 16514

WB:rb
opeiu#2
afl-cio