American Postal Workers Union, AFL-CIO

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ABSENTEEISM

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The Postal Service began issuing discipline for absenteeism around 1972. It has been, and continues to be the leading cause of all disciplinary action taken in the Postal Service.

Whether the Service has the right to issue discipline for excessive absenteeism must be determined on a case-by-case basis taking into consideration the particular facts and circumstances of each case.

It has been well established during these past years that the Postal Service has the right to expect a reasonable degree of regular job attendance and may issue discipline for poor attendance - even where absences are caused by legitimate, documented, illness.

Enclosed are copies of National level arbitration opinions rendered by Arbitrators Sylvester Garrett and Howard Gamser which address the issue of discipline for attendance irregularity in conjunction with approved leave. These awards clearly establish management's right to discipline, subject to the "just cause" principles outlined in Article 16.

Also enclosed are some standards by which Arbitrators judge absenteeism as well as those used to defend against discipline for absenteeism.

It is our job as officers and stewards to defend our members against unwarranted discipline for the legitimate use of the negotiated sick leave benefits to which they are contractually entitled.

It is the Arbitrator's job to balance the employers' rights to expect regular attendance against the employees' right to exercise the legitimate use of those benefits.

The purpose of this program is to assist you in tipping that balance in favor of the employee, and to help you in formulating successful arguments in

attendance related discipline.

Yours for a Stronger UNION,

"Bob"

Robert D. Kessler
Nat'l Business Agent

In Union Solidarity,

In Union Solidarity,
Nat'l Business Agent

ARTICLE 10
LEAVE

Section 1. Funding

The Employer shall continue funding the leave program so as to continue the current leave earning level for the duration of this Agreement.

Section 2. Leave Regulations

A. The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement.

B. Career employees will be given preference over noncareer employees when scheduling annual leave. This preference will take into consideration that scheduling is done on a tour-by-tour basis and that employee skills are a determining factor in this decision.

(The preceding paragraph, Article 10.2B, applies to Transitional Employees.)

[see Memos, pages 317-322]

Section 3. Choice of Vacation Period

A. It is agreed to establish a nationwide program for vacation planning for employees in the regular work force with emphasis upon the choice vacation period(s) or variations thereof.

B. Care shall be exercised to assure that no employee is required to forfeit any part of such employee's annual leave.

511.3 Eligibility

511.31 Covered

Covered by the leave program are:

a. Full-time employees.

b. Part-time regular employees.

c. Part-time flexible employees.

d. To the extent provided in the NRLCA Agreement, temporary employees assigned to rural carrier duties.

511.32 Not Covered

Not covered by the leave program are:

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

b. Casual employees.

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

511.4 Unscheduled Absence

511.41 Definition

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

511.42 Management Responsibilities

To control unscheduled absences, postal officials:

a. Inform employees of leave regulations.

b. Discuss attendance records with individual employees when warranted.

c. Maintain and review Forms 3972, *Absence Analysis*, and Forms 3971.

511.43 Employee Responsibilities

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

512 Annual Leave

512.1 General

512.11 Purpose

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

666.8 Attendance

666.81 Requirement for Attendance

Employees are required to be regular in attendance.

666.82 Absence Without Permission

Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance. In emergencies, the supervisor or proper official will be notified as soon as the inability to report for duty becomes apparent. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or fails to provide satisfactory evidence that an emergency existed will be placed in a nonpay status for the period of such absence. The absence will be reported to the appropriate authority.

666.83 Tardiness

Any employee failing to report by the scheduled time when time recorders are not used is considered tardy. Tardiness in units or installations equipped with time recorders is defined as being any deviation from schedule.

666.84 Falsification in Recording Time

Recording the time for another employee constitutes falsification of a report. Any employee knowingly involved in such a procedure is subject to removal or other discipline. Failure of a supervisor to report known late arrivals is regarded as condoning falsification.

666.85 Incomplete Mail Disposition

It is a criminal act for anyone who has taken charge of any mail to quit voluntarily or desert the mail before making proper disposition.

666.86 Disciplinary Action

Postal officials will take appropriate disciplinary measures to correct violations of these requirements.

667 Legal Assistance Provided by the Postal Service

667.1 Defense of Civil Suits Against Postal Service Employees Arising Out of Their Operation of Motor Vehicles

667.11 Coverage

This section contains the procedure to be followed by Postal Service employees (hereby defined to include present and former employees or their estates) against whom a civil action for damage to property or for personal injury or death is brought, arising out of the employee's operation of a motor vehicle in the scope of that person's employment. Under the Federal Drivers Act (28 U.S.C. 2679(b)-(d)), employees who are found to have acted in the

Re: Case No. AC-N-14034
John R. Napurano, Grievant

In the Matter of the Arbitration between

AMERICAN POSTAL WORKERS UNION, AFL-CIO
(New Jersey Eastern Area Local)

-and-

UNITED STATES POSTAL SERVICE
(Newark, New Jersey Post Office)

OPINION AND AWARD

BEFORE:

Howard G. Gamser, Impartial Arbitrator

APPEARANCES:

For the Union - Schneider, Cohen & Solomon
by: Edward A. Cohen, Esq.

For the USPS - Mason D. Harrell, Jr., Esq.
Office of Labor Law

BACKGROUND:

In December of 1975, in Step 2 of the grievance procedure provided for in Article XV of the collective bargaining agreement between the above-captioned parties, a charge was advanced by John R. Napurano, 1st Vice-President of the North Jersey Area Local, wherein he alleged that the Postal Service at the Newark Post Office was violating Article 10, Section 3d of the Local Memorandum of Understanding. Mr. Napurano contended that local management was violating that provision of the Local Memorandum by charging certain employees with "Irregularity of Attendance" despite the fact that the terms of that sub-section of the Local Agreement do not permit disciplinary action as a result of an employee taking

"...any leave that has been documented and approved."

Mr. Napurano stated that there were twenty five or more cases which would be scheduled for arbitration in which this was the issue in contention.

Although the Postal Service contended that the grievance advanced by Mr. Napurano was filed untimely, under the provisions of Article XV of the Master Agreement, the Postal Service did agree that the letter submitting the case to arbitration was filed within the contemplated time limits. The Postal Service also agreed at the arbitration hearing, to address the merits of the case and to seek a determination of the issue raised by the Union.

This case is unique in that it was not brought to arbitration for the purpose of securing a determination of whether, in a specific case, and based upon a specific set of facts, the USPS had just cause to discipline or take any action adverse to the tenure of employment of any individual employee. The Parties apparently agreed that, because of the nature of the issue raised and the controlling agreements involved, an Award in the nature of the declaratory judgment would be sought. Without indicating in any manner that such a procedure takes any color of right from the grievance provisions of the Master Agreement, or that entertaining a case brought before the arbitrator under these circumstances should have any precedential value as to the appropriateness of proceeding in this fashion, the undersigned agreed to hear and decide the case as presented.

The hearing was held at the General Post Office in Newark, New Jersey on July 19, 1977. At that hearing, both Parties were given full opportunity to present testimony, other evidence and argument in

support of their respective contentions. By agreement, post-hearing briefs were filed. These were received in timely fashion and the contents of same were duly considered in the Opinion below.

THE ISSUE:

The Parties did not agree upon a definition of the matter placed in issue before the Arbitrator. However, from the contentions raised and the arguments advanced, during the course of the hearing, it was apparent that two questions were posed by this grievance. The first of these is whether the Local Union and Local Management, in their Memorandum of Understanding, were granted jurisdiction to limit the action which management could take where an employee's attendance was regarded as "irregular" although that employee's absences were all covered by documented and approved sick leave. The second question is whether, assuming managerial action were not limited by the terms of the Local Memorandum, the USPS could establish just cause to discipline an employee, up to discharging such an employee, under the principles enunciated in Article XVI of the Master Agreement for irregular and erratic attendance covered by documented and approved sick leave.

CONTENTIONS OF THE PARTIES:

In a very well reasoned and lengthy brief, which supplemented the testimony which it had adduced during the course of the hearing, the Union argued that in negotiating the 1973 and 1975 Local Memoranda of Understanding, the Parties to that Memoranda had agreed that employees who receive documented and approved leave of any kind, and more specifically sick leave, would not have absences so covered used as the basis for disciplinary action.

The Union claimed that the testimony of the witnesses at the hearing, who were active participants in the negotiation of the Local Agreements, clearly established that the Parties had agreed that sick leave which was approved, either earned or projected, could not be the basis for taking disciplinary action. The Union also claimed that there was never any question that the words "any leave" as used in Subsection 3d of Article 10 of the Local Agreement referred to sick leave as well as other forms of leave customarily afforded to Postal employees. The Union called attention to the entire wording of Section 3, Subsections a through i, inclusive, as well as the testimony of the negotiators regarding the positions taken by the parties and proposals exchanged on this provision to substantiate this claim.

The Union also argued that management could not now equitably argue that the local negotiators did not have authority to negotiate such a restriction on managerial rights in 1973 and 1975 as well. The Union contended that management was estopped from taking such a position when the contents of the Local Agreement were known to higher management in 1973 and 1975, and no action was taken to disown or to remove from the Local Agreement this language after the Union had successfully resisted efforts made during negotiations to modify the language ostensibly for the purpose of conforming to the requirements of the Master Agreement. The Union asserted that management could have challenged the Union's right to secure such a provision in the Local Agreement in the impasse procedures provided to resolve local issues, but that the Postal negotiators failed to do so. Thus, the right to contest the validity and viability of such a provision could not be raised in the instant proceeding which was not designed to

resolve local bargaining impasses which were not raised in a timely fashion.

The Union also argued that, in any event, the restrictions placed upon management's right to discipline contained in Section 3d of Article 10 of the Local Supplementary Agreement did not conflict with the provisions of the Master Agreement. The Union pointed to the fact that Article XVI of the Master Agreement requires that discipline be corrective in nature rather than punitive. The Union contended that the most creditable arbitral opinion has held that absences due to physical inacapacity have nothing to do with discipline and should not be the basis for disciplinary action. In addition, the Union made reference to several arbitration awards in which it was also held that where there was an approved sick leave program, and the employee's absences were covered by leave provisions under such a program, there could be no disciplinary action taken against such an employee. In other words, just cause for discipline could not be found under such circumstances since management agreed under the terms of the sick leave program to excuse absences approved under that program.

Management argued that Article XIX of the 1975 Agreement, which is the Agreement under which this grievance was raised, provides, as did previous agreements, , .. . inter alia that provisions of Postal Manuals not inconsistent with the terms of the National Agreement shall remain in full force and effect. By virtue of that provision, Section 442.181 of the Postal Service Manual, which provides, "Employees are required to be regular in attendance.", was incorporated as a provision of the 1975 Agreement.

The Postal Service pointed out that Article XXX of the Master Agreement specifically provides that in local negotiations no agreements could be made that were inconsistent with or in conflict with the terms of the Master Agreement. These provisions, the USPS pointed out also appeared in exactly the same language in the 1973 Agreement. For these reasons, the Postal Service argued that the Local Union and Local Management in Newark could not have agreed upon and put into effect a provision in the Local Memorandum which restricted management's right to require employees attend to their duties with regularity, and the approval of sick leave could not inhibit management from enforcing this requirement incorporated by reference into the Master Agreement.

The Postal Service also argued that excessive absenteeism due to illness is proper grounds for disciplinary action. The USPS cited several arbitration awards which so held and argued that this was the prevailing arbitral opinion. The Postal Service also contended that the existence of a sick leave program and accrued sick leave days could not protect an employee from being counseled, warned, suspended and even discharged for a failure to maintain regular attendance although the absences were excused and possibly paid for under the existing sick leave program.

OPINION OF THE ARBITRATOR:

The threshhold issue which confronts the Arbitrator in this case is whether there was a clear and enforceable agreement between the parties to the Local Memorandum in Newark which would prevent Local Management from taking disciplinary action against

an employee with an irregular attendance record when the cause of that employee's absences has been sickness covered by documented and approved sick leave.

The undersigned believes that the Union did present credible evidence to substantiate its contention that Section 3d of Article 10, as it appeared in both the 1973 and 1975 Local Agreements, referred to sick leave as well as annual leave and other leaves of absence for which management could excuse and pay an employee who did not appear for work. Having said that, it is necessary to add, however, that neither local management or the local union negotiators had authority and the power, under the terms of the provisions of Article XXX of the Master Agreement, as those provisions appeared in the 1973 and 1975 Agreements, to restrict management's right to discipline in this fashion. Article XXX clearly provided that local memoranda provisions inconsistent with the terms of the 1973 or 1975 Master Agreements cannot be negotiated on a local level. Paragraph B of Article XXX provided in pertinent part that, "...no local memorandum of understanding may be inconsistent with or vary the terms of the 1973 National Agreement." That same provision appeared in the 1973 Master Agreement.

Article XXX also most specifically limits local negotiations to twenty two enumerated items. A careful reading of these items does not reveal that the subjects of discipline and sick leave as well were left to be negotiated out at the local post office or area level. A principle which must be followed when the parties do enumerate and limit subjects with such particularity is to conclude that they meant to include no other subjects for local implementation.

This list of twenty-two specific items on which local negotiations can be had was hammered out laboriously by the negotiators of the Master Agreement. They understood that the basic provisions concerning wages, hours and other terms and conditions of employment would have to be uniform throughout the postal system for all employees concerned and uniformly administered as well. That is why they repeated in 1975 that terms of any earlier local memoranda not inconsistent with the provisions of the 1975 Master Agreement could remain in effect, and new provisions negotiated on the twenty-two items in 1975 would also have to be consistent with the terms of the Master Agreement made in 1975 and could not vary the terms of that Agreement.

Clearly the local postal representatives and union representatives had no authority to negotiate a provision which the Union alleges restricts management's rights to discipline an employee for a failure to maintain regular attendance, as provided for in Section 442.181 of the Postal Manual, as incorporated by reference into the Master Agreement pursuant to the provisions of Article XIX discussed above. Nor can management be required to apply such a provision at the Newark Post Office because it failed to protest its existence and challenge its validity in an impasse proceeding. Neither party to the local negotiations had the authority to negotiate the provision that the Union urges, in this proceeding, be given validity. Management cannot be estopped from asserting its invalidity at this time. To so provide would expose the parties to the Master Agreement to the chaotic situation under which the terms concerning discipline and its relation to approved sick leave, as in this instance, and other terms covered by the Master Agreement, in other instances, would not be uni-

applied and administered because of the existence of a provision in a local memorandum inconsistent with or in conflict with the provisions of the Master Agreement.

Having concluded, for the reasons set forth above, that Subsection 3d of Article 10 of the Local Memorandum at the Newark, New Jersey Post Office could not be so implemented, the subsequent question posed in this proceeding is whether, under the provisions of Article XVI of the Master Agreement, irregular attendance can provide just cause for discipline. More particularly, the question is whether irregular attendance, even when absences are covered by documented and approved sick leave under a negotiated sick leave program, can provide just cause for actions taken by management against the absentee.

The undersigned has carefully considered the well reasoned arbitration awards submitted by both sides in support of their respective contentions regarding this latter issue. After due deliberation, and for the reasons set forth below, the undersigned is of the opinion that irregular attendance and unreliable attendance, regardless of the legitimacy of the reasons for the absences, may provide management with just cause for taking disciplinary action.

As Arbitrator Cushman held in Case No. AC-S-9, 936-D, decided on June 6, 1977:

> "This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons. Vera D. Bugg, AB-S-6, 102-D....
>
> "This Arbitrator is sympathetic to employees

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

This same line of reasoning was advanced in several other cases which arose in the Postal Service and which were cited by Management in this proceeding. Those cases were decided in the same manner in face of the existence of the Postal Service negotiated sick leave plan with which those Postal Service arbitrators were certainly familiar. None of the cases relied upon by the Union to contest this view arose in the Postal Service. Although recognizing the limitations upon the application of the principle of stare decisis in an arbitration proceeding, the undersigned must give some persuasive weight to awards rendered interpreting the same language of Article XVI of this Agreement.

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

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

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

As stated above, local management and local union negotiators did not have any right to modify, amend or alter management's right to

discipline for just cause. Just cause is provided where, as stated above, irregular and unreliable attendance requires that steps be taken to provide for a reliable and dependable work force. The local parties to the Newark Post Office Local Memorandum attempted to place restrictions on what constitutes just cause for disciplinary action in such cases. This they lacked authority to accomplish through local negotiations , and this grievance must therefore be

A W A R D

The grievance filed by Local Vice-President John R. Rapurano is hereby denied.

HOWARD G. GAISER, IMPARTIAL ARBITRATOR

Washington, DC
February 9, 1978

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

BACKGROUND

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

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

This case represents the culmination of a basic disagreement between the parties which initially took form in an April 5, 1977 letter of the then NALC President, Joseph Vacca, to the then Senior Assistant Postmaster General - Employee and Labor Relations, James Conway. The letter read— 2

> "It has come to my attention that Postal Service Management in the Central Region, Northeast Region and Southern Region has embarked upon a shockingly disgraceful program of 'absenteeism control' whereby they have taken the position that it is, under our National Agreement, permissible to discipline and even discharge employees for legitimate use of annually earned or accrued sick leave on the grounds that an employee who uses all such leave is not 'maintaining a regular work schedule.'

Examples of this program are attached to this letter for your information and review.

"NALC stringently disagrees that such programs are permissible under Articles III, X and XVI of our National Agreement and Federal Statutes guaranteeing postal employees the right to earned and accumulated sick leave. Therefore, I hereby request that you inform me whether or not Postal Service Management at the National level agrees with the interpretation of the National Agreement evidenced by the Central, Northeast, and Southern Region directives attached hereto.

"Should you inform me that National Postal Management agrees with that interpretation of our contract, I shall be forced to conclude that there exists 'a dispute between the Union and the Employer as to the interpretation of (the National) Agreement' within the meaning of Article XV, Section 2, last paragraph, and initiate, hereby, a grievance at the National level over that dispute and request an immediate Step 4 discussion to attempt to resolve the same."

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

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

"POLICY ON ABSENTEEISM CONTROL

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

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

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

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

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

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

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

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

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

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

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

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

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

with the language appearing in the new Manual, as revised, on the subject of "Leave," commencing with Part 510 in Chapter 5.

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

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

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

The Presentations

1. NALC

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

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

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

The Civil Service Commission Policy, as thus stated, is controlling in respect to all USPS preference eligible veterans who elect to appeal the imposition of discipline under Civil Service procedures rather than under the grievance procedure established in the National Agreement. In the NALC view, it is absurd to have two different disciplinary policies applicable to USPS employees working under the same Agreement, depending on whether or not an employee happens to be a preference eligible veteran. In its judgment, therefore, the USPS now should be required to embrace the CSC policy. 10

The NALC also emphasizes the obvious incongruity of trying to apply "corrective" discipline to discourage an employee from being injured or becoming ill. Under Article XVI all disciplins must be corrective in nature, not punitive. In the case of employees on OWCP approved workmen's compensation (or continuation of pay status because of on-the-job injury), these are benefits to which employees are entitled by Federal law. The NALC concludes that the disputed USPS policies thus ignore the fact that, under Article III of the National Agreement, the USPS is obliged to honor all applicable laws. 1

2. The USPS

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

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

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

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

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

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

> "The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has the right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons.
>
> * * * * * *
>
> "This Arbitrator is sympathetic to employees whose absenteeism is due to illness, and, therefore, to no fault of their own. Where however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. (USPS, /Vera D. Bugg/ AB-S-6-102-D.) The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable

> physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He is simply being terminated for irregularity and undependability of attendance. Such situations are really not disciplinary in nature..."
>
> (Underscoring added.)

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

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

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

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

FINDINGS

1. Scope of the Issue

The USPS brief sees no real issue here in respect to the imposition of discipline where an employee is absent (1) on continuation of pay due to a traumatic on-the-job injury, or (2) on OWCP - approved Workers Compensation. The USPS, says the brief, does not discipline employees for use of leave benefits provided by the Office of Workers Compensation Program (OWCP). The NALC has presented no evidence to the contrary. Nothing in the memoranda from the Central Region, Marblehead, or Jacksonville specifically states that discipline should be imposed on employees for absences on OWCP approved Workmen's [illegible] due to traumatic on-the-job injury. 17

Given the assurances embodied in the USPS brief, therefore, the present analysis is limited to considering whether the imposition of discipline because of absences on approved sick leave may involve violation of the National Agreement.

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

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

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

2. Earlier Opinions by USPS Regional Arbitrators

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

The most significant Regional case, for present purposes, was decided in the Southern Region December 17, 1975 by Fred Holly, a highly respected and eminently qualified arbitrator, in Case AB-S-6102-D (herein called the Bugg Case). There the grievant had a little over 3 years of service when discharged in late 1974. Within two months of being hired she had established an unsatisfactory attendance record, which was called to her attention by two separate supervisors. After five months of employment, she again was told to improve her attendance record. About a month later she was warned by letter that her attendance was unsatisfactory and was placed on restricted sick leave. Ultimately, she was sent to a USPS designated physician for an examination to determine her fitness for duty because of a continued poor attendance record. On February 18, 1974 the physician reported that she was able to perform her job from the medical standpoint. Three months later she again was warned about continuing absenteeism. In September of 1974 an analysis of her attendance record over recent months was prepared. This resulted in the decision to discharge. During her last 7½ months of employment she had been absent more than one third of her scheduled hours. There is no suggestion in Holly's Opinion that the grievant was suffering from any single, identifiable illness which might have been responsible for all, or most, of her repeated absences from work.

A key paragraph in the Opinion in the Bugg Case reads— 23

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

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

> "It has been well established by arbitration decisions that when an employee becomes undependable as to adequate attendance, so as to impede operations, the employer may finally discharge, regardless of what reasons cause the undependability or unfitness.
>
> The employer has no contractual obligation to retain an employee whose services are irregular or where absences are due to disability over a long period....Regardless of causes of continuing absences, a just cause for removal exists where reasonable corrective steps have not changed a deficient performance so as to meet the established standards."
>
> (Underscoring added.)

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

> "...there is nothing in Article X, Section 4, which states, or...implies, that absences due to sick leave, whether covered by sick leave, or beyond such coverage, cannot be

used as a basis of discipline when combined with other absences, or as a basis of discharge for disability without fault standing by itself, where such disability to perform on an acceptable basis is fully established by medical evidence.

* * * * * *

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

(Underscoring added.)

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

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

"The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have

tion is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from their employees and that when such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. Vera D. Bugg, AB-S-6102-D.

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

(Underscoring added.)

On June 6, 1977 Arbitrator Cushman also decided Case AC-S-9,936-D, finding 27
just cause for a "termination." The grievant there was a ZMT Operator who had only about two years of service when discharged in August 1976. Within only 8 months of his hire he had been counselled for excessive absenteeism, and 2 months later was placed on restricted sick leave. Thereafter he received a letter of warning, a 5-day suspension, and a 14-day suspension because of his continuing absenteeism. He did not reply to the June 25, 1976 notice of proposed removal. Between March 27 and July 2, 1976 he was absent on 68.57% of his scheduled work days. All of his absences either were on approved sick leave or approved leave without pay. After again citing the Bugg Opinion, Cushman wrote—

"This Arbitrator is sympathetic to employees whose absenteeism is due to illness and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such case the employee is not being 'punished' because he

is ill. He simply is being terminated for irregularity and undependability of attendance. Such situations are not really disciplinary in nature. And that is why this Arbitrator has stated in Case AC-S-12,796-D that in a case of excessive absenteeism if the absenteeism genuinely arises from a physical or medical problem discipline in the form of disciplinary suspensions is inappropriate."

(Underscoring added.)

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

"The Service does not question the genuineness of the reasons given for all of these absences. It states that it has no information on which to do so. Under such circumstances, it must be assumed that the grievant was not 'at fault.' Accordingly, this is not a case in which discipline or discharge are appropriate for any wrongful conduct or behavior which breached her employment duties or the requirements of the collective agreement.

Under such circumstances the case, necessarily, turns on the question whether the Service had grounds to terminate (not 'discharge') the grievant because it had reason to apprehend that, on the basis of the attendance record referred to, the grievant would not maintain a reasonable attendance record in the future. In other words, and in effect, the Service's position is that the absence record demonstrates that the grievant does not possess the physical qualifications to maintain a satisfactory attendance record in the future."

(Underscoring added.)

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

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

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

3. Significance of the Earlier Regional Opinions

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

Management properly may assume that most USPS employees are conscientious and not prone to abuse the sick leave program. Medical certificates understandably are not generally required to support every one or two day absence because of claimed illness. Even where medical certificates are required they may not be difficult to obtain, even by a malingerer. There is no practical way for the USPS 32

to question their validity, moreover, except as other evidence may surface to reveal that a given employee has been malingering.

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

Some of the problem envisioned by the NALC in the present case, moreover, may arise from unnecessarily broad generalizations embraced in some of the Regional opinions which imply that the application of discipline always will be proper when the USPS can show "excessive absences" from work. Indeed, the USPS brief quotes from the Elkouri text, "How Arbitration Works" (3rd Ed. 1973) at p.545, a sentence to the effect that an employer has a "right" to terminate an employee for excessive absences even when due to illness. Reliance on such broad and misleading generalizations may obscure the fundamental consideration that the true issue, under Article XVI of the National Agreement, is whether the employer has established "just cause" for the given discipline in the specific case. The presence or absence of "just cause" is a fact question which properly may be determined only after all relevant factors in a case have been weighed carefully. The length of the employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the types and frequency of all of the employee's absences, the nature of the diagnosis, the medical history and prognosis, the type of medical documentation, the possible availability of other suitable USPS jobs or a disability pension, the employee's personal characteristics and overall record, the presence or absence of supervisory bias, the treatment of similarly situated employees, and many other factors all may be relevant in any given case. 34

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

> "In addition, the undersigned is constrained to add the following comments. Of course properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. However, neither can excused sick leave be considered as a grant of immunity to an employee against the employer's right to receive regular and dependable attendance and to take steps necessary to insure the existence of a reliable workforce to do the work at hand.

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

Given the specific facts in most of the cases before them, it occasions no surprise that many Regional Arbitrators have indicated that repetitive, excessive absenteeism--even including absences on approved sick leave--may provide "just cause" for discipline or discharge. Such extreme situations are not hard to find. The facts in the original Bugg case, as well as those before Arbitrators Cushman in Case AC-S-9,936-D and Seitz in Case AC-N-16,605-D serve to illustrate this point 36

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

4. Relevance of Civil Service Commission Policy

Article XVI, Section 3 of the National Agreement recognizes that any USPS employee who is "preference eligible" may elect to appeal the imposition of discharge, or a suspension of more than 30 days, to the Civil Service Commission instead of filing a grievance claiming violation of Article XVI. This alternative,

of course, is available only to those bargaining unit employees who happen to be preference eligible. All other employees covered by the National Agreement may seek redress for discharge, or suspension of more than 30 days, only through the grievance procedure.

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

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

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

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

> "When an agency exercises its authority to approve leave the employee is released from his obligation to report for duty and his absence does not constitute a breach of the employer-employee relationship. As a result, an adverse action based on approved leave in any amount is not normally a cause that will promote the efficiency of the service. Such an adverse action, then, should be reversed on appeal for failure to state a cause of action."
>
> (Underscoring added.)

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

> "In light of this new Commission policy, 'failure to meet position requirements' or 'undependability' based upon excessive approved absences should not be used as grounds for taking adverse actions against preference eligible employees, unless and

until we are successful in reversing Commission policy through the vehicle of a motion for reopening on a 'test' case."

(Underscoring added.)

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

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

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

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

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

> "Pursuant to Article III of the 1975 National Agreement this Arbitrator must view the action of the Employer in the light of applicable law and regulations. The Federal Ruling issued in accordance with the responsibilities Congress has imposed upon the Employer by law is such an applicable regulation governing the Employer's action here.

> Therefore, since Biggs' discharge was based on a record of approved leaves of absences from February 1, 1975, when he injured his knee, to December 7, 1975, when he was discharged, the action of the Employer must be set aside."

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

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

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

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

It follows that neither a Regional nor National Level Arbitrator may presume to enunciate or establish any broad general rule contemplating that the imposition of discipline always will either be upheld, or be set aside, in any given category of case. Nor can the pronouncement of the CSC Bureau of Policies and Standards now be accorded such a status by this Arbitrator. To do so would be, in effect, to amend Article XVI. 52

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

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

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

Conclusions

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

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

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

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

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

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

AWARD

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

Sylvester Garrett,
Arbitrator

ARBITRAL STANDARDS IN DENYING ABSENTEEISM GRIEVANCES

It has been held consistently that chronic or excessive absenteeism is just cause for discharge. The real problem has been to determine whether absenteeism is excessive. In making this determination arbitrators consider many factors. The following quotes from arbitration decisions represent the general reasoning of most arbitrators in sustaining discipline for absenteeism:

Arbitrator Edwin H. Benn, C4C-4Q-D 21595

"First, Grievant's record does not only involve the extended absence resulting from the accident. Grievant showed periods of absences in other pay periods during the measuring period.

Second, there is no question that Grievant missed a substantial period of time - approximately 25% of his scheduled days.

Third, Grievant was specifically counselled by Keys that he had to improve his attendance. Notwithstanding the counselling, Grievant missed three days at a point approximately four weeks after the counselling.

Fourth, although Grievant worked four weeks after the counselling without missing until he was again absent for three days in June 1986, in light of extensive time missed prior to that time, I cannot say that Grievant showed any kind of measurable improvement to defeat a decision to issue discipline.

As in all the attendance regularity cases, each case is examined on its own facts to determine whether the line demarcating regular from irregular attendance has been crossed. The key, in major part, is to

determine whether or not a pattern has been exhibited showing a wild card or sporadic use of sick leave. No single factor listed above is sufficient to justify the Service's action herein. However, when viewing these factors in their totality and considering the ordinary definition of the word "regular", I am satisfied that the Service has met its burden of demonstrating that Grievant was not regular in his attendance as required by section 666.81 of the ELM."

Arbitrator John P. McGury, C4C-4A-D 16915

"The grievant was hired on November 13, 1982. On February 22, 1983, she incurred a back injury which subsequently resulted in management issuing her a Letter of Removal on April 16, 1984. The arbitrator in that case set the removal aside but refused to award back pay. It was clear to Arbitrator Roumell that the grievant had contributed to the situation by being dilatory and making false representations and, therefore, was not entitled to back pay.

On this instant case, the grievant was notified on March 7, 1986 that she would be terminated effective April 11, 1986. The Employer based their action on 22 incidents between September 1, 1985 and February 24, 1986. Included were nine cases of tardiness and two AWOL's after the grievant had volunteered to work a holiday. 104 total hours of absences were involved. Only two of the absences subsequent to Roumell's earlier award were attributed, by the grievant, to her back condition. There was no evidence presented which linked the grievant's record in this case with her back condition. Therefore, the arbitrator stated that the grievant's back condition played only a minor role, if any, in this instant case. "

Arbitrator James P. Martin, C4C-4B-D 15632

"The Service had just cause to remove the grievant for his unsatisfactory attendance. The progressive discipline imposed upon the grievant was impressive, and thorough, running from oral warnings through seven, fourteen, twenty-one and approximately a forty day suspensions, with two of these as reductions from removals. It, therefore, would be hard to conceive how an employee can be given more notice that his conduct was unacceptable. The grievant received every possible opportunity to reform his attendance, and he did not do so. The Postal Service, therefore, had more than adequate just cause to remove the grievant and the grievance was denied."

Arbitrator Thomas J. Erbs, C4C-4D-D 29023

"The arbitrator found that the removal of the grievant was for just-cause under the provisions of the National Agreement. He further stipulated that there was no evidence that the grievant was subjected to unjust, discriminatory or disparate treatment. The grievant was given every opportunity to correct any problem causing his absenteeism; he was warned, counseled, disciplined, and cojoled, but no correction was forthcoming despite the repeated warnings that corrective action was necessary for this continued employment."

Arbitrator Robert W. McAllister, C1C-4H-D 26873

"On December 8, 1983, the grievant was issued a Letter of Warning for unsatisfactory attendance.

The arbitrator denied the grievance due to the fact that the grievant had been forewarned about her absenteeism in a previous discussion

and because he felt the issuance of discipline in this case was to correct a perceived slide into excessive absenteeism."

Arbitrator Ernest E. Marlatt, S4C-3U-D 32671

"The Union suggests that the Grievant has learned his lesson and should be given a last chance. The record does not bear out this argument. The Grievant offered no explanation for his deplorable attendance record, nor could he show any mitigating or extenuating circumstances whatsoever. He was given two previous opportunities to save his job with the Postal Service by making the effort to come to work regularly and on time. The Grievant's continued failure to improve his attendance leads to the conclusion that he would not do so if given still another chance. No employer need keep any person on the payroll indefinitely, month after month, year after year, if that employee cannot be depended upon to report for work regularly. There was ample just cause to remove the Grievant from his employment with the Postal Service."

Arbitrator Patrick Hardin, S8C-3D-D 31497

"With a minor exception, the facts concerning the grievant's attendance are not disputed. Her record was described as the worst by far at the Mobile Post Office, apart from a few instances involving periods of pregnancy. It is enough to say that the record would fully justify the discipline, apart from its relationship to the serious illness of drug and alcohol addiction. The determinative question in this case is whether the Postal Service has discharged its obligation under the contract to assist the grievant in the solution of the personal problem

that has so impaired her work record. I conclude that it has done so and, thus, the removal was for just cause within the meaning of Article XVI.

Article XXXV imposes rather limited duties on management with respect to employees whose unsatisfactory work record is related to chemical substance abuse. Under the contract, the Postal Service must maintain PAR, and other agreed programs, refer employees who need and seek referral, and see that the PAR counsellor has 'a reasonable period of time to evaluate the employee's progress in the program.' It is apparent that management went well beyond those limited responses in this case. A removal was rescinded. Thrity days' sick leave was advanced for detoxification and stabilization. A second hospital program was found when the first effort did not succeed. The four month period ending in April 1981 was, according to the testimony of the PAR counsellor, adequate time to 'evaluate' the grievant's 'progress'."

Arbitrator Patrick Hardin, S8C-3D-D 31497

"I am hardly immune from the temptation to use the arbitration process as a device to give a troubled employee a full, fair chance, as the Union here has urged me to do. See, U.S.Postal Service and Mail Handlers Union (Harris), No. S8M-3D-D 27987 (Hardin, 1981), directing the limited reinstatement of the grievant where I concluded that the full fair chance had not been accorded. It must be remembered, however, that the contract obligation is precisely the limited one described above. In this case, that obligation has been more than amply

discharged.

If, as the grievant testified,she is now free of drug and alcohol use, and able to return to work, she can readily become qualified for a preference in re-employment, see Employee & Labor Relations Manual §873.1 et seq. I am confident that the Union leaders and Postal Service managers will give her every assistance in that respect."

Arbitrator Gerald Cohen, 8 NID-BP 4

"It has been said many times by many arbitrators that part of the employment agreement between an employer and an employee embodies an agreement on the part of the employee to be regular in attendance. As a matter of fact, Postal handbooks and manuals specifically state that employees have an obligation to be regular in attendance. The reasons for such behavior are numerous and obvious.

The employer's facilities must be staffed to function. The absence of one employee must be filled by another. This can lead to excessive overtime charges, or, if not that, at least to disgruntled fellow employees upon whom an extra burden is placed.

The situation can evolve where the extended illness of a family member is no longer acceptable as an excuse for an employee's work absence any more than an extended illness of the employee himself will be accepted indefinitely as an excuse for continual absence from work. Of course, illness will generally be given greater toleration as an absence excuse than many other reasons, since illness is beyond one's control and therefore something that, to some extent, must be endured. However,

the Postal Service now finds itself in a position where it can no longer accept such an excuse for absence from work."

Arbitrator John P. McGury, C4C-4B-D 9270

"The grievant was issued a Notice of Removal on August 20, 1985 for being absent without leave from July 22, 1985 through August 20, 1985. The arbitrator, upon reviewing the evidence, found the Employer had just cause for removal. He stated that the only real defense offered by the Union was that the Employer did not follow the principal of progressive or corrective discipline. He stated that although he agrees that progressive discipline usually applies to a case of this type and that failure of the Employer to follow it would preclude discharge, however, in this case, progressive discipline was not applicable because the grievant abondoned her job. Under the circumstances, the Employer was justified in formalizing a result created by the grievant herself."

ROBERT D. KESSLER/CARL CASILLAS
NATIONAL BUSINESS AGENTS
AMERICAN POSTAL WORKERS UNION
1001 EAST 101st TER SUITE 390
KANSAS CITY MO 64131

DEFENDING ABSENTEEISM DISCIPLINE

Arbitrators generally hold that there comes a time when, regardless of the reasons for absences, the usefulness of the employee has ended and the employer cannot be expected to continue the employee on the employment rolls. There are several arbitral standards to look for in defending discipline for absenteeism. If the majority of those standards are not present, any grievance challenging the discipline is severely weakened.

1) Has the employee shown an improvement since the last discipline?

This is a major consideration of many arbitrators. If no improvement can be shown, absent any mitigating or extenuating circumstances, the grievance is lost before you begin. If improvement is present, your chances are more favorable.

ARBITRATOR, JOHN F. CARAWAY - S8C-3A-D 12279

"Based upon the validity of the grievant's absences and some evidence, even though it is not substantial, of improvement in her work attendance, the Arbitrator believes that it would be unduly harsh and severe to remove the grievant."

ARBITRATOR, ALLAN DASH - E1C-2D-D 8735

"Grievant's attendance record subsequent to the July 1987, 'Grievance Resolution' was far better than his preceding record that led to his July 12, 1982, Notice of Removal."

ARBITRATOR, J. FRED HOLLY - S8C-3D-D 27885

"The data supports the Grievant's contentions that his attendance improved. In fact, over his last 14.5 months of work his average monthly absences were only one-half of what they had been in the 10.6 month period prior to the stipulations of September 24, 1979." (Settlement date of a previous discharge.)

"The Grievant's demonstrated improvement in his attendance record destroys any justification for his removal. Not only did he achieve the level of improvement required by the September 24, 1979, stipulation, he also achieved a sick leave balance and retained such a balance at the time of his removal."

ARBITRATOR, JAMES M. O'REILLY - C4C-4K-D 21011

"The warning was based upon a four month review period, while the suspension was based upon a nine month review period. During the four month period preceding the Letter of Warning he had approximately 181.5 absent hours, while during the next nine

ARBITRATOR, PATRICK HARDIN - S8C-3F-D 32241

"There is particularly strong justification for part of the absence for which he was discharged. He was hospitalized for treatment of alcoholism, the disease that has been causing his poor attendance. The National Agreement gives the Postal Service only a limited responsibility to aid employees who are suffering from alcoholism or other drug-related problems. Still, it seems inconsistent with the spirit of that responsibility -- however limited it may be -- to discharge an alcoholic employee based in part on his absence due to hospitalization for the treatment of his illness."

ARBITRATOR, GERALD COHEN - C4T-4M-D 19629

"While Grievant's supervisor was aware that he suffered from diabetes, he seemed to have been unconcerned with Grievant's resulting problems. Grievant was entitled to consideration on account of his diabetes. He did not receive the consideration that he should have been given."

ARBITRATOR, ROBERT FOSTER - S7C-3B-D 29170

"As bad as grievant's attendance record has been, the just cause standard as a condition to final removal action requires management to consider mitigating and extenuating circumstances before arriving at the prediction that grievant's unacceptable pattern is not likely to alter if she remains in the employment of the Postal Service. Arbitrator Alsher had it right in Case No. S7C-3D-D 27984 when he chastised the Employer who "rigidly and mechanistically relies on numbers, not reason(s) behind the numbers."

3) <u>FAILURE TO CONSIDER REASONS FOR ABSENCES</u>

ARBITRATOR, ERNEST E. MARLATT - S4C-3E-D 52589

"If mere attendance statistics were sufficient to justify the removal of a Postal employee, then management could save handsomely on manpower costs simply by programming a computer to issue a removal notice whenever an employee accrues a certain number of unscheduled absences. But that is precisely what Arbitrator Garrett said it cannot do. A Postal employee is not a statistic. He or she is a human being, with strengths and weaknesses like the rest of us. Indeed, Postal employees may have more weaknesses than the rest of us because it is the commendable policy of the Postal Service to provide employment to partially disabled veterans and other handicapped persons. It puts a very small burden on the Postal Service to expect it to determine why an employee has an attendance problem and what if anything can be done to correct the problem. It puts a very large burden on the employee to find other employment once having been removed for absenteeism. Just Cause requires the employer to lay out on the table before the arbitrator the applicable Garrett Factors, not simply a list of dates on

months he had approximately 59.69 absent hours, which is a substantial improvement in his attendance record. Therefore, the arbitrator felt that further counseling and encouragement would seem to be the appropriate level to follow, in lieu of issuing a 7-day suspension.

ARBITRATOR, GEORGE E. LARNEY - C4C-4P-D 35983

"The arbitrator concurred with the Union's position in that if the employer attempts to justify imposing progressive discipline for attendance deficiencies based mainly on a comparative basis of performance improvement from one period of time to another, it can not ignore an interim period of perfect or near perfect attendance that occurred between the last date cited in one disciplinary action and the first date cited in the next disciplinary action, as it did in this instant case. The comparative figures demonstrated that the grievant did improve her attendance performance in the period subsequent to her receiving the Letter of Warning." Therefore, based upon the record, the arbitrator sustained the grievance.

2) MEDICAL EVIDENCE / EXTENUATING MITIGATING CIRCUMSTANCES

ARBITRATOR, J. FRED HOLLY - S8C-3D-D 27885

"The record shows that the vast majority of his absences were documented by statements from physicians, and there is no claim or indication that he abused the sick leave program."

ARBITRATOR, JOHN F. CARAWAY - S8C-3A-D 16717

"There are mitigating circumstances in this case which the Arbitrator cannot ignore. This is an employee with seven years tenure. Up to approximately three years prior to her removal, the grievant was a dependable and reliable employee. A series of accidents and physical problems deteriorated her work attendance."

ARBITRATOR, PETER DILLON - C8C-4M-D 5535

"In the judgement of this Arbitrator the grievant's absences and tardiness were for valid reasons in most cases. In most of the incidents, medical statements supported his absence; ear infection in one instance, teeth extractions in another instance, car break downs with garage receipts to support his absences in several other instances. With regard to the appropriateness of punishment for such absences, it would seem unduly harsh to hold that absences for such reasons deserve the severest penalty when in all these cases a proper report-off occurred."

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which the employee allegedly accrued unscheduled absences."

ARBITRATOR, ROBERT W. MCALLISTER - C1C-4H-D 26648

"The grievant was issued a Letter of Warning for attendance irregularities. In sustaining the grievance, the arbitrator stated that the establishment of proof in irregular attendance cases requires more than a statistical count of absences. The USPS failed to take into consideration or to make any allowance for the absences directly attributable to an on-the-job injury, which constituted a substantial number of the occurrences in the charge. Therefore, in view of the Service's basic misunderstanding of the facts involved, the arbitrator expunge the Letter of Warning."

ARBITRATOR, EDWIN H. BENN - C4C-4P-D 30829

"The arbitrator found that the Service had not met it's burden of proof in demonstrating just cause for the disciplinary action taken against the grievant.

First, the Form 3971 for the January 9, 1987 absence shows that the absence was scheduled and was approved by the supervisor for a previously arranged doctor's appointment at least two weeks in advance, therefore, the January 9th date was erroneously charged as an unscheduled absence. Secondly, the supervisor admitted on the stand that he did not consider the reasons for the grievant's absence, although he usually considers that factor in determining whether or not disciplinary action of this type should be issued. Third, an examination of the Form 3972 showed that the grievant's record did not justify the action taken against her. And, fourth, contrary to the assertion of postal management, the grievant did make significant improvement from the date she had previously been issued a warning letter."

ARBITRATOR, ROBERT W. MCALLISTER - C4T-4M-D 38412

"I am left with management's straight statistical determination that the grievant had missed "too many days." This statistical tabulation to the exclusion of all other factors associated with the analysis of an employee's attendance record is subjective and arbitrary."

4) <u>WAS THE EMPLOYEE FOREWARNED?</u>

ARBITRATOR, ALBERT A. EPSTEIN - C4C-4D-D 14481

"The arbitrator, upon reviewing the testimony, evidence and arguments of the parties, found that the grievant was never warned or disciplined in any way about the use of approved sick leave and apparently was never warned that continued use of approved sick leave might lead to an absent record which would justify termination, even where the sick leave was approved. The arbitrator was impressed by this particular fact which,

in his opinion, justified the Union's position that termination was too severe a penalty under the circumstances of the instant case. Although the grievant did not have a good record and deserved some form of disciplinary action, her record, under the circumstances, does not call for or justify discharge."

The arbitrator then reinstated the grievant but without back pay.

ARBITRATOR, HARRY N. CASSELMAN - AC-C-9603D

"Even if Butwin's testimony is credited that Grievant did not report to him on April 1, 1976, or inform him in March that he was going to a Veteran's Hospital, I still find no evidence that Grievant was warned after his two week penalty that any further failure to attend as scheduled would result in discharge. Such a warning is part and parcel of corrective discipline.

If the purpose is to correct, warning of impending jeopardy is essential; if the purpose is simply to get rid of offenders, there is no way better calculated to do so than to fail to warn them. But such a course of conduct is the opposite of corrective discipline, and amounts to a calculated method of effectuating termination."

5) PROGRESSIVE DISCIPLINE

ARBITRATOR, MATTHEW W. JEWETT - ADS-772-D

"I cannot imagine Postal management being a party to a "Mexican Standoff." Either management is in control of the situation or it is not. In this case, it appears to have lost some control. Furthermore, it acted improperly in the extent of its suspension of the Grievant because part of that suspension was predicated on consideration of a letter of warning on March 14, 1978, which was subsequently reduced to an official counseling. As to its overall action, it acted properly."

ARBITRATOR, G. ALLAN DASH - AC-E-28, 291-D

"The Arbitrator would be quite disposed to sustain the Postal Service's discharge action in this case were it not for that portion of Agreement Article XVI which reads, "...a basic principle shall be that discipline should be corrective in nature, rather than punitive." The parties to the present Agreement have regularly utilized a corrective discipline system, in absentee cases, that is progressive in nature, advancing (with some variations) from counseling through written warnings, short-term and long-term layoffs and, finally, to discharge if all else fails."

6) LENGTH OF SERVICE

ARBITRATOR, WILLIAM HABER - AC-C-24-902 D

"An employee of three and a half decades ought to have some credit for a long term of tenure. The Arbitrator does not disagree with the Postal Service when it states in its brief that seniority does not provide immunity from discipline. Nevertheless, he is of the view that the mere fact of having worked for 34 years, of having been recognized as a competent person with supervisory skills, of having been used as a supervisor on a temporary basis, of not having used up all of his sick bank - all of these factors on the favorable side should simply not be set aside. Whether the grievant is eligible for the retirement benefits which are vested and whether he has, in fact, applied for retirement, as was reported, is not of special importance."

ARBITRATOR, A. HOWARD MEYERS - S4C-3W-D 24090

"Here there is agreement that Mrs. Williams was a good employee until the recent development of attendance problems. With eighteen years service her record shows, as the supervision concluded, she had provided acceptable performance; her unscheduled absences included only one AWOL. I have stated above that the testimony of Supervisor Crews is contradicted by his notation in the removal letter that grievant had informed him of family problems and related car problems. In my opinion she is a responsible person whose long seniority standing should have received more consideration and weight in these circumstances."

ARBITRATOR, ALLAN WEISENFELD - AC-N-19,355D

"Given the grievant's length of employment with the Service and the fact that she has regained her health, I believe she is entitled to another opportunity."

7) EXTENDED ABSENCE CONSIDERED "ONE INSTANCE"

ARBITRATOR, GERALD COHEN - C8C-4H-D 11676

"Many industrial absence-control programs, with which this arbitrator is familiar, would hold that Grievant's absences from April 21 to October 9 constituted only two absences, even though they totaled 81 days during that period of time. These absence-control programs define an absence as an absence occurring for one reason, regardless of the number of days involved, so long as the days of absence are consecutive. The theory behind this definition is that the person is only absent once because he or she had not returned to work to start a new work period."

8) ERRONEOUS CHARGES

ARBITRATOR, JOHN E. CLONEY - C1C-4H-D 32741

"In view of the lack of a discussion and in view of the fact that the grievant was charged with unscheduled absence for periods in which she had previously been granted leave, and charged with absence for period during which she had, in fact, not been absent. The grievance was sustained."

9) SICK LEAVE NOT EXHAUSTED

ARBITRATOR, ALAN WALT - C8C-4K-D 13252

"In those cases where an employee has not exhausted earned sick leave, however, it is necessary to carefully examine the particular facts of his or her case in determining whether there is a reasonable probability of regularity in attendance for the future. It must be remembered that accumulated sick leave is an "earned" benefit... . In view of the employer's right to require verification of employee illnesses, there must be a strong showing in support of removal establishing that an employee wh has not yet exhausted all earned sick leave offers little prospect of regular attendance in the future."

10) AUTOMATIC DISCIPLINE AT SET NUMBER OR %'s.

ARBITRATOR, ROBERT W. MCALLISTER - C0C-4D-D 139

"There is, however, a substantial distinction between chronic, excessive absenteeism and situations involving occasional and infrequent illness. Nelson explained to the Arbitrator that he had no responsibility to look at underlying reasons(s) for an absence 'if it is unscheduled.' According to Nelson, once an employee is deemed unscheduled, it will be used against the employee. It is evidence Nelson has described a "no fault" absenteeism policy which mandates discipline at set numbers of absences regardless of legitimacy. This is not the system promulgated by the United States Postal Service."

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.

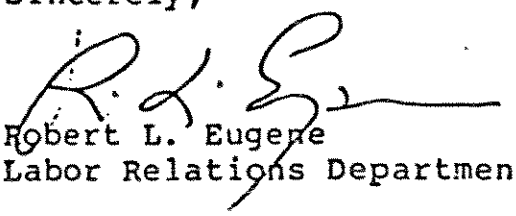
Second, the Union has presented affidavits from several employees who attest that they were told by their supervisors and/or in step one grievance proceedings that if they used more than three percent sick leave they would be disciplined. The supervisors referred to have all submitted statements stating 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

SUPERVISOR'S GUIDE TO HANDLING GRIEVANCES

HANDBOOK EL-921

AUGUST 1990

◆ Was a thorough investigation completed?

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

This is the employee's *day in court* privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves *before* the discipline is initiated.

◆ **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?**

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense.

There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be

DOCUMENTATION / INFORMATION REQUIRED FOR PROCESSING ABSENTEEISM GRIEVANCE

1. A copy of the issuing supervisor's request for disciplinary action.
2. Notice of charges.
3. Copy of grievance settlements and/or current status of any grievances filed in relation to any element of past record cited in disciplinary notice.
4. Absence analysis Form 3972 (including 30 day period following a removal notice).
5. 3971(s) for absences cited in charges.
6. Reasons for each absence.
7. Any medical documentation submitted to support absences.
8. Any existing local attendance guidelines / policies.
9. Copy of document with concurrence signature (if it exists).
10. 3972(s) of other employees under the same issuing supervisor's jurisdiction if disparate treatment argument is used.
11. Supervisors attendance / discipline record if relevant and cited as disparate argument.
12. Supervisor's 2608 (step one grievance summary).
13. Grievant's clock rings for any date a "discussion" took place if grievant denied a discussion was held (for PSDS offices).
14. Copy of your information request form.
15. Any offers of settlement at step 1 or step 2.
16. Memo of interview with supervisor that issued the discipline. Interview is to:

    A. Determine "what actions were taken to improve attendance before requesting discipline."
    B. Ask for dates, times of discussions, where held and what was discussed. (If they reference discussion in 'A' above.)
    C. Go over each absence and inquire if supervisor knows why grievant was off.
    D. Name of concurring official.

17. Development and incorporation into the official grievance of all arguments including mitigating or extenuating circumstances, e.g.;

A. Due Process Arguments:

1. No pre-disciplinary interview (Pre-D) EL-921.
2. No review / concurrence by higher level authority (Art. 16.8).
3. Expunged, expired, or unadjudicated discipline cited as element of past record.
4. No proper 10/30 day notice.
5. Supervisor had no authority to settle.
6. Failed to provide veteran's preference rights.
7. Discipline was not progressive.

B. Delay in issuing discipline, considerable time between last absence and issuance of discipline.
C. No consideration to reasons for absences.
*Also, a set number or % which results in automatic discipline.
D. Invalid or erroneous charges (not just "typo's")
E. Number of absences or % of absenteeism within average for office.
F. Disparate treatment (similar situated employees).
G. Substantial improvement since last discussion / disciplinary action.
H. Absences mostly related to same illness / injury.
*Legitimate/Bonafide illness supported by Med. Doc. which discipline cannot cure.
I. Absences related to specific ailment / injury which is temporary in nature, e.g., broken bones, pregnancy, flu, etc.
* Long period of absences for surgery, etc., vs. short-term sporadic absences.
J. Transportation problems of temporary nature.
K. Absences caused by unusual circumstances beyond grievant's control.
L. Job related injury absences (legitimate, not "alleged").
M. FMLA absences (legitimate, not "alleged").
N. Family problems, e.g., single parent, divorce proceedings, death of family member, sick child.
O. Participation in EAP, AA, or other similar program.
P. Scheduled absences / attempted scheduled absences.
Q. No "pattern" of sick leave use - no evidence of abuse. Absences not connected to N/S days.
R. No AWOL charges - All leave has been approved.
S. Long periods of satisfactory attendance in employment history.
T. Grievant on OTDL and/or volunteers for holidays.
U. Employee has sick leave balance, using S.L. at a rate less than what is earned.
V. No previous discipline for absenteeism (suspension, removal cases).
W. Part day absences (shows attempting to work even if sick).
X. Long-term employment (removal cases).
Y. Satisfactory / good work history, awards, commendations (removal cases).
Z. Attitude of employee toward job.