

C# 01536

RA-72-795 ✓

ARBITRATION
OPINION AND AWARD
GLENN R. EWING
BAKERSFIELD, CALIF.

In the Matter of Arbitration

between

Grievance G-2246-72

UNITED STATES POSTAL SERVICE

(Glenn R. Ewing)

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS

APPEARANCES: John H. Arbuckle, Esq., for the Employer;
Alfred K. May for the Union

DECISION

This grievance arose under and is governed by the terms of the 1971-73 National Working Agreement between the above-named parties. The undersigned having been designated as Arbitrator, a hearing was held on 25 February 1974, in Bakersfield, California. Both parties appeared and presented evidence and argument on the following issue (Tr.5):

Whether or not the Ridgecrest, California Post Office had just cause for discharging Glenn R. Ewing on August 23, 1972; and, if not, what is the appropriate remedy.

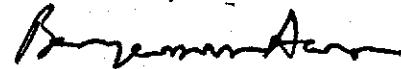
A verbatim transcript was made of the proceedings before the Arbitrator, and each party filed a posthearing brief.

On the basis of the entire record, the Arbitrator makes the following

AWARD

The Ridgecrest, California, Post Office did not have just cause for discharging Glenn R. Ewing on 23 August 1972.

Glenn R. Ewing shall be reinstated to his former position as a letter carrier at the Ridgecrest, California, post office, effective 24 August 1972, with unbroken seniority and back pay for all time lost, less any sums earned as wages in substantially similar employment between the date of his discharge, 23 August 1972, and the effective date of his reinstatement.



Benjamin Aaron
Arbitrator

Los Angeles, California
29 April 1974

In the Matter of Arbitration

between

Grievance G-2246-72

UNITED STATES POSTAL SERVICE

(Glenn R. Ewing)

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS

OPINION

I

Glenn R. Ewing, the grievant in this case, was initially employed as a letter carrier at the Ridgecrest, California, post office on 1 May 1971. He worked continuously in that capacity until his discharge on 23 August 1972. The last day Ewing reported for work was 29 June 1972. At that time he was assigned to the China Lake Station, a branch of the Ridgecrest post office located at the China Lake Naval Weapons Center. His supervisor at that time was Gilbert Barker, China Lake Branch Superintendent.

On 16 June 1972 Ewing was given a five-day suspension, based on his use of profane and abusive language to or in the presence of patrons, employees of other organizations, and other postal employees. (EE-3-6) He did not file a grievance over his suspension.

Ewing was scheduled to work on Monday, 3 July 1972, but failed to appear and did not personally call in to explain his absence or to request the day off. Ewing testified, however, that on Sunday, 2 July, his motorcycle had broken down while he was at Big Sur, and that he had telephoned Arthur P. Donaldson, the Union's Branch President, "to have him notify the post office." (Tr.200) Donaldson corroborated this testimony. He testified that Ewing had telephoned him about the breakdown and had told him that he "could not get hold of anybody in Ridgecrest in supervision"; and that Ewing had also asked him to "pass the word along the following day that he [Ewing] would not be able to work for that reason." Donaldson said that he had relayed this information by telephone to Barker 15 or 20 minutes before commencement of work on Monday, 3 July. (Tr.159-60)

Ewing and his wife went from Big Sur to Oakland to get his motorcycle repaired. On Tuesday, 4 July, Ewing and a number of others were arrested and charged with the gang rape of two teenage girls. Martin C. Fischer, who was at the time Officer in Charge of the Ridgecrest post office, testified that he had read the story of Ewing's arrest in a Bakersfield newspaper on 6 July.

The newspaper reported that bail for each of the accused had been set at \$100,000. Ewing's name was given, but the Postal Service was not mentioned.

On Wednesday, 5 July, at about 6:15 a.m., Mrs. Arlyne Roderick, Ewing's mother, telephoned Frank Seay, Superintendent of Mails at the Ridgecrest post office, and, according to Seay; told him that Ewing would not be in to work that day; "she didn't know whether he was sick or had a break-down...." (Tr.131) Barker testified that he had received a call from Ewing's wife at about 6:45 a.m. on the same day. According to Barker, Mrs. Ewing "said that Glenn was home sick and wouldn't be in." (Tr.134) Mrs. Ewing testified that she had given this false information on the advice of her attorney: "He told me that the best thing for me to do would be to report Glenn sick for the next two days because he felt the incident could be taken care of in two days and he thought he [Ewing] would lose his job unless Glenn did it that way." (Tr.177) Mrs. Ewing testified that she had called Seay, not Barker, but I conclude that she was mistaken in her recollection. In a letter to "Officer in Charge" dated 11 September (EE-2), Mrs. Ewing stated in part:

On July 5 I called Mr. Barker at the China Lake Post Office concerning my husbands absents [sic]. I told...[Gil] Barker, Glenn was sick and needed a few days off. I said this because Glenn had been arrested and I knew he was innocent.

On 11 July Fischer mailed a letter (JX-2A) to Ewing at his home address in Ridgecrest. The letter was headed, "Failure to Report for Work" and read as follows:

We were advised on July 5, 1972 by...your mother and...your spouse that you would not be able to come to work. Two different reasons were given as to why you could not be at work. We have not been notified since that date of your continued absence, and the reason for such absence. You are required to notify the Post Office on a day to day basis if you are unable to report as scheduled.

If you are still unable to appear for work by Friday, July 14, 1972, you are instructed to notify us no later than that date as to why you are unable to report for work.

This letter was received and signed for on 13 July by Mrs. Ewing.

Donaldson also received a copy of the letter. He went to see Fischer to inquire about Ewing's status, and testified that the following conversation took place (Tr.157):

I received a copy of this letter and I went in to ask Mr. Fischer what was going on and he told me that if Glenn did not get in contact with the Ridgecrest Post Office -- I don't recall his exact words, but the gist of it was he would be on his way to getting fired from his job.

And I attempted to file a grievance at that time and I was told I had no grievance because Mr. Ewing had not been removed from the service.

Fischer testified that on the morning of 13 July Mrs. Ewing came to see him in the Postmaster's office in Ridgecrest. He testified that she told him that Ewing was "being held in Oakland," but did not actually use the words "in jail." Fischer also said that he had advised Mrs. Ewing to tell her husband "to reply to our letter as to why he wasn't reporting to work." (Tr.44) Mrs. Ewing testified that she had never spoken to Fischer about her husband's absence, and that her conversations had been with Seay. Seay denied having any personal conversations with Mrs. Ewing during this period. I conclude that Mrs. Ewing was mistaken in her recollection, and that her conversation at the post office on 13 July was with Fischer.

Mrs. Ewing apparently either delivered Fischer's letter of 11 July to her husband in the Oakland city jail or communicated its substance to him, because Ewing sent Fischer a written reply dated 15 July (JX-2B) and postmarked 17 July (JX-2C), which Fischer received on 19 July. Ewing's letter read as follows:

Due to circumstances beyond my control, which I am sure you are fully aware of, I am requesting that I be granted a leave of absence without pay for an undetermined length of time.

The envelope bore the return address, "1225 Fallon St., Oakland, Calif.," which was in fact the address of the Oakland city jail, although nothing in the letter or on the envelope identified it as such.

Without acknowledging receipt of Ewing's letter of 15 July, Fischer sent him another letter dated 20 July, headed "Notice of Proposed Removal" (JX-2D), and mailed to Ewing's home address in Ridgecrest. The letter, which was received by Ewing's wife at his residence on 22 July, read in pertinent part:

You are hereby given 30 days advance written notice of proposed discharge from the Postal Service. The action against you will be effected not sooner than 30 days from the receipt of this letter and is considered to be for such cause as to promote the efficiency of the service.

The proposed adverse action is based on the following charges:

Charge No 1 - Absence without approved leave and failure to notify postal officials of your intended absence....

Charge No 2 - In our letter of 7/11/72 you were instructed to appear for work by 7/14/72 or notify us by that date as to why you are unable to report

for work. On this date 7/20/72 you have still failed to report for duty or notify us of your reason for such unapproved absence....

In addition the following elements from your past record will be considered in arriving at a decision on this letter of proposed adverse action, should the current charges be sustained. On 6/16/72 you were notified that you would be suspended without pay for five days for misconduct. You were suspended without pay on 6/20/72.

You have the right to reply to these charges within ten (10) days of receipt of this letter. You may reply orally, in writing or both. You may submit any documents or affidavits in your behalf....

Your reply will be carefully considered before a decision is made on the action taken in your case. You will receive a notice of the decision, in writing, which will inform you of the reason or reasons relied upon in making that decision.

In accordance with the Collective Bargaining Agreement we are exercising our option that you be on the job for the 30 day period. Your work schedule will remain as in the past.

Asked on direct examination why he had decided to discharge Ewing, Fischer replied (Tr.51):

First we were short of help and I needed him on the job. Our annual leave schedule was in effect and a freeze was in effect and we had no excess employees to replace him.

He gave no explanations as to his whereabouts and the reasons for his absence.

He had just come off of a five-day suspension about eight days previous to his not reporting to work on the 3rd.

And he was a short-term employee and his total time with us only amounted to about 1^{1/4} months and his attendance record wasn't too satisfactory.

On cross examination Fischer admitted that he had known Ewing was in jail on and after 6 July. Asked why he had not sent his letter of 20 July to the return address appearing on the envelope of Ewing's letter to him of 15 July, Fischer replied that Donaldson had told him on 19 July that the address "was an apartment house." (Tr.103) Fischer was asked several times why he had not responded specifically to Ewing's request for a leave of absence without pay. He testified that it had been the policy of the Ridgecrest post office to grant leaves of absence without pay only "a day at a time," although leaves of absence for longer periods may occasionally have been granted. (Tr.126-27) Asked why he had not written to Ewing saying, "...no, we can't grant you an indefinite leave of absence, but we will give you a leave of absence of X days," Fischer replied: "I didn't think of it that way." (Tr.127) Regarding his failure to respond directly to Ewing's letter of 15 July, the following colloquy took place between Fischer and the Arbitrator (Tr.128):

Q You also said you didn't respond to the letter because it was not a direct response to your original request that he advise you where he was and when he would be returning to work; is that correct?

A Yes

Q Well, outside of satisfying your desire to have him admit he was in jail, what purpose would that have served?

You have already stated you assumed he would not know exactly how long he would be in jail because he didn't know his trial date.

What information could he have supplied to you that you didn't already have?

A There wouldn't be any. I was just trying to get him to carry out his responsibility.

Q His responsibility meaning that he admit to you that he was in jail although you knew that already?

A Yes.

On 23 August Fischer initiated the required paper work to accomplish Ewing's discharge, effective that same date. This consisted in filling out a Form 2526 and sending it to the personnel services center in Sacramento, where the information was then transferred to a Form 50, Notification of Personnel Action (Removal), stamped with the signature of the Regional Postmaster General. (JX-2E) The Form 50 stated in part:

REMOVAL - AWOL - FAILED TO RETURN TO DUTY AND
FAILED TO REPLY TO OFFICIAL
CORRESPONDENCE

Thereafter, Fischer hired a permanent replacement for Ewing.

Ewing remained in jail until 31 August, when the charges against him and the other defendants were dismissed in the interest of justice on motion of the County District Attorney, who had meanwhile ascertained that the accusations of the prosecuting witnesses were false.

Ewing returned to his Ridgecrest residence on 2 September. He testified that it was only then that he saw Fischer's letter to him of 20 July. The record is not entirely clear on this point. In a subsequent grievance letter to Fischer dated 23 September (JX-2F) Ewing stated in part: "At no time did I receive any correspondence official or unofficial from the U.S. Post Office in Ridgecrest or any other Post Office or Postal Official." But Fischer testified that on the morning of 5 August Mrs. Ewing visited him at the Ridgecrest post office and asked "if we had received any replies to our letters." (Tr.54) From this the Postal Service infers "that she had delivered or forwarded to her husband both the July 11 and July 20th letters to him from Fischer." (Employer's Br., p.5)

Mrs. Ewing testified that she had received Fischer's letter of 20 July, but had not sent it or brought it to her husband in jail because she "was under the impression that they wouldn't have allowed [it]...." (Tr.182) She also testified that she did not open the letter because Ewing does not like her to open his mail. She stated further that she had been present at the Ridgecrest residence on 2 September when Ewing opened Fischer's letter of 20 July. Finally, Mrs. Ewing could not recall any conversations with Fischer about the letters.

As previously indicated, I conclude that Mrs. Ewing either gave her husband Fischer's letter of 11 July or told him what it said. I conclude further that although Mrs. Ewing's memory is faulty and not to be trusted, it is more likely than not that Ewing saw Fischer's letter of July 20 for the first time at his residence on 2 September, as both he and she testified.

On 5 September, the first business day after his return to Ridgecrest on 2 September, Ewing went to the Ridgecrest post office to see Fischer about returning to work. There were no witnesses to the conversation between the two men, which took place in Fischer's office. The versions of the incident given by Fischer

and Ewing were substantially different. Fischer testified that the conversation lasted "no more than about two or three minutes" (Tr. 60); that Ewing had asked for his job back and Fischer had told him that "he was terminated on August 23rd" (Tr.57); that Ewing had denied receiving either Fischer's letters of 11 and 20 July or the personnel action forms relating to his discharge; and that Ewing stated he had been advised by one Union official that "his job would be held in abeyance until his trial" (Tr.60), and by another that he should "report to work every day." (Tr.59)

Ewing testified about the conversation with Fischer as follows (Tr.204-05):

Mr. Fischer told me that he had recommended that I be terminated and that at the present time there had been no response to that recommendation and it was pretty much out of his hands.

And I told him that I would like to initiate the grievance procedure at that time. And Mr. Fischer informed me that since it was still as a recommendation from him, that I had no grievance to file until I received a Form 50 and was officially fired from the Postal Service.

Fischer testified that on 8 September Ewing, accompanied by Donaldson, visited Fischer at the Ridgecrest post office "to find out if they could possibly

get a decision from a higher authority on his reemployment, and we had reference to the [Mojave] Sectional Center facility postmaster [Layman Alsbury]. According to Fischer, he advised them that they might try to submit "a letter of explanation" to Alsbury, so that "he would know the whole case." (Tr.62)

Fischer testified further that on about 12 September Ewing returned with a letter addressed to "Officer-in-Charge, Ridgecrest Post Office," dated 11 September. (EE-1) In this letter Ewing gave his version of the events concerning his case that had taken place between 3 July and 2 September. He concluded as follows: "I realize that my past performance with the...Postal Service has been lacking, but I feel that if now given the chance to prove myself I can and will be an asset to the Service in Ridgecrest."

According to Fischer, Ewing handed him the letter, and he handed it back and advised Ewing to mail it to Alsbury.

During Ewing's absence, the letter carriers formerly assigned to China Lake were transferred from that location to the post office annex in Ridgecrest. The carrier supervisor at that location was Ken Kratz. Following

his conversation with Fischer on 5 September, and before he received the official notice of his removal on the afternoon of 18 September, Ewing reported to the annex in uniform several times to demonstrate his readiness to work. He testified that Kratz finally told him "that if I continued coming around the postal premises...he would call the police." (Tr.206)

On the morning of 19 September, the earliest opportunity after he had received his removal notice, Ewing went to the annex and told Kratz that he wished to "initiate the grievance procedure at step 1." (Tr.206) According to Ewing's uncontroverted testimony (Kratz did not testify), Kratz refused to let Ewing into his office and told him that he (Kratz) was not Ewing's immediate supervisor "because I didn't work for the post office.... He said there was nothing he could do about it." (Tr.207)

Shortly after his conversation with Kratz, Ewing, assisted by Donaldson, who by then had resigned as Branch President of the Union, wrote the grievance letter to Fischer dated 23 September, to which reference has previously been made. In this letter Ewing referred to the two charges in the removal notice (being AWOL and refusing to answer official correspondence) and stated:

"I feel that these charges are false in that I requested a leave of absense [sic] due to the fact I was incarcerated." He and Donaldson personally delivered the letter to Fischer, Ewing purporting to act not only as a grievant but also in his capacity of assistant shop steward. Fischer testified that he received the hand-delivered letter on 23 September after working hours, but that he had no discussion about it with Ewing and Donaldson.

In a letter to Ewing dated 28 September (JX-2G) Fischer denied the grievance presented to him on 23 September on the ground that it was "not in compliance with the National Agreement.... Nineteen days had elapsed between your appearance at the post office and the filing of the grievance."

On 29 September Ewing sent to the Director of Employee Relations of the Postal Service in San Francisco a letter (JX-2H) which he characterized as "a grievance at Step 2b of the Grievance Procedure outlined in Article XV of the National Working Agreement...." The letter, after giving Ewing's version of the preceding events, continued in part:

The National Agreement gives a time limit of five (5) days from the time 'the employee or Union has learned or may reasonably have been expected to have learned of its cause.' It is my contention at this time that I was well within the time limits

of the National Agreement. My POD form 50 was not received by me until Sept. 19, 1972. My grievance was submitted on Sept. 23, 1972.

As to the nature of my grievance, I feel that I was terminated from the U.S. Postal Service without just cause. I do not feel that I was AWOL in that I requested a leave of absence for the period of time that I was in jail. This was done in writing in my letter to M.C.Fischer on July 14, 1972. I also feel that I did not fail to answer official correspondence in that I never received [sic] any. Two Certified letters were mailed to me at my home address and were received [sic] by my wife. These letters were not forwarded to me and I had no knowledge of them until my return to Ridgecrest on Sept. 2, 1972. Mr. M.C.Fischer has stated to me that he made no attempt to contact me at any time while I was in jail in Oakland, Calif.

I further believe that my termination was brought about by the fact that I was active in the operation of the National Association of Letter Carriers (AFL-CIO) #4233...and the fact that I was serving in the office of Vice President of #4233 at the time of my removal.

In a letter to Alfred K. May, the Union's Western Regional Coordinator, dated 19 October (JX-2I), R.H. Stevens, Manager of the Labor Relations Branch of the Postal Service's Western Region, officially confirmed that at a grievance hearing on 13 October Ewing's grievance had been denied on the following basis:

1. The grievance was not processed through the Grievance Procedure according to the provisions of Article XV.
2. The employee was separated from the Postal Service for just cause and the action was appropriate in this case.

II

Although the basic issue in this case is whether the Postal Service had just cause to discharge Ewing, there is a preliminary question whether Ewing's grievance was timely filed. Article XV (Grievance Procedure), Section 2 (Procedure), of the National Working Agreement (JX-1) provides in relevant part:

Step 1: The employee must discuss the complaint with his immediate supervisor within five (5) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause. The employee may be accompanied by his steward or a union representative, if he so desires. The supervisor shall render a decision within two (2) days. The Union shall be entitled to appeal an adverse decision in Step Two of the grievance procedure within five (5) days after receipt of the Employer's decision.

Step 2: Such appeal shall be made in writing to the head of the installation, or his designee. The employee shall be represented by a steward or a Union representative. A decision by the Employer regarding the grievance shall be rendered within five (5) days after it has been appealed to Step Two....

b. In the absence of settlement through Step 2-a, grievances involving the subject of disciplinary action taken against an employee or the discharge of an employee may not be submitted to Step Three or Four, but may be appealed in writing to the Director of Employee Relations in the Regional Office within ten (10) days after receipt of the Employer's decision. The Director shall provide a hearing at a management level higher than the installation level and at a location convenient to the parties....[T]he Employer's decision shall

be rendered within seven (7) days after the grievance has been appealed to this step. If there is no settlement at this step, the Union shall be entitled to refer the grievance directly to arbitration within fifteen (15) days, and in accordance with the arbitration procedure....

The failure of the aggrieved party or his representative to present the grievance within the prescribed time limits of the steps of this procedure, including arbitration, shall be considered as a waiver of the grievance.

The Company takes the position that Ewing did not file a Step 1 grievance "because he did not discuss the grievance with his supervisor, Gil Barker, and the grievance he filed with Officer in Charge Fischer was not filed within 5 days of September 2, 1972, the date on which Ewing alleges he first learned of his proposed discharge." (Employer's Br., p.9) In support of this contention the Postal Service argues (Employer's Br., pp. 9-10):

As Ewing had never worked under Kratz, it would not have been unreasonable for him to have refused to discuss the grievance with Ewing. It is submitted that Barker was Ewing's last supervisor, and since he was still employed as a supervisor by the Ridgecrest Post Office, Ewing had an obligation under Article XV of the contract to file the grievance with him at step one and to discuss it with him. Thus, Ewing failed to meet this contractual requirement. (Underscoring added)

I find this argument unpersuasive. The language of Article XV, Section 2, is explicit and unambiguous: "The employee must discuss the complaint with his immediate supervisor" (underscoring added), not simply a supervisor. Barker's own testimony established that after the latter part of July, Kratz was Ewing's immediate supervisor (Tr.138):

Q ...What was your position after that?

A Formally it was still Branch Superintendent. Ken Kratz was the Foreman of Mails at the Annex. All the carriers moved to the Annex [from China Lake]. At that time he was their immediate supervisor and I have overall charge of the office.

Q And the carriers at the Annex after...the ...latter part of July, were under the direct supervision of Ken Kratz?

A Yes....

Q Now, if any grievances were filed they would be filed with Mr. Kratz; is that correct?

A From that point on, yes. (Underscoring added)

Furthermore, it seems almost certain, given the widespread publicity of Ewing's arrest, that Kratz and Barker were equally familiar with the cause of Ewing's absence. Nor can it seriously be doubted that either man would, in any case, have done more than deny the grievance had he been willing to accept it.

Ewing's testimony that he attempted to file a Step 1 grievance with Kratz on the morning of 19 September, the earliest opportunity after he had received his removal notice on the afternoon of 18 September, stands unchallenged in the record. The only person in a position to rebut his testimony was Kratz, who was not called as a witness. I find no reason to disbelieve Ewing's testimony on this point, which also establishes that Kratz had treated Ewing's discharge as an accomplished fact, from which Ewing had no right to appeal. Clearly, the Postal Service cannot, through one of its agents, refuse to accept a properly filed employee grievance and then seek to have the grievance dismissed because the grievance was not accepted.

The Postal Service contends further, however, that Ewing's grievance even if filed on 19 September, would have been untimely. Its argument is as follows (Employer's Br., p.11):

If it is determined that the 5 day grievance period did not begin to run until Ewing was out of jail, his efforts continued to be untimely. As he admitted returning home on September 2, 1972 and reading the July 20 letter on that date, it appears that the 5 day period in which to file a step one grievance expired on Thursday, September 7, 1972, the answer should have been given by September 9, and the 2 (a) appeal filed

no later than September 14. By failing to discuss the grievance at step one or to appeal it to step 2 (a) by these dates, Ewing's inaction clearly constitutes a waiver of his grievance.

This argument falls, however, if one credits Ewing's testimony, previously quoted, that Fischer had advised him on 5 September "that I had no grievance to file until I received a Form 50 and was officially fired from the Postal Service." But the Postal Service urges that Ewing's testimony is not to be believed because, if Fischer had actually made the statement attributed to him, Ewing would have emphasized that point in his Step 2(b) appeal, previously quoted, which in fact contained no reference to Fischer's alleged statement on 5 September. The Postal Service argues further that Ewing's version of his conversation with Fischer on 5 September is inconsistent with his testimony that on 8 September Fischer advised him to write directly to Alsbury, explaining his side of the case.

These arguments, too, are unpersuasive. Ewing cannot be assumed to have had a lawyer's awareness of the need to make specific allegations in his appeal. For all that is known, he may have accepted Fischer's statement as an uncontestable fact; indeed, that would explain his apparent reliance on 19 September [actually 18 September] as the

crucial date from which his five-day period for filing a grievance was to run. As for Fisher's advice to Ewing on 8 September, it is equally inconsistent with Fischer's own statement of his view of the case, namely, that 7 September was the last date on which Ewing could have filed a grievance.

There are additional reasons for crediting Ewing's version of the conversation on 5 September, rather than Fischer's. First, Donaldson testified, as previously noted, that after receiving a copy of Fischer's letter of 11 July to Ewing, he attempted to file a grievance on Ewing's behalf with Fischer and "was told I had no grievance because Mr. Ewing had not been removed from the service"--virtually the same words which Fischer, according to Ewing, said to Ewing on 5 September. Second, at no time did Fischer deny the statements attributed to him by Ewing and Donaldson. Although they testified after he did at the arbitration hearing, he could have been recalled for rebuttal testimony had the Postal Service wished to do so.

I conclude that Fischer actively discouraged and prevented Ewing from filing his Step 1 grievance until after he had received his formal removal notice on

18 September, and that the five-day period in which to file the grievance was not exceeded by Ewing. He made a bona fide, though unsuccessful, attempt to file his Step 1 grievance with Kratz on 19 September, and thereafter filed all successive appeals within the time limits prescribed in Article XV, Section 2.

In Step 2 of the grievance procedure it states in part: "The employee shall be represented by a steward or a Union representative." There was some discussion at the hearing to the effect that Ewing's appeal was irregular because presented directly by him, without representation by a steward or a Union official. The uncontroverted testimony, however, was that Ewing was still an assistant shop steward with authority to represent himself on behalf of the Union, and the Postal Services did not pursue this point in its posthearing brief.

III

We come finally to the merits of the dispute: did the Postal Service have just cause to discharge Ewing on 23 August 1972?

It is admitted that Ewing had been something less than a model employee. He had been suspended for misconduct for a week in June, 1972, and in his letter of 11 September, previously quoted, he acknowledged that his past performance in the Postal Service "has been lacking." Nevertheless, and despite Fischer's statement that he considered this past conduct in determining to discharge Ewing, I am satisfied that Ewing's absence from 3 July to 5 September was the direct cause of his removal.

In evaluating the reasons for discharge, the statements made by Fischer at the time and in the subsequent hearing are more significant than the posthearing arguments of counsel. Thus, although it is true, as pointed out in the Employer's Posthearing Brief (pp.13-14), that Article X (Leave) of the National Working Agreement is silent on the question of granting leaves without pay, it is clear from Fischer's own testimony, previously quoted, that he was not thinking "that way" when he discharged Ewing.

As previously noted, Fischer based his decision to discharge Ewing on three principal grounds: (1) the Postal Service was short of help and there were no excess employees to replace Ewing; (2) Ewing "gave no explanations as to his whereabouts and the reasons for his absence";

(3) Ewing had just come off a five-day suspension and he was a short-term employee, with a less than satisfactory attendance record.

It is true that the Ridgecrest post office was shorthanded in the summer of 1972, but it seems evident that this was not the real reason for discharging Ewing; the post office had shown its ability to cope with past manpower shortages caused by more than the usual number of employees being on vacation or sick leave. Also, the claim that Ewing's attendance record had been unsatisfactory was clearly an afterthought; it was not mentioned as a ground for discharge in the removal notice, and thus cannot be given any weight in this proceeding. As for Ewing's conduct leading to his disciplinary suspension, it was, by hypothesis, not sufficient justification for his discharge.

In the end, therefore, the operative grounds for discharge boiled down to the two specifically cited in the formal removal notice: "AWOL" and "Failed to return to duty and failed to reply to official correspondence." As to the charge of being AWOL, Fischer knew that Ewing had been arrested and was being held on \$100,000 bail, an amount manifestly far beyond Ewing's ability to raise. Moreover, at this stage, Ewing had to be presumed innocent

unless and until convicted. This, then, was a classic case of an employee being prevented from returning to work for nonculpable reasons.

The charge that Ewing failed to reply to official correspondence is even more difficult to understand. Fischer knew, by his own admission, that Ewing was in jail and the reason for his arrest. Yet Fischer refused even to take cognizance of Ewing's letter dated 15 July, requesting a leave of absence without pay, which Fischer received on 19 July, the day before he sent Ewing his letter of 20 July, giving Ewing 30 days advanced written notice of his proposed discharge from the Postal Service. He did not consider granting Ewing's request for a leave, or even granting a leave of limited duration, because, as he said, he was "trying to get him to carry out his own responsibilities and report to us why he wasn't reporting to work." (Tr. 116) But what was clear from the start and what Fischer eventually admitted was that he considered Ewing's "responsibility" to be "that he admit...that he was in jail although you knew that already."

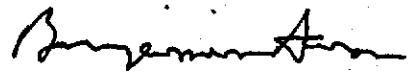
Asked during the hearing why he had not said in his letter to Fischer that he was in jail, Ewing replied

that he had assumed his wife or his mother would have already given the Postal Service that information, and that, moreover, "I felt they had enough notice of where I was. It appeared in every major newspaper in the country and it was on national television. I felt they knew where I was....I was a little bit ashamed...that I was there."
(Tr.203)

Fischer also complained that Ewing had failed to answer his letter of 20 July. Asked why he did not send it to the return address on Ewing's letter to him of 15 July, Fischer said he had no idea who was at that address. Whatever his doubts, however, given the highly unusual circumstances of this case, Fischer was obligated, in my judgement, at least to send a carbon copy of his letter of 20 July to the Oakland return address on Ewing's letter to him.

In any event, I conclude after reviewing all the testimony in this case, that Fischer's asserted reasons for discharging Ewing were disingenuous and insufficient cause for Ewing's removal. In the circumstances, therefore, it is unnecessary to consider the Union's arguments,

based on the alleged applicability of various provisions
of the Postal Manual, to the facts of this case.



Benjamin Aaron
Arbitrator