

C#14131

REGULAR ARBITRATION PANEL

WESTERN AREA

UNITED STATES POSTAL SERVICE)	GRIEVANT: RICK YATES
and)	POST OFFICE: RANCHO
NATIONAL ASSOCIATION OF LETTER)	MIRAGE
CARRIERS, AFL-CIO)	CASE NO: F90N-4F-C94030206

BEFORE:

WILLIAM EATON, Arbitrator

APPEARANCES:

U. S. Postal Service:	THOMAS R. AVEY Senior Labor Relations Specialist U. S. Postal Service 11351 Rancho Carmel Drive San Diego, CA 92199-9401
Union:	MANUEL L. PERALTA, Jr. Regional Administrative Assistant National Association of Letter Carriers, AFL-CIO 3636 Westminster Avenue #A Santa Ana, California 92703

Place of Hearing:

Rancho Mirage, California

Date of Hearing:

November 11 1994

AWARD: The Service violated the rights of Grievant Rick Yates under the terms of the National Agreement when it denied him the right to work from February 5 through May 12 1994 in that the Grievant and the Union were deprived of critical documentation contrary to the provisions of Article 15 of the Agreement.

Date of Award:

January 2 1995


WILLIAM EATON, Arbitrator

STATEMENT OF THE CASE

The issue to be determined is whether the Postal Service violated the rights of Grievant Rick Yates under the terms of the National Agreement when it denied him the right to work during the period February 5 1994 through May 12 1994. Hearing was held at the Palm Springs California Post Office on November 2 1994. At that time the Grievant was fully and fairly represented by the Union and was present throughout the hearing, although he was not called to testify. Following presentation of evidence by both parties, the matter was submitted upon filing of post-hearing briefs, which was completed on December 6 1994.

The Grievant is a full-time regular Letter Carrier who has been employed by the Postal Service since June of 1981. During the period preceding November 19 1993 he was incapacitated from work while undergoing a psychotherapy program related to drug and alcohol abuse and attendant behavior difficulties at work. In November 1993 the Grievant was released to return to work without restriction by his treating psychiatrist. After review the Postal Service senior Medical Director for the Pacific Area, Dr. Ibrahim Farid, determined that he could return to work without a fitness-for-duty (FFD) examination, and he was allowed to return on December 12 1993.

A few days after he returned to work he was required to serve a 14-day suspension as a result of an incident which occurred in August 1993 prior to his psychotherapy. When he returned from that suspension he was notified that he was

scheduled for a fitness-for-duty examination by Dr. Randall Black on January 12 1994. On January 25 1994 the Grievant was advised by Postmaster Ann Wachter that he would be allowed to return to duty under certain restrictions and conditions. When these conditions were imposed upon the Grievant the Union was not provided at that time with a copy of Dr. Black's fitness-for-duty report, upon which the conditions were based. On February 4 1994 the Grievant was advised that Dr. Farid by that time had concluded that he was not fit to carry on his duties in a safe manner, also based on Dr. Black's report, and he was not allowed further work.

It is stipulated that the time from January 25 1994 through February 4 1994 had been converted to Administrative Leave, and that the backpay claimed by the Union is for the period February 5 1994 through May 12 1994.

The Union argues that failure to furnish Dr. Black's FFD report was harmful to the Grievant by denying the Union the information needed to determine what course of action would be most expedient to return him to duty, that when the report of Dr. Black was received it indicated that the Grievant was released to return to work, that withholding this information denied the Union's and the Grievant's rights under the National Agreement, and that the Employer acted in bad faith when it refused to release the FFD report to the Union. It is stipulated that the report of Dr. Black was eventually received by the Union on May 2 1994.

For these reasons the Union asks that the Grievant be made whole for the period in question.

The Postal Service contends that it had reason to request the fitness-for-duty examination in January 1994, and that it had reason to place restrictions and conditions upon the Grievant's return to work, based upon his history of alcoholism and amphetamine abuse, personality disorder and the opinion of Dr. Farid that he could not be returned to work safely. It is therefore contended that there was no violation of the National Agreement in keeping him from work for the period February 5 1994 to May 12 1994.

National Agreement

Article 15 - Grievance-Arbitration Procedure

Section 2. Grievance Procedure--Steps

Step 2

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from

jointly agreeing to interview additional witnesses as provided above.

(f) Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for denial of the grievance.

ARTICLE 17 - REPRESENTATION

Section 3. Rights of Stewards

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.

ARTICLE 31 - UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will

furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Handbooks and Manuals

EL-806

222.211 Every request for restricted medical information must be submitted in writing. Every requestor, except the subject individual, must provide a specific reason for needing the information, (to make a hiring or termination decision, to take disciplinary action, to use in a legal proceeding, etc.).

222.212 Requests made by the subject of the record, postal officials, collective bargaining representatives, and EEOC representatives must be submitted through the employee's installation head. . . .

223.3 Union Representative

223.31 Requirement

In certain cases, employee medical records may be provided without an employee's authorization to a postal union official under the collective bargaining agreement to which the USPS is a party.

223.32 Restriction

Requests from postal union representatives without an employee's authorization must be carefully reviewed. Information that is relevant and material to collective bargaining is available to an authorized representative only when acting officially.

Return to Work Conditions

By letter of January 21 1994 Rancho Mirage Postmaster, Anne Wachter, notified the Union that certain return to duty requirements would be imposed as the result of the diagnosis of

Dr. Black. The letter indicated that the diagnosis included alcoholism, amphetamine abuse, personality disorder, including passive-aggressive features, moderate psychosocial stressors, and a poor level of adaptive functioning. The letter stated that Dr. Black also concluded that the Grievant needed "extensive psychiatric and psychological treatment," that should he return to work he should be subject to random drug-testing, and that "Continued argumentative and demandingness should be anticipated."

The conditions imposed as a result for his return to work were: active participation in a structured chemical dependency rehabilitation program; total abstinence from alcohol or drugs and consent to random testing; acceptable documentation for any sick leave; compliance with U.S. Postal Service standards of conduct, Section 666 of the ELM; and medical certification that he was able to resume his regular duties. The letter, prepared for the Grievant's signature, as well as that of the Postmaster, stated that the Grievant had read the requirements, and, that "I freely sign this agreement without reservation, duress, or coercion on the part of anyone and agree to abide by their terms." The Grievant's signature, however, indicates that he had signed "under protest."

Area Shop Steward for the Union, Christian Price, testified that, although the letter referred to the report of Dr. Black, the report was not furnished, nor was it forthcoming when

he asked for it. As indicated, the report was finally received by the Union on May 2 1994.

In the meantime, Dr. Farid had reviewed the FFD report of Dr. Black, which had found the Grievant "fit for duty to perform the purely mechanical aspects of the duties of a Letter Carrier." Dr. Farid, however, informed the Postal Service that he did not consider the Grievant fit to carry out those duties in a safe manner. He therefore indicated that immediate attention should be given to the chemical substance abuse problem through referral to EAP, along with referral for psychotherapy on a regular basis, and that he should not return to work "until he has undergone a period of rehabilitation." Dr. Farid did indicate that the Grievant "may be returned on restricted duty, which will exclude driving a Postal vehicle for approximately three months," and that a further review and opinion would be rendered at that time.

Union Involvement

Union Steward Price testified that in seeking to assist the Grievant, and subsequently in processing his grievance through Step 3, he was inhibited by lack of full information as to the Grievant's medical condition. Steward Price did have in his possession in a timely manner a letter of January 7 to the Grievant from the Postal Service indicating that he would be scheduled for a FFD with Dr. Black on January 12 1994, an appointment which he kept. Steward Price also was furnished a

copy of the January 21 1994 letter stating the five conditions under which the Grievant would be returned to work.

On January 27 1994 Dr. Farid informed the Postal Service that he had evaluated the FFD report of Dr. Black, which had found the Grievant "fit for duty to perform the pure mechanical aspects of the duties of a Letter Carrier." However, Dr. Farid concluded that the Grievant was not fit to "carry on these duties in a safe manner," and so informed the Postal Service. He indicated the Grievant would continue to be a disciplinary problem, and that he "should not be returned to work until he has undergone a period of rehabilitation" for chemical substance abuse. Price testified that he was not furnished with this document until the day prior to the arbitration hearing. He said that had the document been furnished to him, it would have made a significant difference in his handling of the matter, due to the indication that the Grievant might not be able to work safely.

The Postal Service did furnish Price with a report from Vasquez Management Consultants dated January 30 1994, indicating that the Grievant had consulted his EAP Counselor. Asked whether this did not indicate to him that the Grievant was suffering some sort of drug or alcohol dependency, Price replied that he took it to mean simply that the Grievant was conforming to the return to work condition set forth by the Postmaster. The Steward was also furnished with a note dated February 1 1994 from the Grievant to the Postmaster indicating that he had consulted with EAP, and a

second note of the same day requesting a copy of Dr. Black's Fitness For Duty Report.

By letter of February 4 1994 Postmaster Wachter informed the Grievant that, due to the opinion rendered by Dr. Farid, he would not be allowed to return to work until he had undergone a period of rehabilitation, although the letter did not indicate the reason for requiring rehabilitation. This letter also was furnished to Steward Price in a timely manner. Price was asked, then, whether he had not been advised of the Grievant's alcoholism and amphetamine abuse problem upon being furnished the Return to Duty requirements letter of January 21 1994. He said that he had asked the Grievant about those charges, and that at that time the Grievant had denied any such problem or dependency. Asked if he was not put on notice by the fact that the Grievant was sent to EAP, Price said that he did inquire about that, but the Grievant replied that he was just trying to get back to work, and was "just following the conditions" of the Return to Work letter.

Asked whether the Postal Service had authority to return the Grievant to work before he had analyzed Dr. Black's report, Dr. Farid replied in the negative. He stated that he makes a "recommendation" after such analysis, which is usually followed. He testified specifically that a local office is not authorized to make conditions for return to work before his recommendations are received, and that he was not consulted concerning the conditions placed upon the Grievant.

Fitness-For-Duty

Dr. Farid testified that his original clearance for the Grievant to return to work without the necessity of a fitness-for-duty examination was based upon the opinions of a psychiatrist and a clinical psychologist who had treated the Grievant. Dr. Perry Maloff had reported that he was able to return to work without restrictions on November 22 1993. Dr. Richard T. Laird, a licensed clinical psychologist, had related that the Grievant had "done especially well in treatment," and that he was "to be applauded for his effort and interest in obtaining his own sense of well-being and appropriate behavior." Dr. Laird added that the Grievant had actively pursued therapy and would continue to do so...so that he could "be trusted to respond to out-patient treatment in a very favorable manner and his prognosis is considered to be good." Dr. Farid testified that, had he had the additional diagnoses obtained thereafter, he would not have returned the Grievant to work in December 1993 without a fitness-for-duty examination.

Dr. Black's Fitness-For-Duty Evaluation was dated January 18 1994. In it he detailed a history of drug and alcohol abuse and treatment over a ten year period. This included use of "speed" by a variety of means, including intravenously "a few months ago." He had been discharged from a private psychiatric hospital in November 1993 where he was treated for "Major depression, single episode," but with no comment at that time concerning amphetamine abuse or alcohol abuse, although the

Grievant admitted both to Dr. Black. Dr. Black indicated that, "Continued argumentiveness and demandingness should be anticipated" should the Grievant return to work, and that these matters should be dealt with within the rules and regulations of supervision and personnel requirements. Nevertheless, the report concluded that the Grievant was able to "safely perform his duties as a letter carrier without hazard to himself or others," and in that sense he was fit for duty.

Dr. Farid amplified upon the findings of Dr. Black, indicating that the Grievant was diagnosed as hypomanic, which Dr. Farid described is a condition approaching bi-polar disorder, or a manic depressive state, but not so severe. This state is accentuated by amphetamine use, which induces the affected individual to go for long periods without sleep. Depression then follows, and there is a need for alcohol to get off the "high," often used to excess. It was the opinion of Dr. Black that this was the pattern experienced by the Grievant. Dr. Black's report also indicated that the Grievant suffered from personality disorder with mixed features, including passive-aggressive features and histrionic features. The report described his level of adaptive functioning during the previous year as "Poor." It was the opinion of Dr. Farid that the entire history of the Grievant, as reflected in Dr. Black's report, indicated that for ten years or more he had never been fully treated and still had not been at the time of the report.

As a matter of functioning in the workplace, it was Dr. Farid's opinion that the passive-aggressive state often leads to a secretive resistance, a tendency to slight authority figures and to reject improvement. This tendency can "finally blow up" into irritability and open hostility, as apparently it had done in the case of the Grievant. As Dr. Farid put it, this condition is one which "bumps along to paranoia and delusions," so that one suffering from it could erupt at any time and cause fear in the workplace, thus presenting an unsafe situation.

As to whether employees at the Rancho Mirage Post Office felt unsafe in the presence of the Grievant, it is stipulated that the Union and Employer representatives in this dispute investigated that matter on June 22 1994 by questioning employees at the Office, at which time no one interviewed expressed any fear of working with the Grievant.

Questioned as to whether he was a certified psychiatrist, Dr. Farid responded that he was not but that he had taken a particular interest in psychological and psychiatric problems as Medical Director of the Pacific Area. His tasks in that capacity include referring employees to psychiatrists or psychologists, as the occasion may require, and evaluating their subsequent reports. He testified that he had not known Dr. Black prior to Black's involvement in the present dispute, but that he had approved sending the Grievant for the fitness-for-duty examination to Dr. Black.

Dr. Black, who has since relocated his practice to Tullahoma Tennessee, had occasion to review his original evaluation, and communicated the results to the Postal Service in a letter dated August 10 1994. He stated that it would have been "more appropriate to have said that this man could safely perform his duties as a letter carrier if indeed he was not using amphetamines and was not affected constantly or intermittently by their mood altering effect." Referring to the Grievant's track record of "irritability, argumentiveness and difficulty in dealing with authority," Dr. Black reiterated that, "If he were drug free this man could safely perform his duties." However, Dr. Black observed that "apparently, according to reports," the Grievant continued to use drugs and continued to have disciplinary problems so that Dr. Black's prognosis as of August 10 1994 concerning his adjustment within the Postal Service was "somewhat guarded."

Grievance Procedure

Area Steward Price testified that at no time during his handling of the grievance procedure was he furnished with Dr. Black's revised opinion. He reiterated that it was unusual to be deprived of the most relevant document required to process a grievance, namely Dr. Black's original fitness-for-duty report. He indicated that, had the original report been available, the Union would have had alternatives in handling the case, including

opportunities under Article 14 to have conflicting medical reports resolved.

Asked whether he had ever tried to contact Dr. Black directly, Price indicated that that was not the normal practice. Nor had he asked the Grievant to sign a release in order to get Dr. Black's report or other materials which the Union did not have. Among other requests for Dr. Black's report was a request by the Union stated in the grievance summary of the Step II hearing, where the report was requested based on Articles 17 and 31 of the National Agreement.

In its additions and corrections to Step II the Union alleged that, lacking Dr. Black's report, "all we could talk about during Step 2 meeting was the lack of information necessary to discuss the case."

Extensive correspondence between the representatives of the parties at the arbitration hearing indicates that a good faith effort was made by them to obtain all relevant material, most of which was subsequently entered into evidence by stipulation.

ARGUMENTS

Union

The Union, under the authority of Article 17, Section 3, and Article 31, made a request for information to which it was entitled. This entitlement is supported by Section 222.211 and 222.212 of the EL-806. The Union right to the information is

further supported by the November 16 1988 Step 4 settlement language (H7N-1P-C 2187). Subsequent to the above Step 4, the Employer and the Union entered into an additional Step 4 settlement, which in part reads:

Further, during our discussion, we mutually agreed that the release of medical records to the Union without an employee's authorization is provided for in the Administrative Support Manual, EL-806, and by Articles 17 and 31 of the National Agreement. (H7N-2C-C 44938)

During the hearing the advocate for the Postal Service asked the Union's witness if he had made any attempt to contact Dr. Black for a copy of the fitness-for-duty report. Mr. Price testified that the Union made its request through the installation head. This testimony is consistent with the citation from Section 222.212 of the ELM.

At no time during the processing of the grievance nor during the presentation of the Employer's case has there ever been an objection raised by the Employer regarding the Union's right to the medical report which it requested to properly represent the Grievant. As such, any post-hearing attempt to object to the Union's right to the information must be rejected. The Employer refused to provide the information requested, then claimed that they did no wrong until the Union's Step 3 representative forced the Postal Service representative to provide the document in question during a separate grievance being met on at Step 3. The Union then received the document on May 2 1994. The fact that the document was released to the

Union after the fact in this grievance does not undo the harm done to the Grievant nor to the Union.

Paramount to the Union's argument is the Employer's intentional refusal to provide the Union the information that was requested beginning on February 1 1994. The Union was deprived of the opportunity to determine what other courses of action could have been followed, including additional medical evaluations or treatments which could have dealt with the concerns that were raised in Dr. Farid's January 27 1994 letter.

The Union's right to information must be viewed as a fatal flaw to the Employer's case. The Union believes that this flaw is of such magnitude that the remedy requested by the Union should be sustained in full without even a review of the merits of the Employer's claims.

The Employer's actions, that of continuous and intentional refusal to provide the Union with the information which it requested, followed by their attempts to have the Arbitrator ignore that blatant defiance of the National Agreement, especially as it related to the responsibility defined in Article 17 and Article 31 of the Agreement, demonstrate that the Employer accepts absolutely no liability in regard to the grievance before you.

The Postal Service simply asked the Grievant and the Union to trust their opinion regarding the Grievant's medical condition, and not question the review of Dr. Farid, let alone request a copy of Dr. Black's report. Had the Employer provided

the fitness-for-duty report of Dr. Black and the Memorandum prepared by Dr. Farid when requested on February 7 1994, the Grievant and the Union would have been able to respond to the assertions contained therein.

The Union may have had the Grievant file a written request for light duty pending receipt of additional medical information from the Grievant's doctor. The Union may have also continued the processing of the instant grievance, arguing that Dr. Black found the Grievant fit for duty, which he did. The Union would also have had the opportunity to ask Dr. Farid to explain the reasons for his disagreement with the opinion of Dr. Black. The fact remains that Mr. Price did not see the January 27 1994 memo from Dr. Farid until the evening before the hearing when it was shown to him by the Union in preparation for arbitration.

Mr. Price testified that in regard to the "Return to Duty Requirements" the Grievant contacted Vasquez Management Consultants and filled out an authorization to release information. Mr. Price also testified that the Grievant did in fact meet with the EAP counsel he was assigned to. This evidence was not contradicted by the Postal Service, nor was there any witness who testified that the Grievant did not go to the EAP Counselors to seek the help that the "Return to Duty Requirements" identified. Mr. Price testified that the Grievant's February 1 1994 note to the Postmaster further

supports the Union's arguments that the Grievant began to work with a Counselor to help himself.

The Union submits that the fitness-for-duty of Dr. Black did in fact find the Grievant fit for duty. Although the Postal Service has rejected this opinion, there was no timely attempt to go back to Dr. Black with additional information which the doctor may not have been aware of when he found the Grievant fit for duty.

Had the Postal Service wished to act in good faith, or if it desired to "cooperate fully in the exchange of information," the Union would have been provided a copy of Dr. Black's report when it was requested. The Postal Service might have further provided the Union with a copy of additional facts which Dr. Black may have been provided in order to reconsider his opinion of the Grievant's fitness for duty.

At the hearing it was verified that Dr. Farid does not specialize in psychiatry nor is he a Certified Psychiatrist. He explained that he holds an M.D. and specializes in the field of "occupational medicine." He further explained that he is as qualified to perform surgery as he is to practice psychiatry.

The Union argues that the Postal Service found that the Dr. Black report did in fact determine that the Grievant was fit for duty. Whereas this report served their needs, it was used without conferring with Dr. Farid. It is interesting to note that after the Postal Service surreptitiously used the document to create the "Return to Duty Requirements," they claimed to not

have access to the form as evidenced by his March 24 1994 letter to Gary Connely, in which he claims that his office has been precluded from "having or reviewing" medical information obtained through fitness-for-duty exams.

The Grievant has been made to suffer through the actions of his Employer by being required to serve a 14-day suspension only 3 days after his return to duty following a period of incapacitation in which he underwent a psychotherapy program. The discipline had initially been issued in August of 1993, but was postponed until after his return to duty.

Then the Employer sent the Grievant to a fitness-for-duty examination without stating the reasons for the referral to either the Grievant or the Union. A close review of the package of information which was submitted in support of the January 6 1994 request for the fitness-for-duty examination, in conjunction with the fact that the Grievant was allowed to work up until his scheduled January 12 1994 examination by Dr. Black, clearly shows that there was no safety concern by any party at the Rancho Mirage Post Office, the San Diego District Office or the Pacific Area.

The Employer's Step 3 decision for the first time raises an inference that there were problems which prompted the referral to the fitness-for-duty. The manner in which this is raised comports with the overall dereliction by the Employer of their responsibility to share documents and information, as is

clearly articulated in the moving papers, the Union's opening statement and the evidence as developed during the hearing.

Dr. Black did diagnose amphetamine abuse and alcoholism, but found the Grievant fit for duty. This is quite different than a presumption that Dr. Black might not have been aware of the Grievant's use of alcohol or amphetamines. One may be inclined to give Dr. Farid's opinion more weight, had Dr. Black been denied information regarding the Grievant's substance abuse. The USPS did not, however, acquire the type of medical report that it desired and therefore looked for a way to reject the opinion of the Board Certified specialist who evaluated the Grievant.

The Employer simply did not want the Grievant to return to duty. It was the USPS that sent the Grievant to the Board Certified Psychiatrist, yet the USPS Area Medical Officer rejected that opinion. At no time has there been any medical evidence provided to the Union supporting the decision by Dr. Farid, until Dr. Farid's testimony at the hearing. The Union carries forward its objections to all references to Dr. Farid's FAX of January 6 1994, even through the testimony of Dr. Farid. This again is predicated on the Employer's failure to provide this evidence in the development of the grievance through the earlier steps of the grievance procedure.

The Grievant has lost income which he should not have been denied. He lost his home through foreclosure as a direct result of not being able to keep current with his financial

obligations. His inability was directly caused by the Employer's actions herein.

The Union hereby requests that the Arbitrator find in favor of the Union and sustain this grievance.

The Union requests that the Grievant be made whole for all lost wages, fringe benefits and seniority rights. The Union also requests that the Arbitrator fashion an appropriate additional remedy to compensate the Grievant for the harm he suffered.

The Union further requests that the Arbitrator find that the Employer violated Article 15, Article 17, Section 3 and Article 31 of the National Agreement. The Union further requests that the Arbitrator fashion the appropriate remedy for this violation in addition to making the Grievant whole for all his losses.

Postal Service

The Union's entire position rests on only one sentence contained within the entire ten page report of Dr. Black, "from a standpoint of being able to safely perform his duties as a letter carrier without hazard to self or others, this man is fit for duty." (emphasis in original) The report clearly indicates that this individual is in need of psychotherapy, possible psychotropic medication, and psychiatric treatment which he is not receiving.

Dr. Farid reviewed Dr. Black's report and provided an evaluation and recommendations in a January 27 1994 report:

Mr. Yates should not be returned to work until he has undergone a period of rehabilitation. Upon successful completion of the treatment, he may be returned on restricted duty, which will exclude driving a Postal vehicle for approximately three months. At that time, further review and opinion will be rendered.

The Union contends that Dr. Farid's evaluation and recommendation cannot supersede that of Dr. Black's opinion that the Grievant was fit for duty. Dr. Black, however, provided a supplemental report wherein he indicates a clarification to his initial report:

It would be more appropriate to have said that this man could safely perform his duties as a letter carrier if indeed he was not abusing amphetamines and not affected constantly and or intermittently by their affect altering effect. This man has a long track record of irritability, argumentativeness and difficulty dealing with authority. As his history of drug abuse has been documented it may be easier to see the effect of his drug abuse upon his ability to work. If he were drug free this man could safely perform his duties. Nevertheless, this man has apparently, according to report, continued to use drugs and continued to have disciplinary problems. As indicated in my report, this man was less than 100% open and honest about his drug use and abuse and information about his drug use and abuse was yielded reluctantly by him.

The record is devoid of any evidence that the Grievant has come to grips with his condition and actively seeking treatment. On the contrary, there is evidence that he is continuing to abuse illegal drugs. During an interview with the

Union's representative, Manny Peralta, and the Service's representative, Thomas Avey, on June 22 1994 he was tested for illegal drug use. The results of the test were positive for amphetamines/methamphetamine. This information was shared with Mr. Peralta both verbally and in writing. In addition, the Service made this document part of the moving papers of the appeal wherein the Union did not raise an objection.

Additional evidence was provided to the Union and incorporated into the hearing from a subsequent fitness-for-duty examination of the Grievant by Dr. Melvin Schwartz. The service opines that this medical report constitutes substantial medical support for the evaluation and recommendation in Dr. Farid's report dated January 27 1994. Dr. Schwartz has provided an opinion on his report which coincides with that of Dr. Farid. The weight of medical evidence supports the Service's position that the Grievant is not fit for duty for the period February 2 1994 through May 12 1994.

Article 15.3.(b) allows the parties to remand a case to Step 2 of the grievance procedure for full development of all the facts and further consideration at that level. No evidence was presented to establish the Union's contention that the discussions at Step 3 did not adequately provide the Grievant with representation regarding the Dr. Black report. On the contrary, the Union utilized the report as their contention that the Grievant could return to work. A Union cannot have it both ways. Once the document was received, options were open for the

Union to utilize-- remand or full development at Step 3. One cannot just sit on a position and expect a procedural argument to hold up their case.

The Union representative at Step 1 and Step 2 indicated he did nothing more than request the document. He made no attempt to interview Dr. Black or Dr. Farid. While the Agency does not condone the late arrival of the Dr. Black report, it does not condone nor agree with the Union's argument that this alone is sufficient to render the action fatally flawed.

The Service would contend that the arbitration decision referenced by the Union from J. Barker, grievances W7N-5C-D 9956, W7N-5C-D 9957 and W7N-5C-D 10996, is not on point. In that case, the Service did not provide the psychiatric report until the arbitration. Mr. Barker opined that this was too late in the process and it did affect the Union's ability to represent. This case is not similar in nature as the Black report was provided well before the Step 3 decision was rendered.

In their appeal the Union has raised procedural arguments; the first being the Union's inability to properly defend the Grievant by being denied the January 18 1994 Dr. Black fitness-for-duty report. The record reflects that the Union made a request to have a copy of that report provided to them. This document was provided to the Union via letter dated April 27 1994 and received by the Union on May 2 1994, some three months before the Step 3 decision was rendered. The Union contends that this delay in providing this document severely

hampered their ability to defend the Grievant. They argue also that this "denied them the opportunity to have the Grievant's doctor review the fitness for duty report in an effort to correct matters before the Grievant suffered the harm identified in this instant case." No evidence was provided at the hearing which indicated that the Union had anyone, let alone any doctor, review the documents to provide a medical opinion.

No evidence was provided that Article 15 was violated. The Grievant's placement into a non-work status was not disciplinary in nature, but administrative. No portion of Article 15 addresses a "de facto suspension" as indicated on the Union's appeal to arbitration. He was given options of several different forms of leave he could utilize for his absence but he did not chose any form of leave. As such, he was placed in a leave without pay status. The National Agreement cannot be expanded in the Article 15 area outside of those sections listed, none of which indicate a category of de facto suspension. Pure and simple, this is an administrative action and nothing else.

The medical evidence of record supports the conclusion rendered by Dr. Farid in his January 27 1994 letter. Additional medical evidence supports Dr. Farid's conclusion that the Grievant is not fit for duty. The Service requests the Arbitrator to deny the Union's appeal.

ANALYSIS

This case presents a rather unusual sequence of events and a very confused, not to say convoluted, development as to the factual occurrences. The parties are to be complimented for gathering the extensive documentary material into coherent sequences, for stipulating to its introduction and to certain additional facts as well, thus allowing the case to be presented in an efficient and highly professional manner.

The Union's central complaint is that it was deprived of the primary document upon which refusal to allow the Grievant to work was based, namely the original report of Dr. Black. Numerous efforts were made to obtain the report and it is not entirely clear why these were not successful. Nevertheless, the Union was deprived of material to which it clearly had a right under the National Agreement. The question is whether presentation of the case was adversely affected as a result.

Upon questioning, Area Steward Price agreed that materials he had gave some indication of drug and alcohol abuse on the part of the Grievant. His testimony that he asked the Grievant about it and that the Grievant denied it would seem to indicate a somewhat superficial inquiry by Price. But that consideration does not negate the fact, as Price contends, that he was deprived of alternatives he might have selected in proceeding with the matter had he had available the full report, including the full history of the Grievant's drug and alcohol abuse, at the outset.

Dr. Farid testified without contradiction that the Postal Service had no authority to impose the conditions set forth in the letter of January 21 1994 from the Postmaster to the Grievant without first consulting with Area Medical authority. Those conditions were imposed without such consultation and before Dr. Farid had an opportunity to review Dr. Black's report. After he had reviewed it, by letter of January 27 1994, Dr. Farid determined that the Grievant should not return to work at all before undergoing extensive rehabilitation.

The Union argues forcefully that being deprived of the fitness-for-duty report of Dr. Black, which was the basis for denying work to the Grievant, severely impacted its ability to handle his grievance properly. The Union points out that, had the report been available, the Union would have been able to respond to the assertions contained therein, would have had the opportunity to ask Dr. Farid to explain the reasons for his disagreement with the opinion of Dr. Black, might have more fully understood the Grievant's true condition, and conceivably might have elected not to pursue the grievance at all.

To these and similar arguments, the Postal Service replies that the January 18 1994 report of Dr. Black was received by the Union on May 2 1994, considerably before the Step 3 decision was rendered; that denying work to the Grievant was not disciplinary in nature, but administrative; that it was not a "de facto suspension;" and that the Grievant was given several leave options and finally placed on LWOP status.

In answer to the claim that Article 15 was violated in failing to provide the report, the Postal Service observed that Article 15.3(b) allows the parties to remand a case to Step 2 for full development of all facts and further consideration at that level. It is contended that there is no evidence to establish that the discussions at Step 3 did not adequately provide the Grievant with representation regarding Dr. Black's report, and that in fact the Union argued on the basis of that report that the Grievant could return to work at Step 3.

In support of its procedural argument, the Union cites Case No. W7N-5C-D 9956, 9957, 10996, decided by Arbitrator James T. Barker on April 3 1989. There, as in the present case, the heart of the procedural argument was "the purported failure of the Service to accomplish a timely release of the psychiatric medical information serving as the catalyst" for the action it had taken, in that case emergency suspension and removal. Arbitrator Barker pointed out that Article 15, Section 2 "requires the Service at Step 2 to make a full and detailed statement of facts and contractual provisions relied upon and mandates full cooperation of the parties to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31." Arbitrator Barker therefore concluded that the failure of the Service to provide the medical reports which formed the basis of the action taken "forms a sufficient basis for sustaining the grievance,"

although he proceeded to the substantive issue in that case for reasons not relevant to the present dispute.

The Postal Service points out that the missing medical reports in the Barker case were furnished only at or slightly prior to the arbitration hearing, whereas they were presented prior to the Step 3 decision in the present case. That argument, it seems to me, is sufficiently countered by Arbitrator James S. Scearce in Case No. SIN-3D-C 27186, decided on February 12 1986. There also there had been repeated requests for relevant records, in that case Carrier scheduling records, and the records had not been produced. And in that case, as in the present case, "The documents would have been precisely on point with the incident in dispute." Arbitrator Scearce made the following observation:

Whether the Union could have concluded that it had proper cause for disputing the Service's actions or not is speculative at this point, but at least it would have had a fair opportunity to look at the matter from both vantage points - its and the Service's. What it is forced to do is initiate a grievance anyway and potentially bear a cost it otherwise might have avoided. Article 15, particularly at Section 2, Step 2 (d) and (f) contemplates full disclosure of the underlying fact and condition.

The cited provisions of Article 15 do not require that relevant material be produced between Step 2 and Step 3, but that it be produced at Step 2. In the present dispute it was not, and the considerations set forth by Arbitrator Scearce fully apply. The document which was improperly withheld from the Union contained the material which led the Postal Service to conclude that the Grievant should be placed in a non-work status. It is

true that we cannot know now what difference, if any, timely access to Dr. Black's report might have made in the processing of the present grievance. The point is that no intelligent decision can be made by a party lacking the fundamental facts upon which to proceed, facts which are required to be supplied by Articles 15, 17 and 31 of the National Agreement.

It should be noted in conclusion that, were reinstatement a consideration, given the uncontroverted evidence of the Grievant's medical and psychiatric history, further consideration would be indicated.

AWARD

1. The Postal Service violated the rights of Grievant Rick Yates under the terms of Articles 15, 17 and 31 of the National Agreement when it denied him the right to work during the period February 5 1994 through May 12 1994, in that the Grievant and the Union were deprived of critical documentation contrary to the relevant provisions of those articles.

2. The Grievant shall be made whole for all lost wages, fringe benefits and seniority rights during the period in dispute.



WILLIAM EATON, Arbitrator

34eJanuary 2 1995