LETTERS OF DEMAND, DUE PROCESS AND PROCEDURAL ADHERENCE

STRATEGY FOR ENFORCING ARTICLE 19 OF THE COLLECTIVE BARGAINING AGREEMENT

BY:

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Memorandum

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From the Office of JEFF KEHLERT
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Dear Brothers and Sisters:

TO:

SUBJECT:

In recent years, our Union has met with increasing success when raising procedural arguments at arbitration. The focus of this success has been instances when monetary demands are made of bargaining unit employees.

This report's purpose is twofold. First, to place into a readily accessible package the applicable provisions of the Collective Bargaining Agreement - with pertinent arbitral reference - which relate to procedural requirements when Letters of Demand are issued to workers. Second, the report is also a reference for arguing procedural contractual adherence whenever language within Article 19's Handbooks and Manuals is applied in enforcement of the Collective Bargaining Agreement.

Contained herein are references to the Master Collective Bargaining Agreement, Postal Bulletins, Handbook and Manual provisions, and excerpts from arbitral opinion.

POSTAL BULLETINS

On May 29, 1986, Postal Bulletin #21568 was issued which added new subchapters to the Employee and Labor Relations Manual (Subchapter 450 and 460). This was done by the United States Postal Service to administer the collection of debts owed by Bargaining Unit employees. Of particular interest were the following provisions:

460 Collection of Postal Debts From Bargaining Unit Employees

461 General

461.1 Scope. These regulations apply to the collection of any debt owed the Postal Service by a current postal employee who is included in any collective bargaining unit.

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.

Following issuance of the above language in the Postal Bulletin those cited provisions were placed into the Employee and Labor Relations Manual.[1]

In the above cited provisions, the Postal Service clearly states that the regulations apply to any debt owed to the Service and that in collection of a debt, the Service must follow the procedural requirements governing collection. The Service did not use the term may or the term should or even shall; but rather the Service mandated the requirement with the strictest degree of adherence, must.

In September of 1986 (9-25-86) Postal Bulletin #21586 was issued by the United States Postal Service to "bring the F-1 Handbook in line with the new collection and appeal procedure..." as previously stated (Subchapter ELM 450 & 460), Part 174 states:

174 Demands for Payment for Losses or 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 the Postal Service's 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 Postal Service's determination of the debt or its proposed method of repayment. Regulations detailing the rights of nonbargaining unit employees and applicable collection and appeal requirements are set forth in part 450 of the Employee and Labor Relations Manual (ELM).

Requirements governing the collection of debts from bargaining unit employees are specified in part 460 of the ELM and the applicable collective bargaining agreement.

563 Collection Procedures for Monies Demanded

563.1 Bargaining Unit Employees

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[1] ELM references 460, 461, 461.1, 462.3; issue 12 5-1-89

.11 When, in accordance with the conditions and standards set forth in Article 28 of the employee's respective collective bargaining agreement and part 460, ELM, 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 the Postal Service's determination of the existence, nature, and amount of the debt, and requesting payment, the demand letter must contain the following statement regarding the employee's right to challenge the Postal Service's claim: "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

.12 If an employee grieves a money demand of more than $200.00, 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 $200.00 are due when presented regardless of whether an employee files a grievance.

Following their issuance, in the Postal Bulletin, the cited amendments were placed into the F-1 Handbook under parts 133 and 473.1, .11, .12 respectively[2]

In summation of these provisions of the F-1, the Postal Service required that each demand issued to an employee adhere to the following:

1. Be in writing

2. Contain signature of Postmaster or Postmaster's designee

3. State Postal Service's determination of existence, nature, amount of debt

4. State options to employee to either:
   A: Repay debt
   B: Appeal debt
   C: Proposed repayment method

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[2] F-1 reference 133 and 473

5. Contain following statement: "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

Once the Postal Bulletin provisions were placed into the Employee and Labor Relations Manual and F-1 Handbook, they became part of Article 19 of the Collective Bargaining Agreement which states:

ARTICLE 19
HANDBOOKS AND MANUALS

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

Following the Postal Service changes to the F-1 and ELM, many Letters of Demand were issued which did not adhere to the mandatory requirements set forth by the Postal Service. When such letters of demand were arbitrated, the Service's major arguments can be summarized as follows:

> Mr. Arbitrator:
>
> 1. The Union never raised these technical procedural issues as possible violations prior to this, the last step of the Grievance/Arbitration mechanism. The Union should now be barred from raising the arguments.
>
> 2. Since the grievant did, in fact, grieve the Letter of Demand, the fact that it did not contain the grievant's appeal rights is a moot point. There was no harm done to the grievant or the Union. This was a simple, harmless error. The grievance was processed, was not

untimely, and collection was delayed until adjudication through the Grievance/Arbitration aperitive. The arbitrator cannot relieve the grievant of financial responsibility because the Letter of Demand was not written properly.

These arguments by the Postal Service were addressed in many arbitration decision during the past four (4) years. The following are excerpts from some of the decisions most favorable to the Union:

RAISING PROCEDURAL AND DUE PROCESS VIOLATIONS AT ARBITRATION:

ARBITRATOR MITRANI, CASE NUMBERS N4C-1N-C 30242, N7C-1P-C 3418, N7C-1P-C 3661; PAGES 5 and 6:

C. DISCUSSION

Although the Service quoted from "How Arbitration Works: (Elkouri and Elkouri - 3rd Edition) in support of its position, it is the Arbitrator's finding that the particular paragraph in question does not prevent the Union from raising Article 19 in this arbitration case. After all, Article 19 is "an additional element closely related to the original issue." The Union has not changed the issue in this case. It concerns whether or not the Letters of Demand were proper under the contract. It is worth noting the following excerpts from "How Arbitration Works" (Elkouri and Elkouri - 3rd Edition) on page 195:

> "In turn, Arbitrator Walter Boles has declared that 'any arbitrator would be derelict in his duty if, in considering whether or not a given section of a contract was applicable to a matter before him, he limited his inquiry only to points of argument raised before the matter came on to hearing.'
>
> Nor will a grievant be bound rigidly at the arbitration stage by an ineptly worded grievance statement, or one which gives an incorrect contractual basis for the claim or cites no contractual provision at all. Formal and concise

pleadings are not required in arbitration. A possibly typical view is that which was expressed by Arbitrator Marion Beatty:

> 'Employees or their Union officers cannot be expected to draw their grievances artfully. If they have sufficiently apprised the Company of the nature of their complaint and if it is found that the Company has violated any portion of the contract, the employees, in my opinion, are entitled to relief.'"

The opinions expressed above are the ones generally accepted in arbitration. And the Arbitrator wishes to note that there is even a stronger opinion on page 196 of "How Arbitration Works" (3rd Edition).

Both in the grievance and the grievance procedure, the Service knew that the grievants were grieving the Letter of Demand that each one of them received. Obviously, this has never changed. The issue in this case has not been expanded and the references to Article 19 are perfectly proper in arbitration. The Arbitrator wishes to note that the F-1 Handbook is part of Article 19. The F-1 is referred to in the Letter of Demand and this is what is being grieved. Clearly, Article 19 was always an integral part of the grievance. Furthermore, the grievance procedure does not require the very high degree of formality that the Service is insisting on in this case. Nevertheless, it is the Arbitrator's finding that it was proper for the Union to raise the issue of Article 19 in this arbitration hearing. This language is directly related to the grievance in question and the Union has not changed the basic issue. Furthermore, it was the Letter of Demand that was grieved and the Letter refers to the F-1 which is included in Article 19. Even though Article 19 may not have been specifically discussed in the grievance procedure or even though it was not specifically identified in the grievances, the Union has the right to raise this issue in arbitration.

Given the appropriate language of Article 19 (see three prior arbitration awards indicated earlier in this award) the Arbitrator rules that the three Letters of Demand involved in this case are defective and are to be withdrawn.

ARBITRATOR WITTENBERG, CASE NUMBER NIC-1N-C 43206, PAGES 5, 6, 7, and 8

Article 19 is clear and specific. It requires that Postal Service rules and regulations contained in its handbooks and manuals "shall be continued in effect." In essence, the Postal Service is bound by the terms of the rules and regulations it promulgates under the National Agreement.

The Employee and Labor Relations Manual requires the Postal Service to comply with its procedural requirements regarding the issuance of letters of demand. Specifically, Section 462.3 requires that the employee be given notice of his right to challenge the demand under the terms of the National Agreement.

Section 133 of the F-1 Handbook is more specific in this regard. It requires the Postal Service to "specify the options available to the employee" to either repay the shortage or appeal the letter of demand. Section 473.1 of the F-1 Handbook requires the Postal Service to cite the appeal procedures of Article 15 of the Agreement.

The Letter of Demand issued Grievant fails to comply with the regulations set forth in the E&LR manual and the F-1 handbook. The Letter of Demand neither notifies Grievant of his right to challenge the demand, nor cites the appeal procedures available under Article 15. In light of these deficiencies, the Arbitrator finds the Letter of Demand to be unenforceable.

In so finding, the Arbitrator is not persuaded by the Postal Service's contention that Grievant was not harmed by the error since he grieved the

employer's actions. The employer's obligation to conform to its own rules and regulations is not excused by a claim of no harm. The Postal Service has the same obligation as its employees to follow its rules and regulations set forth in manuals and handbooks which are enforceable under the Agreement.

One remaining Postal Service contention must be answered. The Postal Service asserts that the Union's claim of procedural error is untimely since the issue was not raised during the course of the grievance procedure. The right to contest a procedural defect is not waived merely because the Union failed to raise the issue prior to arbitration. The grievance is not so specifically drafted as to preclude the Union's argument in this case.

ARBITRATOR KLEIN, CASE NUMBER C7N-4J-D 23488, PAGE 6

Furthermore, in Case No. S8N-3P-D 17652, R. Droster, Arbitrator Britton addressed the question of the absence of the discussion of procedural issues during the grievance procedure, and he stated in part: "....matters so basic and fundamental to procedural due process as those hereinabove described are not waived or lost by the absence of notice or lack of opportunity to rebut their validity".

ARBITRATOR HOWARD, CASE NUMBER E7C-2B-C 20739, PAGES 4-5

While the Service argues strenuously that the arbitrator should not consider Article 8, Section 2C of the Agreement because the provision was not raised or discussed during the grievance procedure, the argument is unpersuasive. First, the grievance procedure, including arbitration as its terminal step, is a hierarchical procedure through which presumably more experienced advocates address the issue as it proceeds through its subsequent stages. As it so proceeds, more sophisticated judgments and arguments will be addressed. These should not be denied a hearing merely on the basis that

they were unaddressed during earlier stages of the grievance procedure. Secondly, and more importantly, neither the Union nor the Service can afford to accept a procedural rule in arbitration by which basic rights and responsibilities conferred by the Agreement are waived merely because they were not considered during earlier steps of the grievance procedure.

ARBITRATOR ZUMAS, CASE NUMBER N4C-1A-C 25317, PAGE 6

3. Arbitrator Aaron's admonition that parties to this Agreement are barred from introducing evidence or arguments not presented during the various Steps of the grievance procedure is a sound principle, but in this Arbitrator's judgement, is not applicable in this dispute. Here we have a glaring substantive procedural violation of Grievant's due process rights. Such violation of a clear contractual right may be raised at any stage of the grievance procedure, including arbitration.

ARBITRATOR MARTIN, CASE NUMBER C7C-4M-C 9861, PAGES 5-7

Two questions must be answered to resolve this claim; was the Issue of the Procedural Defect properly considered, and was the Procedural Defect sufficient to cause the Letter of Demand to be rescinded. As to the first, Management relied upon a Decision by Arbitrator Aaron, NC-E-11359, in which Arbitrator Aaron states: "It is now well settled that parties to an Arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding Steps of the Grievance Procedure, and that this principle must be strictly observed. The reason for the rule is obvious: Neither party should have to deal with evidence or argument presented for the first time in an Arbitration Hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument." The Union presented a plethora of

Arbitral Decisions, which distinguished cases which relied upon the words of the Agreement from new evidence or arguments. It must be presumed that Management was aware of the Agreement, and it is charged with knowledge of what is contained in the Agreement. The challenge in this case from the beginning was to the Letter of Demand, and Management has told itself how it should handle Letters of Demand. The first action Management should take, when its actions are challenged, is to review its actions against the obligations imposed upon it, under and by the Agreement, and be prepared to defend its actions. That is all that has occurred in this case. The Union told Management that it had failed to comply with its own regulations, and Management simply can not be allowed to yell: "Surprise!" That it must comply with the Agreement simply can not be a surprise to Management, can not be a new piece of evidence, and should take no time whatsoever to prepare a defense. That should have been done the day the Grievance was received.

Technical defenses, which avoid facing the merits of a case, should be of some substance before they are allowed to be controlling. In this case, however, as has been found by many Arbitrators before, the "technical" defense is not based upon a technicality, but upon demanding that Management comply with what it has told itself to do: Include in the Letter of Demand certain elements, not as a suggestion, but as an outright obligation. It has told its Managers to do something when they issue a Letter of Demand, and the Managers are obligated to do so, and the Union is entitled to challenge Management's actions based upon its failure to follow its internal directives.

The facts in this case reveal that Management failed to comply with the procedures which it has directed itself to follow in the issuance of a Letter of Demand, and the Letter of Demand is therefore invalid. It is to be rescinded, and the grievant relieved of her obligation to pay under the Letter of Demand.

ARBITRATOR TALMADGE, CASE NUMBER N7C-1P-C 26965/66; PAGES 5,7,8

> [Certainty of Grievance Subject Matter] In general, arbitral authority holds that there is no jurisdiction to hear an issue (or arguments) initially raised at the arbitration hearing. However, in this instance while respectful of Arbitrator Aaron's admonition supra, ([footnote from page 5] **The Arbitrator notes that Arbitrator Aaron observed that "the spirit of the rules, however, should not be diminished by excessively technical construction," supra at page 4) this Arbitrator concurs with the understanding provided to us by Arbitrator Zumas that we be on alert to "glaring substantive procedural violation of grievant's due process rights." See supra, Zumas, July 1990 Award at 6.
>
> In this Arbitrator's judgement, Arbitrator Zumas' recognition that "violation of a clear contractual right may be raised at any stage of the grievance process including arbitration," is correct.

ADHERENCE TO SPECIFIC CONTRACTUAL LANGUAGE IN ARTICLE 19's HANDBOOKS AND MANUALS:

ARBITRATOR SCHEDLER, JR., CASE NUMBER S4C-3W-C 22674, PAGES 7-8

> However, there is another reason for the Union to prevail. The employees are expected to abide by Postal rules and regulations. Management, likewise, is expected to abide by Postal regulations. Higher level management makes the regulations and field operation management is expected to follow those regulations. The Collection Procedures for Monies Demand, Part 473 of the F-1, states that "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.'"

The demand letter was offered into evidence as Joint Exhibit 22. The letter was typed on a Form 0-13 and it requested the Grievant to immediately replace the shortage of 4295.,68. The letter 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.

Many arbitrators do not like to sustain or deny grievances on procedural technicalities. I feel the same way; however, management made the rules and is expected to follow those rules.

ARBITRATOR DUNN, CASE NUMBERS S4C-3D-C 64951/S7C-3D-C 9918; PAGES 6-7

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.

ARBITRATOR HOWARD, CASE NUMBER E7C-2B-C 15779, PAGES 3-4

It is abundantly clear that the Letter of Demand issued to the grievant was procedurally defective in failing to comport with the instructions contained in the F-1 Handbook and the Employee and Labor Relations Manual. The instructions require that the Letter of Demand specify the options available for repayment and provide notice of the rights on the part of the employee to challenge the demand as cited supra.

Indeed, the Service does not deny that the Letter of Demand was procedurally defective, but merely contends that the grievant cannot show any adverse consequences from the procedural defect. There is nothing in the instructions, however, which require the grievant to show adverse consequences in order to enforce the instructions which are clear and unambiguous. These instructions become enforceable rights of the employees under Article 19 of the National Agreement. For the arbitrator to require that the employee show injury from the failure of the Service to conform to its own instructions as a requirement necessary to invalidate the Letter of Demand would establish a structure of incentives which would encourage the Service to violate its own rules and regulations which have become enforceable obligations under the National Agreement. This the arbitrator is not prepared to do.

ARBITRATOR PURCELL, CASE NUMBER N4C-1G-C 34076, PAGES 5-6

DISCUSSION AND FINDINGS

The Arbitrator does not agree, notwithstanding the several arbitral awards submitted by the Employer by way of buttressing its contention, that the burden of proof must necessarily rest with the Union when the case involves a money shortage. If, for example, a given shortage case implied theft (not the situation here) which would forever brand the individual as a dishonest employee, thereby jeopardizing that person's future employment opportunities

wherever he/she might seek them, this Arbitrator, at least, would require the employer to meet the highest degree of proof burden. In this matter, however, as the Union has correctly asserted, there is no need to enter such murky waters, the reason being that the decision here does not turn on a substantive (merits) question but, rather, turns on a procedural one. And, consequently, no lengthy "Discussion and Findings" treatment of the matter needs to be given here.

The Union was also justified in emphasizing the Agreement's admonishment to an arbitrator which, more explicitly than many labor contracts, prohibits an arbitrator, irrespective of the reason, from altering, amending, or modifying, any of the terms or provisions of the Agreement. The Arbitrator is also, well aware of the U.S. Supreme Court's warning on the point that:

> "an arbitrator is confined to interpretation and application of the collective bargaining agreements: 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. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Enterprise Wheel and Car Corp. vs United Steelworkers)

The Employer concedes that it did not comply with the strict language of the Agreement/Regulations with respect to the content of the subject "Letter of Demand" but it argues it should be held that the Employer did comply with its contractual/regulatory obligations on the basis of the testimony provided by the processing of the dispute through the several steps of the grievance procedure. That argument is considerably less than persuasive. The Regulations (which means, the collective bargaining agreement by the

incorporation language of Article 19) clearly and unambiguously states that a "Letter of Demand" "must" include the statement regarding the employee's appeal rights contained in Article 15. (see, for example, the above, including the Handbook Manual, F-1, TL-14, 12-20-86). There are no exceptions to that requirement. The primary obligation of an arbitrator is to determine the mutual intent of the parties that agreed to the contract. When the language is sufficiently clear that the mutual intent of the parties can be discerned with no other guide than a simple reading of the pertinent language, then the arbitrator must stop right there. He/she may not go behind the language to search for some exotic meaning.

The Employer suggests that its failure to include the subject appeal rights of the Grievant was an unimportant "technicality". That is far from being true. Indeed, the Arbitrator, as well as anyone who takes the time to read reports of perpetrators of the most heinous crimes, avoiding punishment on one technical basis or another, must wonder if there is any such thing as an unimportant technicality. Be that as it may, what many are prone to think to be a mere technicality is, in reality, a binding legal obligation.

It appears, as the Union has pointedly asserted, that the requirement in Section 473.11 of the Handbook-Manual relating to a "Letter of Demand" became effective 12-20-86 which was only twenty-four (24) days prior to the subject January 13, 1987, "audit" and "Letter of Demand" to the Grievant. The shortness of that time span may well explain the failure of the Employer to comply with the appeal advice requirement of Section 473.11. The "Letter of Demand" used in this case was obviously a pre-printed form letter which became obsolete and inappropriate on December 20, 1986. If such was the case, and the Employer's failure to comply with the appeal advice was due to inadvertency, the Arbitrator would not thereby gain the authority to disregard the clear command of the contract. The grievance must be, and hereby is, sustained.

These issues have also been addressed in numerous arbitration decision cited to the arbitrator by the Union. Without exceptions these decisions support the Union's position in this case relative to both the alleged contractual violation of not complying with the provisions of the section 473.11 and the Union's requested remedy for such violations. Applying the principle that the language of the parties' agreement should be given it normal and regular meaning, unless substantial evidence supports a counter finding, the arbitrator finds that the word "MUST" used in the language relied on by the Union is normally interpreted as creating an imperative need or duty; an indispensable and essential requirement. The arbitrator further finds no evidence in the record that a different interpretation of the language was intended. The arbitrator further observes that section 473.11 is subject to the following language of Article 19 of the Agreement:

> "Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly related to wages, hours, or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable and equitable."

Finally, the arbitrator recognizes that the Service, in both cases has included some language relative to the grievant's rights to adjudicate the shortage. However, the language of section 473.11 is <u>mandatory</u> concerning the <u>exact</u> language to be included in the Demand Letter. Given this preciseness of section 473.11 language and the opportunity to alter that language provided in Article 19, the arbitrator feels compelled to find that the provisions of section 473.11 require the

Service, if it is to be in compliance with section and, therefore, the Agreement, to use the specific language set forth in section 473.11 when issuing a Letter of Demand to an employee.

Consequently, the arbitrator finds that the Service violated Article 19 of the Agreement when it issued the contested Letter of Demand to the Scott and failed to comply with the language requirements of section 473.11 of the Manual.

ARBITRATOR COLLINS, CASE NUMBER N4C-1V-C 29495, PAGES 3-4

As a general proposition the doctrine of harmless error has, in this Arbitrator's opinion, much to be said for it. The doctrine looks to a fair result, i.e., if there is no actual injury there should be no recovery, and it discourages unnecessary litigation. However, it is also true that in some situations in order to encourage absolute compliance with a regulation, i.e., to ensure its integrity that regulation will be enforced even though failure to comply with it has produced no actual injury.

The present situation seems to fall into the latter category. Part 563.1 of the F-1 unequivocally mandates inclusion of the language at issue in every Letter of Demand. And under Article 15.4 A 6 and 19 of the National Agreement an arbitrator may not vary or modify the language of Part 563.1 of the F-1.

The Arbitrator has been referred to numerous arbitration decision, some in the northeast Region and some directly in point, that have set aside Letters of Demand where there has been a failure to include in the Letter advice as to appeals as required by applicable regulations. The apparent unanimity of that arbitral view entitles it, in the opinion of this Arbitrator, to considerable weight.

For the foregoings the Arbitrator will grant the grievance and order the Letter of Demand issued to Williams be rescinded.

ARBITRATOR MARX, JR., CASE NUMBER N7C-1E-C 4024, PAGES 4-5

Under full review of the arguments set forth in this instance and in light of all the previous cases cited in this and the Arbitrator's two previous awards, the Arbitrator concurs with the conclusion reached by Arbitrator Collins. In this instance, the Letter of Demand was issued on October 8, 1987, a full year after the mandatory language was placed in effect. In addition to the new language, F-1 Section 473.11 also requires signature by the Postmaster or his/her designee. This is lacking here. The Postal Service is at liberty, subject to contrary provisions of the National Agreement, to set its own regulations. Just as it requires compliance by employees to such regulations, the Postal Service must, under Article 19, be similarly bound.

For this reason, there is no basis to review the serious questions of general lack of security at Quincy which were raised by the Union.

ARBITRATOR MARTIN, CASE NUMBER C4C-4R-C 34753, PAGES 6-8

Management's argument that the Letter of Demand could have been re-issued at any time and the procedural errors contained therein corrected may be a true statement, but it has no bearing whatsoever in this case. The Letter of Demand was <u>not</u> re-issued, and the Letter of Demand which was issued went to Arbitration. Local Management received instructions from its boss, that it was necessary to write a Letter of Demand in a certain form. This requirement was set out in the F-1 Handbook, and in the ELM. Inasmuch as the these Handbooks and Manuals are part of the National Agreement through Article 19, they are as enforceable by the Union as by Management, since they are part of the Agreement between the parties. In this case, the Union is

insisting upon enforcement of a requirement established by higher level Management, and binding upon lower level Management. The Letter of Demand failed to contain the ELM 462.3 Notice, the F-1 563.1 Statement, and the F-1 473.1 Statement. Local Management in effect is asking the Arbitrator: "Higher level management demands that we put certain things in our Letters of Demand, but you don't mind if we skip them, do you?" Yes, I do. It is at least unseemly for an Arbitrator to, in effect, say to local Management: "What right do those big dummies in Washington have to tell you how to prepare a Letter of Demand? Do it your way, and I'll ignore the rules imposed upon you, just as you have. Besides, you could always have done it differently if you had felt like it." This, it appears to me, is an inappropriate message to send to local Management. Local Management had certain obligations imposed upon them, not "should", "might", or "would be nice to", but "must". It does not say that these rules must be followed if harm is done, and it does not say these rules must be followed initially, or up to the time of the Arbitration Hearing. There may be some point at which an amended Letter of Demand can be re-issued in compliance with the mandatory requirements of the F-1 Handbook, but it most assuredly is not at the Arbitration stage.

I am reluctant to play the picayune procedure game, but in this case, upper Management itself told local Management how to handle Letters of Demand, and it is necessary to enforce such rules at the insistence of the other party to the Agreement, the Union, which has an equal right to demand strict enforcement of the Contract. The grievance must therefore be allowed, and the Letter of Demand withdrawn.

ARBITRATOR ROUKIS, CASE NUMBER N4C-1P-C 34812, PAGES 4-5

In considering this case, the Arbitrator takes judicial notice of the numerous arbitral awards cited by the Union on this very same issue and, of necessity, and consistent with the principle

of Stare Decisis must give effect to these awards. In Case No. N4C-1V-C 29495, involving a similar dispute, Arbitrator Daniel G. Collins ably distinguished harmless error from error which relates to the maintenance of a regulation's integrity. In that award, he held that the pertinent part of the F-1 Handbook mandating the inclusion of the sentence, "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement" was a definitive requirement and, as such, under Article 15.4 A6 and 19 of the National Agreement, the Arbitrator was without authority to vary or modify the regulation's language.

Accordingly, in view of the above awards which have not been contradicted by other awards, and in view of the need to maintain arbitral consistency in the parties' collective relationship and in view of the similar, if not, identical nature of these disputes with the grievance herein, the Arbitrator finds these decisions on point and controlling herein. For these reasons, the grievance is sustained.

ARBITRATOR STOLTENBERG, CASE NUMBER E7C-2E-C 13312, PAGES 7 AND 8

The Parties agree that the alleged procedural defects determine the outcome of his dispute. If, in fact, it is found that the grievance was not filed in a timely manner, then the grievance is procedurally defective and must be dismissed. If, on the other hand, the Postmaster's failure to include within the text of the letter of demand that the Grievant had the right to grieve the issuance of the letter, then the letter of demand must be found defective and the grievance sustained.

The finding in this dispute is that the letter of demand was procedurally defective. Postal Service handbooks and publications clearly state that any letter of demand served upon an employee must provide notice that the employee has the right to challenge the demand under the

applicable collective bargaining agreement. The requirement to provide such notice has existed in publication form since at least May 29, 1986, and was carried over in a revision of the ELM on May 1, 1989. The applicable provisions of the handbooks requiring that a statement concerning the right of appeal be contained within the letter of demand, it must also be found that verbal notice of the right to appeal such actions is not sufficient and does not comply with the terms of the Postal Service's own publications and handbooks. While it is recognized that the Grievant was a former Union Steward with another Union representing Postal Service employees, his Union background does not exempt the Postal Service from providing notice of the right to appeal the letter of demand.

The grievance was not filed within the time limits stated within the Agreement. Since, however, the letter of demand did not contain the required notice of the right to appeal the determination through the grievance procedure, the Postal Service cannot now foreclose the Grievant from seeking redress by raising the timeliness issue. The Postal Service went to great lengths in its own publications to state the need to include the appeal notice within the letter of demand, it cannot be found that the Grievant, as a former Union official, provides a basis for the Postal Service to ignore the policies attaching to a letter of demand.

Based on all of the foregoing, it must be found that the letter of demand issued the Grievant on June 2, 1988, was procedurally defective since it failed to include within the text of the letter the Grievant's right to appeal the demand determination. The Postal Service's failure to include the appeal rights within the text of the letter raises doubt as to whether or not the Grievant knew that a letter of demand could be grieved. For this reason, the untimely filing of the grievance must be set aside in favor of the Grievant's rights to protest a procedurally defective letter of demand, especially if that defect involved failure to give required notice of those appeal rights

within the text of the letter. For all these reasons the grievance is sustained, the letter of demand is to be withdrawn, and the Grievant is to be made whole for losses suffered under the letter of demand.

ARBITRATOR RIMMEL, CASE NUMBER E7C-2E-C 25813, 25814, 25815; PAGES 9 AND 10

I am dealing here with the subject matter of an employee's strict accountability, something that is essential to the interest of the Postal Service and the efficiency of its operations. Without such, the Service arguably would encounter even more difficulty properly maintaining the substantial funds its employees receive and dispense. However, given the strict accountability obligation upon employees, certain contractual safeguards have been provided in light of this high standard of accountability. Of course, the most notable is that the Service is required, "to provide adequate security for all employees responsible for postal funds." An arguably lesser requirement, though nonetheless mandated, is that the Service, in issuing a letter of demand, "must" provide employees with a concise statement regarding their right to challenge the USPS claim.

Now, I might speculate as to why the Service felt that such a requirement was necessary when Management determined that a letter of demand was in order. However, whatever the premise for such, the fact remains that this determination was made by the Service in promulgating the afore-quoted Handbook and Manual regulations. Moreover, it cannot be overlooked that these regulations have been made a part of the parties collective bargaining agreement under Article 19 thereof. As such, I have no authority to excuse, under a harmless error or other theory, this claimed administrative omission.

ARBITRATOR CUSHMAN, CASE NUMBER E7C-2E-C 24423; PAGES 7-9

> The initial critical inquiry here is whether the Letter of Demand was procedurally defective. Section 473.11 of the F-1 Handbook which is integrated into the Agreement by virture (sic) of Article 19 states that the Letter of Demand "must contain the following statement regarding the employee's right to challenge the United States Postal Service claim 'bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement'" (underscoring supplied). The language of the regulation is clearly mandatory. The use of the word "must" in the regulation constitutes a command. It is not, as the Postal Service seems to contend, precatory. A clear command is that every Letter of Demand contain these words in haec verba. As Arbitrator Daniel Collins stated in a similar situation in Case No. N4C-1V-C 29495 "the F-1 unequivocally mandates inclusion of the language at issue in every Letter of Demand." Arbitrator Collins further stated that "under Article 15.4 A 6 and 19 of the National Agreement an arbitrator may not vary or modify the language ... of the F-1." Article 15, Section 4, Paragraph 6 states:
>
> > All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.
>
> The Postal Service points out with some force that the Letter of Demand in fact furnished to the Grievant a stronger and more comprehensive statement of the Grievant's right to appeal through the grievance procedure than does the F-1. That point applies to the matter of harm

to the Grievant, not to compliance with the provisions of the F-1. The Letter of Demand was procedurally defective.

The Service contends that there was no adverse impact of any procedural defect in the Letter of Demand. As this Arbitrator pointed out in Case No. E7C-2U-C 13325:

> The holding of and observation of Arbitrator Howard in Case No. E7C-2B-C 15779 is relevant. He stated at p. 4 of his Opinion that:
>
> There is nothing in the instructions, however, which require the grievant to show adverse consequences in order to enforce the instructions which are clear and unambiguous. These instructions become enforceable rights of the employees under Article 19 of the National Agreement. For the arbitrator to require that the employee show injury from the failure of the Service to conform to its own instructions as a requirement necessary to invalidate the Letter of Demand would establish a structure of incentives which would encourage the Service to violate its own rules and regulations which have become enforceable obligations under the National Agreement. This the arbitrator is not prepared to do.

This Arbitrator concurs in the views of Arbitrator Howard in case E7C-2B-C 15779. Also appropriate is the comment from Arbitrator Daniel Collins in Case No. N4C-1V-C 29495 referred to above:

> As a general proposition the doctrine of harmless error has, in this Arbitrator's opinion, much to be said for it. The doctrine looks to a fair result, i.e., if there is no actual injury there should be no recovery, and it discourages unnecessary litigation. However it is also true that in some situations in order to encourage absolute compliance with a regulation, i.e., to ensure its integrity that

regulation will be enforced even though failure to comply with it has produced no actual injury.

The grievance is sustained. The Letter of Demand shall be withdrawn and the Grievant shall be made whole for the monies collected from him by the Postal Service.

ARBITRATOR ZOBRAK, CASE NUMBER E7C-2F-C 23311, PAGES 13-17

However, rather than having to make a determination of whether the Grievant failed to exercise reasonable care in protecting his accountability or whether the Postal Service failed to provide adequate security, this dispute must be determined on the basis of the Union's procedural objections to the Letter of Demand. The Letter of Demand improperly demands that payment be made immediately. The F-1 Handbook provides that if the amount demanded is more than $200, collection will be delayed until after the disposition of the grievance either by settlement or through the grievance-arbitration procedure. In this case the demand to seek immediate payment violates Section 473.12 of the F-1 Handbook.

A second and more serious violation of the F-1 Handbook procedures occurred when the Letter of Demand did not contain the specified statement of appeal rights found in Section 473.11. Under the provisions of Article 19 of the Agreement, handbooks and manuals carry the weight of the Agreement. The Postal Service has the right to publish handbooks and manuals, while the Union retains the right to challenge the publication if the publication is viewed inconsistent with the National Agreement. The F-1 Handbook is covered under the provisions of Article 19 of the Agreement and, therefore, its provisions must be enforced as any other provisions of the Agreement.

In Section 473.11 of the F-1 Handbook, the Postal Service provides, within quotation marks, the exact appeal rights which must be contained in the Letter of Demand. No provision is made for some variation of the exact terms set forth therein. The Grievant's Letter of Demand did not contain the statement "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement." The Grievant's Letter of Demand instead stated: "You have the right to file a grievance under the Grievance-Arbitration Procedure as set forth in Article 15, Section 2 of the National Agreement,

within 14 days of your receipt of this notice." Clearly, the Grievant's Letter of Demand was not in compliance with Section 473.11 and, therefore, is defective since the terms of the Agreement were not followed.

The Postal Service denies that this change in wording denied due process to the Grievant and maintains that the contentions of a procedural error are unfounded. The Union, however, provided in its post-hearing brief examples in numerous arbitration awards holding that the failure to present the exact appeal rights as stated in Section 473.11 of the F-1 Handbook results in the Letter of Demand being determined as procedurally defective. Each of those determinations was reviewed for application to the instant matter. Of those awards, the award of Arbitrator Daniel Collins in Case No. N4C-1V-C 29495 deals squarely with the procedural dispute raised in the instant case.

Arbitrator Collins was faced with a Letter of Demand which spelled out his grievant's appeal rights, yet did not employ the exact terms incorporated into the F-1 Handbook. Collins found:

> As a general proposition the doctrine of harmless error has, in this Arbitrator's opinion, much to be said for it. The doctrine looks to a fair result, i.e., if there is no actual injury there should be no recovery, and it discourages unnecessary litigation. However, it is also true that in some situations in order to encourage absolute compliance with a regulation, i.e., to ensure its integrity that regulation will be enforced even though failure to comply with it has produced no actual injury.
>
> The present situation seems to fall into the latter category. Part 563.1 of the F-1 unequivocally mandates inclusion of the language at issue in every Letter of Demand. And under Article 15.4 A 6 and 19 of the National Agreement an arbitrator may not vary or modify the language of Part 563.1 of the F-1.
>
> The Arbitrator has been referred to numerous arbitration decisions some in the Northeast Region and some directly in point, that have set aside Letters of Demand where there has been a failure to include in the Letter advice as to

appeals as required by applicable regulations. The apparent unanimity of that arbitral view entitles it, in the opinion of this Arbitrator, to considerable weight.

For the foregoings the Arbitrator will grant the grievance and order the Letter of Demand issued to Williams be rescinded.

The Postal Service did not provide a single award in which the failure to include the exact terms specified in Section 473.11 was held to be a harmless error. Given the weight of the arbitrable authority cited by the Union, its contention that the failure to comply with the provisions of Section 473.11 results in a defective Letter of Demand must be sustained.

The Agreement is clear that an arbitrator may not modify its terms. Under the provision cited in Article 19, handbooks and manuals must be given the weight of the Agreement. When the Postal Service published Section 473.11 of the F-1 Handbook, it placed in quotes the specific appeal rights it required to be contained in a Letter of Demand. The Letter of Demand issued in the instant dispute does not contain those appeal rights. This arbitrator lacks the authority to excuse the Postal Service from following the directives it has published in the F-1 Handbook. For these reasons, the Grievant's Letter of Demand, lacking the specific appeal rights published in Section 473.11 of the F-1 Handbook, is found to be procedurally defective. For this reason, the grievance is sustained and the remedy requested is granted.

ARBITRATOR HOWARD, CASE NUMBER E7C-2B-C 20972, PAGES 8-9

The Procedural Issue

The language of Section 473.1 of the F-1 Handbook is clear and unambiguous. It specifies the exact language which must be contained on a Letter of Demand. The Letter of Demand of March 18, 1989, did not contain this language. (Joint Ex. 3) Moreover, the Letter of Demand did not set forth the options available to the employee to repay the debt in accordance with Section 133 of the same handbook. (Joint Ex. 3)

The Service maintains that it corrected the latter deficiency in an amended Letter of Demand dated

June 6, 1989. (Service Ex. 1) A careful analysis of the letter does not indicate what it purports to be, an amended Letter of Demand or a reminder to pay up. The first paragraph of such letter references the prior Letter of Demand, but does not contain anew the mandatory language required by Section 473.1 of the F-1 Handbook. The second paragraph states:

> Kindly make the necessary arrangements with the undersigned to indicate the option(s) you choose to elect to repay the above cited debt. Failure to make arrangements to reply (sic) this debt will result in collection in accordance with the Debt Collection Act, 5USC 5514(A) and Part 460 of the Employee and Labor Relations Manual.

Taken as a whole, this seems more a dunning letter than a specification to the employee of his or her rights under the Agreement.

Finally, the Service relies on the Zumas decision, cited supra, in which he found the "exact language" requirement de minimis, and the failure to set forth alternate methods of payments at the outset not a fatal defect in a Letter of Demand. The undersigned arbitrator respectfully disagrees. An analysis of the arbitration decisions submitted to the undersigned arbitrator indicate that the overwhelming weight of arbitral precedent prior to the Zumas decision was to the contrary. Moreover, the overwhelming weight of arbitration decisions after the Zumas decision has also been to the contrary.

For the above reasons, the Letter of Demand was procedurally defective and should be overturned.

ARBITRATOR PARKINSON, CASE E7C-2F-C 21598, PAGES 15-16

If the monies owed by Mr. Kelly were owed to the OPM, or to the OWCP, Department of Labor, then Chapter 7 of the F-16 Handbook must be followed. Chapter 7 deals with "Collection Assistance Between Government Agencies." Section 711.41 notes that Section 5 of the Debt Collection Act, 5 U.S.C. § 5514(a), authorizes Federal agencies to offset a Federal employee's salary as a means of satisfying debts owed to the United States. Section 711.42 provides as follows:

> Due Process Requirements. Before any deductions based on the salary offset provisions of the Debt Collection Act can be made, the creditor agency is required to give an alleged debtor 30 days written notice of its determination of the debt as well as an explanation of the individual's rights under the Debt Collection Act and relevant implementing regulations. These rights include (1) an opportunity to inspect and copy Government records relating to the debt; (2) an opportunity to enter into a written agreement establishing a repayment schedule; and (3) an opportunity for a hearing on the existence or amount of the debt and on the terms of an involuntary repayment schedule. Only after a debtor is accorded (sic) these due process rights by the creditor agency may that agency request the employing agency to begin the actual collection of the debt.

Furthermore, if a Federal Agency requests the Postal Service to offset the salary of a Postal employee then it must comply with Section 712.231 which states that:

> a. In seeking to offset the salary of a postal employee under the authority of Section 5 of the Debt Collection Act, 5 U.S.C. § 5514(a), a creditor agency must first provide the USPS with a written request, certifying that all due process requirements contained in the statute and appropriate implementing regulations have been followed. This request must specify the total amount of debt to be collected, the exact amount or percentage of salary to be deducted and transmitted to the creditor agency each pay period, and the number of installments to be collected. If the deductions are to be made pursuant to an agreement between the creditor agency and the employee, a copy of the written agreement must be attached to the agency's letter of request. If the creditor agency submits an incomplete or uncertified request, the postmaster or installation head must return the request with written notice that the procedures specified by 5 U.S.C. § 5514 (a) and any applicable implementing regulations must be followed and a properly completed and certified

request submitted before the Postal Service can begin the requested offsets.

After the Postal Service has received a completed and properly certified offset request then the Postmaster or installation head must provide the employee with a copy of that request along with the written notice of the date the Postal Service intends to begin the specified collection from the employee's current pay account.

ARBITRATOR ZUMAS, CASE NUMBER N4C-1A-C 25317; PAGES 4-6

After a review of the record, it is this Arbitrator's finding that, under the circumstances, the Letter of Demand was sufficiently defective so as to warrant its rescission. This finding is based upon the following:

1) Section 473.1 of the Revision of the F-1 Handbook states that the Letter of Demand "must" include the following sentence:

"Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

In a recent case (September 1989) Arbitrator Marx in N7C-1E-C 4024 concluded that the Letter of Demand was improper, holding:

"...The Arbitrator has reviewed 16 arbitration awards which made findings on the technical issue of proper notification of grievant's rights. Virtually all found that the Letters of Demand must be withdrawn because of the failure of the Postal Service to follow its own notice regulations. ...There was unanimity in finding the Letters of Demand defective where no notice of grievant's options was indicated.

These findings were made, despite various Postal Service arguments, in one or more of the cases, that the employee was not harmed because a grievance was filed in any event; that the issue was not raised during the pre-arbitration Steps of the grievance procedure; or that the language should not be binding."

And Arbitrator Collins in N4C-1V-C 29495 (August 1989) stated as follows:

> "As a general proposition, the doctrine of harmless error has, in this Arbitrator's opinion, much to be said for it. The doctrine looks to a fair result, i.e., to insure its integrity, that regulation will be enforced even though failure to comply with it has produced no actual injury.
>
> The present situation seems to fall into the latter category. Part 563.1 (later designated as 473.11) of the F-1 Handbook unequivocally mandates inclusion of the language in every Letter of Demand. And under Articles 15.4A6 and 19 of the National Agreement an arbitrator may not vary or modify the language of ...the F-1.
>
> The arbitrator has been referred to numerous arbitration decisions, some in the Northeast Region and some directly in point, that have set aside Letters of Demand where there has been a failure to include in the Letter advice as to appeals as required by applicable regulations. The apparent unanimity of that arbitrable view entitles it, in the opinion of this arbitrator, to considerable weight."

There can be no question, therefore, that Management's failure to advise Grievant of his appeal rights, is of sufficient gravity as to constitute an impermissible violation of the National Agreement to warrant rescission of the Letter of Demand.

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.

ARBITRATOR TALMADGE, CASE NUMBER N7C-1P-C 26965/66, PAGES 5-7

Opinion

At the outset and during the course of the hearing, the Union raised the threshold issue of procedural defectiveness. In the matters before us, the critical questions often raised as to whether the Service proved that the grievant did not "exercise reasonable care" or contrawise the Service's failure to provide "adequate" security, have not been vigorously pursued by the parties [N4C-1V-C 28786; C 35501 (1990) and N7C-1A-C 30787 and C 2729 (Talmadge, 1991)]. The dispute before us is confined to a narrow issue as to whether the Letters of Demand were procedurally defective.

The thrust of the Union's position is that Section 473.11 of the F-1 Handbook mandates inclusion of this language:

> Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement.

The opinion of Arbitrator Collins is very much on target.

> Part 563.1 (later designated as 473.11) of the F-1 unequivocally mandates inclusion of the language at issue in every Letter of Demand. And under Article 15.4 A6 and Article 19 of the National Agreement, an arbitrator may not vary or modify the language of 473.11 of the F-1. N4C-1V-C 29495 (Collins, 1989).

The twenty-three (23) Awards cited by the Union express in explicit terms that the language of Section 473.11 must be included in each Letter of Demand.

We were reminded by Arbitrator Cushman that the use of the word must in the regulation constitutes a command. At page 7, E7C-2E-C 24423 (1991).

The Arbitrator concludes that the Letters of Demand were procedurally defective.

[Harmless Error] The Service asserted that due process was (not/sic) denied to the grievant. The contention of procedural error, in turn, lacks any foundation. The grievant, it argued has available to her every tool of the parties' grievance procedure. She had full access to every avenue of the appeal process. The inadvertent failure by postal management to use the verbatim language of Section 473.11 of the F-1 Handbook was merely a harmless error. The Service relied on the Zumas decision in which he found the exact language requirement de minimus. The failure to use the cited language did not generate a fatal defect in the Letter of Demand. E7C-2H-C 22283 (1990). Arbitrator Zumas rendered this award in April 1990, within months later in July 1990 Arbitrator Zumas concluded.

> After review of the record, it is the Arbitrator's finding that under the circumstances, the Letter of Demand was sufficiently defective so as to warrant its rescission. This finding is based upon the following.
>
> Section 473-1 of the Revision of the F-1 Handbook states that the following Demand 'must' include the following sentence:
>
> Bargaining employees' appeal procedure are contained in Article 15 of the applicable collective bargaining agreement. N4C-1A-C 25317 (July 1990). See N7C-1E-C 4024 (Marx, 1989).

The Arbitrator returns to the cogently stated analysis of Arbitrator Collins, supra.

> As a general proposition, the doctrine of harmless error has, in this Arbitrator's opinion, much to be said for it. The doctrine looks to a fair result, i.e., if there is no actual injury there should be no recovery, and it discourages unnecessary litigation. However,

it is also true that in some situations in order to encourage absolute compliance with a regulation, i.e., to ensure its integrity that regulation will be enforced even though failure to comply with it has produced no actual injury.

The present situation seems to fall into the latter category. part 563.1 [later designated as 473.11] of the F-1 unequivocally mandates inclusion of the language at issue in every Letter of Demand.

AMBIGUITY OF CONTRACT LANGUAGE IN HANDBOOKS AND MANUALS:

ARBITRATOR COHEN, CASE NUMBER C4C-4M-D 33178, PAGES 7-8

Article 19, Handbooks and Manuals, provides that the Handbooks and Manuals are part of the contract. This means that they are as binding on the parties as if they had been negotiated.

However, Article 19 provides that Handbooks and Manuals will be issued by management, with the Union only having the right to grieve if it feels that there are grounds for grievance. The Union does not have the right to participate in the authorship of the Handbooks or Manuals, nor does it have the right in any way to propose its own language for Handbooks or Manuals. It may only grieve what has been proposed by Management.

There is a rule of contract construction which provides that when a contract is ambiguous, it is to be construed against the party who wrote it. The rule is generally invoked in construing insurance contracts. It is rarely invoked in construing collective bargaining agreements because the usual collective bargaining agreement is the result of joint effort between the parties.

Because of the way that the contract between the parties here is written, the Handbooks and Manuals are not the joint effort of the parties, but are the sole authorship of the Postal Service. Therefore, following the rule of construction of contract law, any ambiguity in the Handbooks and Manuals would be resolved in favor of the Union.

As you can see from the reasoning contained in the arbitration decisions, management is required to adhere to their own authored handbooks and manuals. Management's defense of no harmful error is a poor one. The Union's right to expect management to obey its own regulations must be enforced. When ambiguity is found in the Handbook and Manual provisions, it should be applied in favor of the Union. Even Management's attempts to bar the Union from raising procedural arguments at arbitration were unsuccessful.

Although in almost each cited Arbitrator's decision the issue was a monetary demand upon an employee, the arbitral reasoning resulting from Union arguments is applicable for all grievances, whether disciplinary or contractual, where Article 19's Handbooks and Manuals can be referenced. We must require Management to adhere to all provisions of the Collective Bargaining Agreement. The cited arbitrators have provided us with beacons to light the dark road we call our Grievance/Arbitration Process. The complete texts of the arbitration decision excerpts contained in this narrative are available from my office. If you need further information on due process and procedural adherence, please contact me at (609) 273-1551.

I L L U S T R A T I O N

An illustration of the Handbook and Manual application can be found in the EL-921 "Supervisor's Guide to Handling Grievances". In this Handbook, on pages 11-14, the Postal Service defines Just Cause for its managers. Of particular importance is number four on page 13 which states:

> 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.

This passage from the EL-921 requires Management to conduct a thorough and objective investigation prior to disciplining an employee. It also, I believe, requires a pre-disciplinary interview with the employee.

> 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.

Management will argue that number four does not state "a pre-disciplinary interview is required." However, the Cohen "ambiguity in handbooks and manuals" decision previously cited should be utilized in conjunction with the previously mentioned awards to address management's challenge.

Our position is that the second paragraph of number four does require a pre-disciplinary interview and that if an arbitrator finds any ambiguity in the passage, that ambiguity should be found in favor of the Union; not in favor of the party who wrote the EL-921--the Postal Service.

In support of the pre-disciplinary interview argument in the EL-921, the following arbitration excerpts are applicable:

ARBITRATOR MARLATT, CASE NUMBERS S4C-3S-D 53003/53002, PAGES 5-8:

> If this were the sole issue in the case, I would have no choice but to deny the grievance. There are ample precedents for removal of employees for this exact offense, and no discussion is necessary. However, the Union vigorously argues that the Grievant was denied due process because the supervisor who initiated the request for discipline failed to conduct a pre-disciplinary interview. In this connection, the Union has obviously done its homework and has cited a number of prior arbitration decisions which bear directly on the issue.
>
> A case in point is the award of the late great Peter Seitz in NIM-1A-D 4810, a Mail Handlers case decided in 1983. In that case, the grievant was involved in a fight with another employee. The grievant's supervisor initiated emergency suspension and removal action based entirely on the investigative Memorandum prepared by the Postal Inspectors, unaware that the grievant was claiming self-defense. Arbitrator Seitz observes,

> At the risk of some repetition, but because of its importance in the Postal Service dispute-resolution system, I have to make the following observations: It seems to me wholly appropriate for a supervisor who has the responsibility (with a concurring signature of his superior) of determining whether a disciplinary suspension should be imposed or whether there is just cause for discharge, to be guided and influenced, in the judgmental process, by what facts were developed by a Postal Inspector in the latter's properly conducted interview with a grievant, including, of course, statements voluntarily signed by the grievant in the course of such an interview. The Postal Inspector, however, does not have the responsibility of determining whether disciplinary action should be taken and in my experience, as important as the function of the Postal Inspector may be and however professionally and competently Postal Inspectors may perform their assigned duties, it is the supervisor who should be satisfied that the facts are such as to warrant disciplinary action. As careful and conscientious as Postal Inspectors may be, they do not always ask all of the questions which bear on the question of whether the judgment of a supervisor should be exercised on the side of disciplinary action. The supervisor ... cannot, in my judgment, be fully satisfied that he is acting fairly and justly unless he interviews the grievant and gets his version of the events before taking action.

Arbitrator Seitz proceeded to order the grievant reinstated with full back pay because the disciplinary action was taken without affording the grievant an opportunity for a predisciplinary interview with his supervisor.

The rationale for his decision was well explained by Arbitrator William E. Rentfro in NCW-15975-D, a Letter Carrier's case:

> "When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or

> without affording the employee an opportunity to be heard falls short of minimum standards ... A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits a deliberate, informed judgment to prevail. By giving the Grievant an opportunity to present his side of the story and point out the mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect that when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider even in the light of new information is more pronounced in labor-management relations because the employer has an additional institutional interest to 'stand firm' and defend the authority of the supervisory personnel who made the decision to discharge.

In a similar case, C1N-4J-D 13864, Arbitrator Elliott M. Goldstein points out that a predisciplinary interview is specifically required by the Postal Service's own M-39 Handbook. While this handbook is primarily concerned with Letter Carrier operations, it cannot be argued that members of the Clerk Craft are entitled to less procedural due process than members of the Letter Carrier Craft.

Another case in point, S1N-3W-D 20459, was decided by Arbitrator Elvis Stephens in this very Management Sectional Center, a case involving a Letter Carrier who was alleged to have sold cocaine to an undercover agent at the Miami General Mail Facility. The supervisor testified that he made the recommendation to terminate the grievant based on her statement to the Postal Inspectors contained in the Investigative Memorandum. Under Question No. 3 of the standard recommendation form in use at the time, "When you interviewed the employee about the infraction, what did he or she have to say?", the supervisor wrote, "Employee was interviewed by Inspection Service and admitted participating in a drug sale." Arbitrator Stephens commented, in sustaining the grievance.

> "One of the basic principles of due process is that employees are given a chance to tell their side of the story before a final decision is

> made concerning discipline to be taken against them. This principle is reflected in question number 3 of the "Request for Disciplinary Action" form."

It is revealing to note that the "Request for Disciplinary Action" form, which is, of course, prepared by management, now requires an even stronger entry: "Give the dates, time, and who was present during the pre-disciplinary interview with the employee about this infraction. (This pre-disciplinary interview must be completed prior to requesting discipline.)" Supervisor Ryals answered this question, "*****p.m. See attached I.M." Now the supervisor may have been confused about her obligation personally to conduct a predisciplinary interview, but someone in the Employee and Labor Relations Office (which received the document on December 16, 1986, before the disciplinary action was taken) must have realized that no interview had been held, and that this omission was harmful procedural error which would invalidate any subsequent discipline.

One must ask this embarrassing question: who is causing the United States Postal Service the greater harm, the window clerk who steals forty cents every time she takes in a parcel, or the Labor Relations Representative who knowingly allows a supervisor to fire an employee without going through the formality of the mandatory predisciplinary interview, thus incurring thousands of dollars in liability for back pay due to the procedurally defective disciplinary action?

It is clear from these decisions that an investigation of a possible violation of Postal laws and regulations by the Inspection Service is not in any way an acceptable substitute for the immediate supervisor's own inquiry into the equities of the case. To a Postal Inspector, an employee with thirty years service and a dozen superior performance awards who steals a 22¢ stamp is simply a thief who has misappropriated Postal property. ...

Arbitrator Marlatt quotes Arbitrator Goldstein who references the M-39 Handbook as requiring a pre-disciplinary interview. The M-39 states:

115 DISCIPLINE

115.1 Basic Principles

In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

115.2 Using People Effectively

Managers can accomplish their mission only through the effective use of people. How successful a manager is in working with people will, to a great measure, determine whether or not the goals of the Postal Service are attained. Getting the job done through people is not an easy task, and certain basic things are required, such as:

a. Let the employee know what is expected of him or her.

b. Know fully if the employee is not attaining expectations; don't guess—make certain with documented evidence.

c. Let the employee explain his or her problem—listen! If given a chance, the employee will tell you the problem. Draw it out from the employee if needed, but get the whole story.

115.3 Obligation to Employees

When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves as well as to the employee, to:

a. Find out who, what, when, where, and why.

b. Make absolutely sure you have all the facts.

c. The manager has the responsibility to resolve as many problems as possible before they become grievances.

d. If the employee's stand has merit, admit it and correct the situation. You are the manager, you

must make decisions; don't pass this responsibility on to someone else.

Although the M-39 does not specifically state "A pre-disciplinary interview is required", it is our position the intent for such an interview exists. Again, should any ambiguity in the cited M-39 provisions be found, then Arbitrator Cohen's reasoning must be argued and applied in favor of the Union.

Other arbitral reference is as follows:

ARBITRATOR WILLIAMS, CASE NUMBER S4C-3A-D 52478, PAGE 8

> The general feeling expressed by Management was that, given the grievant's confession, there was no need for any investigation. The Station Manager conceded that all he had was her statement, which was recorded in the meeting with the supervisor. So there was no knowledge or attempt to determine if there were procedural or due process problems or mitigating circumstances to consider. Yet, a major "just cause" standard requires a fair and objective investigation. This includes a determination of possible mitigating circumstances. It also requires a pre-disciplinary interview with the employee in which all facets of the case can be explored. From the testimony, it is apparent that the Station Manager saw the grievant, referred to her confession, and handed her a resignation to sign. When she refused, he handed her a termination letter, which already had been prepared.

ARBITRATOR FRANKLIN, CASE NUMBER N7C-1N-D 15797, PAGE 14

> The Arbitrator believes that the process was flawed when Ms. Massie was not offered a discussion with her supervisor prior to the action taken, to inform her of the seriousness of her poor attendance, and to give her an opportunity to improve. Further, there did not appear to be an investigation prior to the decision to remove her, and afford her the chance to respond.

ARBITRATOR STALLWORTH, CASE NUMBER C7C-4K-D 22390, PAGES 16, 17, & 19

> The complete absence of a pre-removal investigation by management of the circumstances of the Grievant's absences is another, serious violation of due process. ... He did not conduct a "thorough investigation" before issuing the removal notice to "determine whether the employee committed the offense." (Joint Exhibit No. 7, Supervisor's Guide to Handling Grievances, p. 13). That is one of six "basic considerations" that the Service states "the suspension must use before initiating discipline." (Joint Exhibit No. 7, p. 11, original emphasis). He did not follow the procedure to "Let the employee explain the problem - and listen! If given a chance, employees will explain their problem. Draw it out, if necessary, but get the whole story." (Joint Exhibit No. 7, p. 8). He did not interview the Grievant before issuing the removal to determine for which absences the Grievant had submitted documentation, to discuss possible mitigating circumstances or discuss her overall absence record. Indeed, the only investigation was conducted post discharge.
>
> Again, the Arbitrator is of the firm opinion that if management had inquired into these circumstances, that it would (or should) have considered the total situation as mitigating circumstances as contemplated under the just cause requirements of Article 16 and the ELM and the Supervisor's manual. Management failed to do so, and thus, seriously violated the Grievant's due process rights under the contract.

ARBITRATOR GOLDSTEIN, CASE NUMBER C1N-4J-D 13864, PAGES 24-26

> The remaining question is whether the actions taken in investigating this matter comply with the Service's own part of the National Agreement between these parties through Article 19 (Jt. Ex. 1). As I noted in a strikingly similar case

involving the same Post Office (C8N-4J-D 33941, U.S. Postal Service and NALC) discharge of George S. Stone (cited by the Union in its brief):

> "I note that the actual standards adopted by the Postal Service provide for a fair investigation prior to discipline are more stringent than the standards set forth in Arbitrator Daughtery's rules. See Enterprise Wire, supra. at 361. (There, Daughtery found substantial compliance where the company did not actively solicit an explanation from Grievant as to the justification for his absences, but also did not deny Grievant the opportunity to present his excuse.)
>
> Since the Service has itself agreed that the gathering of facts and a full investigation, including informing employees in reasonable detail as to the charges against them and affording a reasonable opportunity to respond before discipline is initiated, is a part of basic due process rights in this industrial setting, I find that this standard was violated here. Certainly, no one from management talked or discussed with Grievant the Grievant's side of the story prior to issuance of the Notice of Removal.
>
> Without evidence that the P-32 Supervisor's Guide to Handling Grievances section quoted above is not mandatory or was designed for other circumstances, this arbitrator must deem that the breach of the Service's own procedures and rules is not niggling or a trifle and is the sort of procedural faux pas that affects substantial employee rights."

As the Union stressed, Arbitrator Dobranski has also discussed the importance of a thorough investigation:

"Providing the Grievant with an opportunity to explain permits him to present his version of the incidents and point out any extenuating circumstances. Perhaps the supervisor would have concluded after such an investigation that the discharge was still warranted... However, fundamental fairness requires that such an investigation be conducted before a conclusion is reached." (Case C8N-4J-D 6749, Postal Service v. National Association of Letter Carriers [discharge of Melvin Fields])

Arbitrator Rentfro thoroughly analyzes the development of employees' due process rights in the field of labor relations. The Arbitrator concludes:

"When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards...a thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits a deliberate, informed judgment to prevail. By giving the Grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important affect that when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider even in the light of new information is more pronounced in labor-management relations because the employer has an additional institutional interest to 'stand firm' and defend the authority of the supervisory personnel who made the decision to discharge." (Case

NCW-15975-D Postal Service v. National Association of Letter Carriers [discharge of Howard C. Saunders, Jr.])

As the Union emphasized, the failure to investigate in the instant case resulted in the Employer making a decision to discharge the Grievant without hearing his explanation of the alleged medical problems which Grievant believes helped explain his irrational behavior on November 8.

ARBITRATOR MYERS, CASE NUMBERS AC-S-9381-D/AC-S-9382-D, PAGES 9-10

Related to the failure of management at any time to question either Arteaga or Williams concerning the corridor incident after the EEO meeting, the Union supports its position that supervisory discipline without proper investigation of facts negates the just cause standard of Article XVI the Union submitted a Willingham Decision in a Chicago case (M-C-128-Alice Cohen) The Arbitrator said that grievant's foreman "made the recommendation for discipline yet never investigated the facts. He never asked grievant for an explanation nor did he offer her an opportunity to refute the charge. A grievance procedure to be effective should have an opportunity at the primary level for adjustment of the grievance. Here we have an action taken by a supervisor with no knowledge of the event who makes no effort to ascertain facts and gives the grievant no opportunity to state her position. Such conduct clearly is not conducive to establishment of "just cause" which is the contractual criterion for imposition of discipline. If the evidence had proven grievant guilty of the charge such abuse of the procedure might well have been a basis for mitigation of the penalty."

I concur in the thought expressed by that language that seems tailored to fit the defects in the handling of this removal case. It might be arguable that the contract provides adequate grievance procedures to protect an employee from

arbitrary or discriminatory treatment by management. Adequate as that safeguard of grievance steps up to arbitration may be, the present absence of any fair opportunity to convince management of possible error by proposed removal caused injury to this grievant. I find that was a violation of both just cause and the corrective discipline principles of Article XVI. I am reversing the removal action as not shown to be for just cause.

ARBITRATOR WITNEY, CASE NUMBER C7C-4Q-D 28021, PAGES 26-28

Certain obligations are imposed upon Management under the terms of the Supervisor's Guide to Handling Grievances, Handbook EL-921, September, 1983. (Joint Exhibit 13) Pursuant to Article 19 of the National Agreement, Postal Service handbooks are incorporated into the National Agreement. Thus, whatever the Management's obligations may be under the document, they have the status of contractual obligations just as any language appearing in the National Agreement.

The Handbook states:

3. Let the employee explain the problem - and listen! If given a chance, employees will explain their problem. Draw it out, if necessary, but get the whole story.

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 employees 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. (Emphasis in original)

Opportunity to Respond to Charges

Nothing in the record demonstrates Management gave the Grievant the opportunity to tell his side of the story concerning the altered document charge. Just because the charge was eventually dropped does not erase Management's obligation.

Indeed, if it is conceded arguendo that the Grievant had the opportunity to respond to the AWOL charge, Management did not do the same regarding the altered document charge. Indeed, the Employer does not even claim it did so either during the arbitration or in its comprehensive post-hearing brief. To this extent, Management did not conduct a thorough and objective investigation as required by the aforesaid handbook. Employer requirement to provide employees with the chance to tell their side of the story before discipline is imposed is such a universally accepted principle of the arbitration process that it is not necessary to cite authority.

Its failure to provide Emmett with that opportunity is not just a technical or trivial matter. If it had done so, maybe Management would not have charged him with the submission of an altered document. If it did not, maybe the Employer would have not discharged him solely on the AWOL charge. Instead, as was its previous practice in attendance cases, it may have imposed a lesser penalty.

ARBITRATOR STALLWORTH, CASE NUMBER C7C-4L-D 27019, PAGES 22-24

In the instant case, there is no record that the Grievant was ever given an opportunity to present her side of the story to management in any kind of investigative meeting. ...

Under these circumstances the Arbitrator concludes that the five-day letter was more important than it might have been if a full investigation had been conducted. Although information presented by the Grievant might not

have made a difference in this ultimate decision, the fact remains that the grievant never was given the opportunity to present it before her removal. The failure to provide the five-day letter, in connection with the lack of any investigation other than looking in the Grievant's file within the department, denied the Grievant her full due process rights.

ARBITRATOR STALLWORTH, CASE NUMBER C7C-4D-D 28874, PAGES 16-18

The Undersigned Arbitrator has no hesitation in concluding that, but for the violation of the contractual due process provisions, the grievance would have been denied without hesitation. However, the Service's failure to comply with the Collective Bargaining Agreement was as plain as the Grievant's intentional falsification of his 1989 application.

The Service's own Supervisor's Guide to Handling Grievances requires Management to conduct a "thorough and objective" investigation before initiating discipline, let alone discharge. That precondition is a "basic consideration that the supervisor must use before initiating disciplinary action." Most important for the instant grievance is the requirement that the Service must "let the employee explain the problem - and listen!" (Handbook EL-921, Parts III.A.3 and III.C., at pp. 8, 11, 13).

As the Union notes in its well-researched brief, numerous Arbitrators have enforced the principles of industrial due process embodied in these provisions. Arbitrator Ernest E. Marlatt summarized the basis for this principle as follows:

> "When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards ... By giving the Grievant an opportunity to present his side of the story and point out the mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision many have a more important effect than when offered at the

grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider even in the light of new information is more pronounced in labor-management relations because the employer has and additional institutional interest to 'stand firm' and defend the authority of the supervisory personnel who made the decision to discharge."

Case Nos. S4C-3S-D 53002, 53003 (E. Marlatt, September 18, 1987), at pp. 6-7 (Emphasis added), quoting Case No. NCW-15975-D (W. Rentfro, date not identified).

See also, Elkouri and Elkouri, How Arbitration Works, at p. 673 (BNA, Fourth Edition); Case No. S7C-3Q-D 21737 (R. Foster, February 11, 1990), at p. 11; Case No. N7C-1N-D 15797 (L. Franklin, February 28, 1990), at p. 14; Case No. S1N-3W-D 20459 (E. Stephens, October 10, 1983), at p. 7. As with the principle that the Service is entitled to discharge employees who intentionally falsify employment applications to conceal past criminal convictions resulting in incarceration, the above-stated maxim regarding industrial due process requires no further elaboration.

The Union correctly points out that Rushing did not comply with the requirements of due process in the instant matter. Rushing acknowledged that he did not seek the Grievant's "side of the story" until after he had signed the Notice of Removal and given that document to the Grievant. The Undersigned Arbitrator agrees with Arbitrator Foster that:

"[a]sking [the] grievant for any comments regarding the charge coming with the tender of the proposed removal notice, or prior to the final decision letter after the initial decision had been made, thereby hardening management's position in the matter, falls short of this basic due process requirement [for a predisciplinary interview]."
Foster, at pp. 11-12 (Emphasis added).

The evidence presented to the Arbitrator establishes beyond doubt that the Service breached its due process obligations in the instant matter.

ARBITRATOR WALTER POWELL, CASE NUMBER E7T-2D-D 39611, PAGES 8-9

Medical testimony is obfuscated by the failures of the Postal Service managers to live up to the dictates of their own manual Handbook E-21 (sic: EL-921) Supervisor's Guide to Handling Grievances. In defining just cause, the manual sets forth criteria that the supervisor must use before initiating discipline. Several of these rues (sic) have been either omitted, forgotten or disregarded by the management of the installation. Question 4. Was there an investigation completed? Ms. Merrick's supervisor admitted that she never discussed the matter with Ms. Merrick. There was no discussion, no prior notice, and no first hand knowledge of the work done by the grievant. The failure to investigate the facts, the omission of any notice to Ms. Merrick and the lack of first hand knowledge whether the work was done by Ms. Merrick suggests that there was no thorough and objective investigation. It also fails to give the employee any advance knowledge of the charges against them, and does not provide a day in court and an opportunity for the employee to defend herself and present evidence in their own behalf. The Union vigorously argues that the grievant was denied due process because the supervisor who initiated the request for removal failed to conduct any predisciplinary interview. Citations and opinions from many other arbitrators sustain this position (Seitz NIM-1A-D 4810), Rentfro (NCW-15975-D) "Discharge without affording the employee an opportunity to be heard falls short of minimum standards." Arbitrator Goldstein C1N-4J-D 133864 (sic)), held that a predisciplinary interview is required. The vast majority of arbitrators require as a basic principle of due process that employees be given a chance to tell their side of the story before discipline is administered. This arbitrator has stated before that all concurring officials be required to read EL 921.

ARBITRATOR MARLATT, CASE NUMBER S7C-3N-D 18403, PAGES 8-11

However, there was one glaring deficiency in the supervisor's investigation, and that is the fact that her conversation with the Grievant could not remotely be categorized as a pre-disciplinary interview. For some reason, this same omission of a vital element of due process keeps cropping up, although arbitrators have been pointing it out to the Postal Service and setting discipline aside because of similar violations in case after case for fifteen years. Perhaps if the Postal Service is unwilling to listen

to the views of arbitrators, it should at least defer to that six-hundred-pound gorilla known as the Supreme Court of the United States, which stated in the case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985):

> First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood [citations omitted]. While a fired worker might find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.
>
> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes [citations omitted]. Even where the facts are clear, the appropriateness or necessity of discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. (Emphasis Supplied)

The Court went on to say,

> The essential requirements of due process. . .are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. . . .The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity for him to present his side of the story.

It is recognized, of course, that the above decision is specifically applicable only to preference-eligible Postal employees and that the Grievant in this case does not hold that status. However, the Postal Service has frequently applied or attempted to apply to all postal employees the "harmful error" standard used by the Merit Systems Protection Board in appeals from preference-eligible postal employees. Indeed, such a criterion was asserted by the

Postal Service in its Step 3 answer to this grievance. If all employees are to be judged by the same standard of proof, then the Postal Service must accept the holding of the Supreme Court in Loudermill to the same degree that it relies on decisions of the MSPB. In this business, you have to take the bitter with the sweet.

The same approach was taken by arbitrators long before the cited decision of the Supreme Court. In an early award in a letter carrier case, NCW-15975-D, Professor William E. Rentfro of the University of Colorado School of Law phrased it succinctly:

> When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards. . . .A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits a deliberate, informed judgment to prevail. By giving the Grievant an opportunity to present his side of the story and point out the mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider even in the light of new information is more pronounced in labor-management relations because the employer had an additional institutional interest to "stand firm" and defend the authority of the supervisory personnel who made the decision to discharge.

In a recent Southern Region case, S7C-3C-D 18102 (Memphis, TN, 1989), under very similar facts, Arbitrator Elvis Stephens set out three basic procedural rules which are applicable to to (sic) prediscipliniary hearings:

> 1. This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which

he/she is being charged and to defend his/her behavior.

2. The Company's investigation must normally be made before its disciplinary decision be made. If the Company fails to do so, its failure may not normally be excused on the ground that the employee will get his/her day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

3. There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he/she will be restored to his/her job with full pay for time lost.

It is clear in the present case that the Postal Service wretchedly mishandled the incident with almost complete disregard for the requirements of due process. The Grievant was never informed that removal action was under consideration. She was not furnished a copy of the Investigative Memorandum—indeed, she was fired before the memorandum was even written. She was never afforded a predisciplinary hearing at which she could have requested Union representation.

ARBITRATOR STUTZ, CASE NUMBER N4C-1N-D 2013, PAGES 3-4

But even a marginal employee is entitled to due process when the critical decision to terminate is made. there is no reason to doubt that Malewich thought that he saw Weber in the parking lot on January 23 at about 7:30 p.m., but he was approximately 50 feet away on a very cold January night in a crowded parking lot, and he could have been mistaken. He waited until the following night to make an "investigation" and the sum total of this investigation was to determine that Weber did not have permission to leave the building on January 23 and to ask Weber one question in an interview that lasted barely one minute. Management made no further effort to establish where Weber was at 7:33 p.m. on

January 23. Weber was given no indication that his job was on the line until he was given the removal letter on January 31. He was given no opportunity to defend himself.

ARBITRATOR POWELL, CASE NUMBER E7C-2A-D 34888, PAGE 11

The Service must be able to prove conclusively that the grievant engaged in dishonest conduct. The implication by the Postal Inspector and the Claims Office is that the grievant should have been confined to bed for the period of her absence. There is no basis for this conclusion. She acted according to the instructions of her doctors, and the Postal Service must prove that her off duty activity would have aggravated her injury.

Two barest rudiments of due process are to be informed in writing, of the specific charges against you, and be afforded an opportunity to present a defense to those charges to an unbiased party. The Union argues correctly that there was harmful error in that the grievant is accused of a criminal act. No one gave her the time of day to inquire about the whys and wherefores of the circumstances. No hearing was held, no inquiries were made as to the allegations, nor was she permitted to respond other than through the grievance procedure. Instead she was actually evicted from the building.

This arbitrator would strongly suggest to the concurring officials that all supervisors be required to read and understand Handbook EL-921, Supervisor's Guide to Handling Grievances. I have no intent of expanding and cramming the contents of this decision with its contents; however if it had been adhered to, this hearing would not have been necessary.

ARBITRATOR KLEIN, CASE NUMBER E0C-2D-D 3163, PAGES 7-8

After a careful evaluation of the evidence presented at the hearing, the Arbitrator finds that the grievance must be sustained.

The evidence establishes that the Supervisor failed to conduct a proper investigation prior to issuing discipline. The grievant did not work directly for Supervisor Moore; he was a Tour I Supervisor, however, the grievant had been assigned to the day shift. After the grievant qualified on

her scheme, she was put back on his tour and pay location for "administrative purposes" only. He testified that "absence control" notified him of the grievant's absence from Tour I as of December 8. He also testified that he thought that she had been absent for five days when he signed the extended absence letter; however, the evidence establishes that she had been absent for only three days when the letter was sent. She failed to report to Tour I on Saturday, December 8, however, Sunday was a non-scheduled day; she failed to report to Tour I on Monday, December 10 or Tuesday, December 11. Then on December 12, 1990, the extended absence letter was issued. Supervisor Moore testified that the extended absence letter was "presented to him" and he signed it. The Supervisor also testified that he was aware that the grievant had responded to his letter, but he did not know whether she met the three day requirement cited therein.

Of greatest significance was the Supervisor's testimony that the Notice of Removal was also "presented to him for his signature".

Although the Supervisor claims to have reviewed the grievant's medical records, he acknowledged at the hearing that he had not seen the statement from Dr. Bill dated December 6, 1990. Furthermore, he did not speak with the grievant prior to signing the Notice of Removal. Although Supervisor Moore testified that he "thought" that removal was warranted, the facts remains that he did not thoroughly investigate this matter and he did not make the "determination" to initiate the discipline; therefore, he was in no position to contradict a higher level authority by attempting to resolve the grievance at Step 1, as referenced in Article 15.2.

Based on the above-cited procedural errors alone, recision of the discipline is warranted.

ARBITRATOR NATHAN, CASE NUMBER C0T-4M-D 4270/5424, PAGES 14-17

In this case, it is undisputed that, after suspending her, Service management did not interview Bischoff to determine her side of the incident. Although there may have been no dispute as to what had occurred, Bischoff was entitled to explain her side of the outburst, and, perhaps more significantly, management may have in the context of this explanation, been able to assess the degree to which the

behavior was influenced by the grievant's disabilities. Her irate telephone call and emotional letter to OIC McGuigan were not a substitute for an objective Service-initiated inquiry, particularly where, as here, the incident occurred on the grievant's first day back at work after a 30-day injury-related leave, both McGuigan and Hansen were aware that she had a history of serious emotional problems, and McGuigan at least knew that she had been referred to EAP in the past.

In a similar vein, Arbitrator Goldstein, in Case No. C1N-4J-D 13864, refused to sustain a removal that would have otherwise been justified under a last chance agreement, because of the Service's failure to interview the grievant. The grievant had taken sick days on the workdays immediately and after the day of his outburst, but was never given a chance to explain his medical problems. He quoted Arbitrator Rentfro's explanation of the importance of the employee's due process rights:

> When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards...a thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits a deliberate, informed judgment to prevail. By giving the Grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider even in the light of new information is more pronounced in labor-management relations because the employer has an additional institutional interest to 'stand firm' and defend the authority of the supervisory personnel who made the decision to discharge. (Case No. NCW-15975-D.)

Accord, Case No. S7C-3N-D 18403 (Marlatt, 1990).

In the present case, the grievant had a history of Post Traumatic Stress Syndrome, prior psychological treatment, and EAP participation. Although she had emotional and abusive outbursts before, she had never engaged in physical violence. She had just returned from a 30-day leave due to a work-related back injury, and was still severely restricted in her ability to work. Under these circumstances, the management should have sought to determine whether her current back injury or other medical or psychological condition should have mitigated the discipline.[3]

Indeed, the failure to interview the grievant or to attempt objectively to obtain her explanation of the incident is closely related in this case to the Service's violation of its obligation under Section 35 to give favorable consideration to the grievant's participation in EAP.[4] Hansen, McGuigan and Wheeler were all aware of Bischoff's history of serious emotional problems, and McGuigan and Wheeler (and possibly Hansen) were aware of her past participation in EAP and 12-step programs. There was no

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[3] It must be emphasized that the record contains no evidence of any prior discipline that is relevant to this incident. This case must therefore be distinguished from those "last chance agreement" cases where arbitrators have excused the Service from conducting an interview, on the ground that the interview would not have altered the disciplinary decision. See, e.g., Case Nos. S7W-3C-D24432 (Foster, 1990) and W7V-5D-D14305 (Axon, 1989).

[4] The Service objected to the Union's reliance on Section 35, on the ground that this was a new argument not raised at earlier steps of the grievance process. Union witness Corneail's testimony that he discussed Bischoff's EAP participation with McGuigan and Wheeler at Step 2 was not controverted at the hearing. In support of its position, the Service has submitted an affidavit attached to its post-hearing brief. The arbitrator rejects this submission, which was not authorized in advance nor accompanied by an appropriate motion. After reviewing the record carefully, the arbitrator determines that the processing of the grievance was rather disjointed at Step 2, where several conversations were held, and, based in the witnesses' testimony, finds that it is more likely than not that the grievant's EAP history was the topic of one or more of these Step 2 conversations. Any comments to the contrary by the arbitrator during the hearing are hereby withdrawn.

testimony that any of them either investigated or gave adequate consideration to the grievant's voluntary participation in EAP.[5] Many arbitrators have reversed discipline imposed by the Service without affording the employee this favorable consideration. See, e.g. Case Nos. C1C-4B-D 10052 (Cohen, 1983) and C7C-4A-D 23584 (Stallworth, 1990). Reversal of Bischoff's dismissal is appropriate in this case.

A final note on the pre-disciplinary interview issue. Many arbitrators resist the Union's arguments in this regard. We must still present those arguments as a key element in the defense of discipline.

In following the progression of the Union's successful due process and procedural contractual adherence arguments under Article 19's Handbooks and Manuals in monetary demand cases, the Union should pursue just cause arguments utilizing Article 19's EL-921.

Although the issues--monetary demands and just cause--are wholly dissimilar, the principle of procedural adherence in contract language authored by the United States Postal Service is applicable to both issues.

Management must adhere to its own authored handbooks and manuals under Article 19 of the Collective Bargaining Agreement. When we process our grievances and present them to Arbitrators, we must argue procedural language adherence. The Letters of Demand arbitration success has cracked the door, now we must push it all the way open.

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[5] The Service has submitted with its post-hearing brief an affidavit purporting to summarize EAP records. In the absence of an appropriate motion, this affidavit is not considered part of the record in this case.

If you need any additional information regarding this report or have any comments, please call me at (856) 427-0027 or write:

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Cherry Hill, New Jersey 08003

Yours in Unionism, I am

JEFF KEHLERT
National Business Agent
Clerk Craft

JDK/svb
OPEIU#2/afl-cio

455.2 *Transfer to Another Federal Agency.* If a postal employee whose wages are subject to offset transfers to another Federal agency, and the full debt cannot be collected from amounts due the employee from the Postal Service, the Postal Service must request the former postal employee's new agency to continue offsetting the debtor's salary until the debt is satisfied. The request must specify the amount of the original debt, the amount collected by the Postal Service through salary offsets, the amount which remains to be collected, and the percentage of the debtor's disposable earnings or current pay which should be deducted each pay period. In addition, the Postal Service must certify that the former postal employee has been accorded all required rights of due process. When the Postal Service's request is sent to the new employing agency, a copy also must be sent to the former employee at his home address.

455.3 *Collection of Debt Upon Separation.* If the full debt cannot be collected from amounts due the employee at the time of his separation, the Manager, Postal Accounts Branch, must attempt to recover any available retirement or disability payments due the former employee in accordance with the provisions of 5 C.F.R. § 831, Subpart R (see Part 743 of Handbook F-16, *Accounts Receivable*).

460 Collection of Postal Debts From Bargaining Unit Employees

461 General

461.1 *Scope.* These regulations apply to the collection of any debt owed the Postal Service by a current postal employee who is included in any collective bargaining unit.

461.2 *Debts Due Other Federal Agencies.* Regulations governing the collection, by involuntary salary offset, of debts owed by postal employees to Federal agencies other than the Postal Service are specified in Chapter 7 of the Handbook F-16, *Accounts Receivable*.

461.3 *Definitions.* As used in this subchapter, the following terms have the same meaning ascribed to them in 451.3 of subchapter 450:

a. Administrative Salary Offset.
b. Court Judgment Salary Offset.
c. Current Pay.
d. Disposable Pay.
e. Debt.
f. Employee.
g. Pay.
h. Postmaster/Installation Head.
i. Waiver.

461.4 *Effect of Waiver Request.* If an employee requests a waiver of a debt, the recovery of which is covered by these regulations, such request will not stay the collection process. However, if the waiver request ultimately is granted, the

462 Administrative Salary Offsets

462.1 *Authority.* Under Section 5 of the Debt Collection Act, 5 U.S.C. § 5514(a) (1982), the Postal Service, after providing an employee with procedural due process, may offset an employee's salary in order to satisfy any debt due the Postal Service. Generally, up to 15 percent of an individual's "disposable pay" may be deducted in monthly installments or at "officially established pay intervals." A greater percentage may be deducted with the written consent of the individual debtor. If the individual's employment ends before collection of the full debt, deduction may be made from subsequent payments of any nature due the employee.

462.2 *Determination of Debt*

.21 *Establishment of Accounts Receivable.* Depending upon the circumstances of a particular case, the determination of a debt, the collection of which is covered by this subchapter, may be made by an official in the field or at the servicing PDC or MSC. For payroll-related debts discovered in the field, Form 2240, *Pay, Leave, or Other Hours Adjustment Request*, must be submitted to the servicing PDC. Payroll-related debts discovered at the PDC level must be reported on Form 2248, *Monetary Payroll Adjustment*. Other debts must be reported to the Manager, Postal Accounts Branch, on Form 1902, *Justification for Billing Accounts Receivable*. Regardless of the amount of the debt, it is the responsibility of the servicing PDC to create a receivable for each debt and to forward an invoice to the postmaster/installation head at the facility where the debtor is employed. At the time a receivable is created, the PDC must ensure that the employee's records are flagged so that the final salary or lump sum leave payment for that employee will not be made until the debt is paid.

.22 *Responsibility of Postmaster/Installation Head.* Each postmaster/installation head is responsible for collecting, in accordance with these regulations, any debt owed to the Postal Service by an employee under his supervision. A postmaster/installation head may delegate his responsibilities under these regulations.

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

LETTERS OF DEMAND COLLECTION AND APPEAL PROCEDURES

Effective immediately, when a determination is made that an employee is indebted to the Postal Service, the collection and appeal procedures detailed in subchapters 450 (nonbargaining unit employees) and 460 (bargaining unit employees) of the EMPLOYEE AND LABOR RELATIONS MANUAL must be followed. [See POSTAL BULLETIN 21568, 5-29-86, pages 3-26.] In addition to other requirements, those regulations specify that a letter of demand served on an employee must include notice of any right he or she may have to appeal the Postal Service's determination of the debt or its proposed method of repayment. To bring the Handbook F-1, *Financial Handbook for Post Offices*, in line with the new collection and appeal procedures, parts 174, 563, and 564 are amended as follows:

174 Demands for Payment for Losses or 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 the Postal Service's 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 Postal Service's determination of the debt or its proposed method of repayment. Regulations detailing the rights of nonbargaining unit employees and applicable collection and appeal requirements are set forth at part 450 of the EMPLOYEE AND LABOR RELATIONS MANUAL (ELM).

Requirements governing the collection of debts from bargaining unit employees are specified in part 460 of the ELM and the applicable collective bargaining agreement.

563 Collection Procedures for Monies Demanded

563.1 Bargaining Unit Employees

.11 When, in accordance with the conditions and standards set forth in Article 28 of the employee's respective collective bargaining agreement and part 460, ELM, 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 the Postal Service's determination of the existence, nature, and amount of the debt, and requesting payment, the demand letter must contain the following statement regarding the employee's right to challenge the Postal Service's claim: "Bargaining employees' appeal procedures are contained in Article 15 of the applicable collective bargaining agreement."

.12 If an employee grieves a money demand of more than $200.00, 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 $200.00 are due when presented regardless of whether an employee files a grievance.

563.2 Nonbargaining Unit Employees

When it is determined that a nonbargaining unit employee is indebted to the Postal Service, the collection and appeal procedures specified in part 450, ELM must be followed.

563.3 Percentage Limitation

Payroll deductions to liquidate a postal debt may not exceed 15 percent of an employee's *disposable pay* for any one pay period unless the employee agrees in writing to a greater amount. The term *disposable pay* refers to that part of an employee's salary which remains after all required deductions—normal retirement contributions, FICA and Medicare insurance taxes, Federal income tax, State and local income taxes, and employee-paid Federal health insurance premiums—are made.

564 Payroll Deduction Procedures

564.1 Voluntary

.11 Generally, voluntary payroll deductions must be in amounts of 15 percent or more of an employee's biweekly *disposable pay*. If an employee requests approval of a repayment plan providing for smaller installment payments, however, the Postmaster/Installation Head may approve the plan if the employee's proposed repayment schedule bears a reasonable relationship to the size of the debt and the employee's ability to pay. Generally, an employee's voluntary repayment plan should provide for installment payments of no less than 10 percent of *disposable pay* per pay period and for a repayment period of 26 pay periods or less.

.12 In order to implement voluntary payroll deductions, Form 3239, *Payroll Deduction to Liquidate Indebtedness Authorization*, must be completed in triplicate. Part one must be attached to a Form 1902, *Justification for Billing Accounts Receivable*, and sent to the General Accounting Section of the servicing Postal Data Center (PDC). Part two must be submitted to the appropriate Personnel Office, and part three must be sent to the employee.

564.2 Involuntary Payroll Deductions

.21 Involuntary payroll deductions to liquidate a postal debt may not exceed 15 percent of an employee's *disposable pay* during any one pay period.

460 Collection of Postal Debts From Bargaining-Unit Employees

461 General

461.1 Scope

These regulations apply to the collection of any debt owed the Postal Service by a current postal employee who is included in any collective-bargaining unit.

461.2 Debts Due Other Federal Agencies

Regulations governing the collection, by involuntary salary offset, of debts owed by postal employees to federal agencies other than the Postal Service are specified in Chapter 7 of the Handbook F-16, *Accounts Receivable*.

461.3 Definitions

As used in this subchapter, the following terms have the same meaning ascribed to them in 451.3 of subchapter 450:

a. Administrative Salary Offset.
b. Court Judgment Salary Offset.
c. Current Pay.
d. Disposable Pay.
e. Debt.
f. Employee.
g. Pay.
h. Postmaster/Installation Head.
i. Waiver.

461.4 Effect of Waiver Request

If an employee requests a waiver of a debt, the recovery of which is covered by these regulations, such request will not stay the collection process. However, if the waiver request ultimately is granted, the amount collected will be refunded to the employee.

462 Administrative Salary Offsets

462.1 Authority

Under Section 5 of the Debt Collection Act, 5 U.S.C. 5514(a) (1982), the Postal Service, after providing an employee with procedural due process, may offset an employee's salary in order to satisfy any debt due the Postal Service. Generally, up to 15% of an individual's "disposable pay" may be deducted in monthly installments or at "officially established pay intervals." A greater percentage may be deducted with the written consent of the individual debtor. If the individual's employment ends before collection of the full debt, deduction may be made from subsequent payments of any nature due the employee.

462.2 Determination of Debt

462.21 Establishment of Accounts Receivable. Depending upon the circumstances of a particular case, the determination of a debt, the collection of which is covered by this subchapter, may be made by an official in the field or at the servicing PDC or MSC. For payroll-related debts discovered in the field, Form 2240, *Pay, Leave, or Other Hours Adjustment Request*, must be submitted to the servicing PDC. Payroll-related debts discovered at the PDC level must be reported on Form 2248, *Monetary Payroll Adjustment*. Other debts must be reported to the Manager, Postal Accounts Branch, on Form 1902, *Justification for Billing Accounts Receivable*. Regardless of the amount of the debt, it is the responsibility of the servicing PDC to create a receivable for each debt and to forward an invoice to the postmaster/installation head at the facility where the debtor is employed. At the time a receivable is created, the PDC must ensure that the employee's records are flagged so that the final salary or lump sum leave payment for that employee will not be made until the debt is paid.

462.22 Responsibility of Postmaster/Installation Head. Each postmaster/installation head is responsible for collecting, in accordance with these regulations, any debt owed to the Postal Service by an employee under her or his supervision. A postmaster/installation head may delegate her or his responsibilities under these regulations.

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.

462.4 Amount of Offsets

Regardless of any other ceiling in an applicable collective-bargaining agreement or postal regulations, no more than 15% of an employee's "disposable pay" may be deducted each pay period to satisfy a postal debt under the authority of the Debt Collection Act, unless the employee agrees, in writing, to a greater amount.

462.5 Implementing Offsets

After the applicable procedural requirements have been followed, the postmaster/installation head must institute the collection process by completing the appropriate sections of Form 3239, *Payroll Deduction Authorization to Liquidate Postal Service Indebtedness*. (See Exhibit 452.233.)

463 Court Judgment Salary Offsets

463.1 Authority

Pursuant to Section 124 of Public Law 97-276 (October 2, 1982), 5 U.S.C. 5514 note (1982), the Postal Service may deduct up to one-fourth (25%) of an employee's "current pay" in monthly installments or at officially established pay periods to satisfy a debt determined by a

123 Data Verification

123.1 Statement of Account. Postmasters must verify that the Statement of Account is accurate and complete before signing.

123.2 False Entry. A false entry made by a postmaster or postal employee in an official account to force a balance or show an incorrect condition is a violation of Federal law (18 U.S.C. 2073). Report any indications of false entries to the local Inspector in Charge (ASM 220).

130 Liability

131 Postmasters

When an accountable financial loss occurs and evidence shows the postmaster conscientiously enforced USPS policies and procedures in managing the post office, the Postal Service grants relief for the full amount of the loss. When evidence fails to show the postmaster met those conditions, the Postal Service charges the postmaster with the full amount of the loss.

132 Other Employees

The postmaster consigns postal funds and accountable paper to other employees. Employees are held strictly accountable for any loss unless evidence establishes they exercised reasonable care in the performance of their duties.

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 nonbargaining 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.

140 Protection

141 Equipment

141.1 Acquisition. Postmasters must ensure that equipment on hand is used to provide the best security and that the priorities of protection are observed. Order protective equipment according to the criteria in Handbook AS-701, *Supply Management*, Chapter 2.

141.2 Assignment. Equipment assigned to an employee and used to protect stock or funds must be examined by the supervisor and employee to determine that it provides proper safekeeping. Equipment is not assigned when design, wear and tear, or damage result in inadequate protection. Employees must notify their supervisors in writing if their equipment does not provide proper security. Supervisors must take immediate action to correct security deficiencies.

142 Priorities

The following priorities for postal items have been established for protecting funds and accountable paper:

Priority	*Item*
1.	Postal funds and blank Treasury checks
2	Federal food coupons
3	Postage stamps, aerogrammes, international reply coupons, plastic stamp dispensers, migratory-bird hunting and conservation stamps, and philatelic products (items 800 through 999)
4	Blank money order forms
5	Stamped envelopes and postal cards, money order imprinters, and nonsalable stamp stock

not made, enter the balance as a write-in disbursement entry to Suspense, AIC 767, 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.

.223 *Offsetting Differences.* The postmaster or a designated supervisor must make the decision whether to adjust shortages and overages found in the audit of stamp credits and other cash accountability. If a postmaster believes that an overage in one employee's credit should be offset against a shortage in another employee's credit because a relationship between the differences exists, he must first secure the written agreement of the employee from whom the overage is to be withdrawn.

.224 *Differences of $100 or More.* Form 571, *Discrepancy of $100 or More in Financial Responsibility*, must be prepared at the time of the examination, if applicable (See ASM Exhibit 221.5).

.23 Stamp Credit Examination Record. Form 3368, *Stamp Credit Examination Record*, must be maintained for each employee or contractor having a stamp credit. The results of each stamp credit count must be entered on Form 3368 at the time of the count. A file of Forms 3368 must be maintained by the postmaster or manager accountable for the stock from which the stamp credit was consigned.

472.3 Main/Unit Reserve Stock Accountability

.31 The examination of the Main/Unit Reserve Stock is covered in F-50.

.32 Overages and shortages in the Main/Unit Reserve Stock must be adjusted through postage or bird stamp sales at the Accountbook or unit Form 1412 level, as applicable.

.33 An overage decreases and a shortage increases postage or bird stamp sales.

472.4 Contract Postal Units

.41 Whenever a stamp stock count falls within tolerance, any discrepancy is noted on Form 3368, *Stamp Credit Examination Record*, and carried forward without further action.

.42 If the inventory discloses a discrepancy in excess of the allowed tolerance, recheck the credit. The contractor must replace shortages with personal funds (preferably a check). Unless a specific complaint from a customer has been documented at the post office, overages belong to the contractor.

473 Collection Procedures for Monies Demanded

473.1 Bargaining Unit Employees

.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."

.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.

Supervisor's Guide to Handling Grievances

Handbook EL-921, Sep. 1983

C. Just Cause

What is *just cause?* The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the *basic* considerations that the supervisor must use before initiating disciplinary action.

1. Is there a rule? If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule?

Important: It is not enough to say, ". . . well, everybody knows that rule," or, ". . . we posted that rule 10 years ago." You may have to *prove* that the employee was not ignorant of the rule or that a reasonable employee should have known of the rule.

Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, or insubordination, etc. may be generally assumed to have understood that these offenses are neither condoned nor acceptable even though management may not have issued specific regulations to that effect.

2. Is the rule a reasonable rule? Management must maintain work rules by continually updating and reviewing them, and assuring that they are reasonable, based on the overall objective of safe and efficient work performance. Management's rules are reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee, and such are known to the employee.

Note: In some cases an employee can justify disobedience if it can be shown that to obey the order would jeopardize personal safety and integrity.

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 offens it is not appropriate to single out one of the emplo ees for discipline.

On the other hand, when the Postal Servic maintains that certain conduct is serious enough t be grounds for discharge, it is not generally goo practice to make exceptions. For example, if th Postal Service is to maintain consistency in its posi tion that theft or destruction of deliverable mail i grounds for discharge for a first offense, then th otherwise good employee guilty of this offense mus be discharged the same as the borderline or margi nal 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 employe with a similar past record was issued a 30-da suspension for the same offense.

There is no precise definition of what estab lishes a *good, fair, or bad* record. Reasonable judg ment must be used. An employee's record of pre vious 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 arbitra tor 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 em ployee may have been issued a more severe disci pline 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.

D. Disciplinary Arbitration

Management bears the burden of proof in disciplinary arbitrations. Although the standard of proof is generally less than the standards required in courts of law, it is nevertheless an important re quirement which must not be taken lightly.

.12 **Residential Route.** A foot or motorized route on which 70 percent or more of the possible deliveries are residential.

.13 **Mixed Business and Residential Route.** A foot or motorized route on which 30 to 69 percent of possible deliveries are business establishments. This may include a route on which business and residential deliveries are made on the first trip and the business area only is served on a second trip. To determine the percentage, consider total possible deliveries (counting business establishments only once).

112.2 Collection

.21 **Foot Collection Route.** A route where mail is collected from boxes by a carrier on foot. These routes generally serve downtown business sections.

.22 **Motorized Collection Route.** A route served by automotive vehicle. Shuttle trips made by a collector using a vehicle to pickup mail deposited at selected points by other collectors constitute motorized collection.

.23 **Business Collection Route.** A route where collections are made from boxes located mainly within business areas.

.24 **Residential Collection Route.** A route where collections are made from boxes located within territory that is mainly residential.

.25 **Mixed Collection Route.** A route which may perform a variety of collection and/or mail transport services. Examples are: combination intra-city box collection trips, business residential trips, and contract station-box collection trips.

113 TYPES OF DELIVERY

113.1 Foot Route

A city delivery route served by a carrier on foot. A bicycle or other conveyance used solely as transportation to and from the route does not affect the status as a foot route.

113.2 Curbline Motorized Route

A motorized city delivery route on which 50 percent or more of the possible deliveries are made to customer mailboxes at the curb.

113.3 Bicycle Route

A city delivery route on which a bicycle is used to deliver mail.

113.4 Park and Loop Route

A route that uses a motor vehicle for transporting all classes of mail to the route. The vehicle is used as a moveable container as it is driven to designated park points. The carrier then loops segments of the route on foot.

113.5 Dismount Route

A city delivery route on which 50 percent or more of the possible deliveries are made by dismount delivery to the door, Vertical Improved Mail (VIM) Room, Neighborhood Delivery and Collection Box Units (NBU), Delivery Centers, etc. (If the dismount deliveries are less than 50 percent of the total possible deliveries of a route, the route will be classified as per the majority of the type delivery; e.g., curbline, park and loop, etc.)

114 CITY DELIVERY AREA MAP

114.1 Each unit must have a map of the ZIP Code area served. Show the boundaries of each route using street names or numbers and identify each route by number. If desired, use different colors to show each route.

114.2 The unit manager can study the line of travel to discover possible improvement.

114.3 Location of collection and relay boxes can be shown. This will serve to determine the adequacy of the boxes and as instruction or reference to new carriers.

115 DISCIPLINE

115.1 Basic Principle

In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

115.2 Using People Effectively

Managers can accomplish their mission only through the effective use of people. How successful a manager is in working with people will, to a great measure, determine whether or not the goals of the Postal Service are attained. Getting the job done through people is not an easy task, and certain basic things are required, such as:

a. Let the employee know what is expected of him or her.

b. Know fully if the employee is not attaining expectations; don't guess—make certain with documented evidence.

c. Let the employee explain his or her problem—listen! If given a chance, the employee will tell you the problem. Draw it out from the employee if needed, but get the whole story.

115.3 Obligation to Employees

When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves, as well as to the employee, to:

a. Find out who, what, when, where, and why.

b. Make absolutely sure you have all the facts.

c. The manager has the responsibility to resolve as many problems as possible before they become grievances.

d. If the employee's stand has merit, admit it and correct the situation. You are the manager; you must make decisions; don't pass this responsibility on to someone else.

115.4 Maintain Mutual Respect Atmosphere

The National Agreement sets out the basic rules and rights governing management and employees in their dealings with each other, but it is the front-line manager who controls management's attempt to maintain an atmosphere between employer and employee which assures mutual respect for each other's rights and responsibilities.

116 MAIL PROCESSING FOR DELIVERY SERVICES

116.1 Scheduling Clerks in a Delivery Unit

Schedule distribution clerks in a unit with decentralized distribution so that service standards will be met and an even flow of mail will be provided to the carriers each day throughout the year. Schedule the accountable clerk to avoid delaying the carriers' departures in the morning and for clearance of carriers on their return to the office.

116.2 Mail Flow

.21 Leveling Volume Fluctuations. When volumes for daily delivery vary substantially from the lightest to the heaviest day in the week, a unit cannot operate at maximum effectiveness. Substantial changes in the daily relationships of flats and letters have considerable effect on delivery costs. If this situation exists, the unit manager must document the problem and request, through appropriate management channels, a more even flow of mail.

.22 Plan for Next Day's Workload. Each day as early as is practical, using procedures developed locally, the delivery unit manager should obtain information about anticipated volumes, especially flat volumes for the next day's delivery. This information will assist in planning the next day's manpower needs. Anticipating the flow of mail will minimize undertime and overtime which can be controlled. If undertime occurs often in the morning or afternoon, examine the mail flow, the scheduling of the delivery unit's clerks and carriers, and the affected routes.

116.3 Receipt of Principal Letter Dispatch

Carriers should not sweep distribution cases upon reporting for work. Rather, they should proceed directly from the time recording area to their cases and without delay begin casing mail which is already at their cases. The following priorities have been established for various procedures by which the first receipt of mail from the distribution unit reaches the carriers. These procedures are listed in the order of decreasing cost effectiveness:

a. Preferred Procedure. Letter-size mail is placed on the left side of the carrier case ledge one row high with stamps down and to the right. The carrier may then pick up a handful with the left hand and begin casing without repositioning the letters.

b. Second Priority. Letter-size mail, trayed separately for each route with stamps down and to the right, is placed at the carrier case. If this is not possible, a tray cart (or other suitable item used to transport trays) should be placed as close to the carrier cases as possible with the trays identified by route. Empty trays, if needed for later use, may be stored under the carrier's case. Carriers must work mail directly from trays if the letters are trayed with stamps down and facing to the right. *Note:* If letter mail is not worked directly from trays (second priority), require Mail Processing to tray letters with stamps up and facing one direction so that when the tray is flipped over on the carrier case ledge, the letters will be in the proper position; i.e., stamps down and facing to the right.

c. Third Priority. Letters, faced and loose-packed in No. 3 sacks for individual routes, with each sack identified by route number, are at the carrier's case when he or she reports for work. Empty sacks, if needed for relays when casing is completed, may be stored under the carrier's case.

d. Fourth Priority. Mail, which is tied in bundles, is placed at the carrier's case.

e. Fifth Priority. Sacks containing bundles of mail and identified by route number are transported to the carrier's case. Carriers dump the sacks, check the bundles, and place the letters on the ledge. If empty sacks will be needed when casing is completed, they may be stored under the carrier's case.

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.