VOLUNTARY LABOR ARBITRATION C#01191

A, B

IN THE MATTER OF ARBITRATION BETWEEN:	
UNITED STATES POSTAL SERVICE, ROYAL OAK POST OFFICE, ROYAL OAK, MICHIGAN 48068	GRIEVANCE OF:
AND	RICHARD GERARD (Removal - Allegations of verbal assault and threats on supervisor - protected activity of steward)
NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH NO. 3126, ROYAL OAK, MICHIGAN 48068	
Case Nos. CIN-4B-D 3937 CIN-4B-D 3938 CIN-4B-D 4857 CIN-4B-D 4867 CIN-4B-D 4858	OPINION AND AWARD

APPEARANCES:

FOR THE EMPLOYER

Howard E. Byrne, Director, Employee & Labor Relations
Thomas C. Hopper, Labor Relations Representative, Royal Oak
Beverly A. Jordan, Superintendent, Delivery & Collection
Edsel A. Saunders, Postal Inspector, Detroit Division
Brian Thorpe, Superintendent, ASIS, Royal Oak
Stanley G. West, Manager, Delivery & Collection

FOR THE UNION

Ronald Brown, Regional Administrative Assistant
Donald Roll, President, Branch 3126
Norman Brenberger, Vice President, Branch 3126
Richard Gerard, Grievant

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I. INTRODUCTION

The hearing in this case was held on Wednesday, May 5, 1982, at the Royal Oak, Michigan Post Office, 200 Second Street, Royal Oak, Michigan 48068, before the undersigned arbitrator assigned by the parties pursuant to the Rules of the United States Postal Service Regular Regional Level Arbitration Procedures. At the hearing, both parties were afforded full opportunity to present such evidence and arguments as desired, including an examination and cross-examination of all witnesses. Both parties stipulated at the hearing as to this arbitrator's jurisdiction and authority to issue a final and binding decision in this matter. No formal transcript of the hearing was made and each of the parties filed a post-hearing brief. Upon receipt of the second brief on June 14, 1982, the hearing was officially closed.

II. STATEMENT OF ISSUE

The stipulated issues involved herein are as follows:

> "Whether the emergency suspensions dated January 8, 1982 and February 5, 1982 were issued for just cause pursuant to Article 16 of the 1981 National Agreement? And whether the notice of removal dated February 5, 1982, effective March 9, 1982, was issued for just cause pursuant to Article 16 of the 1981 National Agreement?"

III. PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

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

* * *

Section 7. Emergency Procedure

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

* * *

ARTICLE 17

REPRESENTATION

Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

Section 2. Appointment of Stewards

A. Each Union signatory to this Agreement will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of each Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula hereinafter set forth.

Employees in the same craft per tour or station	
Up to 49	1 steward
50 to 99	2 stewards
100 to 199	3 stewards
200 to 499	5 stewards
500 or more	5 stewards plus additional steward for each 100 employees

B. At an installation, a Union may designate in writing to the Employer one Union officer actively employed at that installation to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance. The activities of such Union officer shall be in lieu of a steward designated under the formula in Section 2A and shall be in accordance with Section 3. Payment, when applicable, shall be in accordance with Section 4.

* * *

Section 3. Rights of Stewards

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.

In the event the duties require the steward leave the work area and enter another area within the installation or post office, the steward must also receive permission from the supervisor from the other area he/she wishes to enter and such request shall not be unreasonably denied.

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance, or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

While serving as a steward or chief steward, an employee may not be involuntarily transferred to another tour, to another station or branch of the particular post office or to another independent post office or installation unless there is no job for which the employee is qualified on such tour, or in such station or branch, or post office.

If an employee requests a steward or Union representative to be present during the court of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.

IV. FACTUAL BACKGROUND

According to Management, Grievant Richard Gerard was, at the time of the incident from which this grievance arose, a full-time Letter Carrier at the Royal Oak, Michigan Post Office. During the relevant time period, Grievant was also Steward for Unit III at the Royal Oak facility (see Employee Exhibits 7 and 8). Beverly A. Jordan was Supervisor, Delivery and Collections, supervising Unit II at the Royal Oak Station and was, therefore, not Grievant's immediate supervisor at the relevant time involved here.

On February 5, 1982, Grievant Gerard was issued a Notice of Removal, effective March 9, 1982. Prior to this, Grievant had been issued an emergency suspension, effective January 8, 1982. Simultaneous with the Notice of Removal, Grievant was issued a second Notice of Emergency Suspension for the period from February 5, 1982 until March 9, 1982, when Grievant was removed from the Service. The reasons for the removal, as stated on the Notice of Removal (Joint Exhibit 4) are as follows:

> On January 7, 1982 at approximately 2:00 P.M., you threatened Supervisor, Beverly Jordan, stating "We are going to burn your ass, we're gonna get you." Immediately following this statement, Supervisor Jordan informed Manager, Delivery and Collection, Stanley West, of what had taken place. Mr. West then went out to the lunch room area and informed you that because of the threat to Supervisor Jordan you must leave the building. Mr. West then escorted you from the building.
>
> After you were escorted through one door, you went back into the building through another door and went back to Injury Compensation Supervisor, Joseph Michniacki. When Mr. West was informed that you were back in the building, he again went to escort you out of the building and he informed you that he previously told you not to be in the building without prior approval. You stated to Mr. West, "You only have so much power." Mr. West again escorted you from the building.
>
> The following elements of your past record were considered in the issuance of this Removal Notice:

Date and Type of Discipline	Charge
November 25, 1980 3 Day Suspension (Reduced from 7 days)	Insubordination - Using foul and abusive language toward your Supervisor.
March 6, 1981 Letter of Warning	Irregular Attendance

Date and Type of Discipline	Charge
April 8, 1981 2 Day Suspension (Reduced from 10 days)	Irregular Attendance
August 11, 1981 Letter of Warning	Failure to Deliver Mail
August 21, 1981 Letter of Warning	Failure to Work Safely
September 17, 1981 7 Day Suspension	Misdelivery of Mail
November 13, 1981 14 Day Suspension	Failure to follow instructions and violating safety procedures.

Management's version of the facts was presented primarily by Supervisor Jordan; although Union President Roll was called as an adverse witness and several additional manager witnesses were presented to testify concerning the status of Steward Gerard on the day in question; whether he was designated to serve as a Steward; and his alleged actions immediately after the precipitating incident involved here.

Perhaps the most succinct way to describe Management's version of the precipitating incident and thus to encapsulate their theory supporting removal is to directly quote from Supervisor Jordan's written statement made on January 7, a short time after the incident itself (Union Exhibit 1). Supervisor Jordan wrote as follows:

> On January 7, 1982, Thursday, Rick Gerard and Mike Carrier came to me. Mike said I am ready for the meeting we set up for today. I told him the time had been changed to 3:00 P.M. Rick said I am going to sit in on the meeting as his advisor. I said talk to S. West, we have already arranged for his Union Steward or the Steward in his unit John Sachs to sit in for this meeting. He and Mike walked into the office. Later I went into the office to see Ben Long, Ben was talking to Rick and Mike, he then came over to me and asked what was going on? I said Rick wants to sit in on the meeting as an advisor to Mike, but we already arranged for M. Sachs to be his advisor. I then walked to my desk. Rick and Mike came over. Rick said I have a couple of questions to ask you. I asked him was he on the clock and he said no. I then said what kind of questions do you have to ask me, what is it about. He said this matter and others. I then told him I would answer the questions in the meeting. I then asked him to leave the workroom floor if he was not on the clock. He then turned and said "We are going to burn your ass, we're gonna get you." I said that is a threat.

All other Management witnesses (including adverse witness and Union President Roll) corroborated Supervisor Jordan's assertions as to the basic facts involved herein. First, President Roll in fact did agree that Steward Gerard was not designated or certified as the Steward for Unit II, the Unit in which part-time flexible Carrier Michael Carrier had worked during his probation period and the Unit supervised by Jordan. Moreover, the Management witnesses testified that a scheduled meeting with "higher level authority" West had been delayed until 3:00 P.M. and that John Sachs, Union Steward for Unit II, was indeed coming in off his route to be in attendance at that meeting. The testimony of the Management witnesses also revealed that the Grievant, after the alleged threat quoted several times above, was reluctantly escorted out of the building, but did attempt to return to the

building through another entrance, supposedly to see another Management person about an injury compensation matter.

According to the Grievant's testimony, Grievant did not make any threatening statements to anybody on January 7, 1982. The Grievant testified that he gained entry to the installation that day, in his capacity as Union Steward. He was not on the Employer's time, since he was off work for a physical injury. Moreover, the Grievant testified that he came to the premises on the day in question to represent Michael Carrier, a probationary employee who was about to be terminated. Management had agreed to a meeting concerning this individual, even though the Contract did not provide representation of employees on probationary status. Moreover, the involved individual, one Michael Carrier, had requested Union representation, and had specifically telephoned Grievant asking for Grievant to act as Carrier's advisor. Moreover, according to the testimony of Grievant, Carrier had told Management of his desire to have Gerard represent him.

According to the Grievant, as he was attempting to fulfill his obligations and duties as Union Steward, he was told by Supervisor Jordan that the scheduled meeting was delayed; Gerard was not going to be allowed to represent Carrier; John Sachs, another Steward (and the designated Steward for Unit II) was going to represent Carrier; and that Sachs was returning from his route to fulfill this duty. Thus, these basic facts are disputed.

According to Grievant Gerard, he at this point told Jordan that his purpose for being at the meeting was not to file a grievance on the termination of a probationary employee, but to "investigate" whether other possibilities for filing other pertinent grievances were available under these facts (since Steward Gerard apparently believed that an insufficient number of work days on a route were involved to allow Jordan to analyze properly Carrier's work abilities or to allow her to terminate this individual). Jordan allegedly checked with her Supervisor (Ben Long) at this time about the precise arrangements that were in fact made, and, after this reconfirmation, told Carrier and Grievant Gerard that Sachs would handle the matter and that Gerard should leave the area.

Grievant testified that immediately subsequent to his departing from the workfloor, accompanied by probationary employee Carrier, the Grievant returned to the workfloor by himself and talked to Jordan. Grievant's version of this crucial conversation (which both sides concede was out-of-ear shot of any other person) is sharply different in both tone and content from that presented by Supervisor Jordan. The Grievant testified that Supervisor Jordan attempted to intimidate the Grievant when he asked her questions concerning probationary employee Carrier's status and work days. Jordan asked Gerard whether he was "on the clock --" and stated she did not have to discuss these matters until the meeting. When Gerard responded that he was not on the

clock, Jordan, according to the Grievant, ordered Carrier off the workfloor by telling him "Get the hell out of my Unit, I don't want to talk to you and I don't have to."

According to Grievant Gerard, he then responded "Don't mess with me -- don't mess with a Union Steward." Grievant further testified that he then told Jordan "You could get your ass burned by messing with a Union Steward." (As noted by Management, and as revealed on Employer Exhibit 11, Grievant did in fact maintain throughout the grievance procedure, until at least February 25, 1982, that he made no statements that could have been interpreted as Jordan reported them and that at most he stated only "You are not going to get away with it.")

The Grievant testified that he neither intended to threaten anyone, including Jordan, nor did he intend to take any physical action against Jordan by the above statements or anything said in the disputed conversation. The Grievant acknowledged that he was very upset on the afternoon of January 7, 1982, after being informed by Supervisor Jordan that he could not function as Steward. Moreover, Grievant admitted that he perceived Jordan's actions as overbearing and unreasonable; that he was upset because of prior unreasonable actions by Jordan; that he perceived Jordan to be prejudiced against him based on sex and race, and that he thought that Management was interfering with his protected Union activity. Moreover, as revealed by

several of the extensive documents presented as Joint or Union Exhibits (e.g. Joint Exhibits 6-9), Grievant perceived that his conversation with Jordan was engaged in while Grievant was acting as Union Steward and that when Grievant warned Jordan about her course of conduct, he was speaking on behalf of the Union, telling Jordan that her actions in standing in the way of his functioning as a Steward were actionable pursuant to the grievance process and possibly the National Labor Relations Act.

The Grievant indicated that he intended absolutely no physical harm by any statements made and that he did not intend to personally or physically threaten the supervisor. Instead, to Gerard, he was merely discussing (albeit in perhaps a heated and forceful manner) the possible consequences to supervision of its erroneous course of conduct. Grievant also stated that, later, when approached by various members of Management and forcefully ejected for a supposed "threat", the Grievant could not comprehend nor understand what was occurring.

The Management witnesses who testified at this hearing indicated that the Grievant had had prior incidents where he had used foul and abusive language toward his supervisors, and had been insurbordinate to supervisors at prior times also. Postal Inspector Edsel Saunders, who testified on behalf of the Service concerning his partial investigation in this matter and a prior incident with a female supervisor (never memorialized in any way nor the basis of any discipline), asserted that he had discussed with the Grievant an alleged threat three or four months prior

to this incident, wherein Grievant supposedly threatened another female supervisor. Saunders states that he had heard, second hand, about this threat and merely told the Grievant at the time that he should be careful not to engage in such conduct.

V. CONTENTIONS OF THE PARTIES

A. The Employer

The central thrust and fundamental, "rock bottom," position of the Service is that employees who make threats of physical violence against supervision (and, especially, put supervisors in genuine fear for their personal safety and bodily integrity) breach the reasonably acceptable standards of employee conduct, as contemplated by the parties, and are thus subject to immediate termination. To Management, Article 16, Section 7 of the National Agreement provides specific, clear language involving the issuance of an emergency suspension where an employee may be injurious to him or her self or others. This certainly shows both parties to the National Contract contemplated, and knew of the seriousness of infractions like that before me and recognized the grave nature of such an offense.

Therefore, the emergency suspensions were squarely within the intent of the parties and in no way violated this labor contract! In addition, Postal Inspector Saunders testified that he had warned Grievant about such threats and the consequences

of threatening supervisors. Moreover, Grievant had been disciplined in November, 1980 for insubordination and using foul and abusive language toward a supervisor. Therefore, there is no issue as to an isolated, idiosyncratic outbursts being involved here, wherein emergency suspensions would be uncalled for.

Thus, credible evidence clearly establishes that the Grievant had a propensity to engage in behaviors almost precisely identical to those on which he stands accused by Supervisor Jordan. Considering these threats in the context of the Grievant's prior disciplinary record and his behavior as a whole, the Service clearly established the presence of just cause to support the degree of discipline which was administered in this case.

The Employer emphasized that there is no question that Supervisor Jordan felt threatened and was clearly afraid she would be harmed by Grievant, based on his threats. Jordan testified that she called her husband because of her anxiety and he offered to pick her up at the Post Office. She testified, in addition, that because of the close proximity of her car to the Post Office (less than 50 feet away) and the fact that another employee was on the back dock to see her to her car, she felt comfortable enough to turn down her husband's offer. She also testified that her daughter, at home, was instructed to watch

for her and notify the police if she did not come home on time. Based on all the above, it is quite clear that Supervisor Jordan was put into fear and apprehension of her physical well-being and that such discomfort and intimidation used against supervision cannot be tolerated by the Service.

Last, Management contends that Article 16, Section 7, does not preclude back-to-back emergency suspensions, when the Employer reasonably attempts to make the careful investigation necessary under these circumstances. The need to protect supervision, and particularly Supervisor Jordan, from fear and intimidation was sensibly balanced with the mandate to conduct a thorough investigation in this removal matter. Therefore, two emergency suspensions were justified under these circumstances.

Thus, all allegations of impropriety, both substantive and procedural, with reference to the emergency suspensions (see Joint Exhibits 2-8) should be rejected by this Arbitrator.

The second major point emphasized by the Service is that the Union is completely in error in its emphasis on the Union Steward immunity defense under these facts. First, Management stressed that Grievant Gerard did not in fact enjoy Union Steward status during any of the times relevant to this matter. Management noted that Michael Carrier was a probationary employee who worked for Supervisor Jordan in Unit II. Management emphasized that

testimony of Union President Roll showed that one John Sachs had been certified to handle grievances in Unit II and was in fact being brought in to handle the Carrier matter on the day in question. Thus, pursuant to Article 17, Section 2, quoted above, Gerard was not the Steward designated to represent the probationary employee and had no standing to be on the premises in that capacity. In addition, the probationary employee was not entitled to Union representation in the first place; and therefore Gerard could not claim to be acting on behalf of the Union when representing this employee. In addition, the credible testimony of Management witness West and the lack of testimony from Michael Carrier, the involved probationary employee, shows that Grievant's testimony that Carrier had specifically requested Gerard to act as his Steward was false and in error.

Thus, from the extensive evidence presented, it is clear that Grievant Gerard was totally wrong in his posture that he had a right to act as a Steward on behalf of Michael Carrier; that he was in fact acting as a Steward at the time in question; and that Supervisor Jordan was engaging in wrongful conduct when she denied Gerard the opportunity to be present on January 7, 1982. Simply put, the Union was totally wrong in its interpretation of Article 17 at the time and continues so to be.

Based on these facts and the clear language of Article 17 of the Contract, Gerard was in no way acting as a Steward on the day in question, and therefore could not assert any potential Steward's immunity in this matter.

To buttress its posture, Management quoted extensively from Arbitrator Marvin J. Feldman's award in the Carole Martin case (USPS and APWU, August 5, 1977). As the Service reads this award, Feldman held that Stewards are given the privilege of investigating, presenting and adjusting grievances with the Employer for and on behalf of members of the bargaining unit. This adjusting of claims does not necessarily give rise and create a trigger to any quality of Management in the Steward equal to that of the Employer. This is verified by the fact that Stewards, under the Contract, need to first obtain permission from the Employer to do any Union work involving adjudicating claims. Thus, to Management, the Steward status is non-supervisory and not coequal with Management; Stewards must follow reasonable instructions and orders of Management, just as all other employees are so obligated; and deviation from this pattern (as in the Carole Martin matter) permits the imposition of discipline and even removal, under the appropriate facts. Relying primarily on Arbitrator Feldman's award, its perception of the plain meaning and limited grant of authority under Article 17 of the Contract, and general arbitral authority, Management strenuously asserts that there is no immunity--strict

or otherwise--under these circumstances for Union Stewards and, particularly, Grievant Gerard.

Last, the Service presented considerable arbitral authority that threats and profane and abusive language surrounding such threats (especially when the supervisor is put in genuine fear for physical integrity) constitute behaviors which support removal. These awards show a consistent concern for the authority of supervision and an obligation to look carefully at the context which the threat was uttered, as well as a grievant's attitude, prior work record, and demeanor. Based on these standards, and in light of the clear weight of credible evidence which proves that Supervisor Jordan was clearly accurate in her recitation of the precipitating event, as well as Grievant's prior record, there is no question there was just cause for discharge, Management argued. Therefore, the Service maintains that this grievance should be overruled in its entirety.

B. The Union

The Union emphasized four major points to support its theory in this matter.

First, the Union contended that the investigation by Management was slipshod, incomplete and reveals prejudice against the Grievant and the Union and also an insincere desire to get to the real facts in the matter. As one example to support this posture, the Union notes that Postal Inspector Saunders quit his

investigation after contacting Supervisor Jordan and talking to her. He did not even make a written statement from any participant. In addition, he came to investigate the matter some two weeks after the incident, and after the offenses were reported to the Postal Inspection Service. This lack of serious investigation by the Postal Inspector reflects both the anti-Union attitude of Management and also the fact that the incident was not really serious in nature. It did not really relate to criminal activity, either actual or potential, so as to justify any emergency suspensions whatsoever, let alone two back-to-back suspensions, the Union contended. Moreover, the Union stressed that Manager Brian Thorp, who conducted the in-house investigation, did not attempt to look for potential witnesses to the incident, other than Grievant and Jordan. Basically to the Union, Thorp merely copied out Jordan's initial statement, made on January 7, 1982, verbatim in his "investigation" (which concededly occurred at least one and perhaps two weeks later) (Employer Exhibit 9). These facts strongly contradict the assertions of fairness and care which Management has made in this case; clearly undercut Management's excuse (a thorough investigation) for the two emergency suspensions; and do show that bias against both the Union and Grievant was the real motivator here.

The second major point stressed by the Union was that Grievant was acting as a Union Steward at all times relevant

herein. The Union noted that such actions afford immunity to individuals engaging in Union work, both under the National Agreement and under the National Labor Relations Act. To support this point, the Union cites Arbitrator Thomas F. Levak in the C. Fischer award (U.S.P.S. and APWU, February 26, 1982). In this award, Arbitrator Levak extensively analyzes relevant arbitration precedents concerning the scope of special immunity status accorded Union Stewards and the limits set on this protection.

To the Union, Grievant Gerard was clearly attempting to fulfill his obligation as a Union Representative when he came on to the Postal Office property on January 7, 1982. He informed Supervisor Jordan of this fact and was told, in turn, that he was not going to be allowed to represent Michael Carrier. After an exchange of words in front of Carrier, the Union contended, Carrier and the Grievant left the Unit floor. The Grievant, clearly speaking on behalf of the Union, returned and engaged Jordan in a private, one-on-one conversation. This is precisely the context in which, according to Levak and the precedent cases he relies on, the strongest Steward immunity and protection exists. In this context, Grievant, speaking on behalf of the Union, informed Jordan that she "could get her ass burned by messing with a Union Steward." According to arbitration authority, this is completely protected activity; was not personally

threatening or abusive, and was not meant to be; and was not disruptive of production or done in front of other employees so as to belittle or harm Management. Thus, the complete immunity doctrine applies.

Third, the Union stressed that Supervisor Jordan was herself personally abusive and overbearing with employees, and the individuals who worked in her Unit were being demoralized and intimidated by her. The Union asserted that Jordan was prejudiced, based on race and sex, and that this fact, along with her overbearing and insecure manner - and apparent hypersensitivity to being called on an obvious error in judgment - really caused and precipitated the incident before me.

Last, the Union emphasized that the credible testimony supports that of Grievant that no threat whatsoever was intended or actually uttered. The Union noted that Grievant had maintained this posture thoroughout, and that Management's assertions that Grievant recently fabricated his "warning" to Jordan (that she could get in trouble for "messing with the Union Steward") are completely false. The Union noted that Grievant asserted the precise warning to Supervisor Jordan concerning her overreaching actions against the Union on February 25, 1982, when the statement first became relevant in the grievance procedure (see Joint Exhibit 9). To the Union, the prior grievances and facts contained therein (Joint Exhibits 2-8) dealt with emergency suspensions and procedural technical

problems, and not with the merits or the affirmative offense available to Grievant Gerard. Therefore the Union stressed that no credence should be given to Management's assertions that Grievant recently fabricated and inconsistently reported his conversation on January 7, 1982 as to the nature of his representative warning - made on behalf of the Union - that Supervisor Jordan was overreaching herself and should be careful not to continue in this path, or she would be embarrassed or declared in error.

Accordingly, the Union contended that this grievance should be sustained in its entirety since no basis whatsoever exists for any discipline at all, let alone the removal sanctions.

VI. DISCUSSION AND OPINION

After careful consideration of this matter, including all the testimony presented, the precedent awards cited to me by the parties, and the arbitration cases presented and analyzed in the above-cited opinion and award of Arbitrator Levak, I find that the Employer did not have just cause to remove Grievant Gerard, based on the facts as adduced on this record.

As I have noted in at least one matter between the parties involved herein (Theodore Smith, Jr., U.S.P.S. and NALC, Branch 343, September 10, 1981) the act of physically attacking one's

supervisor is one of the gravest offenses which an employee can commit and justifies immediate termination. If this is true, certainly threats of physical violence by employees directed toward other employees, and especially supervisory personnel, are almost equally serious breaches of acceptable employee conduct. If established through credible evidence, these threats will also support removal (and, during the time of investigation, emergency suspensions to protect the affected employees and supervision). As noted by Arbitrator Feldman, and supported in Arbitrator Levak's extremely thorough and comprehensive analysis, threats of harm or assaults or attempted assaults never fall within the special immunity status given a Union Steward when appropriately acting in his or her representative capacity. Thus, as Arbitrator Levak notes, such threats, "whether or not accompanied by profanity, a heightened temper or a raised voice" are not protected under arbitration case precedent, the National Labor Relations Act or under the specific mandates of the National Agreement between these parties. As Levak wrote, "a shop steward who threatens a supervisor, who offers to fight, or who engages in an assault or an attempted assault, loses all privileged status, and is subject to immediate discipline."

When this clear rule is kept in mind, the apparent inconsistencies and differing results in the opinion and awards

of other arbitrators cited to me as precedent are more apparent than real. The principles used to form the basis for analysis in all cases presented were virtually identical and adhered to by each and every arbitrator. Only perceptions as to the actual facts and differing credibility resolutions changed the emphasis and the ultimate result in each case. Simply put, threats to supervisors are indeed subject to the strongest discipline appropriate under the facts. Threats to personal bodily integrity, gross insubordination, and repeated disobeying of direct orders by management (see Arbitrator Feldman's award in the Carole Martin case, quoted above) may indeed result in removal and still be squarely within the contractual requirements of just cause under the precepts of Article 16 of the National Agreement.

In the instant case, the threshold question for determination is: Did the Grievant's words and/or acts constitute "threats" or "threatening conduct", no matter which story is to be believed?

With reference to credibility, I note that there really is very little substantial difference in the two versions of the story actually presented, except for Jordan's categorical statement that Grievant told her, "we're going to burn your ass, we're going to get you", and Grievant insists (belatedly, as viewed by the Grievant's documentation), that he informed

Jordan that "she could get her ass burnt by messing with a Union Steward". Very frankly, as perhaps indicated at hearing, after due and careful consideration, I agree with the Union that there is just very little substantial difference between the two phrases, taken in actual context of this particular dispute.

First, as the Union has contended throughout the processing of this grievance, even if one is to accept Jordan's version in toto, how is the use of the plural form of the personal pronoun ("we" and "we're") to be explained? No evidence was presented at the hearing that Grievant Gerard is of royal lineage or has a speech peculiarity wherein he refers to himself by the term "we". In the context, the obvious reference to the plural form is to the Union, for which Gerard (apparently mistakenly) assumed he was acting. Management's explanation that perhaps the plural form was used because Gerard had friends or gangster associates who would "get Jordan" outside of work, has no basis or evidentiary support on the record as developed. There is just no substantiation whatsoever for this really quite strained interpretation of the plural form. Moreover, such phrases in the real life interaction between first-line management and union stewards as is illustrated here, are extremely commonplace in my experience. Such "warnings" do not usually refer to physical threats or intimidation, but

to the use of the grievance procedure or similar available remedies, with the threatened result of making the other side look foolish or wrong in their initial posturing.[1]

Looking at the literal meaning of the phrase upon which this Agreement centers, if Jordan's version is credited, the so-called direct and specific threats of physical harm would be that Grievant had asserted that some group, including himself, was "going to burn your ass." As the Union stated, Jordan's assertion that she was literally in fear of a burning to some portion of her anatomy just does not ring true or at least is certainly unreasonable under these facts.

A common sense interpretation of the disputed phrase, whichever version is credited, is that Gerard was displaying a heightened temper, probably raised his voice, and certainly

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[1]This should in no way be perceived as condoning such exchanges. Like Arbitrator Feldman, I believe that minimum civility and the lack of personal abuse should as much as possible be the norm in the relations between Management and labor in the industrial setting. However, the fact of life is that tempers do flare and people do say somewhat personally abusive, acerbic things in "lightened temper" or anger under similar circumstances, is a commonplace observation, but one essential in determining whether the words actually spoken here--no matter which version is credited--can reasonably be interpreted as an actual threat of physical harm to a supervisor or merely a somewhat imprudent, "smart-aleck" remark of a somewhat personally abusive, mildly profane nature.

used profanity in an effort to warn supervision that the Union would take some action (perhaps a grievance or an NLRB charge?) against what the Steward perceived as overbearing behavior on Jordan's part. No reasonable supervisor should have interpreted these critical words any differently; therefore, the fear and the stress of Supervisor Jordan, even if genuine and truly felt, is irrelevant in a determination of the applicability of the special immunity status in Stewards in the situation before me.

Based on the above, I conclude that Grievant did not "threaten bodily harm" to Supervisor Jordan as I understand the meaning of that phrase. There is, in addition, absolutely no evidence of disruption of production, another one of the elements which destroy immunity, according to arbitration precedent.

If Grievant was in fact acting as a Steward on January 7, 1982, his personal abusiveness to Jordan falls precisely into the zone for which the special immunity status was created; a closed grievance meeting or closed discussion to discuss Union matters. It is in this context, and this context alone, that the parties meet as equals. The Steward is entitled to the same deference and latitude as his or her supervisor. It is in this situation, away from an audience of other employees, where a Steward may display a loss of temper or use profanity and still be protected from discipline. If Grievant Gerard was,

under the circumstances, appropriately acting as a Steward, special immunity status does in fact apply and the Grievant is fully protected from any discipline whatsoever. (The Arbitrator, obviously, does not commend or recommend such displays by either management or the Union. He merely notes the existence of a protection for the representative process which extends to valid, vigorous advocacy of both union and management points of view in the narrow confines of private meetings or one-on-one conversations where Union business is being discussed.)

The case then comes down to whether the protection of a Steward's status applies only when a Steward is correct in his or her assessment of the appropriateness of acting as a Union representative, or whether the protection also applies when the Steward perceives he is acting in a representative capacity, but is wrong in his assessment, based on applicable contract language (here, Article 17). It is rather obvious from the facts presented that Grievant Gerard was indeed wrong in his belief that he in fact had a right to demand to represent Michael Carrier on the day in question. Employer Exhibits 7 and 8, the Certification of Stewards, and the testimony of Union President Roll clearly reveal that Grievant was not actually designated as a Steward. Moreover, the Union's evidence concerning the personal request by part-time flexible

Carrier, Michael Carrier, for Grievant "specifically" is completely unpersuasive, as actually presented at hearing. Carrier's not testifying at all, and Supervisor West's direct refutation of Grievant's assertions as to this point, make this rather obvious. In addition, Grievant certainly exercised poor judgment in his use of language to Beverly Jordan, a member of supervision, on the date in question.

In light of all the above, the Arbitrator finds as follows:

(a) That the Grievant neither engaged in any threatening gestures nor made any physical contacts with Supervisor Beverly Jordan on the day in question;

(b) That the Grievant was operating in a highly emotional state as the result of Jordan's proper refusal to allow him to act as Union Steward on behalf of Michael Carrier;

(c) That there was no history of any physical violence in the Grievant's employment history, but that he had had "words" with Supervisors previously, including at least one instance of abusive profanity during Grievant's rather short work history;

(d) That the words used were most inappropriate, but were obviously intended, as indicated above, and when considered within the actual context of the incident,

to illustrate his frustrations; to act as a warning that a grievance or like action would be filed; and that Jordan might be embarrassed or overruled;

(e) That no reasonable supervisor could have perceived otherwise;

(f) That the Grievant genuinely believed that he was in fact acting in a representative capacity, on behalf of his Union;

(g) That the Grievant's subsequent conduct, particularly his attempt at re-entry into the building, apparently after his ejection, reflected and corroborated his lack of threatening intent; and

(h) That Jordan's response was over-sensitive and unreasonable under the facts presented.

Based on the above, the Arbitrator finds Grievant indeed was not acting in a representative or steward status and that, therefore, no complete immunity protects Grievant from the imposition of some discipline for his "warning" to Jordan. Had Grievant been appropriately designated, or had a specific request for Grievant been proved, complete immunity would in fact have existed for the above-described action.

Thus, just cause cannot be found in this evidence in this record to sustain a removal of Grievant. Grievant's genuine beliefs, emotional state and the absence of any proof of a real intent to do bodily harm or of an actual threat here preclude the termination penalty. However, based on the lack of genuine Steward's status at the relevant time, there is no complete immunity available from the unjustified, personally abusive nature of Grievant's words. Therefore, some degree of discipline is appropriate, given this evidentiary record, when considered as a whole. After all, one's thinking that he or she is acting in the Steward's status is insufficient to achieve Steward's immunity when the very disagreement which caused words to be exchanged is over that precise issue: the status and scope of a Steward's authority at that very time. As Arbitrator Feldman notes, to allow the cloak of immunity to completely cover Grievant's acts under these circumstances would vitiate and undercut the limited contractual grant of Article 17, and especially Section 3 thereof, which mandates that Stewards act in their representative capacities only after complying with carefully drafted procedures to make the switch to this status. The solution for Grievant here is the old but still compelling requirement: obey now, grieve later.

One last point needs mentioning here. Management asserted that since the Grievant was on sick leave or injury compensation at the time, no award of backpay will lie. This is of course not required under these circumstances, but Grievant will be ordered to supply satisfactory medical documentation that he was fit and able to work at the initial point in which backpay began to accrue. I so hold.

VII. AWARD

For the reasons stated above, attached hereto and made a part hereof as if fully rewritten:

1. This grievance is sustained in part.

2. The emergency suspensions and removal of City Carrier Richard Gerard are not for just cause as required by the applicable provisions of the National Agreement.

3. The remedy shall be as follows:

(a) The Grievant shall be immediately reinstated with benefits and backpay but for the period of time indicated in (b) below;

(b) The period of January 8, 1982 through January 15, 1982, shall be treated as a disciplinary suspension (without pay) for the reasons articulated in the above decision; and

(c) Medical documentation must be submitted by Grievant that he was fit for duty on or about January 15, 1982, and had completed recovery from the prior injury when backpay began to accrue. If such evidence is not forthcoming, backpay will begin to accrue at such point as Grievant can supply satisfactory medical documentation that he was fit to return to duty.

ELLIOTT H. GOLDSTEIN
Arbitrator

Chicago, Illinois
July 6, 1982