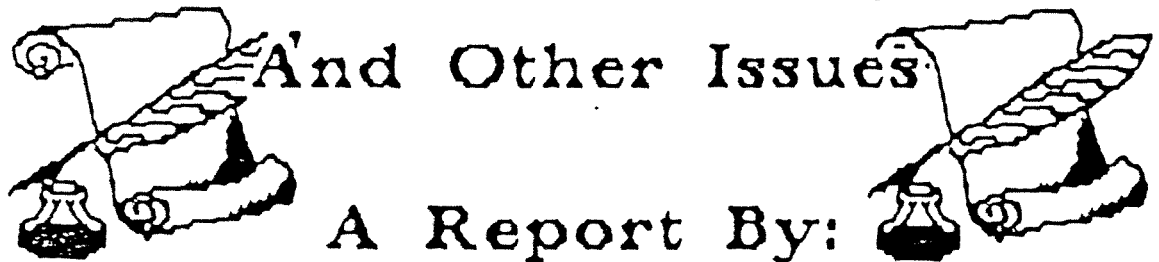


VENDING CREDIT & SHORTAGES

And Other Issues

A Report By:



JEFF KEHLERT

National Business Agent
representing clerks

in

Your Region

Delaware, New Jersey, Pennsylvania
AMERICAN POSTAL WORKERS UNION, AFL-010

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American Postal Workers Union, AFL-CIO

Memorandum

Telephone
(856) 427-0027 Office
(856) 795-7143 Fax

10 Melrose Avenue
Suite 210
Cherry Hill, NJ 08003

From the Office of JEFF KEHLERT
National Business Agent
Clerk Division
Eastern Region



INTRODUCTION

TO:

SUBJECT:

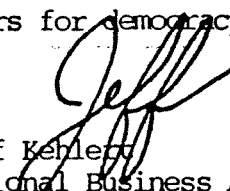
Dear Brothers and Sisters:

The following is a report on contract issues important to clerks and members of other crafts on a variety of subjects.

Information on the issues addressed will, I believe, prove useful to shop stewards in the enforcement of the Collective Bargaining Agreement and to members in understanding problems affecting the work floor.

I have also enclosed several recent, successful arbitration awards on cases I presented, one of which--out of New Castle, Pennsylvania,--resulted in one of the largest monetary awards a single grievant has ever received for a contractual violation of the Collective Bargaining Agreement. This award, in particular, should be stressed the next time a member asks why the Grievance Process takes so long.

Yours for democracy in unionism, I am


Jeff Kehler
National Business Agent
Clerk Craft--Your Region

JDK:svb
OPEIU #2
afl-cio

VENDING CREDIT SHORTAGES

An ever-growing problem in the Region is shortages in vending credits. Often, clerks are being improperly required to pay for such shortages as if they had occurred in credits of window accountabilities. This is incorrect. Shortages in vending credits are addressed by specific contract language found in the M-74 Handbook under Article 19 of the Collective Bargaining Agreement.

Section 622 of the M-74 Handbook ¹ states in part:

622 SHORTAGES

622.1 Causes

The SSPC technician does not have complete personal control at all times for the assigned account. Therefore, any shortage which cannot be identified as being caused by fire, burglary, robbery, acceptance of counterfeit money and slugs, etc., must be assumed to be the result of machine malfunction, unless:

- A. It can be established that the loss was the direct result of negligence on the part of the servicing employee or,
- B. There is sufficient evidence to prefer charges against the servicing employee for theft, embezzlement, etc.

This language places the burden upon the United States Postal Service to establish that a shortage was the direct fault of the clerk. There is no assumed liability placed upon the clerk as is so often the case in fixed credit shortages of window clerks under Article 28 of the Collective Bargaining Agreement.

¹ Handbook M-74; Self-Service Postal Center Operations

Despite Management's responsibility to adhere to the M-74 and Part 622 in particular, it is clear that many clerks assigned vending credits are required to pay for shortages automatically. We will never know how often this occurs; but I believe dissemination of the M-74s contractual requirements will help protect clerks' rights in this regard.

PART 436 OF THE ELM vs. ARTICLE 15

In a recent decision by Arbitrator Edward Levin in case number N7V-1N-C 3452,² it was determined that Article 19's ELM provision for back pay claims -- Section 436 -- was not in conflict with the fourteen-day limit for timely grievance filing. This decision is a breakthrough for pursuit of pay claims after the fourteen-day time frame has expired. Specifically, Section 436 of the ELM states in part:

436 BACK PAY

436.1 Corrective Entitlement

436.11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employment benefits which the employee normally would have earned during the period.

436.26 Any claim made by a postal employee or his or her authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after date such claim first accrued.

² Attachment #2; N7V-1N-C 3452
New Brunswick, New Jersey; 2/14/89

Based upon that language, I believe the best way to initiate a claim is to send a certified letter, return receipt requested, to the Postmaster or temporary Installation Head (OIC, acting PM) stating the following:

I am writing to request a pay adjustment due to (nature of claim) in the amount of (hours or money).

This request is sent to you in accordance with Parts 436. 11 and 436.26 of the Employee and Labor Relations Manual. Please inform me as to whether you need further information in writing.

Please respond in writing as soon as possible with regard to this important matter.

Be sure to keep a copy of your letter and attach the certified slip and return receipt for your records. If the Postmaster responds either orally or in writing and denies the claim, then use that denial as a trigger or starting point for your fourteen-day grievance time limit.

In any grievance so filed, include your original request, certified slip, return receipt and Postmaster's written response (if it exists). Should the Postmaster not respond, then file a grievance within fourteen days of the date he received the requested letter. In this way, I believe we can successfully utilize Section 436 of the ELM in conjunction with Article 15's grievance rights to address unjust back pay restitution issues.

CONTROLLING LANGUAGE HANDBOOKS AND MANUALS OF ARTICLE 19

In a tremendous arbitration victory,³ Clerk Craft National Business Agent Mike Morris of the Memphis Region was successful in overturning a \$17,470.06 Letter of Demand by using Management's own authored Handbooks and Manuals language. The issue in the case was whether Management's failure to adhere to and include mandatory language in the Letter of Demand concerning grievance appeal rights rendered the Letter of Demand null and void.

As background, it must be stated that the Letter of Demand was timely grieved even though the required language was not included in the letter. The provisions in question are as follows:

F-1 HANDBOOK

POST OFFICE ACCOUNTING PROCEDURES

133 DEMANDS FOR PAYMENT FOR LOSSES AND DEFICIENCIES

All employees must receive written notice of any money demand for any reason. The letter of demand, which must be signed by the postmaster or his or her designee, must notify the employee of a USPS determination of the existence, nature and amount of the debt. In addition, it must specify the options available to the employee to repay the debt or to appeal the USPS determination of the debt or the proposed method of repayment. Regulations detailing the rights of non-bargaining unit employees and applicable collection and appeal requirements are in Employee and Labor Relations Manual (ELM) 450. Requirements governing the collection of debts from bargaining unit employees are in ELM 460 and the applicable collective bargaining agreement.

³ Attachment #3; S4C-3D-C 64951/S7C-3D-C 9918
Birmingham, Alabama; 2/8/89

473 COLLECTION PROCEDURES FOR MONIES DEMANDED

473.1 Bargaining Unit Employees

473.11 When, in accordance with the conditions and standards set forth in Article 28 of the employee's respective collective bargaining agreement and Employee and Labor Relations Manual (ELM) 460, it is determined that a bargaining unit employee is financially liable to the Postal Service, any demand for payment must be in writing and signed by the postmaster or his or her designee. In addition to notifying the employee of a USPS determination of the existence, nature, and amount of the debt, the demand letter requesting payment must contain the following statement regarding the employee's right to challenge the USPS claim: "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

473.12 If an employee files a grievance over a money demand of more than \$200, collection will be delayed until after disposition of the grievance either by settlement with the Union or through the grievance-arbitration procedure. Money demands of not more than \$200 are due when presented regardless of whether an employee files a grievance.

EMPLOYEE AND LABOR RELATIONS MANUAL

462.3 Applicable Collection Procedures

In seeking to collect a debt from a collective-bargaining unit employee, the Postal Service must follow the procedural requirements governing the collection of employer claims specified by the applicable collective-bargaining agreement. Care must be taken to ensure that any demand letter served on an employee provides notice of any right an employee might have to challenge the demand under the applicable collective-bargaining agreement.

The arbitrator found that the USPS had indeed violated the Collective Bargaining Agreement when it failed to adhere to the mandatory provisions of the F-1 Handbook and ELM. The Arbitrator ruled Management cannot prevail on an issue of contract violation by simply claiming there was no harmful error to a grievant because there would be harm done to the Union's rights in expecting Management to adhere to the Collective Bargaining Agreement.

I believe the concept of strict adherence to contract language National Business Agent Mike Morris used in this case can be applied in all cases whereby we allege Management violated specific contract provisions, especially those from Handbooks and Manuals. This decision should be used as a supportive illustration in those instances to demonstrate what the arbitrator did in considering and addressing the Union's case.

Lastly, for his scholarly formulation and presentation of the Union's arguments, National Business Agent Mike Morris deserves our gratitude and congratulations on a job very well done.

RAISE CONTENTIONS, ARGUMENTS, CONTRACTUAL PROVISIONS

E A R L Y

Too often we present grievances in arbitration which have not seen the Union address its contentions, arguments and the applicable contractual provisions at the early steps of the Grievance/Arbitration process. We are then left with the task of developing facts, raising arguments, and citing contractual provisions violated at the time of arbitration. Often arbitrators will give no consideration to points raised or information produced at the hearing which was not part of the case previously. Management will also raise objection to expansion of the Union's case at arbitration; and when this occurs, most times the arbitrator will sustain the Postal Service's objection and bar the Union from such expansion of the facts, arguments and contractual provisions cited. If the situation was reversed, the Union would do the same--an illustration:

John Doe received a notice of suspension in January of 1989 for three specific charges. When the case came to arbitration in July of 1989, the USPS tried to add two more charges to the three previously cited. We would certainly object and the arbitrator would rule the two new charges were not part of the Suspension Notice.

In contract cases, the USPS is raising objections to our efforts to fill the gaps and boost our case. When we file grievances, we must raise all arguments, cite inclusive contractual provisions and provide complete facts as early as possible. If we fail to present a full case (early on), we probably will not get that opportunity at arbitration.

RECENT ARBITRATION AWARDS

I have enclosed several recent awards for arbitration cases I was successful in presenting.

The first ⁴ from Arbitrator Robert Condon is a case involving the all important Clerk Craft Seniority Rights protected by Article 37 of the Collective Bargaining Agreement. The Arbitrator found Management had blatantly violated those rights of the grievant when they forced her out of her properly bid and held position and subsequently turned her life upside down:

It is the Arbitrator's determination that the parties did, indeed, have a purpose in mind when they included definitions of Abolishment, Article 37, Section 1F and Reversion, Article 37,

⁴ Attachment #4; E1C-2F-C 16877/McGarvey
New Castle, Pennsylvania; 4/6/89

Section 1G in the National Agreement. It is my determination that the application of one term in place of the other is a violation of the jointly negotiated agreement. Since evidence submitted, and testimony offered, indicate that the duties of the Grievant were not abolished, I believe she should never have been directed to perform other duties or be canvassed for another position. The privileges related to seniority are quite meaningful and should be so honored by both parties. To ignore the Grievant's length of longevity with the Postal Service and subject her to a Part Time Flexible position both as a Letter Carrier and a Clerk in order to exercise her right to a Tour II position is difficult to accept. This is especially true when it is a fact that the duties of her original position have been, and still are, being assigned as a necessary part of the New Castle Post Office operation.

Arbitrator Condon awarded the grievant her original seniority, her original job and one of the largest monetary awards a single grievant in our Union has ever received for a case of contractual violations.

The second case ⁵ deals with the Emergency Suspension and Removal of a clerk for off-duty misconduct. Arbitrator Bernard Cushman found that Management was procedurally improper in placing the grievant in Emergency Suspension. He further found that the grievant's off-duty misconduct was not related to his Postal employment and there was no connection or "nexus" between the grievant's job and the misconduct. Arbitrator Cushman awarded the grievant full back pay and all benefits in sustaining the Union's grievance.

⁵ Attachment #5; E7C-2A-D 6987/E7C-2A-C 8134/DEPTULA
Langhorne, Pennsylvania; 2/7/89

The third decision,⁶ also by Arbitrator Robert Condon, addresses another violation of seniority rights--but this time in conjunction with an excessing situation under Article 12 of the Collective Bargaining Agreement.

The grievant was denied a position because a clerk excessed into the facility was declared successful bidder over the grievant, although the clerk excessed should not have been permitted to bid, as per Article 12. Arbitrator Condon awarded the grievant out-of-schedule premium pay for this violation of Articles 12 and 37.

The fourth case⁷ involves a Letter of Demand in the amount of \$595.47. In presentation, I argued Management had violated its own authored Handbooks and Manuals, under Article 19, citing specific provisions from the F-1 Handbook. Arbitrator Mitrani stated:

Procedural matters (especially in this type of case) are just as important as substantive matters. The Handbooks, which are written by the Service are part of the contract in accordance with Article 19.

Not only was there no letter of demand for the 4/16/86 shortage, but there was also no stamp credit adjustment. The F-1 is clear and must be done when a shortage is found. But after the 4/16/86 shortage none of the procedures were followed. It was almost as if an audit never took place. Then an audit took place on 8/14/86. But there was a serious problem with the frame of reference for this audit. None of the proper procedures as written in the F-1 took place. This also means that there was no due process regarding a proper analysis of the 4/16/86 shortage.

Following the correct procedures in this type of matter is of the utmost importance. It affords proper protection for the Service and the employee. In this case, the critical procedures were not followed after the 4/16/86 audit.

⁶ Attachment #6; E1C-2F-C 16778/Cook
New Castle, Pennsylvania; 4/6/89

⁷ Attachment #7; N4C-1N-C 26984/Edwards
Eatontown, New Jersey; 5/10/89

This is an excellent illustration of using Management's own authored Handbooks and Manuals to our benefit in arbitration.

A LAST WORD

Although often it may take a lengthy period for a grievance to be heard in arbitration, these four decisions are excellent illustrations of the process when it is successful and fruitful for our members.

If you need further information on any of the enclosed materials, please contact me:

Jeff Kehlert, National Business Agent
American Postal Workers Union
10 Melrose Ave., Suite 210
Cherry Hill, NJ 08003
(856) 427-0027

Yours for democracy in unionism, I am


Jeff Kehlert
National Business Agent
Clerk Craft

JDK:svb
opeiu #2
afl-cio

CHAPTER 6

EXAMINATION OF ACCOUNT

610 GENERAL

611 FREQUENCY

The credit assigned to the servicing employee will be examined according to the National Agreement.

612 TOLERANCE

A tolerance of \$75.00 is allowed for each SSPC credit unless the procedures in Chapter 5 are used. In that case, a \$75.00 tolerance is allowed for each sub-account. do not recount a credit or sub-account for variances less than this amount.

620 OVERAGES AND SHORTAGES

621 EXCESS

Overages and shortages in excess of tolerance are treated as stated in 560, Handbook F-1.

622 SHORTAGES

622.1 Causes

The SSPC technician does not have complete *personal control* at all times for the assigned account. Therefore, any shortage which cannot be identified as being caused by fire, burglary, robbery, acceptance of coun-

terfeit money and slugs, etc., must be assumed to be the result of machine malfunction, unless:

a. It can be established that the loss was the direct result of negligence on the part of the servicing employee or,

b. There is sufficient evidence to prefer charges against the servicing employee for theft, embezzlement, etc.

622.2 Malfunction Losses

.21 Normally, major losses due to mechanical malfunction are quickly discovered by the servicing employee, through:

(a) Reports from customers,

(b) Shortage of both stock and funds in a particular machine, or

(c) Comparison of requirements for stamp stock requisition with remittance, etc.

.22 Such losses must be brought to the attention of the postmaster, estimated as closely as possible, and submitted as a claim as soon as they are discovered.

622.3 No-Vend Complaints

Generally the resolution of no-vend complaints (see 821) will not result in a loss to the SSPC account.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration ^X
between
United States Postal Service
and
American Postal Workers Union

Grievant: R. Stocketta
P. O.: New Brunswick
Case #N7V-1N-C-~~6439~~
3452

Before: Edward Levin, Arbitrator ^X

Appearances:

For the United States Post Service: Lynn Goldstein,
Labor Relations Representative; Anthony
Di Benedetto, Fleet Manager.

For the American Postal Workers Union: Walter
Marshall, National Business Agent; Thomas M.
LaFauci, Local President, Robert Stocketta,
Grievant.

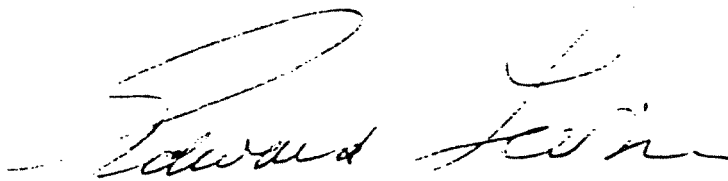
Place of Hearing: Edison, NJ

Date of Hearing: February 14, 1989

Award:

1. This grievance is arbitrable under the provisions of Section 436 of the Employee and Labor Relations Manual which are not in conflict with Article 15 of the National Agreement.

Date of Award: March 9, 1989


Edward Levin, Arbitrator

In accordance with the provisions of the collective bargaining agreement between the United States Postal Service(Postal Service) and the American Postal Workers Union(Union), the undersigned was designated Arbitrator to hear and determine the following issue:

Is this grievance arbitrable?

A hearing was held on February 14, 1989 at the Postal Service facility in Edison, NJ at which time the parties were afforded opportunity to present testimony, oral argument and documentary evidence in support of their respective positions.

Postal Service Position

The Postal Service raised the issue of arbitrability of this grievance and noted that the Step 1 grievance meeting was held on November 10, 1987 between Anthony DiBenedetto, the Fleet Manager and Thomas LaFauci, the Local President. The Grievance involved a question of overtime between November 28, 1981 and March 8, 1986. This was 20 months after the alleged violation had ceased. The Postal Service rejected this grievance as being untimely.

The Postal Service points out that Article 15, Section 3(B) provides that,"(t)he failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure,

including arbitration, shall be considered as a waiver of the grievance."

The Postal Service contends that the grievant knew or should have known about his changed schedule when shortly after he received a bid effective November 28, 1981 showing his hours of work as 8:00 a.m. to 4:30 p.m., he was required to work 6:30 a.m to 3:00 p.m. Also, when he was notified on February 19, 1986 in writing that his hours would be henceforth from 8:00 a.m. to 4:30 p.m., it should have been apparent to him that the change was made and he should have filed a grievance then if he felt that he had been improperly treated. It is therefore the Postal Service's position that the grievant had, at the most, 14 days from February 19, 1986, when he was rescheduled to submit a grievance. The grievance was not submitted until some twenty months later.

The Postal Service argues that Section 436 of the Employee and Labor Relations Manual does not apply to this case inasmuch nothing in the Employee and Labor Relations Manual may supercede the National Agreement. Another reason, in the Postal Service's opinion, that Section 436 does not apply to this case is the entire section is related to backpay due to unjustified or unwarranted personnel actions.

UNION POSITION

The Union points out that the contractual time limits for grievances start when the Union finds out about the grievance. The Union claims that it did not know that the grievant was working out of schedule until shortly before it filed the grievance and that therefore the grievance was timely filed.

The Union also points to Section 436 of the Employee and Labor Relations Manual which provides the following:

.11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employment benefits which the employee normally would have earned during the period.

....

.26 Any claim made by a postal employee or his authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after the date such claim first accrued.

According to the Union this gives the Union a 6 year period within which to submit claims and that Step 1 of the grievance procedure was an attempt to make such a claim for back pay under Section 435. Therefore this grievance is valid and arbitrable.

ARBITRATOR'S OPINION

While Article 15 of the National Agreement clearly sets forth time limitation for the filing of grievances and

provides that the failure to adhere to such time limitation constitutes a waiver of the grievance, this case has a unique feature in that Section 436 of the Employee and Labor Relations Manual also has a bearing on the dispute. Article 19 states that nothing in the Postal Service Handbook may conflict with the Agreement. The question, therefore, is does Section 436 conflict with the National Agreement? Article 15 of the National Agreement defines a grievance as follows:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment...

The Arbitrator finds that Section 436 does not conflict with this definition of a grievance, but merely enlarges on the area of wages and provides for a more liberal procedure related to backpay, which is not specifically covered by the definition. Therefore, Article 19 and Section 436 are compatible with one another rather than in conflict. The area of backpay is given special consideration in Section 436 and the time for making a claim is extended to within 6 full years after the date such claim first accrued.

Whether or not Section 436 in its entirety is applicable to the claim for back pay is a matter to be determine after an examination of the merits of the claim.

Accordingly, the Arbitrator finds that the refusal of the Postal Service to comply with the requirement of Section

436 of the Employee and Labor Relations Manual is a proper grievance and is governed by the language of that section.

AWARD

The undersigned, after receiving and giving careful consideration to the testimony, documentary evidence and oral argument of the parties in support of their respective positions, awards as follows:

1. This grievance is arbitrable under the provisions of Section 436 of the Employee and Labor Relations Manual which are not in conflict with Article 15 of the National Agreement.

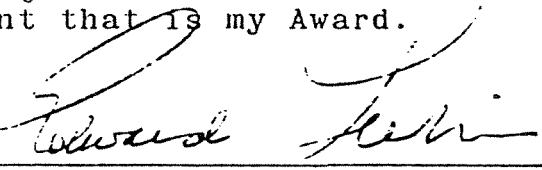
STATE OF NEW YORK

SS:

COUNTY OF NEW YORK

I, Edward Levin, hereby affirm that I am the individual who executed this instrument that is my Award.

March 9, 1989



Edward Levin, Arbitrator

File 905

REGULAR ARBITRATION

In the Matter of the Arbitration	(	GRIEVANT: L. Fitzpatrick
between	(	POST OFFICE: Birmingham, AL
UNITED STATES POSTAL SERVICE	(	CASE NO: S4C-3D-C 64951
and	(	.....
AMERICAN POSTAL WORKERS	(	GRIEVANT: C. Stephens
UNION, AFL-CIO	(	POST OFFICE: Birmingham, AL
	)	CASE NO: S7C-3D-C 9918

BEFORE: Dr. J. D. Denn, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Ronald H. Drain

For the Union: Mike Morris

Place of Hearing: Birmingham, AL

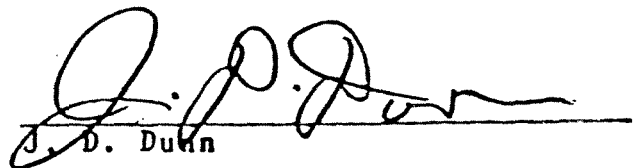
Date of Hearing: 02-08-89

Briefs Received: 02-20-89 & 02-24-89

AWARD: The answer to the issue is, "yes." The Letter of Demand did violate the 1987-1990 National Agreement and/or Postal Regulations. The grievance is granted. The Letter of Demand is set aside. The Employer is directed to relieve the Grievant of the shortage specified in the Letter of Demand dated 7-31-87.

In accord with the stipulation, the C. Stephens grievance, too, is granted.

Date of Award: 02-25-89


J. D. Denn

ISSUE

The parties agree the following issue is to be decided.

Did the Letter of Demand violate the 1987-1990 National Agreement and/or Postal Regulations? If the answer is "yes" what will be the remedy?

The parties further clarified the issue as follows:

Specifically, did the USPS specify the options available to the employee(s) to repay the debt or to appeal the USPS determination of the debt or the proposed method of repayment in accord with

- 1) Section 133 of the F-1 Handbook, and
- 2) Section 473.11 of the F-1 Handbook.

The parties further agree, as follows:

If the grievances are not granted on the basis of the above issue, the parties will set another date for a continuation of the hearing on the Fitzpatrick grievance.

The parties further agree that the C. Stephens grievance (S7C-3D-C 9918) will be resolved in accord with the Arbitrator's decision in the above-stated issue. If the Fitzpatrick grievance is granted on the above issue, then the Stephens grievance, too, will be granted. If the Fitzpatrick grievance is not granted in its entirety solely on the narrow procedural issue stated above, then the Stephens grievance will be denied in its entirety, but, in contrast, the Fitzpatrick grievance will be continued on the merits of the Letter of Demand.

BACKGROUND

A Letter of Demand dated 7-31-87, issued to Grievant L. Fitzpatrick, reads as follows:

During the audit of your flexible credit on 7-31-87 a shortage of \$17,470.06

was revealed. This is a letter of demand that you repay this shortage. You have ten (10) days from receipt of this letter in which to repay this shortage.

Grievant Fitzpatrick received the Letter of Demand on the same day it was issued (i.e. 7-31-87).

The Step 2 Grievance Appeal Form is dated 8-27-87. The grievance charges a violation of the following parts of the 1987-1990 NATIONAL AGREEMENT: 15, 19, 28.1, 28.4. Article 19 is entitled: HANDBOOK AND MANUALS. This article is cited, in part below.

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect ... (underline added) [Joint Exhibit #1, p. 80]

This language is clear and the parties agree that the F-1 handbook [Joint Exhibit #3] is a part of their collective bargaining agreement.

In terms of the narrow procedural issue which the parties have asked the Arbitrator to resolve, the following language of the F-1 Handbook is decidedly relevant:

**133 Demands for Payment for Losses
and Deficiencies**

All employees must receive written notice of any money demand for any reason. The letter of demand, which must be signed by the postmaster or his or her designee, must notify the employee of a USPS determination of the existence, nature, and amount of the debt. In addition, it must

specify the options available to the employee to repay the debt or to appeal the USPS determination of the debt or the proposed method of repayment ... [underline added]

473.1 Bargaining Unit Employees

.11 ... In addition ... the demand letter requesting payment must contain the following statement regarding the employee's right to challenge the USPS claim: "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

.12 If an employee files a grievance over a money demand of more than \$200, collection will be delayed until after disposition of the grievance either by settlement with the union or through the grievance-arbitration procedure. Money demands of not more than \$200 are due when presented regardless of whether an employee files a grievance.

In addition to the above language of the F-1 Handbook, there is also language in the Employee & Labor Relations Manual relevant to the narrow procedural issue to be decided in this arbitration:

462.3 Applicable Collection Procedures

In seeking to collect a debt from a collective-bargaining unit employee, the Postal Service must follow the procedural requirements governing the collection of employer claims specified by the applicable collective-bargaining agreement. Care must be taken to ensure that any demand letter served on an employee provides notice of any right an employee might have to challenge the demand under the applicable collective-bargaining agreement.

In the grievance at hand, the letter of demand cites a shortage of \$17,470.06. Thus, the language of Section 4 of Article 28 applies.

Section 4. Collection Procedure

A. If the employee grieves a demand in the amount of more than \$200.00 which is made pursuant to Section 1, 2 or 3, the Employer agrees to delay collection of the monies demanded until disposition of the grievance has been had either by settlement with the Union or through the grievance-arbitration procedure. [at p. 90-91]

POSITION OF PARTIES

The position of the parties may be summarized in a very brief fashion. The Union points to the last sentence of the Letter of Demand which reads as follows: "You have ten (10) days from receipt of this letter in which to repay this shortage." This demand, states the Union, violates Section 133 of the F-1 Handbook, which says "... it must specify the options available to the employee to repay the debt or to appeal the USPS determination of the debt or the proposed method of repayment ...". Management did not specify the "options available."

Management's position is based, in the main, on the concept of harmful error. Although, Management did mention that in the past, the Union did not grieve similar actions. This position is without merit in the light of the unambiguous language of the Agreement and/or Postal Regulations. At this hearing, Management did not put forth its definition of harmful error nor did Management cite any part of the AGREEMENT which might lend support to its position. Nonetheless, Management's position is not

ephemeral. In some jurisdictions, this concept is firmly established. For example, under 5 U.S.C. 7701 (c) (2), the Merit Systems Protection Board is required to overturn the action of the agency even where the agency has met certain evidentiary standards if the appellant can show the error was harmful (i.e. caused substantial harm or prejudice to his/her rights). Harmful error is defined as "Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached."

OPINION

In the issue at hand, the "error" made by Management is not simply a violation of one of its own unilaterally adopted procedures. The F-1 Handbook and the Employee & Labor Relations manuals are a part of the collective bargaining agreement. The AGREEMENT says they "shall be continued in effect ...". Proposed changes are even subject to arbitration [see Article 19, p.80 of the AGREEMENT].

Who are the parties to the AGREEMENT? The parties are the United States Postal Service and the American Postal Workers Union, AFL-CIO. The Union has a legal obligation to represent members of the bargaining unit. The Union's role is that of enforcing the AGREEMENT. If Management can prevail on an issue of contract violation by simply claiming that there was no harmful error to a grievant, then would the

Union's rights as an institution be in jeopardy? The answer is obvious.

The Union presents the four following arbitration awards for this Arbitrator's review. They are clear and persuasive in terms of the issue at hand.

<u>Arbitrator</u>	<u>Case No.</u>	<u>Date of Award</u>
Britton	S1C-3U-C 48283	November 30, 1987
Sherman	S4T-3E-C 51513	May 20, 1988
Schedler	S4C-3W-C 22674	August 30, 1988
Schedler	S4C-3T-C 63657	October 10, 1988

Arbitrator Britton ruled that a procedural error [omission of the signature of a responsible management official] "renders the Letter of Demand fatally defective." He directed the Employer to "relieve the Grievant of the shortage."

Arbitrator Sherman ruled that "... this letter signed by the Postmaster must (according to the regulation) specify the options available to the employee to repay the debt or appeal the United States Postal Service determination of the debt or the proposed method of repayment. Clearly, the grievant never received this information." Arbitrator Sherman directed Management "to rescind the Letter of Demand."

Arbitrator Schedler's award of August 30, 1988, reads as follows: "The letter [of demand] did not mention that the Grievant had appeal rights and that those rights were contained in Article 15 of the applicable collective bargaining agreement. The letter of demand did not comply

with Postal regulations, and I find a fatal procedural error." Arbitrator Schedler, in his award, ruled that the "Employer violated Postal Regulations", and he directed an appropriate remedy.

In an October 10, 1988 award, Schedler states as follows:

... Part 133 required management to notify the Grievant of his options for paying the debt and the appeal procedure. There was nothing in the letter telling the Grievant of his options, if any, of paying the debt. Part 473.1 of the Post Office Account Procedures is more emphatic in requiring that the Grievant be notified of his appeal rights. Part 473.1 says "the demand letter requesting pay must contain the following statement regarding the employees right to challenge the USPS claim: Bargaining employees appeal procedures are contained in Article 15 of the applicable collective bargaining agreement." There is something very compelling about the word "must."

In Arbitrator Schedler's award, he ruled as follows, in part: "Yes, the Letter of Demand violated the 1984-87 National Agreement and Postal Regulations." Earlier in his award, Arbitrator Schedler disposed of the question of inadequate security by stating specifically that the "defects in security did not cause a loss of funds." Thus, it is clear that Arbitrator Schedler's ruling was based upon his judgment that Management procedural errors were in violation of the National Agreement and Postal Regulations.

The Union suggests that the doctrine of stare decisis is applicable in the grievance herein decided. The Union's

position on this point has been carefully considered. In my judgment, however, the cases cited by the Union are not dealing with the same grievant, the same fact situation, nor did they take place in the Birmingham postal facility. Thus, they are persuasive rather than authoritative in terms of the issue at hand.

In Steelworkers v. Enterprise Corp., 363 U.S. 593, 597, the United States Supreme Court Stated as follows:

Nonetheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

SUMMARY AND CONCLUSION

Management issued a Letter of Demand. Management did not specify the options available to the Grievant as required by Part 133 of the F-1 Manual (i.e. Post Office Accounting Procedure). The Letter of Demand stated "you have ten (10) days from receipt of this letter in which to repay this shortage." Thus, it is clear that Management did not comply with the Part 133 mandate.

Part 473.1 of the F-1 Manual states that "The demand letter must contain the following statement regarding the employee's right ... 'Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective

bargaining agreement.'" The language "must contain" is compelling indeed, in my judgment, and my judgment is consistent with that of Arbitrator Schedler.

Did the Letter of Demand violate the 1987-1990 National Agreement and/or Postal Regulations? This question is answered in the affirmative in the award.

U. S. POSTAL SERVICE/APWU NATIONAL AGREEMENT
REGULAR ARBITRATION PANEL

In the Matter of the Arbitration Between:)
)
 UNITED STATES POSTAL SERVICE)
)
 -and-)
)
 AMERICAN POSTAL WORKERS UNION)
)
 Case E1C-2F-C-16877 -)
 Ruth McGarvey - Clerk - New Castle, PA.)
)

Before: Robert F. Condon, Arbitrator

Appearances: For the A. P. W. U.

Jeff Kehlert - Advocate
John T. Quinn - V. P. APWU
David Wigley - Local President - APWU
Charles J. Sonntag - Local Steward
Alla Snodgrass - Local V. P.
Ruth McGarvey - Grievant
Ken Lutz - Clerk

For the U. S. P. S.

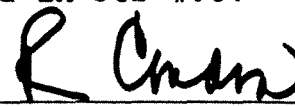
Thomas P. Foley - Advocate
John D. Shukes - Manager, Mail Processing

Date of Hearing: April 6, 1989

Place of Hearing: New Castle, PA GMF

Award: The grievance is sustained. The Grievant is to be returned to a position similar to that she held, known as Job #90, with full seniority of September 27, 1975. She is to be paid out-of-schedule pay for all hours she worked out of her scheduled tour of duty in Job #90. Out-of-schedule pay is to be computed as provided for in Section 434.62 of the E&LR Manual. In addition, if there were any weeks wherein the Grievant was not assigned to work a full forty hours while assigned as a PTF Letter Carrier or Clerk, she is to be paid at the straight time rate of pay she would have earned in Job #90.

Date of Award: April 17, 1989


ROBERT F. CONDON, Arbitrator

U. S. POSTAL SERVICE/APWU NATIONAL AGREEMENT
REGULAR ARBITRATION PANEL

In the Matter of the Arbitration Between:)
)
UNITED STATES POSTAL SERVICE)
) OPINION
-and-)
) and
AMERICAN POSTAL WORKERS UNION)
) AWARD
Case No. E1C-2F-C-16877)
Ruth McGarvey - Clerk - New Castle, PA)
)

Before: Robert F. Condon, Arbitrator

Appearances: For the A. P. W. U.

Jeff Kehlert - Advocate
John T. Quinn - V. P. APWU
David Wigley - President New Castle Local
Charles J. Sonntag - Steward New Castle Local
Alla J. Snodgrass - Exec VP New Castle Local
Ruth E. McGarvey - Grievant
Ken Lutz - Clerk

For the U. S. P. S.

Thomas P. Foley - Advocate
John D. Shukes - Manager, Mail Processing

In accordance with the provisions of the collective bargaining agreement between the parties, a hearing was held on April 7, 1989 at the General Mail Facility, New Castle, PA. Both parties were given full and fair opportunity to be heard, to present evidence and argument, and to examine and cross-examine sworn witnesses.

ISSUE

Did Management violate provisions of the National Agreement when it issued the Grievant a Notice of Reversion dated August 19, 1983 and then recreated that same position in August of 1984? If so, what shall be the remedy?

BACKGROUND

The Grievant has been employed by the U. S. Postal Service for approximately 15-1/2 years. Effective November 22, 1982, she was awarded Distribution Clerk Job #90 at the New Castle, Pa Post Office, as the successful bidder for that position. On August 19, 1983, she was issued a notice which informed her that her position was being reverted due to the needs of the Service. As a result of the notice, the Grievant elected to accept a job on an MPLSM position on Tour III with Saturday and Sunday as drop days. At that time, the New Castle Post Office was moved into the new facility which it currently occupies. On August 3, 1984, Job #1-16 was created and posted for bid. The Union contends that it is the same Job as Job #90 which had been reverted. Subsequently, after completing a one year lock in period on the LSM, the Grievant bid on a Letter Carrier position in order to be able work on Tour 2. After 2-1/2 years as a Part Time Flexible Letter Carrier, the Grievant developed foot trouble and so she bid on a Part Time Flexible Clerk position in the Slippery Rock Post Office, where she is currently employed.

POSITION OF THE UNION

It is the contention of the Union that Management violated the provisions of Article 15 Section 2, Step 2F; Article 37 Sections 1B, 1C, 1F, 1G, 2B, 3A3, 5a; Article 12 Sections 4A, 5B1, 5B3, 5C4b of the National Agreement when it improperly issued the Notice of Revision dated August 19, 1983 to the Grievant reverting her position and forcing her to relinquish her bid assignment.

The Grievant was notified on August 19, 1983 that her

position, Job #90 was being reverted. The letter notifying her of the position reversion stated that the reversion was caused due to the needs of the Service. It is the Union's contention that a filled position may be abolished but not reverted. Therefore, the Union believes that action was in violation of Article 37, Section 1G since the position was not vacant since it was held by the Grievant at the time

Upon moving into the new New Castle facility, the duties of Job #90, the duties at Neshannock Branch from 0700 to 0900 were continued and assigned to any scheme qualified clerk available on Tour 1. Since the move to the new GMF, Management has used approximately 1/2 to 1 hour overtime per day to perform a job which Management felt was not needed. In addition, the Union surveyed TS Form 1236 and determined that from Pay Period 12 to 17, 198 hours, including 36 hours overtime was assigned to perform those duties. After 10 months, local management also realized the waste and created a new position, Job #1-16.

Job #1-16 has the same duties and off days as Job #90 except for a 1/2 hour difference in starting time. According to Article 37 Section 3A5 of the National Agreement, no assignment will be reposted when the change in starting time is 1 hour or less. Therefore, Job #90 should not have been reverted and should have been reassigned to the Grievant

In addition to incorrectly reverting the Grievant's job, when she did accept an LSM position in order to remain on Tour II, she was locked into that position for 365 days and she was not permitted to bid on the new posting of her previous position with

the same days off. That was in spite of the fact that her assignment to the LSM position was not voluntary on her part.

The Union points out that the duties of Job #90 existed from the time it was reverted until it was recreated. During testimony, Manager of Mail Processing, John Shukes stated that "We have been sending other people down there (Neshannock)." A & B scheme work continued to exist in Neshannock. Those duties were part of the work performed by the Grievant when she was assigned to Job #90 and which were never discontinued. The final result of Management's action has resulted in changing the starting time of the Grievant's position, Job #90, by a total of 1/2 hour.

The remedy requested by the Union is that the Grievant be placed back in Job #90 as a Distribution Clerk in the New Castle Mail facility with a seniority date of September 27, 1975. In addition, the Union requests that she be paid out of schedule pay for all hours she worked which were not in compliance with her hours while assigned to Job #90. The Union also requests that she be paid overtime for all hours she worked out of scheduled hours of duty.

POSITION OF THE SERVICE

It is Management's contention that there was no violation of the National Agreement in regard to this matter. When the New Castle, PA Post Office was moved from its old location to the present site, all positions were reverted. Management admits that they should have been abolished and new positions created. However, it is Management's belief that was a technicality and did not effect the final outcome in regard to the overall movement

from the old facility to the new facility.

The record shows that the Grievant was canvassed for an LSM position, which had a lock-in period as provided for in the National Agreement. She accepted a position as an LSM Operator and, therefore, was locked-in for 365 days and was not eligible for bidding during that period of time. After the lock-in period was concluded, on November 5, 1984, she voluntarily transferred to the Letter Carrier craft in order to take a Tour II position. She was not compelled to take that position as a Part Time Flexible Letter Carrier. She voluntarily made the move. Her movement to the Letter Craft was as a result of the settlement of an EEO complaint submitted by the Grievant.

It is Management's contention that all positions were properly abolished and posted. It is also Management's belief that the Grievant was rightfully locked-in to the LSM position as a result of her selection of that position.

The fact that she was locked-in to the LSM position when the Neshannock Branch duties were posted is unfortunate but, the provisions in the National Agreement regarding lock-ins on the LSM positions are for that specific purpose and must be adhered to in order to maintain operator stability.

Management believes that there was no violation of the National Agreement and that the grievance should be denied in full.

DISCUSSION AND FINDINGS

The Arbitrator has reviewed the testimony and evidence submitted by both parties. During the opening remarks of the

Management Advocate, he readily admitted that an error was committed in reverting the Grievant's position. It should have been abolished. However, it is Management's belief that it was merely a technical error and did not alter the final results of eliminating the position when the Post Office operations were moved from the old facility to the new facility. It is the Arbitrator's determination that the parties did, indeed, have a purpose in mind when they included definitions of Abolishment, Article 37, Section 1F and Reversion, Article 37, Section 1G in the National Agreement. It is my determination that the application of one term in place of the other is a violation of the jointly negotiated agreement. Since evidence submitted, and testimony offered, indicate that the duties of the Grievant were not abolished, I believe she should never have been directed to perform other duties or be canvassed for another position. The privileges related to seniority are quite meaningful and should be so honored by both parties. To ignore the Grievant's length of longevity with the Postal Service and subject her to a Part Time Flexible position both as a Letter Carrier and a Clerk in order to exercise her right to a Tour II position is difficult to accept. This is especially true when it is a fact that the duties of her original position have been, and still are, being assigned as a necessary part of the New Castle Post Office operation.

It is my determination that the Grievant should be returned to the duties of Job #90 with her original seniority date of September 27, 1975.

In regard to back pay for the period of time she was not in

her original bid position, she is to be paid for out-of-schedule pay for all hours she worked out of her scheduled tour of duty in Job #90. The out-of-schedule is to be computed as provided for in Section 434.63 of the Employee and Labor Relations Manual. In addition, if there were any weeks wherein the Grievant was not assigned to work a full forty hours while assigned as a Part Time Flexible Letter Carrier or Clerk, she is to be paid for those hours less than forty at the straight time rate she would have earned in Job #90.

In summation, the Arbitrator issues the following:

AWARD

The grievance is sustained. The Grievant is to be returned to a position similar to that she held, known as Job #90, with full seniority of September 27, 1975. She is to be paid out-of-schedule pay for all hours she worked out of her scheduled tour of duty in Job #90. Out-of-schedule pay is to be computed as provided for in Section 434.63 of the Employee and Labor Relations Manual. In addition, if there are any weeks wherein the Grievant was not assigned to work a full forty hours while assigned as a Part Time Flexible Letter Carrier or Clerk, she is to be paid at the straight time rate of pay she would have earned in Job #90.



ROBERT F. CONDON, Arbitrator

Manalapan, New Jersey
April 17, 1989

In the Matter of Arbitration:

UNITED STATES POSTAL SERVICE	)	Case No. E7C-2A-D 6987
	)	Case No. E7C-2A-D 8134
and	)	Steven Deptula
	)	Emergency Suspension,
AMERICAN POSTAL WORKERS	)	Removal
UNION, AFL-CIO	)	Langhorne, PA

STATEMENT AND AWARD

ARBITRATOR: Bernard Cushman, Esq.

APPEARANCES:

For the Postal Service:

Ken Botknecht, Labor Relations Representative

For the Union:

Jeff Kehlert, National Business Agent, Clerk Craft

This case arose under the parties' 1987 National Agreement. A hearing was held in Langhorne, Pennsylvania, on February 7, 1989. Full opportunity to be heard was afforded both parties. The entire record, including oral arguments, has been carefully considered by the Arbitrator.

THE ISSUES

Whether the Postal Service had just cause to place the Grievant on emergency off-duty status on February 26, 1988, and subsequently to remove him effective April 25, 1988; if not, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article 16, Discipline Procedure

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol) incompetence, failure to perform work as requested, violation of the terms of the Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 6. Indefinite Suspension -- Crime Situation

A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty and without prejudice to any grievance filed under B. above.

D. The Employer may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 5 of this Article.

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

EMPLOYEE & LABOR RELATIONS MANUAL

661 Code of Ethical Conduct

661.3 Standards of Conduct

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

- a. Using Postal Service office for private gain.
- b. Giving preferential treatment to any person.
- c. Impeding Postal Service efficiency or economy.
- d. Losing complete independence or impartiality.
- e. Making a Postal Service decision outside official channels.
- f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

661.5 Other Prohibited Conduct

.51 Discrimination

No employee while acting in an official capacity will directly or indirectly authorize, permit, or participate in any action, event, or course of conduct which subjects any person to discrimination, or results in any person being discriminated against, on the basis of race, color, religion, sex, national origin or age.

.53 Unacceptable Conduct

No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty by or pursuant to statute.

666 USPS Standards of Conduct

666.1 Discharge of duties

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

666.2 Behavior and Personal Habits

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

864.3 Fitness for Duty

864.31 A fitness-for-duty examination is required in determining whether an employee is able to perform the duties of the position because of medical reasons, i.e., disability, occupational/nonoccupational injury, or illness.

864.32 Management can order fitness-for-duty examinations at any time and repeat, as necessary, to safeguard the employee or coworker. Specific reasons for the fitness-for-duty should be stated by the referring official.

Personnel Operations

313.3 Hiring Policy on Applicants with Criminal Records

.343: It is USPS policy to evaluate the employability of each applicant with a criminal conviction record individually. The mere fact that an applicant has a criminal conviction record is not sufficient to disqualify that applicant from postal employment. Instead, an applicant should be rejected on the basis of a history of criminal conviction only after a specific finding that the history is directly related to the applicant's present capacity to perform as a Postal Service employee. To the extent available, such factors as the following must be considered during such an evaluation:

- a. The applicant's age at the time of the offense(s).
- b. The nature of the offense(s) and the underlying circumstances of the offense(s).

c. Length of time elapsed since the applicant's offense(s).

d. Evidence of efforts made by the applicant toward rehabilitation, including job training or educational programs the applicant may have participated in while incarcerated.

e. Information supplied by penal authorities, parole and probation officers, social service workers or social agencies regarding the applicant's progress toward rehabilitation or employability.

f. The applicant's prior employment record, including participation in a job training program.

g. Dispensations which may have been granted by state or federal authorities to evidence the applicant's rehabilitation or relieve the applicant of disabilities to which the applicant may have been subject upon conviction (e.g., certificates of relief from disabilities, certificates of good conduct, certificates restoring civil rights).

h. The nature and location of the Postal Service position that the applicant seeks.

.35 Applicants on Probation or Parole. Applicants subject to probation or parole supervision as a result of criminal conviction may not be rejected for employment solely as a result of such supervision. Such applicants are entitled to individual evaluation for positions under 313.343.

SUPERVISOR'S GUIDE TO HANDLING GRIEVANCES

III. Discipline

C. Just Cause

3. Is the rule consistently and equitably enforced? If a rule is worthwhile, it is worth enforcing. Be sure that it is applied fairly and without discrimination.

This is a critical factor and is one of the union's most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules. When employee infractions of a company rule are consistently overlooked, management, in effect, loses its right to discipline for that infraction unless it first puts employees (and the unions) on notice of its intent to again enforce that regulation. For example, if employees are consistently allowed to smoke in areas designated as NO SMOKING areas, it would not be appropriate to suddenly and without warning discipline an individual for the violation.

Similarly, if several employees commit an offense, it is not appropriate to single out one of the employees for discipline.

On the other hand, when the Postal Service maintains that certain conduct is serious enough to be grounds for discharge, it is not generally good practice to make exceptions. For example, if the Postal Service is to maintain consistency in its position that theft or destruction of deliverable mail is grounds for discharge for a first offense, then the otherwise good employee guilty of this offense must be discharged the same as the borderline or marginal employee.

4. 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 be given a reasonable opportunity to defend themselves before the discipline is initiated.

5. Was the discipline administered fairly and was it reasonably related to the infraction itself, 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 another employee with a similar past record 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 used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others.

6. Was the disciplinary action taken in a timely manner? Disciplinary actions should be taken as promptly as possible after the offense has been committed.

E. Investigation

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

F. How Much Discipline?

One of the most difficult areas of discipline is the determination of the amount or type of discipline to be issued for a particular offense. The Postal Service generally does not subscribe to any formula discipline, where a table of penalties is maintained for particular offenses. There are, of course, exceptions to this. Some handbooks do prescribe penalties for certain offenses. In addition, local policies may specify particular disciplinary actions for specific offenses. Generally, however, certain factors should be considered in assessing discipline, and disciplinary action should be tailored to the particular circumstances.

Items for consideration in assessing discipline include:

1. The nature and seriousness of the offense.
2. The past record of the employee; for example,
 - a. Previous disciplinary record.
 - b. Commendations, awards, etc.
3. The circumstances surrounding the particular incident.
4. The amount of discipline normally issued for similar offenses under similar circumstances in the same installation.

The collective bargaining agreements also provide that discipline be corrective in nature rather than punitive.

CONTENTIONS OF THE PARTIES

The Postal Service contends that the emergency suspension and subsequent removal were for just cause and in accordance with the Agreement. The Postal Service asserts that the essential facts involved in this case are undisputed. The Grievant was arrested then charged in Bucks County Criminal Court for indecent exposure, open lewdness, and disorderly conduct. He pleaded guilty to all the charges, and was sentenced to one year probation to be served concurrently, and in addition was fined. The Postal Service states that thereafter the Langhorne Postal officials received several telephone complaints from customers about the Grievant and a newspaper article describing the matter.

The Postal Service contends that the Grievant's conduct was in violation of the Code of Ethical Conduct of which the Grievant was aware. Such off duty conduct was "extremely prejudicial" to the Postal Service since the Grievant was employed in a highly visible position which called for a great deal of trust on the part of the public and his supervisors. According to the Postal Service, the Grievant attempted to conceal his criminal problems from his supervisors. Furthermore, any procedural irregularities, if found, were not prejudicial to the Grievant, and there was substantial compliance with all applicable Agreement provisions in the handling of this matter.

The Union contends that both the emergency suspension and removal were not for just cause and were not effectuated in

accordance with applicable provisions of the Agreement or other governing documents. The Union contends that procedurally the Postal Authority improperly put the Grievant on emergency suspension and failed to carry out a proper investigation. While the Union concedes the facts involved in the criminal court record, it maintains that had the Postal officials meaningfully attempted to hear the Grievant's side of the story, the matter could have been handled administratively pursuant to a fitness for duty examination rather than by removal. As to the merits, the Union asserts that the Postal Service treated the Grievant differently than other employees who were not disciplined for criminal convictions, that under the Postal Service's own rules, a criminal conviction does not automatically disqualify a person from employment. Moreover, the Union contends that there was no meaningful nexus shown by the Postal Service between the off duty conduct and any impact suffered by the Postal Service.

DISCUSSION, FINDINGS AND CONCLUSIONS

Steven Deptula, the Grievant, a part-time flexible clerk, was issued a notice that he was being placed in an off duty status on February 26, 1988. He was issued a Notice of Removal on March 24, 1988, effective April 25, 1988.

This case involves events which took place on September 7 and October 26, 1987, and subsequently at the Criminal Court of Bucks County, on February 3, 1988. At that time, the Grievant was a

part-time flexible clerk working out of the Langhorne, Penndall and Feasterville facilities with approximately one year of service. He performed various clerk duties at those facilities including window clerk, distribution and financial clerk on an irregular schedule.

On September 9, 1987, a man ran nude through the Village of Pennbrook Apartments in Bensalem, Pennsylvania, and was observed fleeing the scene in an automobile. Residents of the apartment complex took down a description of the car and its license plate number. Based on that information, the police interviewed the Grievant about the incident on September 21. According to the police report, the Grievant admitted, after receiving his Miranda warnings, to the conduct. For that incident, he was charged with the following misdemeanors, criminal conduct under Pennsylvania law: 1) indecent exposure; 2) open lewdness; and 3) disorderly conduct. Subsequently on October 26, 1987, the Grievant was charged with "loitering and prowling at night time" around a residence in the Franklin Common Apartments in Bensalem, Pennsylvania. On February 3, 1988, the Grievant pleaded guilty to all the criminal charges. He was sentenced to one year probation to be served concurrently, and was fined \$132.00 for court costs.

Werner Kuehlmann, Superintendent of Postal Operations at Langhorne, testified that in the fall of 1987 the Grievant had twice requested court leave of supervisor Carol Graver. Upon checking further, Kuehlman determined that the Grievant had to go

to court on his own matter and not for jury duty. Later, during the week of January 23 to January 29, 1988, the Grievant had requested a non-scheduled day for February 3, 1988, for his court appearance. According to Kuehlmann, on February 4, 1988, he asked the Grievant how the hearing went, to which the Grievant replied "Good, the charges were dismissed" or "dropped" or words to that effect. The Grievant testified that he had responded to Kuehlmann by saying "it was fine" and denied saying anything about the charges being dismissed or dropped.

Thereafter on February 16, Kuehlmann testified he received a telephone call from an irate woman who complained about the Grievant, asking "what kind of people" do you employ at the Feasterville Post Office. According to Kuehlmann, he asked the woman, who refused to identify herself, what she meant. She replied by reciting a newspaper article which identified the Grievant by name and generally described his criminal activity. He stated that he had not seen the article and she said she would send it to him. Kuehlmann received a copy of that article on February 18. That article was undated and did not identify what newspaper it appeared in. It read as follows:

Man Sentenced for Nude Stroll

A Bensalem man who walked nude on the grounds of a Levittown apartment complex in September and loitered outside a Bensalem apartment in October was given two, one year terms of probation.

Steven Deptula, 36, of Bromley Court, pleaded guilty to indecent exposure, open lewdness and disorderly conduct in connection with the first incident.

Deptula drove his car into the Village of Pennbrook Apartments, Mill Creek Road, at 1:45 a.m. on Sept. 7. According to court records, he removed his clothes and walked along the sidewalk past one of the buildings upsetting residents who saw him.

Deptula also pleaded guilty to loitering and prowling at night at the Franklin Commons Apartments on Sparrow Way, Bensalem, on Oct. 26.

Bucks County President Judge Isaac S. Garb passed sentence, ruling the terms be served concurrently. He also ordered Deptula to pay court costs of \$132 for each offense.

Kuehlmann testified that upon receiving the newspaper article, he confronted the Grievant about it and asked him "why did you lie to me?" The Grievant did not respond. Since Postmaster Joseph Sarrappo was out of town, Kuehlmann made no immediate decision as to the Grievant, but said he "monitored the situation" awaiting Sarrappo's return. Thereafter, Kuehlmann testified he received four other anonymous phone call complaints. According to Kuehlmann, supervisors Brian Oliver, Carol Graver and Bruce Donald informed him that they had also received anonymous phone complaints. Those supervisors did not testify at the hearing. Diana Muro, a general clerk at Langhorne, testified that part of her regular duties between 8:30 a.m. to 5:00 p.m. involves receiving approximately 75% to 80% of telephone calls for Kuehlmann. It was her testimony that none of those calls involved complaints about the Grievant.

Kuehlmann testified further that upon Sarrappo's return, he informed him of the situation, and it was decided on February 26, 1988, to place the Grievant on emergency suspension while at the

same time requesting the Postal Inspectors to investigate the matter. In placing the Grievant in an "off duty status," Kuehlmann gave him the following written reason:

The reason for this action is the disclosure of conviction to the charges of indecent exposure, open lewdness and disorderly conduct. Your behavior is in violation of the Code of Ethical Conduct for postal employees.

On March 23, 1988, Kuehlmann received an Investigative Memorandum from Postal Inspector R.G. Oros which briefly stated the charges, Grievant's guilty plea and the Court determination. Attached to that report was a copy of the court papers including the police reports, the criminal complaint, the guilty plea, the sentencing, as well as criminal checks done by the FBI and the Pennsylvania State Police on the Grievant. Those police checks showed no prior criminal record. The Postal Inspector did not interview the Grievant. Upon receipt of the Investigative Memorandum, Kuehlmann wrote Sarrappo a note along with the Investigative Memorandum recommending Grievant's removal stating: "Not only did he lie to us, but, also, this incident tarnished our image with those of the public who knew him."

Kuehlmann testified that his reasons for the emergency suspension and the removal were based on the phone calls he and the supervisors received which led him to believe that "the integrity of the Postal Service was somewhat at stake." "That this was an embarrassing situation to deal with. We are in the limelight of the Country as it is, and we have to face it, and behave in a way that is not going to be upsetting to the public in general."

Sarrappo concurred in Kuehlmann's assessment. In the written notice to Grievant of his removal effective April 25, 1988, Kuehlmann gave the following reasons for his decision:

Violation of the Code of Ethical Conduct. On September 7, 1987 at approximately 1:45 a.m., you were charged in the Bucks County Criminal Court with (1) Indecent exposure, (2) Open Lewdness and (3) Disorderly Conduct. You pled guilty to the charges and were sentenced to one (1) year probation and charged \$132 court cost. The specifics of the crime you were charged with and sentenced for are that on the above date you took all of your clothes off at Building 30 at the Village of Pennbrook Apartments and walked completely nude along the sidewalk, exposing your genitals under circumstances in which you knew would cause alarm or affront. Your discovery by the residents caused substantial annoyance and alarm and created a physically offensive act serving no legitimate purpose.

On October 26, 1987, you were also charged in the Bucks County Criminal Court with Loitering and Prowling at Night Time. You also pled guilty to this charge on February 3, 1988 and were sentenced to one (1) year probation and \$132 court cost.

The Grievant testified that preceding the incidents in question he had been under a great deal of emotional stress due to financial and family problems. Beginning in July of 1987, he individually, and with his wife obtained counseling at the Delaware Psychological Clinic. He completed that counseling in July of 1988. According to the Grievant his criminal conduct was a result of frustration stemming from those personal problems and he did not want to discuss it with his supervisors for that reason.

The Grievant's Probation Officer Robert Bell III testified that Grievant's probation needs and risks were low due to the nature of the misdemeanors involved, absence of a prior criminal

record and other factors. He stated that the Grievant was not a danger to the community and had successfully completed his probation on February 3, 1989.

Local Union President Eugene Johnson testified on the Grievant's behalf. According to him, two other named Langhorne Letter Carriers had been convicted of driving while under the influence of alcohol, and while they had had their driving licenses suspended, they were not disciplined by the Postal Service. According to Sarrappo he had only been aware of one such conviction. Sarrappo further testified that that individual had come and sought help from the Postal Service for his drinking problem, but was unsure of all the circumstances of that case.

It is clear from the record, including the direct testimony of Kuehlmann that the Grievant was placed on "emergency off duty status" by him as a result of the Grievant's being charged, pleading guilty and being sentenced for criminal conduct. While the decision to use the emergency suspension provision was acknowledged by the Postal Service to have been a "procedural mistake," it was not defective, the Postal Service argues, since Kuehlmann's intent was to place the Grievant on "indefinite suspension." That position is not supportable by the Agreement or the record herein. That decision did not refer to Article 16.7, and did not cite Article 16.6. However, the decision did refer to "off duty status" which are the operative words of Article 16.7 and not those of Article 16.6. Furthermore, that action was denominated as an

"emergency suspension" by the Postmaster in subsequent correspondence and the Postal Service's Labor Relations representatives both in the third step grievance decision as well as throughout this hearing.

Article 16.7 is entitled "Emergency Procedure." It empowers the Postal Service to place an employee immediately in an "off duty status" for certain specified conduct not herein involved. Article 16.6. is entitled "Indefinite Suspension - Crime Situation" and does permit the Postal Service to indefinitely suspend an employee believed to be guilty of a crime under certain conditions. There is a difference between an emergency suspension and an indefinite suspension which is contractually expressed.

That the parties contractually agreed to those distinctions is a matter which the Arbitrator is obligated to recognize and enforce accordingly. Therefore, under the circumstances of this case, the Postal Service is found to have not complied with the applicable Agreement provision and thereby improperly placed the Grievant in an emergency off duty status for the period February 26, 1988, to April 25, 1988.

However, that the emergency off duty status decision was in error is not determinative of whether the removal was for just cause. On that aspect of the case the Union raises disparate treatment, lack of an adequate investigation, and whether the Postal Service was substantially injured by the Grievant's of duty conduct. There is insufficient probative evidence in the

record to base a finding of disparate treatment. That the Postal Officials involved in the discipline, as well as the Postal Inspector, did not interview the Grievant, while troublesome, need not be addressed here because of the circumstances of this case and its disposition.

The larger or more substantive question in this case involves the significance of the Grievant's off duty misconduct in his employment relationship with the Postal Service. That was the basis of his removal. The mere fact that the conduct in question occurred away from the workplace and outside of working hours does not foreclose managerial authority to impose discipline otherwise justified. An employer may properly be concerned when private actions of an employee compromise the employer in a meaningful way. On the other hand, management has no roving commission to act as the guardian or supervisor of the employee's private conduct. As Arbitrator Richard Bloch has said, "Basic precepts of privacy require that, unless a demonstrable link can be established between off-duty activities and the employment relationship, the employee's private life, for better or for worse, remains his or her own." Unpublished Decision, January 17, 1981, quoted in proceedings fo the 39th Annual Meeting National Academy of Arbitrators -- Arbitration 1986: Current and Expanding Roles, p. 130. Arbitrator Ralph Seward has aptly stated that the off duty misconduct must have "a sufficient direct effect upon the efficient performance of Plant operations to be reasonably considered good cause for discipline" and that the employer "must show

that the effect of the incident upon working relationships within the Plant was so immediate and so upsetting as to justify the abnormal extension of its disciplinary authority." General Motors -- UAW Umpire Decision C-278, also quoted in the proceedings of the 39th Annual Meeting National Academy of Arbitrators, p. 138.

The aforementioned principle is generally referred to as the nexus and has been recognized by the Courts as well as Arbitrators in both the private and public sectors. See Elkouri and Elkouri, How Arbitration Works, Fourth Ed. 656-658. In Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981) the Court held that the Merit System Protection Board's presumption of adverse effect of an employee's indictment for immoral acts with his child was improper where there was no evidence of adverse effect to the Postal Service. In that case there was no evidence of significant adverse publicity other than a notice of indictment which did not mention the employee's employment relationship to the Postal Service. The Court found that generalized conclusions about lack of public confidence in the employee were in themselves not enough to support a Board finding of a relationship between the off duty misconduct and the efficiency of the Service. Postal Service Regulations prohibiting such misconduct could not in the view of the Court serve to establish the necessary nexus. The Court stated:

Despite our reflective revulsion for the type of off-duty misconduct in question, ... [t]he 1978 Act does not permit this court nor an employing agency to characterize off-duty conduct as so obnoxious as to

show, per se, a nexus between it and the efficiency of the service. The 1978 Act prohibits the discharge of a federal employee for conduct that does not adversely affect the performance of that employee or his co-employees. 5 USC 2302(B)(10). ... These provisions clearly signal a legislative intent that the agency must demonstrate by sufficient evidence that the off-duty misconduct, upon which the disciplinary action is founded, adversely affects the performance of the duties of the employee or of the agency. We further conclude, in light of the statutory requirements, that the reviewing authority may not place upon the employee, as the Board did, the burden of showing that his continued employment will not affect the efficiency of the service. The Board may not shift the burden of proof by presumption or application of the per se rule. ... [I]n situations involving off-duty activities, the reviewing court will require the agency to demonstrate that removal will promote the efficiency of the service. Identification of the cause for removal is not sufficient; the agency must also establish the relationship between the employee misconduct and the adverse effect on its abilities to perform successfully

The Court remanded the case to the Board, which upheld the removal based upon affidavits of five fellow employees who said they could no longer work effectively with the individual. That removal was sustained on appeal. 712 F.2d 213 (5th Cir., 1983).

The Postal Service here failed to sustain its burden of proof showing a nexus between Grievant's off duty conduct and any sufficient direct adverse effect suffered by the Postal Service as a result thereof. Its only evidence in that regard consisted of uncorroborated hearsay, telephone complaints from anonymous customers about the Grievant's continued employment and an unidentified newspaper article. That article did not mention the Grievant's employment relationship with the Postal Service. Simply stated, the Postal Service presented insufficient probative or credible

evidence that it was adversely affected in any demonstrable way by the Grievant's conduct. Implicit in the Postal Service's position is the presumption that such conduct is of itself harmful to the Postal Service. As the Court stated in Bonet, supra, such a per se approach is inappropriate. A determination can only be made on the basis of all relevant considerations and all the facts.

The Arbitrator has carefully considered Arbitrator Powell's decision submitted by the Postal Service and those decisions relied upon by the Union. The decision relied upon by the Postal Service decided by Walter Powell (Case No. E1C-2B-D 10128/10129) is distinguishable as to the nature of the criminal conduct involved, to wit, bank embezzlement, which reflected on the honesty of the grievant therein. This Arbitrator agrees with those Arbitrators who are of the view that the nexus principle must be seriously considered and shown by reliable evidence. (See S4N-3R-D 47206, S4N-3R-D 41225 decided by Arbitrator Dennis Nolan; and Arbitrator G. Allan Dash in E1C-2D-D 4731.) I find that there was not just cause for the Grievant's removal.

While the Arbitrator has found that the removal must be set aside, that decision should not be viewed as in any way condoning the Grievant's off duty conduct. That conduct remains a matter of concern. The Grievant will be reinstated with back pay and benefits and without impairment of seniority rights less any earnings from outside employment. However, reinstatement shall be subject to a fitness for duty examination which may include a psychiatric examination pursuant to 864.31 and 864.32 of the Employee and Labor Relations Manual.

AWARD

1. The emergency suspension was not for just cause. The grievance is sustained. The Grievant shall be paid back pay and benefits for the period of the suspension less any earnings from outside employment.

2. The removal of the Grievant was not for just cause. The grievance is sustained. The Grievant shall be reinstated with back pay and benefits and without impairment of seniority rights less any earnings from outside employment. However, reinstatement shall be subject to a fitness for duty examination which may include a psychiatric examination pursuant to 864.31 and 864.32 of the Employee Labor Relations Manual.

Dated: April 3, 1989

Bernard Cushman, Arbitrator

U. S. POSTAL SERVICE/APWU NATIONAL AGREEMENT
REGULAR ARBITRATION PANEL

In the Matter of the Arbitration Between:)
)
 UNITED STATES POSTAL SERVICE)
)
 -and-)
)
 AMERICAN POSTAL WORKERS UNION)
)
 Case #E1C-2F-C-16778 - Dorothy R. Cook)
 New Castle, PA)
)

Before: Robert F. Condon, Arbitrator

Appearances: For the A. P. W. U.

Jeff Kehlert - Advocate
John T. Quinn - Ex. VP - PA State APWU
Charles J. Sonntag - Steward, New Castle, PA
David D. Wigley - Pres. New Castle, PA Local
Alla J. Snodgrass - Exec., VP New Castle Local

For the U. S. P. S.

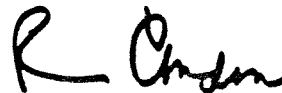
Thomas P. Foley - Advocate
John Shukes - Manager, Mail Processing

Date of Hearing: April 6, 1989

Place of Hearing: GMF New Castle, PA

Award: The grievance is sustained in that the
Grievant is to be paid out-of-schedule
pay for the period from August 3, 1984
until December 1, 1984.

Date of Award: April 21, 1989



ROBERT F. CONDON, Arbitrator

U. S. POSTAL SERVICE/APWU NATIONAL AGREEMENT
REGULAR ARBITRATION PANEL

In the Matter of the Arbitration Between:)	
)	
UNITED STATES POSTAL SERVICE)	
	)	OPINION
-and-)	
	)	AND
AMERICAN POSTAL WORKERS UNION)	
	)	AWARD
Case # E1C-2F-C-16778 - Dorothy R. Cook)	
New Castle, PA)	

Before: Robert F. Condon, Arbitrator

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Charles J. Sonntag - Steward-New Castle, PA
David D. Wigley - Pres. New Castle, PA Local
Alla J. Snodgrass - Exec. VP-New Castle Local

For the U. S. P. S.

Thomas P. Foley - Advocate
John Shukes - Manager, Mail Processing

In accordance with the provisions of the collective bargaining agreement between the parties, a hearing was held on April 6, 1989 at the General Mail Facility, New Castle, PA. Both parties were given full and fair opportunity to be heard and to present evidence and argument. There were no witnesses. The parties presented their cases through documents and commentaries from the Advocates.

ISSUE

Did Management violate the provisions of the National Agreement when it failed to award Job #3-M-4 to the Grievant? If

so, what shall be the remedy?

POSITION OF THE UNION

In an undated notice furnished by Management, the results of MPLSM Tour 3 Job Bids, including Job #3-M-4, Tour III MPLSM, Outgoing, SCF, were published and posted. (Attachment to Union's opening statement). The Job hours were 1530-0000, with Days off being Saturday and Sunday. The notice indicated that it was awarded to A. Amerson who had been excessed from the Butler, PA Post Office to New Castle, PA effective May 12, 1984. On July 25, 1984, job bids were posted, including Job #3-M-4.

The Grievant's seniority date is September 18, 1982 and Clerk Amerson's seniority date is April 23, 1977. In the step 2 decision, Management stated, "All Butler, PA excessed employees were given seniority from date of transfer as per agreement by Management and APWU prior to transfer." The excessing of Clerks from Butler to New Castle began on May 5, 1984.

It is the Union's contention that Management violated the provisions of Article 15 Section 2, Step 2f; Article 12, Section 5B7; Article 12 Section 4A; Article 12, Section 5B1; Section 5B3; Article 37, Section 1C, 2B, 2C, 2D1, 2D1a, of the National Agreement when it failed to declare the Grievant the senior and successful bidder for Job #3-M-4. This action forced the Grievant to work in a less preferred schedule with Sunday and Monday as non-scheduled days rather than Saturday and Sunday as off days.

It is the Union's further belief that Clerk Amerson was not

entitled to bid on the vacant position as provided for in Article 12, Section 5 of the National Agreement since she had not been in her position for more than 180 days after having been excessed from the Butler, PA Post Office. Since the Grievant did eventually bid into and LSM position effective December 1, 1984, she should be entitled to 8 hours overtime pay and 8 hours guaranteed pay for the days she did not work in the position from August 3, 1984 until December 1, 1984.

POSITION OF THE SERVICE

The Butler, PA Post Office was attempting to reduce its complement other than by attrition. It was agreed with the local Union officials that employees from Butler would be transferred to New Castle with full seniority and they would be merged into the New Castle Seniority List. The seniority list submitted by the Union indicates that Clerk Amerson was integrated into the list with her seniority of July 1, 1978 which was greater than that of the Grievant, D. Cook, who's seniority date is listed as September 18, 1982. For that reason, it is Management's belief that the Union had been in agreement with the seniority list and therefore no violation occurred when Clerk Amerson was awarded the position.

DISCUSSION AND FINDINGS

The Arbitrator has reviewed the documentation and commentary submitted by both parties. Management based part of its case on the contention that they had reached an agreement with the Local Union officials in regard to integrating the employees transferred from Butler to New Castle into the New Castle Seniority List. No such agreement was submitted, in writing, to the Arbitrator for

consideration. Although the Union Advocate challenged the allegation that a local agreement had been reached as being illegal, Item 22 of Article 30, Section E of the National Agreement does provide: Local implementation of this Agreement relating to seniority, reassignments and posting, as a negotiable item.

However, since no changes in this regard were negotiated into the Local Memorandum of Understanding during the negotiation period, Management's contention cannot be honored. A verbal agreement, for a matter of this significance, is unacceptable as evidence.

For that reason, I have decided that the Grievant should have been awarded the position in question. She is to be paid for out-of-schedule pay for the period from August 3, 1984 to December 1, 1984.

AWARD

The grievance is sustained in that the Grievant is to be paid out-of-schedule pay for the period from August 3, 1984 to December 1, 1984.



ROBERT F. CONDON, Arbitrator

Manalapan, New Jersey
April 21, 1989

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT: JAMES E. EDWARDS
between) POST OFFICE: EATONTOWN, N.J.
UNITED STATES POSTAL SERVICE) MANAGEMENT CASE NO. N4C-IN-C-26984
and) UNION CASE NO. NC4-617
AMERICAN POSTAL WORKERS UNION)

BEFORE: ROBERT L. MITRANI, ARBITRATOR:

APPEARANCES:

FOR THE U.S. POSTAL SERVICE:

MICHAEL IOLI, POSTMASTER
(MORGANVILLE, N.J.)

FOR THE UNION:

JEFF KEHLERT, NAT'L. BUS. AGENT

PLACE OF HEARING:

EATONTOWN, N.J.

DATE OF HEARING:


MAY 10, 1989

AWARD:

THE LETTER OF DEMAND GIVEN TO MR. JAMES E. EDWARDS ON AUGUST 14, 1986 WAS NOT FOR JUST CAUSE. THE SHORTAGE IS TO BE ADJUSTED TO \$30.00.

DATE OF AWARD:

MAY 16, 1989


ROBERT L. MITRANI, Arbitrator

IN THE MATTER OF THE ARBITRATION)

BETWEEN)

UNITED STATES POSTAL SERVICE)

AND)

AMERICAN POSTAL WORKERS UNION)
(AFL-CIO))

REGIONAL CASE NO. N4C-IN-C-26984)

LOCAL GRIEVANCE: NC4-617)

GRIEVANT: JAMES E. EDWARDS)

OPINION AND AWARD

ROBERT L. MITRANI

This case was heard on Wednesday, May 10, 1989 in Eatontown, New Jersey, before Arbitrator, Robert L. Mitrani, pursuant to the National Agreement between the parties. The Arbitrator is on the regular regional arbitration panel and this was a regular arbitration assignment.

APPEARANCES

U.S.P.S.

MICHAEL IOLI, POSTMASTER
(MORGANVILLE, N.J.)

A.P.W.U.

JEFF KEHLERT, NAT'L. BUS. AGENT.

(A) ISSUE

Was the Letter of Demand given to Mr. James Edwards on August 14, 1986 for the amount of \$595.47 for just cause? If not, what shall be the remedy?

(B) LETTER OF DEMAND

Attached to this award as an exhibit is the Letter of Demand dated 8/14/86. The Letter was issued by Mr. Thomas S. Price, Postmaster of the Eatontown Post Office.

(C) BACKGROUND AND DISCUSSION

The Union filed a grievance in this matter that stated the following:

"The USPS has violated the National Agreement, Article 28, Section 1A. The grievant was issued a Letter of Demand (dated August 14, 1986) in the amount of \$595.47 for a shortage found in his flexible credit as a result of an audit on August 14, 1986. Management contends that since the grievant had a shortage that he failed to exercise reasonable care. This argument is not proper since the grievant did exercise reasonable care in the performance of his duties.

Of the \$595.47 flexible credit shortage \$564.48 was from a previous audit (dated April 16, 1986). The grievant was never issued a letter of demand and as a result never grieved the shortage.

Management has failed to provide proper security of postal funds in that it was shown to the Postmaster that cash draws could easily be opened in a locked position.

The letter of demand was issued prior to any investigation."

The following was Mr. Price's response to the grievance:

"The step 2 meeting was held on Wednesday September 24, 1986 at the Eatontown Post Office. Mr. John Scianna represented the APWU.

Prior to the shortage there was no knowledge of a security problem. The situation has since been corrected.

The reason there was no letter of demand issued on 4/16 was because Mr. Edwards was interviewed by the postal inspector investigating a shortage of Mr. Smaw. When it was found that there was no colleration between the shortage of Smaw and Edwards, the letter of demand was issued."

Both parties agree that when there was an audit of Edwards on 8/14/86, there was a shortage of \$595.47 in his flexible credit. There is also agreement that when an audit was made of Edwards on 4/16/86, there was a shortage of \$564.48.

The following is the contract language of Article 28, Section 1.

ARTICLE 28
EMPLOYER CLAIMS

The parties agree that continued public confidence in the Postal Service requires the proper care and handling of the USPS property, postal funds, and the mails. In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefor.

Section 1. Shortages in Fixed Credits

Employees who are assigned fixed credits or vending credits shall be strictly accountable for the amount of the credit. If any shortage occurs, the employee shall be financially liable unless the employee exercises reasonable care in the performance of his duties. In this regard, the Employer agrees to:

A. Continue to provide adequate security for all employees responsible for postal funds;

B. Prohibit an employee from using the fixed credit or other financial accountability of any other employee without permission;

C. Grant the opportunity to an employee to be present whenever that employee's fixed credit is being audited and if the employee is not available to have a witness of the employee's choice present;

D. Absolve an employee of any liability for loss from cashing checks if the employee follows established procedures; and

E. Audit each employee's fixed credit no less frequently than once every four months.

In its opening statement, the Union read the following:

"On April 16, 1986 the grievant's fixed credit was audited, resulting in a shortage of \$564.48. This was notated on PS Form 3294 and PS Form 3368. No letter of demand was issued for the shortage at that time. The grievant's fixed credit was not adjusted at that time.

On August 14, 1986 the grievant's fixed credit was again audited, resulting in a shortage of \$595.47. This was notated on PS Form 3294 and PS Form 3368. A letter of demand was issued for the shortage at that time. The grievant's fixed credit was adjusted at that time."

The Union added that management violated its own authored regulations under Article 19 in the manner in which it handled this case.

The position of management was that the delay in giving the letter of demand for the 4/16/86 shortage was because Mr. Edwards asked for a delay in order for the Postal Inspectors to investigate this matter.

Mr. Tom Price, Postmaster-Eatontown, testified that after the audit on 4/16/86, James Edwards asked that the postal inspectors investigate another shortage involving another employee. A week later the inspectors said that there was no connection between Edwards' shortage and this other employee.

There was a labor management meeting on 4/18/86 and on 4/23/86 Mr. Price wrote the following memo to John Scianna (Shop Steward).

The following items were discussed and agreed to at the subject meeting:

1. A bar will be installed insafe storing flex-credit drawers. The bar will cover the drawers and be locked each evening by the closing supervisor.
2. Only the Postmaster and a supervisor will have the key to the bar.
3. The carrages holding the cash drawers in the screen line will be built up with a metal plate. Employees will place drawers in the safe when off duty until plate is installed.
4. All stock transacyions will be accomplished on a form #17.
5. A third party will verify turn over of Post Office meter at noon and any other time.
6. A signout sheet will be established for Post Office key.
7. Post Office key at police station will have to be signed for when used. A list of clerks and PTF carriers will be given the Eatontown Police. They will be notified of any changes.

Price said this was the first time that security problems were brought to his attention. Price also testified that there were five prior occasions prior to April 16, 1986 wherein Edwards had shortages. He paid them all and there were no grievances. In its closing statement management said that on 4/16/86 there was a shortage of \$564.48. The Postal Inspectors investigated another employee at Edwards' request. There was no correlation with Edwards

shortage. Edwards has 20 years experience as a window clerk. If he thought there were security problems, he should have notified someone. He did not take reasonable care. And there was still money missing in the audit of 8/14/86.

The Union referred to the following excerpts from the F-1 (Financial Handbook):

".22 Tolerance Exceeded

When the Stamp Stock accountability is out of tolerance and the parties involved cannot agree to the count, it will be necessary to recount the entire accountability. After the amount of the overage or shortage has been firmly established the stamp accountability must be brought into balance as follows:

b. Shortages - Unless the shortage has a relationship with an overage of the same employee in another accountability, or a current overage in another employee's accountability, require the employee to replace the missing amount. Collection procedures in Article XXVIII, Section 4, of the National Agreement will be followed. (See 563). Managers should continue to exercise their judgement when determining the existence of a relationship which may warrant offsetting shortages. Enter the amount collected in Cash remittance (advance) on the employee's Form 1412 and initial the entry. If recovery of the full amount is not made enter the balance as a write-in disbursement entry to suspense on the employee's Form 1412. When there is a balance for that employee from a previous overage within 1 year, and a relationship is established, this balance may be used to offset part or all of the shortage. See 582 for vending machines and self-service units."

"563. Collection Procedures for Monies Demanded

563.1 Criteria for Collection

.11 In accordance with the conditions and standards of care set forth in Article XXVIII of the National Agreement, bargaining unit employees are financially liable for (1) shortages in their credits, (2) loss of or damage to the mails or (3) damage to USPS property and vehicles. When it is determined that such liability exists and a demand is to be made, the employee must be informed in writing stating the reasons for the demand."

"0-133.3 Adjustments

.32 A stamp credit must be adjusted when the actual count exceeds tolerance."

"D-134 Employer Demand

All employees must be informed in writing in advance of any money demand for any reason. The demand must include the reasons for the demand, and it must be signed by the Postmaster or his designee."

It is the Union's position that a fatal flaw exists in this case. And this flaw is that a Letter of Demand was not issued after the 4/16/86 audit. After spending a great deal of time on this case, the Arbitrator agrees with the Union's position. Management claims that a delay occurred because Edwards wanted the postal inspectors to look into certain matters related to security and shortages. But in the matter of a week, the inspectors said there was no relationship. A letter of demand should have been issued without delay.

Procedural matters (especially in this type of case) are just as important as substantive matters. The Handbooks, which are written by the Service are part of the contract in accordance with Article 19.

Because there was no letter of demand after the 4/16/86 audit, there was no grievance or investigation as to why this shortage occurred. The evidence indicates that there were security problems on and before 4/16/86. This is the reason Mr. Price wrote his memo of 4/23/86.

Not only was there no letter of demand for the 4/16/86 shortage, but there was also no stamp credit adjustment. The F-1 is clear and must be done when a shortage is found. But after the 4/16/86 shortage none of the procedures were followed. It was almost as if an audit never took place. Then an audit took place on 8/14/86. But there was a serious problem with the frame of reference for this audit. None of the proper procedures as written in the F-1 took place. This also means that there was no due process regarding a proper analysis of the 4/16/86 shortage.

Following the correct procedures in this type of matter is of the utmost importance. It affords proper protection for the Service and the employee. In this case, the critical procedures were not followed after the 4/16/86 audit.

The shortage on 4/16/86 was \$564.48 and the shortage on 8/14/86 \$595.47. This is a difference of \$30.99. Therefore, the Arbitrator is ruling as follows:

AWARD

The letter of demand given to Mr. James E. Edwards on August 14, 1986 was not for just cause. The shortage is to be adjusted to \$30.99.

Robert L. Mitran

ROBERT L. MITRANI, Arbitrator
May 16, 1989

APB

LETTER OF DEMAND TO EFFECT COLLECTION FOR SHORTAGE
IN FLEXIBLE CREDIT

Aug 14, 1986
(Date)

James Edwards
(Name)

Clerk
(Title)

Main Office
(Work Location)

138-36-4021
(SS #)

Dear Mr. Edwards

This will serve to notify you of the USPS's intention to collect from you the sum of 58⁴², for a shortage found in your flexible credit of 7294⁶⁵.

Specifically, it was determined that you failed to exercise reasonable care in the performance of your duties in that on 8/14/86, as the result of an audit of your flexible credit of 7294⁶⁵, a shortage was found amounting to 59⁴².

Said determination is based upon a review of the facts as they are known and my investigation of same and is in accordance with Article 28 of the National Agreement.

Paragraph below selected as appropriate:

1. This indebtedness being less than \$200.00, in accordance with Section 4a of Article 28 of the 1984 National Agreement, will be automatically deducted from your paycheck beginning with the next pay period. Unless you indicate and request specific terms and consideration within five (5) work days utilizing Form #3239, deductions will be instituted in accordance with Article 28, Section 4b.

2. This indebtedness being more than \$200.00, in accordance with Section 4a of Article 28 of the 1984 National Agreement, will be postponed until adjudicated through the grievance-arbitration mechanism if you so elect to grieve the shortage. If you elect not to grieve, deductions will be instituted as reasonably possible in accordance with Section 4b of the 1984 National Agreement.

Thomas R. Potro
Supervisor's Signature and Title

[Signature]
Employed's Signature and Date

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REPORTS BY JEFF KEHLERT

American Postal Workers Union ☎ 10 Melrose Avenue ☎ Suite 210 ☎ Cherry Hill, NJ 08003 ☎ (856) 427-0027

The following reports are available, upon request, from my office:

1. **Sky's the Limit**
Produced with former National Business Agent for the Maintenance Craft, Tim Romine. This report addresses our ability to obtain "restricted" forms of documentation necessary for enforcement of the Collective Bargaining Agreement with particular emphasis on medical records/information.
2. **Your Rights in Grievance Investigation and Processing**
An alphabetical compilation of Step 4 Interpretive Decisions on shop stewards' rights and related subjects.
3. **More Rights in Grievance Investigation and Processing**
A second volume of the Your Rights report including numerous Step 4 decisions.
4. **Grievances in Arbitration**
A compilation of arbitration decisions on various subjects with a brief synopsis of the awards included.
5. **Vending Credit Shortages and Other Issues**
A report on multiple subjects including the title subject, use of personal vehicles, Letters of Demand, etc.
6. **Letters of Demand - Due Process and Procedural Adherence**
A history in contractual application of the due process and procedural requirements of the Employer in issuing Letters of Demand including numerous arbitration decision excerpts and the application of the principle of due process to discipline.
7. **Ranking Positions to a Higher Level**
Utilization of Article 25 and Employee and Labor Relations Manual Part 230 to upgrade Bargaining Unit Positions to Higher Levels based upon work being performed. (With authoritative arbitral reference.)
8. **Winning Claims for Back Pay**
Applying Part 436 of the Employee and Labor Relations Manual in conjunction with our Grievance Procedure to obtain denied pay and benefits, up to six years in the past.
9. **Letters of Demand -- Security and Reasonable Care**
As Management corrects due process and procedural errors when issuing letters of demand, we must turn to other methods of prosecuting grievances for alleged debts. This report addresses F-1 and DMM regulations to enable us to prove security violations exist.
10. **Surviving the Postal Inspection Service**
This report brings together the crucial information (Situations, Questions and Answers, National APWU Correspondence) necessary for employees and shop stewards on what rights must be utilized when Postal Inspectors come calling. Its goal is to enable Postal Workers to Survive and not lose their livelihood.
11. **Out-of-Schedule Compensation, Strategies for Winning Pay When our Collective Bargaining Agreement is Violated.**
This report places into a readily accessible package the controlling Collective Bargaining Agreement provisions, arbitral reference, contractual interpretation and strategies necessary to pursue violations of the National Agreement in which out-of-schedule compensation would be an appropriate remedy.
12. **A Handbook: Defense vs. Discipline: Due Process and Just Cause in our Collective Bargaining Agreement**
The arguments, Collective Bargaining Agreement references, investigative interviews, and arbitral authority brought together to provide the best possible defenses when discipline is issued.