DISCHARGE - FAILURE TO PERFORM
DUTIES OF POSITION

C # 90

IN THE MATTER OF THE ARBITRATION
BETWEEN
AMERICAN POSTAL WORKERS UNION
AFL-CIO, WICHITA, KANSAS
-and-
UNITED STATES POSTAL SERVICE
WICHITA, KANSAS

AWARD OF THE ARBITRATOR

#170

CASE NUMBER: EMPLOYER # A-C-276

HEARING: This matter was heard on October 27, 1972, at Wichita, Kansas, and these proceedings were declared closed upon receipt of post hearing briefs from both parties on November 11, 1972.

APPEARANCES: The Union was represented by Donald M. Murtha, Esq., Counsel for APWU.

The Company was represented by James K. Hellquist, Central Region Labor Relations, USPS.

AWARD: The undersigned arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named parties, and dated July 20, 1971, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARDS

Grievance of Cleta Garcia is allowed as the Postal Service violated Articles XV and XVII in denying the Union representative access to all medical information upon which discharge was predicated, thereby negating the proper process of the grievance. In addition no just cause for discharge has been established by the evidence. Grievant is reinstated and shall be made whole from February 28, 1972, to date of reinstatement.

Dated: December 11, 1972

STATE OF INDIANA)
)SS.
COUNTY OF MARION)

James J. Willingham, Arbitrator

On this 11th day of December, 1972 before me personally came and appeared James J. Willingham, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

ATTEST: Virginia Ford

Grievance of Cleta Garcia:

Cleta Garcia was terminated, effective March 31, 1972, for the alleged reason of uncontrolled lapses of consciousness which, the Postal Service contends, subjected both her and her fellow employees to hazard and rendered her incapable of performing the duties of her position.

The issue is whether or not the termination of grievant violated the provisions of the National Agreement between the parties.

The Union contends that the employer's refusal to produce the medical records of grievant has, in effect, constituted a violation of the agreement in that the grievance procedure could not be fully pursued, and, that the competent evidence fails to establish just cause for grievant's termination.

The Postal Service contends that grievant's physical condition has rendered her incapable of performance of her duties and thereby that her removal from service was for proper cause. It further contends that a summary of physical findings was furnished the Union Representative, but that the actual physician's reports are privileged and not subject to production to a lay representative.

Employer's Argument:

The issue as it stands before the Arbitrator is whether or not Management had cause to remove the grievant from the United States Postal Service in order to prevent the grievant from injurying herself or others.

The Postal Service wishes to reemphasize that the grievant's removal from the service was effectuated as a result of the grievant's demonstrated, uncontrollable lapses of unconsciousness; a series of factual events that the Union has agreed have occurred. These periods of unconsciousness were first documented as occuring on the date of January 12, 1970, when the grievant passed out shortly before 6:00 P.M. necessitating her being carried to the Women's Lounge. This was the first documented incident known to Management, but other incidents unknown to Management probably occurred while the grievant was in the confines of the Post Office. The frequency of these attacks were unpredictable, as well as the ramifications of the grievant's continued passing out while in the employ of the Postal Service.

Dr. Hamilton testified that even though the definite causality hasn't been established, the episodes constituted a definite hazard to herself and possibly other employees. (See Ex-1, Fitness for Duty Exam.)

On January 10, 1971, the deleterious results of the grievant passing out were made evident when she reported that her passing out resulted in an injury to her person as recorded by Dr. Sheldon in his letter of February 3, 1971 (JX-1, JX-3). Thus, the grievant's uncontrolled lapses of unconsciousness presented a real efficiency and safety problem for the Postal Service, as well as the main concern for the safety of the grievant. After careful consideration of the grievant's apparent physical problems, Dr. Hamilton, acting upon personal observations of the grievant's lapses of consciousness, as well as his physical examination of the grievant (JX-1, Certificate of Medical Examination) along with Dr. Bacon's physical examination (JX-1, Dr. Bacon's January 18, 1972 Report) of the grievant, recommended and advised that the grievant be removed from the Postal Service due to the real problem of the grievant's safety, as well as other employees. The Fitness for duty examination given by the Doctor was for the purpose of establishing whether or not the grievant should be removed. The Postal Service thus wishes to point out to the arbitrator that the decision to remove the grievant was a medical decision made on a good faith basis by Dr. Hamilton. Dr. Hamilton after observing the uncontrolled lapses of consciousness, by the grievant, advised and recommended that in his judgment she should be removed from the Postal Service (JX-1, Medical Opinion - Fitness for Duty). Dr. Hamilton's testimony and medical opinion (JX-1, Medical Opinion - Fitness for Duty) were that continued employment would constitute a definite hazard to herself and possibly other employees. Dr. Hamilton testified of his own prior work experiences in the Post Office, as an employee before graduating from Medical

School. Certainly his competence and ability to make that determination based on medical judgement and postal operations experience outweigh any decision of a layman in this regard. The Doctor testified in part that he had six years experience as a substitute Clerk, so his familiarity with employees safety in industrial medicine should be given controlling weight.

Dr. Hamilton's decision and recommendation in this regard were further buoyed by the Medical Opinion of Dr. Bacon (MM-1, January 18, 1972 Report), who did not find a neurologic disease, but did attribute "The falling attacks ..." to a long term emotional disorder. In any event, Dr. Bacon reaffirmed the findings of Dr. Hamilton that "although the definite causality" hasn't been established, the episodes of unconsciousness were real and caused by some physical or mental condition. The Arbitrator should remain aware that the exact physical or mental cause of the grievant's uncontrolled periods of unconsciousness are not at issue. The issue is and remains whether Management had cause to remove her from the Postal Service in order to prevent the grievant from injuring herself or others. Obviously, in view of the varying medical opinions by different doctors, laymen can't be expected to come up with a medical conclusion. Dr. Bacon's medical opinion of the cause was attributed to a long term emotional disorder (MM-1, Dr. Bacon's, January 18, 1972 Report). Dr. M. G. Sheldon's diagnosis in the letter of February 3, 1971 (MM-1, UM-3) was that her periods of unconsciousness were due to "... syncope due to hyperventilation syndrome". Yet, Dr. Hamilton's telegram of March 4, 1972 (UM-3) was that her general health was good, except for "acute bursitis" over her spine. Dr. Drake's diagnosis (MM-2, Drake's letter of March 23, 1971) was that the grievant had a "cerebral contusion with paroxysmal cerebral dysrhythmia, right hemicrania" and has had no syncopal attacks. Yet, on January 4, 1972, Dr. Drake states that the abnormal electro-encephalogram has cleared and there is no evidence of convulsive disorder (MM-1, Drake's letter of January 7, 1972). He further states the periods of syncope might be associated with slightly low blood sugar and some might be on a nervous basis (MM-1, Drake's letter of January 4, 1972). Dr. Low's medical opinion of March 30, 1972 (UM-11) states that due to prior diagnosis of hypoglycemia he administered a test of blood sugars. His findings in that report (UM-11) state that he was unable to find any physical reasons for the fainting, but that he believes there was some vaso motor instability. In any event, it is apparent that the grievant's treating physicians all came up with varying diagnosis as to the reasons for the periods of unconsciousness. Yet one thing should be crystal clear to the Arbitrator from those medical reports, is that the grievant does suffer from losses of consciousness; the cause of which is not certain depending on the medical opinion reviewed. Thus, the cause is in doubt, but the

fact that they exist is real and apparent and that is what Dr. Hamilton based his decision on (AX-1, Medical Opinion, Fitness for Duty), along with his role as the Medical Director.

The Postal Service, thus, wishes to point out to the arbitrator that the decision to remove the grievant was a medical decision made on good faith by Dr. Hamilton. Dr. Hamilton was the designated Medical Officer of the Wichita Post Office and his medical judgement must be given controlling weight in cases such at hand. It has been long established in arbitration that on cases of similar circumstances, the Union must prove that the Doctor recommending that an employee be removed, acted in an arbitrary, capricious manner. The Union has offered no such proof in the instant case. The arbitrator is directed to an Umpire ruling of Umpire Ralph T. Seward on November 24, 1944, wherein he espoused a long standing doctrine on cases of similar nature. Mr. Seward's decision in (C-276, Nov. 24, 1944, GMC Truck & Coach v United Automobile Worker's Union) stated the following:

> " This request amounts to the contention that in a case of this sort the Umpire should himself determine the question of an employee's physical capabilities, relying upon such expert advise as he sees fit. It should be clear, however, that [illegible]." (Emphasis added.)

The Postal Service wishes to emphasize that at no time has the Union presented any evidence that Dr. Hamilton or Dr. Bacon acted in other than a good faith basis. Dr. Hamilton's findings were the result of sound medical judgement made on the basis of his medical examinations, observations and records of the grievant's uncontrollable lapses of unconsciousness (AX-1, Medical Opinion, Fitness for Duty). In fact, Dr. Hamilton, a physician of long standing and reputation, observed three periods of loss of consciousness by the grievant. Thus, it was the Doctor's findings, made on a good faith basis that brought about the grievant's removal. The arbitrator in the subject grievance, thus, should hold his ruling to that of whether the doctor acted in good faith, and not substitute his opinion for that of the Doctor. The Union's failure to carry the burden of establishing that

Dr. Hamilton acted in an arbitrary, capricious manner in making his recommendation must leave Dr. Hamilton's decision as the one the parties must be guided by. Dr. Hamilton's medical judgement on the employee's physical capabilities based on reasonable medical evidence are what guided Management and the Union has not proven Dr. Hamilton's decision to be arbitrary or capricious.

The Union has presented medical opinion of conflicting nature to that of Dr. Hamilton, as well as an earlier diagnosis very similar to that of Dr. Hamilton's. The Union is thus, attempting to overcome Dr. Hamilton's decision by presenting conflicting medical opinion. Management cannot too strongly emphasize to the arbitrator that it is Dr. Hamilton, alone, and only he that makes medical decisions for Management on determining whether an employee is competent to perform his job without undue hazard to himself or others. The use of contrary medical opinion certainly doesn't outweigh or overrule Dr. Hamilton's initial judgement, nor does it provide evidence that Dr. Hamilton was wrong; it is and remains only that of conflicting medical opinion. Even more importantly, those medical opinions merely underscore the fact that Management must sometimes decide [illegible] conflicting. It has been long held in cases of similar circumstances that a plant physician's opinion and determination must be controlling in a case of this nature. In Umpire Allan G. Dash, Jr's opinion in (C-19, April 3, 1963, Chevrolet Tonawanda GM Corp v United Automobile Workers), the Umpire quoted the following opinion on other physicians reaching a contrary opinion to that of the Medical Director's:

> " In several past decisions it has been indicated already that the Umpire does not consider it proper to substitute his [illegible]. [illegible] medical doctors [illegible] the physical condition of employees, reach their conclusions on the basis of medical knowledge which cannot be matched by any layman. Inasmuch as the opinion rendered by the plant physician in this case was based entirely on his medical knowledge, the Umpire is convinced that there is absolutely no reason to doubt the authority of that opinion. The fact that other physicians [illegible] Employee a different opinion, [illegible]." (Emphasis added)

Thus, the Union's use of conflicting medical opinion has no real "telling significance" in the subject case, as Dr. Hamilton acted in good faith and upon his medical knowledge in determining that the grievant's periods of uncontrolled losses of consciousness presented a hazard to the grievant, as well as other employees, in addition to the interests and efficiency of the United States Postal Service.

In the Union's Opening Statement at the hearing on October 27, 1972, the Union claimed that the medical evidence that Management relied on was not substantial enough to warrant the action taken. Again the Postal Service wishes to point out that the various Union Exhibits presented by the Union are supportive, in and of themselves, for the action taken by Management. H.G. Sheldon's letter of February 3, 1971, (UX-3) point out that her fall was due to syncope due to hyperventilation syndrome and suggested medication to avert further attacks. Dr. Low's Report of March 30, 1972 (UX-11) states that the fainting spells may be due to vaso motor instability and defers an opinion on whether she can work to the grievant's own physician. He further states in that report (UX-11) that apparently the " . . . epileptic seizures were originally on an injury type basis and local in nature." Thus the Postal Service wishes to point out that the Union's exhibits themselves support Management's position that the grievant's periods of uncontrolled unconsciousness warranted her removal.

At the Hearing, the Union offered no medical testimony whatsoever on the grievant's present condition nor did any of the Doctors testify on the behalf of the grievant; thus, Management had no chance to determine what kind of tests were conducted on the grievant or whether they understood what type of work she had been performing. No medical testimony was presented at the Hearing as to whether the treating physician's could assure Management that she was cured of the uncontrolled lapses of consciousness or that they had been controlled. Thus the Postal Service can only deduce that this was not the case. In fact, Dr. Low's Report of March 30, 1972 (UX-11), the last report in date of the physical examination specifically makes no mention whatsoever of her physical capabilities to work and instead states, (UX-11) ". . . I think continued employment would have to be based on Mrs. Garcia's own physician's evaluations of the conditions for which she is being treated." The Union has not presented any medical evidence from beyond that time of date. In view of the Union's lack of introduction of any medical testimony other than documents of questionable dates and for questionable treatments, the Postal Service must question the weight given such evidence in establishing that the grievant was unjustly removed.

The Union also introduced in its Opening Statement the claim that Management based its discharge action on epilepsy and low sugar count and in so doing had no adequate basis to base that conclusion on. The Postal Service wishes to point out that the discharge was not based on a diagnosis of epilepsy nor low sugar count. The Doctor testified at the hearing that the periods of unconsciousness were in his medical opinion "epileptiform."

Taber's Cyclopedic Medical Dictionary defines that term as meaning "Having the form of epilepsy." Dr. Hamilton never diagnosed the specific cause as epilepsy, in fact his testimony was that he didn't have a specific opinion (JX-1, Medical Opinion - Fitness for Duty). The Doctor's diagnosis was that the periods of unconsciousness, with no definite causality (JX-1, Medical Opinion - Fitness for Duty) constituted a definite hazard to herself. Neither did Dr. Bacon diagnose the cause as epilepsy, he stated in his report it was due to a long term emotional disorder (JX-1, Dr. Bacon's Report of January 10, 1972). The diagnosis of epileptic seizures was made in Dr. Low's Report (JX-11) and Dr. Drake's report (JX-1). Management's action was not predicated on the grievant having epilepsy, but instead the uncontrolled, losses of unconsciousness (JX-1). Nor did Management predicate its decision on the diagnosis of low sugar count. It was Dr. Drake in his report of January 4, 1972 (JX-1) that diagnosed the grievant having a slight degree of hypoglycemia. As pointed out before, Dr. Hamilton's decision was predicated on the uncontrolled losses of consciousness, with no established causality (JX-1), except for the multi-diagnoses of the various treating doctors. But this much is clear, the periods of unconsciousness suffered by the grievant were not being controlled nor cured by her various treating physicians, who varied in opinion as to their causes. The frequency and severity of the periods of uncontrolled loss of consciousness were increasing; thereby, creating a hazard for the grievant's well being, as well as other employees. Therefore, the local Medical Officer's decision must be controlling.

The Union in its opening statement also claimed that the grievant was entitled to an advance written notice containing a bill of particulars. Management wishes to point out that action taken against the grievant was explained in (JX-1Bb), (JX-1Bh), and (JX-1Bi). The grievant was given the requisite advance notice required under the contract. Also, the grievant was sent a letter on February 23, 1971 (JX-6) pointing out the reason that she was not to report for duty. Management certainly cannot agree with the Union and wishes to point out that after the grievant's last period of unconsciousness on February 20, 1972, it was agreed to by the Doctor, her supervisor and the Personnel Department that she would have to report to the Medical Department before attempting to go back to work. Thus on the contrary, she was not being placed on suspension, but administrative leave with pay for four days (February 24, 1972 thru February 28, 1972) pending a final conclusion on the grievant's status and also in order to seek advice on the pending situation. The grievant was not suspended as the Union claims in its Appeal dated March 17, 1972. There was no violation of the Agreement as claimed by the Union.

The Union also advances the claim in its Opening Statement that following each time off work, she received a "Fitness for Duty - Examination" from Dr. Hamilton. The Postal Service can't agree and wishes to point out to the Arbitrator that a Fitness for Duty examination is only ordered by Dr. Hamilton (JU-4, Order to Report for a Fitness for Duty Examination), to determine if a person is physically able to perform the duties of her classification. The grievant was not given such an examination upon returning to work from Sick Leave, absences, or hospitalized periods (JU-3). Dr. Hamilton's review of the grievant's condition was only for the reason for her absence predicated upon the treating doctor's recommendations (JU-3), it was not a Fitness for Duty examination. Furthermore, the documents filled out by the grievant's treating physicians, such as the one (JU-10) presented by the Union, are filled out by the grievant's physician recommending a return to work from a specific ailment. They do not encompass a general pronouncement of overall Fitness for Duty; a decision only the Installation's Medical Officer can make (JU-7).

The United States Postal Service further wishes to point out to the Arbitrator that the grievant's removal from the service was not only predicated on Management's right in maintaining efficiency within the business under "Article III - Management's Rights", but also on the basis of the Postal Manual wherein situations such as occured herein were contemplated (JU-9). The Postal Service thus directs the Arbitrator to Section 717.341 and .342 of the United States Postal Manual. That portion of the Manual reads as follows:

".341 Definition"

"Separation for disability is the separation of an employee other than a temporary limited or a probationary employee whose mental or physical condition renders him incapable of performing the duties of his position and who is ineligible for disability retirement, or who, after being advised that he is eligible to apply for disability retirement, declines to do so."

".342 Applicability"

"a. An employee not eligible for disability retirement may be separated for disability if he is considered a hazard to himself or to others or if he can no longer perform the duties of his position."

The Postal Manual section cited above clearly outlines the situation wherein an employee may be separated "if he is

considered a hazard to himself or to others". Thus the action taken against the grievant was not new or novel, as it has always been the right of the Postal Service to effectuate removals wherein the above quoted conditions are existant. This fact coupled with the provisions of "Section 4, Emergency Procedure" of Article XVI clearly establish the procedure for removing an employee whose continued employment has been determined to be injurious to herself or others. Dr. Hamilton and the Management personnel involved clearly acted within the proper guidelines of the Postal Manual and contract in effecting the removal of the grievant. An employee's removal for medical reasons is not new. Arbitrator J. Fred Holly stated the following:

> " Article X affords protection to an employee who is discharged for disciplinary reasons, and it provides that sufficient cause must exist for discharge. The grievant was not discharged for disciplinary reasons, and as noted above his removal was clearly proper under Article VI, Section 4, of the Agreement."
>
> "The grievant was discharged for medical reasons as previously noted." (Arkansas Chemicals, Inc. 51 LA 579)

The Union further contended at the hearing that they were denied pertinent Medical data and were disadvantaged. The Union stated in its Appeal dated March 17, 1972, the following in part:

> " The A.P.W.U. Wichita, Kansas, has not been given access to review the medical records of Cleta Garcia and so must use facts from other sources in trying to establish if this is true."

The Postal Service first wishes to point out that a Steward does not have unlimited access to Management records. Management's policy has been to allow a steward to review only those records that are relevant to the grievance and which are not privileged communications such as an employee's medical records (ASM). The grievant herself was not entitled to review those records as it was privileged medical information in many instances between Doctors and also in some instances privileged communication of Dr. Hamilton himself. Yet, in view of the importance of this case an offer was made to both the steward and the grievant to have a designated physician of his or her choice, examine the file. This offer was apparently not acceptable as a physician was never designated. Mr. Lou Taylor testified that he himself made the offer to Steward Davis during the Steps of the Grievance Procedure. Thus it was not the intent of the parties to withhold any information, but to preserve its confidentiality..

In addition to this offer, Dr. Hamilton made out a summary (JM-10) of medical information to give to James W. Davis, Jr., the Union steward. The steward refused to accept these and continued to demand the original medical documents, even though he was told by theDoctor that in his opinion they were privileged medical information. Mr. Lou Taylor also testified that Steward Davis was offered a summary, but refused to accept same. Thus it was apparent that the Union's real intent was to acquire a claim of technical improperness on Management's part, as opposed to really securing medical information. In any event, the Union was given an opportunity to examine the medical records through a designated physician but declined to do so. In addition, James Davis testified that he never once during the 5 or 6 times he talked to the Doctor interviewed him as to the medical records or for the reason that the Doctor recommended that she be removed. Nor did James Davis interview any other principals in the case.

Bill Wells also testified that he never interviewed the Doctor at Wichita. In fact, he testified that he thought it would have been useless to interview the Doctor. He further testified that it was his understanding that the information would be exchanged at the 2(b) meeting. He also answered in response to a question on the importance of Dr. Low's report that he wasn't a Doctor and how could he be expected to say. It should have been apparent to the Arbitrator that it was the Union's negligence in securing the necessary information and not by any design of Management to disadvantage them. Wichita did not fall under the terms of the National Agreement until February 14, 1972, therefore, both parties were new to its provisions.

The Postal Service further wishes to point out to the arbitrator that the grievant has been given ample opportunities throughout the two prior years to control her sudden losses of consciousness. Sick leave has been advanced freely to the grievant (JM-12, JM-1, Advance Sick Leave, June 23, 1970) throughout this period of time, even though such grants certainly represented efficiency losses. Certainly there has to be a point wherein continued advances of such sick leave, with no improvement in the condition, exceed the bounds of good business judgement on behalf of the employer. An examination of the grievant's prior two years employment reveal that in 1971 she only had 5 pay periods, wherein she worked eighty hours or more (JM-12). In 1972, up to the 5th Pay Period, the grievant only worked one full pay period (JM-12). In 1970, the grievant utilized the advance sick leave up to 240 hours as of June 23, 1970, the maximum allowable (JM-1, Advance Sick Leave June 23, 1970).

At the Hearing on October 27, 1972, the Union advanced the claim that the laws pretty well settle the fact that an ailment doesn't justify the Company discharging an employee. The Union further cited precedent in support of that claim. The Postal Service is aware that the Arbitrator will peruse the decisions cited, but one in particular cited by the Union deserves examination by Management. Arbitrator Hogan stated that the following guideline is of importance:

> " Whether the discharge (or refusal to recall) is for proper cause depends on proof of clear and present hazard and not on speculative medical reports." (Columbia Packing Co. 31 LA 152)

Foreman Tambling testified that there are many objects that had sharp corners, such as racks, distribution cases, the floor itself, typing machine, metal foot rest, etc. Obviously, the clear and present danger to an employee who suffers from uncontrolled, losses of consciousness, in an industrial environment harboring many such items as outlined by Foreman Tambling must be evident. The tour taken by the Arbitrator, with consent of the parties, certainly should underscore the very real danger to a person who suffers from such losses of consciousness. Also, the Doctor testified to the potential hazard to herself (JX-1). The Doctor's prior postal operations experience as a Substitute Distribution Clerk must certainly establish his medical opinion in this area as incontrovertible. The real danger to the grievant comes sharper in focus when one considers the injury she suffered on January 10, 1971 (JX-1), when she blacked out and fell to the floor. This coupled with the prior losses of consciousness experienced by the grievant point out the clear and present hazard to the employee, as well as the liability of the employer for such occurences within the Post Office.

The Postal Service also wishes to refer the Arbitrator to the following decisions. The decisions are dissimilar in factual circumstances, but provide a precedent basis for Management's course of action in the subject case. The decisions are as follows:

(1) Chicago Bridge & Iron Co. 51 LA 774
(2) Connecticut Lighting Service, Inc. 51 LA 343
(3) Arkansas Chemicals, Inc. 51 LA 579
(4) Seaboard Coast Line, R.R. Co. 53 LA 579
(5) Westinghouse Air Brake, Co. 53 LA 763
(6) Maluda Coal & Supply Co. 53 LA 334

It would also be of further interest to examine another claim from the same appeal letter dated March 27, 1972, wherein the Union advances the following claim:

"In a letter to the Postmaster, Dr. Hamilton states that Mrs. Garcia has had her medical problem as far back as May 25, 1966. If this is true, then the Post Office was aware of the problem when Mrs. Garcia was hired into the Postal Service on May 20, 1966. It would seem that there must be some other reason for the Postmaster to want to discharge Mrs. Garcia other than a medical problem which she had at the time she was hired."

The Postal Service certainly cannot accept the Union's claim as advanced in the above quote. The grievant at no time indicated at the time she was being hired that she had a physical handicap, defect, or disability (M-4, EM-1, SF-78 Date 5-17-66). If the grievant is now advancing that claim, she must have fraudulently filled out the employment qualifications at the time of her hire, as Management was not made aware of any physical handicap, defect, or disability at the time of her hire. The Postal Service wishes to emphasize that one of the areas of importance on the SF 78 was Item 16 on Page 4. The grievant related a history of fainting spells in 1966 to the Doctor, with no recurrence and stated they stopped when she became employed. The grievant answered "no" to the rest of those questions. The grievant at no time indicated on the application forms that she had a physical defect, handicap or disability. If the grievant is now saying she did, it should be clear that she falsified those documents in order to acquire the job. The Union objected to the introduction of this document on the grounds of relevancy and materiality. The Postal Service wishes to point out that its relevancy is to the very heart of the issue - whether the grievant was removed for cause. Arbitrator J. McCurry stated, "Under such circumstances, the grievant had an affirmative duty to disclose this condition in the blank space calling for "Physical Defects." (Chicago Bridge & Iron Co., 51 LA 774)

Moreover, the Postal Service also wishes to point out to the Arbitrator that the Union has requested the following remedy in the subject case:

"... the following Corrective Action is requested: That Oleta Garcia be reinstated in her job with complete restitution, ie, back pay, seniority, etc."

The Postal Service again wishes to point out to the Arbitrator that only the Wichita's Medical Officer (EM-7) can make a determination as to when an employee can return to work. Neither the Arbitrator nor an outside physician can make that decision. The decision remains solely with the Installation's Medical Officer. In that regard, the Arbitrator is directed to Section 863.4 of the United States Postal Manual (EM-7), wherein it states:

"Employees returning to work ... at Installations having a Medical Officer, he shall make the final medical determination of his ability and fitness to duty." (Emphasis added)

Further, the Arbitrator should be aware that the terms of the National Agreement have no provisions for outside physicians opinions having determinative weight in returning an employee to work. Many Industrial Agreements do have such contractual provisions, but the parties to this Agreement do not, nor was there any agreements made reducing the rights of Management in this regard, thus, only the Medical Officer can make that decision and in this instance his decision was that she couldn't return to work due to sudden unannounced losses of consciousness. That the arbitrator can't make that decision for Management in this case, only the Medical Officer can put her back to work within the Post Office. The arbitrator can find even though the evidence does not establish, that the Doctor acted in an arbitrary, capricious manner, with no reasonable medical judgement for his decision to remove her from the Service. But, the arbitrator's decision can only go to the point of restoration of seniority. The Postal Service Medical Officer must approve her to return to work and only he can make that decision. Furthermore, the Postal Service wishes to point out to the Arbitrator that the remedy of back pay, if he should so rule for the Union, cannot be awarded in the form of wages or other remuneration. As priorly pointed out, only the Medical Officer at an installation can approve an employee to return to work. In this case, the Medical Officer ruled she was unable to return to work and that she should be removed from the Service, as her periods of uncontrolled, unconsciousness rendered her incapable of performing the work without injury to herself or others. Thus, even if the Arbitrator rules the removal to be improper, it would not take away from the fact that she would not have been approved to work. Therefore, as a result of that fact, the grievant would have had to be on some type of leave and not eligible to work drawing wages. The Arbitrator can't award wages for a period of time that she wouldn't have worked.

In summary, the Medical Officer, Dr. Hamilton, acting in good faith, and upon observations and examination of the grievant recommended and advised that the grievant not be returned to work, as her periods of sudden unconsciousness constituted a definite hazard to herself, other employees, and the interest and efficiency of the United States Postal Service. He recommended and advised that her condition would always be of potential hazard to herself and therefore she should be removed for the well-being and safety of herself, as well as other employees. Dr. Hamilton's

judgement was sound, and made in good faith, based on medical evidence and observations of the grievant. The claims advanced by the Union that the removal was not for cause must be denied.

Thus it is the Postal Service's position that on the facts and testimony presented, the Arbitrator should find that the grievant was removed from the Postal Service, due to the actual and potential hazard to herself, other employees, as well as in the interests of maintaining the interests and efficiency of the United States Postal Service. In addition, he should find that Dr. Hamilton acted on a good faith basis, based on reasonable medical evidence, without any capricious or arbitrary intent.

The Postal Service has demonstrated the reasonableness of the grievant's removal on the facts presented above, therefore, the arbitrator is requested respectfully to dismiss the grievance.

Union's Argument:

> THE EMPLOYER VIOLATED THE AGREEMENT BY FAILING AND REFUSING IN GOOD FAITH TO PARTICIPATE IN A MEANINGFUL WAY THROUGH THE STEPS OF THE GRIEVANCE MACHINERY

The employer's refusal to disclose to the Union representing the grievant the factual data upon which grievant's discharge was based and to otherwise fail and refuse to participate with the Union on a good faith and meaningful basis throughout the several steps of the contractual grievance procedures requires setting aside the discharge of Cleta Garcia.

The Collective Bargaining Agreement provides for several grievance steps leading to binding arbitration. It has long been established that the purpose of grievance procedures is several-fold. First, the Union representing the grievant is entitled to and in fact required to fully exercise its duty of representation of the members of the craft (in this case, the Clerk-craft). If the Union does not carry out its duty of representation in a reasonable manner, it may be subject to various sanctions imposed by the grievant. Since the employer refused to disclose its case to the Union, there was no possibility that the grievance could be resolved at any step of the grievance procedures. Again, if the employer is acting upon information which it refuses to disclose or fails to disclose, the Union is deprived of the exercise of judgment in making decisions either to forego further processing of the grievance, including arbitration, or to make meaningful decisions as to how it should proceed in order to fully protect the rights of the grievant.

The failure of the employer to disclose to the Union the data upon which its contested decision is based is a perfect example of a violation of the Agreement by refusing to comply with the spirit and intent and in fact the letter of the Agreement.

The Supreme Court made this clear in considering the duty of the employer under National Labor Relations Act. In National Labor Relations Board v Acme Industrial Co., 385 US 432, 17 L ed 2d 495, 87 S Ct. 565. Acme used this pertinent language:

> "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Labor Board v Truitt Mfg. Co., 351 US 149, 100 L ed 1027, 76 S Ct. 753. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. NLRB v C & C Plywood Corp., 385 US 421, 17 L ed 2d 406, 87 S Ct. 559; Labor Board v F. W. Woolworth Co., 352 US 938, 1 L ed 2d 235, 77 S Ct. 261. . . ." (17 Law Ed 2d, p. 499)

> "Section 8(a)(5) (NLRA) proscribes failure to bargain collectively in only the most general terms, but Sec. 8(d) explains it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising (under an agreement). . ." (p. 499)

> "Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim." (p. 500)

In Acme the Supreme Court cites with approval the decision of the Second Circuit Court of Appeals' language which describes with precision the position in which the Union

found itself in attempting to adequately process the grievance of Clete Corsin. In Zenith Hearing Co. v. NLRB, 362 F 2d 716, 721, the Court said:

> "By preventing the Union from conducting these studies (for an intelligent appraisal of its right to grieve), the Company was, in essence, requiring it to play a game of blind man's bluff." (and see cases cited at p. 722)

In the field of arbitration law, the principal espoused by Acme is well reflected in the decision of the arbitrator in Monsanto Chem. Co., 24 LA, 361, 363 -- a discharge case:

> "Having thus found that the Company failed to accord the grievant a proper chance to show why he should not be discharged, the Umpire must also hold that the discharge action was improper. For the Company's error herein was not merely a "technical" violation of procedure. The opportunity to present evidence to dissuade the Company from taking discharge action, before it has made a final decision, is obviously an important substantive right of grievant X - or of any other employee threatened with discharge. If that right to be a meaningful one, the Umpire believes, it must be held that denying it to a discharged employee taints the discharge action itself.
>
> Accordingly, without reaching the merits of the disputed incident which led to the discharge, the Umpire holds that grievant X - 's discharge must be set aside. The Company is directed to reinstate the grievant and to make him whole for any loss of earnings he has suffered as a result of its improper action. In the light of this holding, the Umpire deems it unnecessary to rule upon the Union's claim under Article XI, Section 1(a) but wishes to make clear that his decision herein is not to be taken as a ruling one way or the other upon the merits of the latter claim.
>
> DECISION
>
> For the reasons indicated in the Opinion above, the Company's discharge of employee X - is set aside. The Company is directed to reinstate X - and to make him whole for any loss of earnings he may have suffered as a result of the discharge."

The refusal of the employer to produce evidence vital to the determination under scrutiny in grievance cases has consistently been interpreted either as vitiating the action taken or as barring the employer from relying on such information. North American Aviation, 17 LA 385 at 389, 390.

Thus the principal is well supported that where a grievant may only be discharged for just cause and where a series of grievance steps are provided before arbitration that an employee who is being discharged has a right to a good faith processing of the grievance including the right to examine the pertinent medical and other records upon which the employer is relying. In this case, apart from this general rule of law, the particular Agreement before the Arbitrator specifically provides in Article XVII, Section 3, second paragraph, that the steward may request and shall obtain access to review the documents, files and other records necessary for processing a grievance. The facts in this case demonstrate a contract violation through violation of employer's obligation to process the grievance in good faith.

Grievant on February 28 and February 29, 1972 came to the Union steward and asked for representation. The Steward of the Clerk Craft, James Davis, armed with grievant's written authorization, made immediate and repeated demands on the appropriate officials of the employer at Wichita to produce the medical records in the employer's possession and on which the discharge was based. These included the Postmaster, Personnel Officer, Dr. Hamilton (Company Doctor). The steward was told in no uncertain terms that he could not see the records because they were confidential. Postmaster Baird was quite vehement in his refusal. He told Steward Davis, "It will take a court order to get these records."

At step 2b (which involves officials of the employer and the Union at the regional level), National Representative Wells was again denied an opportunity to review the medical data relevant to the discharge. He announced that the Union had had an examination made and that the doctor's report was in the process of preparation. The employer, however, not only failed to provide an opportunity for the submission of this report (J 11), as a part of step 2b, but acted in complete indifference and derogation of the Agreement by receiving additional medical data from Dr. Hamilton after the 2b meeting and then proceeded to render its negative decision prior to furnishing the Union with a copy of Dr. Hamilton's summary. (The sheets of record before the Arbitrator include U 12 - Dr. Hamilton's memo to Ted Brown, April 5, 1972, stamped received in Chicago, April 6, 1972; E 13(a) is the decision dated April 11, 1972, signed by C.W. Vanimburg.)

It is no defense for the employer to say the medical information is confidential and cannot be released to the Union in a medical discharge case. As exhibit U 1 shows on its face, the data was given to the Postmaster. In addition, a document called a "summary" including medical evidence was sent to the regional officials as shown above (U 12). There is no known theory under which this grievant who is being fired for reasons of health can be denied access to the records upon which her discharge was predicated. Nor can the employer "refuse to produce" upon the request of the Union representative, and nowhere is there any basis in law and certainly not under the agreement to condition the obligation of the employer by the employer's directive that the records would be shown only to a doctor selected by the Union who would then be permitted to give a summary to the Union. To the contrary, the Union has an absolute right to examine medical or any other pertinent data and it is for the Union to decide what use will be made of such documents in fulfilling its duty of fair representation within the time limits specified in the Agreement.

Discharge is a serious penalty. In fact it is the supreme penalty in labor-management relations. It deprives a grievant of income, and it places a mark on an employee's record which makes other employment virtually impossible. The Union may not need someone to interpret the medical data, but if it does it must be allowed to seek out its experts and to proceed in a manner required to perform its obligation of fair representation. The gravity of a discharge proceeding far exceeds that of a negligence case and it would be preposterous to suggest that a defendant in tort cases could hold its medical examination reports confidential. Nor can the government keep secret its pertinent information in criminal cases. We are dealing here with a severe penalty and the employer may not cling to secret data without violating the Agreement.

The answer, of course, is to be found in the Collective Bargaining Agreement which contains no provision keeping the employer's medical records secret. On the contrary, the Agreement assumes full faith and frank dealing between the parties in processing grievances. The Union had a right to examine the medical records simply because it has a right to represent employees in grievance processing. Moreover, the Agreement between these parties specifically gives the right of access to and review of the documents, files and other records necessary for processing grievances (Article XVII, Section 3, second paragraph). The Agreement provides for no exceptions, conditions or limitations. The employer will hardly raise the question of relevancy for the grievant was fired on the basis of the medical data.

It is not a condition for the application of the law of disclosure that the Union demonstrate just how the information would have been used if received - the failure to produce is alone enough to void the discharge. If a grievant does not know what is in the mind of the employer, he cannot bring together the facts and representation needed to defend, disprove or to work out alternative dispositions.

For the foregoing reasons the failure to produce upon request of the Union, the failure to engage in meaningful discussion at each step of the grievance, the use of secret information, all requires a finding of violation of the Agreement requiring an award of restoration to duty with pay. Moreover, the failure to produce taken together with the employer's failure to sustain the burden of proving disability with relation to grievant's performance of duties constitutes an absence of just cause for the discharge of grievant.

EMPLOYER DID NOT SUSTAIN BURDEN OF PROOF TO ESTABLISH JUST CAUSE FOR GRIEVANT'S DISCHARGE

Employer failed to establish medical evidence to support discharge.

The span of pertinent consideration of grievant's health, in this case, covers the period surrounding the discharge action. In a discharge case, the burden of proof is upon the employer. The ultimate question is whether or not the Postal Service had before it at the time of discharge an adequate basis in fact to reach the conclusion that the grievant was unable to perform her duties.

At the outset it must be noted that the Postal Service does not base its decision upon lack of efficiency, knowledge, etc., on the part of the grievant while actively engaged in performing her duties. It is admitted that grievant adequately performed her functions. There is no suggestion that she made mistakes, did not understand, or was incapable of carrying out the duties of her assignment. Consequently, we are concerned here only with the status of the grievant's health. The best evidence of the health of an employee is the evidence based upon expert opinions of doctors. Looking then at the pertinent time span, what was the medical evidence?

Taking the medical evidence in chronological sequence, the records show that

On January 4, 1972, Dr. Drake, based upon an examination of Mrs. Garcia, reported no abnormalities following his complete neurological examination,

and further stated that Mrs. Garcia resume work at the Post Office. (E 1, page 27)

Shortly thereafter on January 14, 1972, Dr. Hamilton examined the grievant and, as he testified, he found no abnormalities. This is supported by his written report on Postal Service Form 76. (E 1, page 6) Dr. Hamilton, according to his testimony, arranged for the examination of the grievant by a doctor of his own selection.

Dr. Arthur H. Bacon examined the grievant on January 17, 1972. Dr. Bacon's comprehensive report found no abnormalities of an organic nature after a thorough and extensive examination (E 1, page 13).

Dr. Sheldon, grievant's family doctor, examined her on February 28, 1972, and certified that she was able to return to work (U 7).

Dr. Harold L. Jove gave her a thorough examination on March 30, 1972, with special attention to blood sugar content (hypoglycemia) and concluded that his findings based on comprehensive laboratory tests, were within normal limits, and that he was unable to find any physical reason for her fainting spells (E 11).

Obviously, there does not exist a substantial basis supported by competent medical evidence for the discharge of Mrs. Garcia. While it is true that the management's "letter of charges", (E 13(h)), which incorporated the advance notice of February 28, 1972, (E 13(i)), made reference to three "fainting spells", none of these incidents support a finding that grievant was dangerous to herself or others or was caused by any existing health problem discernable at that time. Thus, on November 8, 1971, according to the Employer's Statement, page 7 (although the letter of charges gives the date as November 7, 1971) the "fainting spells" occurred while the grievant was lying on the couch in the ladies lounge. On December 16, 1971, according to the Employer's statement, page 8, the grievant became "unsteady" while sitting on a rest bar. On February 20, 1972, the grievant's "fainting spell" resulted in grievant's being helped by one of her fellow employees. It is obvious here that she was able to communicate her temporary distress to her fellow employees and ask for help.

The Postal Service at the time of grievant's employment was made aware that the grievant had in the past experienced "fainting spells". While it is true that she has had an unusual amount of sick leave, it should be noted that it is also true that after each and every period of absence, she was certified by her doctors as able to return to her work. She satisfied the Postal Service medical doctor with respect to her health during this period, and the record shows that for long periods of time she worked long and in a perfectly normal fashion without any suggestion of inefficiency - a period of over four years.

If it is the claim of the Postal Service that they are relying upon the two references relating to the mental health of the grievant in the report of Dr. Drake of January 4, 1972, or in the comment of Dr. Bacon in his letter of January 18, 1972, there can be no question that these comments do not constitute a medical opinion upon which it can be stated that the condition of mental health required that she be discharged. Dr. Hamilton, not wanting to rely solely on the basis of his examination that the grievant had no abnormalities, and in the exercise of his duties, sent her to Dr. Bacon, a neurosurgeon. If the Postal Service relied on the question of mental health, then it was Hamilton's same obligation to ask for expert opinions of some doctor or doctors who were qualified in that field. This was particularly true where two neurologists negatived the existence of neuropsychosis or psychoneurosis. Again, we repeat, the burden is on the Postal Service and there is no substantial medical basis in this record for any action that could have been based on the mental health of the grievant.

The above discussion underscores the failure of the employer to sustain its burden of proof as to every question which could possibly be raised:

> If the grievant was discharged for hyperventilation, the medical record does not support such a finding.
>
> If the grievant was discharged for epilepsy, the medical record does not support such a finding.
>
> If the grievant was discharged for low blood sugar count, the medical record does not support such a finding.
>
> If the grievant was discharged for reasons relating to mental health, the medical record does not support such a finding.

Admittedly the grievant experienced nine fainting spells according to the employer over a period of five years, but there is no medical evidence to support a finding of substantial continuing disability as of January, February and March, 1972.

Moreover, even a limited disability would not be cause for discharge. The National Agreement establishes a contractual policy for the giving of special consideration to persons who may be handicapped. Article II provides that there should be no discrimination against such employees providing the employee can perform efficiently without danger to the health or safety of the physically handicapped person or to others.

Article XII and, by incorporation, Article XIII of the 1968 Agreement provides that employees may receive light duty assignment. In this case, it should be noted that light duty assignment was granted grievant for a short period of time after abdominal surgery in 1970. Consequently, there is no suggestion in the Agreement that merely because an employee has some temporary periods of distress that she is unemployable.

The cases are legion in supporting the proposition that just cause discharge does not automatically follow because a person has a serious physical impairment. Cases covering a wide variety of physical handicaps include an employee with a heart condition, ([illegible] International Brotherhood of Electrical [illegible] LA [illegible]; [illegible]), varicose veins, ([illegible] of America, [illegible] LA [illegible]), crushed leg, ([illegible]), hypertension, ([illegible] LA [illegible]), and epilepsy ([illegible] Union of [illegible], [illegible] LA [illegible]).

The strange emphasis in the letter of charges relating to the grievant being dangerous to herself and others is puzzling to say the least. These expressions are used in circumstances where an employee is a person suffering from some form of mental disease causing the employee to go "berserk", harm other persons or mutilate themselves or commit suicide. They speak of a degree of mental illness which is diagnostically identifiable and of a high degree of severity clearly and substantially handicapping an employee in the performance of any duties. Nothing even remotely related is present here. Not only is there a complete lack of medical evidence to support any such type of disability in the grievant, but the facts concerning the fainting spells are such that she would be in relative danger, as far as hazard is concerned, whether in her bathroom or working in an office

such as the Post Office. Grievant is no more "dangerous to herself or others" than a man with a gimpy leg, a heart condition or hypertension, etc. -- a group encompassing perhaps half of all employed. Obviously, persons who fall down for whatever reason may hurt themselves. The burden on the employer is to show that she was required to operate dangerous machinery or otherwise be in a hazardous occupation (coal mining, handling explosives, dangerous chemicals, etc.) The examination of the Post Office and the box section in which grievant works reveals nothing, in a comparative sense, that would constitute a hazardous working condition, such as operating a saw mill or operating a crane. The Union certainly believes that this employee who worked so well and who has been with this employer over four years should not be discharged without adequate evidence or otherwise be discriminated against. Furthermore, as discussed earlier, grievant has not in the situations described in the Letter of Charges ever hurt herself or others in the Post Office.

Finally, it is of very great significance that, at no point in the record of this case, neither among exhibits of the employer nor in the oral testimony of Dr. Hamilton, is there a recommendation by Dr. Hamilton that the grievant be discharged for medical reasons. Not only is the record silent, but Dr. Hamilton, in response to an inquiry put to him by the company representative during the arbitration hearing, stated flatly that he had not made a recommendation that she be discharged.

Thus, the pertinent time span involved herein being just before and after the occurrence of February 24, 1972, as has been shown herein, the medical testimony between January 4 and March 30 does not reveal a medical reason for unemployability.

The Internal Handling Of The Medical Data Constitutes Further Justification [illegible]

The above discussion serves to underscore the handicap to the Union because of the failure of the Postal Service to disclose its records to the Union representing the grievant, or to specify the exact basis on which it relied. We repeat again, a person cannot be discharged under the Collective Bargaining Agreement for just cause where the employer based his action on undisclosed secret reasons. Moreover, even the internal handling of the clandestine medical data establishes not only that competent medical evidence did not exist, but that so-called "summaries" were inaccurate, inconsistent, and misleading. This again demonstrates error and an absence of good faith in the processing of this grievance.

The employer developed very precisely at the hearing the basis upon which it acted. Dr. Hamilton testified at length

about his putting together and submitting to the Postmaster the employer's exhibit, E 1, a document of 30 pages, which included Dr. Hamilton's evaluation, SF 78, and other "confidential" information referred to in the last paragraph of E 13(i), notice of suspension and discharge. Dr. Hamilton, in his letter to Rod Stone, Regional Officer, on April 5, 1972, (U 12) admits that his evaluation emanated from a fitness for duty physical examination requested by the Postmaster on January 10, 1972. Consequently, employer's 11 is admittedly the basis of the discharge. Dr. Hamilton's oral testimony reaffirmed this. Thus Exhibits E 1 and U 12 (and, for all anyone knows, other "confidential records and data) formed the basis for the decisions of the supervisor, the Postmaster, and the Postal Service Regional Office to discharge and then to uphold the discharge of grievant.

Moreover, apart from the infirmities relating to "failure to disclose," Dr. Hamilton's summary of April 5, 1972, is highly prejudicial and inaccurate as to reporting the state of grievant's health in February 1972. This summary refers to hyperventilation in 1966 and January 10, 1971; to cerebral concussion March 5, 1971, and epilepsy (Petit Mal); to hypoglycemia; to emotional disorder. This frightful list also was given to the Postmaster (see first page of Ex. E 1). Yet, at the time of such submission, Dr. Hamilton knew these "diagnoses" were unsupported by competent medical authority for he knew of Dr. Bacon's negative findings in January 1972 as to epilepsy or any other organic cause. This is inexcusable. Furthermore, Dr. Hamilton omits in the summary his own findings of normality from his examination reported in SF 78 (E 13 - 1, p.6), dated January 14, 1972, which included blood and urine analysis as part of a full medical check-up.

That the Union did not receive a copy of the summary furnished to the Regional employer grievance officials after the Regional Level (2b) hearing and before the decision of April 11, 1972, is demonstrated by employer's E 10. This is a memorandum from Hamilton to Steward James W. Davis, dated April 28, 1972 (seventeen days after the Regional 2b decision), and purports to be a copy of the summary of medical history "requested by and furnished Rod Stone, Labor Relations, Central Region, Chicago." It contains the glaring deficiency of omitting any reference to Dr. Bacon's [illegible] [illegible]. As established, as noted earlier again, that Dr. Hamilton remained silent as to his own findings of normality (E 13, p 6). But there is an even more glaring demonstration of lack of good faith in these grievance procedures. While Exhibit E 10 purports to be a copy of the summary sent to the Region on April 5, 1972, it is not the same summary. In the memo to Stone (U 12) Dr. Hamilton reports that Dr. Bacon

"following a complete examination suggested a long term emotional disorder". In the memorandum given to Davis, Dr. Bacon is not even mentioned. So not only are the summaries going to Cobb and to Davis misleading, but fail to report the finding regarding the absence of epilepsy or other organic evidence of neurological pathology made by Dr. Bacon.

To the Union representative, of course, the summary came too late, but to the employer's regional officials it was inaccurate and incomplete in a way to hide, among other things, the absolute medical finding of absence of epilepsy. Where such omission is made by Dr. Hamilton in the same document in which he claims to have observed a form of epilepsy it reflects an absence of good faith even apart from the failure of the employer to disclose and to meaningfully engage in fruitful discussions throughout the stages of the grievance procedures.

The fact is inescapable that the record does not disclose on what grounds the employer was acting. Certainly the Union, which, through its counsel, received employer's ex. J. 1 the evening before the hearing, did not know and it is absolutely certain that the arbitrator has not discovered the basis for the discharge. Under no circumstances can the handling of the grievance be considered to have come within the basic limits of good faith bargaining by which both parties are bound.

CONCLUSION

Counsel for grievant has confined his argument for the most part to the failure of the employer to produce records and the lack of any substantial medical testimony to support the discharge action, both arguments going to the question of just cause. However, by doing so, the Union does not abandon its argument that Mrs. Garcia's suspension under Article XVI, Section 4, putting her on a non-pay status at such a critical time in the development of the grievance steps, constituted in and of itself prejudice and discrimination going to the very heart of the discharge action. Nor does the Union abandon the interlocking relationship to the question of just cause arising from the violation of Article XVII, Section 3. However, the parties have agreed to submit this as one grievance arbitration matter because of these interlocking relationships, that is, the discharge itself, for all these reasons, was in violation of the Agreement and, therefore, not for just cause.

Obviously, while it may be suggested that the Postal Service was still operating under the old rules, and did not fully accept its duty to meet and talk in a meaningful way with the representative

of the grievant during the grievance steps leading to arbitration, this is certainly not an acceptable answer and grievant should not be made the victim of the employer's intransigence.

For the foregoing reasons, it is apparent that the National Agreement was violated by the discharge of the grievant and that she is entitled to be restored to her position with back pay.

Findings: After examination of the evidence received in the hearing of this matter the arbitrator finds:

That the instant grievance was properly before the arbitrator for hearing and disposition.

This is a termination case, not a disciplinary discharge, and the burden of proof is upon the employer to show just cause for the termination of grievant based upon competent evidence and a preponderance thereof.

Inasmuch as this was not a disciplinary matter, but an alleged physical inability to perform the duties of the job without hazard to herself or others I deem it critical and essential that the medical evidence upon which the decision was reached to establish such allegation. There is, in this content, the problem of the lack of information in specificity within the steps of grievance procedure.

I am aware that this action occurred shortly after implementation of the grievance procedure at the Wichita facility. The parties have had but a brief period to readjust their concept of grievance adjustment and of contractual obligations and responsibilities.

Article XVII, Section 3, reads:

"SECTION 3. STEWARD'S DUTIES. A steward shall be permitted, subject to business conditions, upon request to his immediate supervisor, to leave his work to investigate and adjust grievances. In the event his duties require that he leave his area of employment and enter other areas within the installation or post office, the steward shall request and, subject to business conditions, be granted authorization from the supervisor in such other area the steward wishes to enter.

The steward or chief steward may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance, and shall have the right to, subject to business conditions, interview the aggrieved employee, supervisors, and witnesses during working hours. While serving as a steward or chief steward an employee may not be involuntarily transferred to another shift or to another facility unless there is no job for which he is qualified on his shift or in his facility."

It is clear that the above section provides the steward or chief steward with the contractual right to access to review all documents, files and other records necessary to process a grievance. This contractual right is not limited to a unilateral determination that a record or report is confidential or privileged. Inasmuch as Article I provides that representation of all employees in the bargaining unit is vested in the exclusive bargaining agent, it seems patent that the alleged privilege is non-existent because of the contractual status set forth in Article I.

In this case, especially, the basis for the termination was made by the postmaster upon medical information furnished to him by the examining physician. The only privilege, would be that between the employee and her private physician. Clearly

the denial of all pertinent medical information to the Union representative was improper and was a violation of Article XV and XVII. Once the grievant requested Union representation and the grievance was filed the Union is subrogated to all of her rights as well as those contractually set forth in the National Agreement. Denial of the records upon which decision was made is a patent violation of Article XVII, Section 3.

The real question, of course, is whether such denial did, in fact, result in the inability of the Union to properly prepare its grievance and properly process it. It appears to me that the lack of this essential information did result in the Union being unable to properly process this grievance. This grievance actually calls for medical evaluation and lacking the findings of the examiner, it is basic that the Union was unable to properly evaluate or seek competent medical advice in processing the grievance.

Such violation did, in fact, negate any meaningful process of the grievance within the contractual steps provided in Article XV. Reference to Exhibit 13C clearly demonstrates this inability to evaluate and properly seek professional advice.

I also note that Dr. Hamilton did not diagnose the grievant's condition other than as a loss of consciousness. He was quite candid in his testimony that he is not a neurologist and his opinion of hazard is honestly based upon his conclusion that future, undetermined lapses of consciousness may well subject grievant to injury or injury to fellow employees.

There is, in toto, no diagnosis by a neurologist that grievant is epileptic. There is no diagnosis that her hypoglycemia was the causal factor. There is, in fact, no medical evidence by diagnosis and prognosis that grievant has any disease which disables her. She clearly has had a series of unconsciousness with no diagnosis of cause. Her work, when not ill, has been satisfactory. Where then is the "just cause?"

There is a contractual obligation for the employer to show just cause for discharging any employee. In this case the only competent evidence shows that an employee lost consciousness on more than one occasion. What is the diagnosis?-- there is none. Should grievant be terminated solely because she has lost consciousness? I do not consider that such is just cause. There must be some evidence that she will be unable to perform her job and we simply do not have such evidence. Absent a diagnosis, and we have none, there is only an opinion that in the future that such recurrence may subject her to hazard to herself and others.

I am confident that if grievant is suffering from some physical condition that is cause for the lapses of consciousness that proper medical evaluation and diagnosis may determine the same.

Under the evidence herein she was considered physically able to return to work on February 23, 1972. Since the medical information upon which her discharge was predicated was denied

the Union and such was in violation of the National Agreement I find that the procedural violation alone is sufficient to sustain the grievance. There is, however, the additional factor that no just cause has been shown, thus procedurally and on the merits this grievance must be sustained.

James J. Dillingham, Arbitrator

December 11, 1972