C # 10482

ARBITRATION AWARD

In the Matter of

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

W7N-5L-D 21704
S OSORIO
REMOVAL

APPEARANCES

For the Service

Thomas P Avey
Ric Tuminting

Wanda R Freeman
Ed McClain

For the Union

Alan J Apfelbaum
Syndee Osorio
Frank C DeBaca

Steve Shank
Sonja Osorio

ARBITRATOR **EDWIN R RENDER**

By the terms of the contract between the **UNITED STATES POSTAL SERVICE**, hereinafter referred to as "the Service", and the **NATIONAL ASSOCIATION OF LETTER CARIERS**, hereinafter referred to as "the Union", there is provided a grievance procedure including arbitration. Accordingly the parties selected **Edwin R Render, Seattle Washington** as impartial arbitrator. A hearing was held in **San Diego California** on **September 7, 1990.** Equal opportunity was given the parties for the preparation and presentation of evidence, examination, and cross-examination of witnesses, and oral argument. The Service made an oral closing argument. The union submitted a post hearing brief on September 21, 1990.

THE ISSUES

The parties presented three issues for resolution. (1) Whether the Union's grievance is arbitral under the terms of a last chance agreement dated August 21, 1989; (2) whether the grievance was timely filed with respect to incidents which occurred on September 30, 1989, October 25, 1989, and December 22, 1989; (3) assuming the grievance to be arbitral, whether the Service violated any provision of the contact, including the last change agreement in terminating the grievant on January 10, 1990.

CONTRACT PROVISIONS

Article 16 section 1 of the contract provides:

> **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 n this Agreement, which could result in reinstatement and restitution, including backpay.

THE FACTS

The grievant was a T-6 letter carrier assigned to the North Park Station in San Diego. The Service issued the grievant a notice of removal on July 17, 1989. The notice of removal was issued for

"failure to report as scheduled/AWOL". The notice of removal listed five prior elements of past record which were taken into account in making that decision, four of which related to poor attendance.

The Union filed a grievance protesting this discharge. On August 21, 1989 the Service, the Union, and the grievant individually executed a last chance agreement. This document states:

1. The Notice of Removal will be held in abeyance for a period of 12 months from the signing of this agreement. The time period from 8-21-89 to her return to work will be considered Leave Without Pay (LWOP).

2. Syndee will remain on the Restricted Sick Leave list. After the period of 12 months her attendance record will be reviewed and a determination will be made, at that time, as to Syndee's retention or removal from the list.

3. Syndee must maintain satisfactory punctual, attendance. In addition any other violation of a Postal rule or regulation or a situation arises which would normally result in discipline being issued, the notice of removal will be invoked with an effective date being given for discharge from the agency. During the 12 month period Syndee will be allowed, up to but not to exceed, the following unscheduled absences:

   a) Two (2) instances of approved tardiness.

   b) Four (4) instances of Sick Leave.

   c) Total Sick Leave usage not to exceed 40 hours,

   d) Zero (0) instances of Absent Without Official Leave (AWOL).

Any violation of Item #3 or any unscheduled absences in excess of any one of the above will result in an effective date of removal being given to Syndee. In addition she understands that a request for leave is not automatically approved.

4. Appeal rights to the Grievance Arbitration Procedure, Equal Employment Opportunity Commission, Merit Systems Protection Board Procedure are waived during the 12 month period on this removal action.

5. The grievant will bid out of the North Park Station. She has two (2) bid cycles, after 8-21-89, to accomplish this. Failure to bid out of 92104 will activate the removal notice with a new effective date assigned.

It is understood that this is a Last Chance Agreement. The Last Chance Agreement gives Syndee a last-chance opportunity to demonstrate that she can be a productive and dependable employee. Failure on the part of Syndee to adhere to this agreement will result in her removal from the Postal Service. This agreement is executed by all parties willingly and freely, without coercion.

S/Syndee Osorio 8/21/89
Grievant

NALC Representative 8/21/89

Agency Representative 8/21/89

I clearly understand the last-chance opportunity agreement as stated above and I fully and freely agree to the terms of this settlement. I know and understand that I have appeal rights to the Grievance-Arbitration Procedure with respect to appealing a removal action against me. By this agreement, singed on **August 21, 1989**, I **Syndee Osorio**, of my own free will, waive my rights to the Grievance-Arbitration Procedure, Equal Opportunity Commission Procedure and Merit Systems Protection Board appeal process for the duration of this agreement.

S/Syndee Osorio 8/21/89
Grievant

When the grievant was returned to work she bid to a job in the John Adams Station as a T-6 carrier. As a T-6 carrier, the grievant carried a different route each day. This meant that she had different starting times on different days of the week. The grievant

generally had starting times of either 7:00 a.m. or 7:30 a.m. depending upon the route to which she was assigned on a given day.

It will be observed from a casual reading of the last chance agreement that the grievant was permitted two instance of tardiness under the last chance agreement. If she violated this term of the agreement she was subject to termination. It is undisputed that on September 30, 1989 the grievant reported to work approximately one hour and 15 minutes late. The grievant called the Service and reported that she and her boyfriend who was driving her to work, had a flat tire while on the interstate and that she would be late to work that day. It is undisputed that the reason the grievant was late on September 30 was that the vehicle she was riding had a flat tire.

When the grievant arrived at work on September 30 she and acting manager, Mr. Tuminting, met and discussed the situation. As a result of the meeting, Mr. Tuminting asked the grievant to produce documentation as to the reason for her tardiness. He also contacted an employee and labor relations official to determine whether to consider this as an incident of AWOL for which the grievant might be subject to immediate discharge, or a one of the approved tardinesses contained in the last chance agreement. According to Mr. Tuminting, he decided to treat this as a tardy rather than an AWOL and he so informed the grievant of his decision. The grievant did not dispute Mr. Tuminting's testimony regarding the September 30 incident. She

testified that a few days later she and Mr. Tuminting filled out a form 3971. She did state that no one told her that the September 30 tardy was disapproved.

The events surrounding the October 25 incident are somewhat confusing and there is come conflicting testimony about them. Initially there was some confusion about whether the grievant's starting time was 7:00 a.m. or 7:30 a.m. on this date. In addition, there is direct conflict in the testimony whether the grievant reported to work at 7:30 or sometime thereafter.

The Service's evidence regarding the incident of October 29 indicated that the grievant was scheduled to report to work at 7:00 a.m. According to the Service, the grievant was not at work by 7:30. Mr. McClain pulled the grievant's time card from its regular location at 7:38. Mr. McClain testified that he physically observed the grievant's case at 7:30 and noted that she was not there. He also testified and made a contemporaneous written memorandum to the effect that he pulled her time card at 7:38 a.m. and made a report of this to Mr. Tuminting. He stated that shortly after he concluded his report to Mr. Tuminting he walked by the grievant's case and she was there. According to most of the testimony this would have been at approximately 7:40 a.m.

The grievant was then taken to an office where she discussed the matter with Mr. Tuminting. During this meeting which was

attended by Tuminting, McClain, and the grievant, the grievant maintained that she arrived at work at 7:30. She did not punch her time card that morning.

The grievant testified that she arrived at work at 7:30 and that her time card was not in the rack. Furthermore, no supervisor was at a supervisor's desk so she went to her case and began casing mail. She stated that shortly after she arrived Messrs McClain and Tuminting came to the case and asked her to come to the office. She stated that they discussed the matter of the time card and that McClain said that he pulled the time card at 7:38. During the meeting the grievant insisted that she arrived at work at 7:30. Eventually the grievant admitted that she signed a document which indicated that she arrived at work at 7:34. She testified that she did this as a compromise measure because during the course of the meeting "they were not getting anywhere". During the grievant's direct testimony she did say that she could have arrived at work a couple minute late. During the hearing there was a good deal of testimony about how the Service accounted for the grievant's time on October 25. The Arbitrator does not think that the particular method of accounting for the grievant's time is necessary to the resolution of this dispute so that will not be detailed.

On November 18, 1989 the grievant called the Service at 6:45 and told Mr. McClain that she would be late that day. During the course of this telephone conversation, Mr. McClain approved a change

in the grievant's schedule. Mr. McClain reported this matter to Mr. Tuminting. At this time Mr. Tuminting told McClain that the grievant was subject to a last chance agreement and directed him not to approve any more changes in her schedule.

The grievant baby-sat her sister's children at her own home on the night of November 17-18. The grievant testified that her sister believed that the grievant's starting time on November 18 was 7:30 so she did not return to the grievant's return home in time for the grievant to get to work on time. Basically the grievant was late to work because she stayed home and continued baby-sitting her sister's children.

It is undisputed that the grievant and Mr. Tuminting had a discussion about this matter. The grievant testified that she did not remember everything that was said. However, it is rather clear to the Arbitrator that Mr. Tuminting told the grievant that she had used all of her approvable tardies under the last chance agreement and if she was late to work one more time she would be subject to discharge.

On December 22, 1989 the grievant called Mr. McClain at 6:52 and told him that she would probably be late because her truck would not start. She arrived at work at 7:06 a.m. She was scheduled to start work at 7:00 a.m. The official file contains a statement of an individual who stated that he did repair work on the truck. This

statement says that Mr. Gallagher, the repair man, "repaired the fuel injection, the clutch, the distributor, and replaced the battery".

On January 10, 1990 the Service issued the grievant a document entitled "Violation of Last Chance Agreement--Effective Date Removal". This document states:

> You are hereby notified that you will be removed from the Postal Service effective 1-13-90. The reasons for this removal action are:
>
> > On 8-21-89 you signed a Last Chance Agreement that stated you would be removed for a violation of paragraph #3 which specified requirements in regard to your attendance record.
> >
> > Paragraph 3a indicated you would be allowed two (2) approved tardies with your removal being effected if your tardies exceeded two (2).
> >
> > A review of your attendance record finds the following:
>
> | | | |
> |---|---|---|
> | 9-30-89 | 1 hr 13 min. | Late |
> | 10-25-89 | 8 minutes | Late |
> | 12-22-89 | 6 minutes | Late |
>
> Your attendance record in regard to being regular in coming to work on time has violated your Last Chance Agreement.

The Union filed a grievance which was discussed with the Service on February 6, 1990. The Service's step 2 decision states:

> Pursuant to a discussion between your representative, S.Shank, and the undersigned on 2-6-90, and after consideration of the facts, the following is my decision:
>
> > At issue in this grievance is a violation of a Last Chance Agreement--effective date of removal which the union indicates was improperly issued.
> >
> > The grievant was given a Notice of Removal on 7-17-89 which was resoled via the grievance

procedure to a Last Chance Agreement. Paragraph #3 of the document indicated that she would be allowed two (2) approved tardies during the term of the agreement. If during the 12 month time frame she were to incur more than two (2) tardies, the agreement would be considered violated and she would be removed from the U.S. Postal Service without recourse to the grievance-arbitration appeal process.

On 9-30-89 Ms. Osorio was 1 hour 13 minute late for work. Upon her arrival at work she was allowed to take annual leave for this time but was cautioned later that this was her first approved tardy and she was only allowed two (2). No grievance was filed in regard to this incident.

On 10-25-89 Ms. Osorio was scheduled to report for work 0730 hours. At 0738 Supervisor McClain did not find her at her case and subsequently pulled her time card from the rack at the time clock. Upon her arrival she was questioned as to her lateness and she indicated that she was late, whereupon a PS 1260 was filled out with an arrival time. Ms. Osorio did not file a grievance in regard to her being change late on this day.

On 11-18-89 Ms. Osorio contacted the station with information that she was running late. Upon her arrival she was allowed to change her schedule. On 11-24-89 the station manager discussed this incident with her and re-emphasized her obligation under her last Chance Agreement, i.e. only allowed two (2) approved tardies and zero (0) AWOLs. In addition she was told that any more tardies would result in her removal from the U.S. Postal Service.

On 12-22-89 Ms. Osorio contacted her station at 0652 hours indicating her vehicle would not start. She arrived at 0-708 hour which is six minutes late (her begin tour is 0700 hours). As such, this is a third late since signing the Last Chance Agreement and termination is appropriate.

The union contends that there exists some procedural difficulties with the recording of Ms. Osorio's lateness for 9-30-89 and 10-25-89. Although each incident was handled differently for recording purpose, on each date, Ms. Osorio was late in her arrival at work. These minor discrepancies in paperwork are insufficient to

> mitigate or entirely remove the late arrival to work of this employee.
>
> It is management's position that the union is procedurally defective in filing a grievance in regard to the lateness on 9-30-9 and 10-25-89. Article 15.2, Step 1(a) clearly indicates that an employee must file a grievance within 14 days for it to be timely. Ms. Osorio was informed of her lateness on each date but did not challenge this in the grievance procedure. As such, the union is precluded at this time from arguing the propriety of these two tardies.
>
> Based on the above, I find no violation of the National Agreement and must deny this grievance.

The Union being dissatisfied with the Service's step 2 decision, processed the grievance to arbitration.

POSITIONS OF THE PARTIES

Position of the Service

Initially the Service contends that the grievance is not arbitrable. The Service contends that the Union and the grievant knowingly relinquished the grievant's right to grieve any discharge resulting from a subsequent violation of the last chance agreement. The Service emphasizes paragraphs 1 and 4 of the last chance agreement on this point. It places particular emphasis on the first sentence of paragraph 1 which states "The notice of removal will be held in abeyance for a period of 12 months . . ." The Service also notes that the last chance agreement is "in full settlement of the appeal concerning the notice of removal dated July 17, 1989".

A significant part of the settlement agreement was the grievant's obligations which are stated in paragraph 3 of that agreement. If the grievant failed to comply with paragraph 3 of the last chance agreement, she is subject to termination and under paragraph 4 of the last chance agreement. The grievant has waived her right to file a grievance in such a case.

The Service contends that the last chance agreement is clear and unambiguous. The Service also, anticipating a Union argument that the Union does not have the authority to enter into such an agreement waiving the right of an employee to file a grievance, cites several arbitration awards which uphold the Union's right to enter last chance agreements.

The Service relies on a decision of Arbitrator Goldstein in **C1N-4B-D 23347**. This case involved a termination under a last chance agreement and contains standards which must exist before a last chance agreement will be enforced in arbitration. Arbitrator Goldstein states:

> . . . For a "last chance" agreement to be proper, the following conditions must be met: (1) the waiver must be specific, (2) the employee must have full knowledge as to the rights he is giving up, (3) the employee must receive a substantial benefit in return, and (4) the Union must participate and consent, either expressly or impliedly, to the waiver and "last chance" settlement, since the Union negotiated the contractual rights and the waiver by one employee may affect others. . . .
>
> There is no inference other than that Grievant well knew or at least should have known of the waiver of his recourse to arbitration under the progressive or corrective

> discipline standards incorporated into the Labor Contract. . . .

The Service also relies on the decision of Arbitrator J.Dworkin in case C1C-4F-D 15658. The grievant in Arbitrator Dworkin's case was discharged for irregular attendance. The last chance agreement, for all practical purposes was identical to this one in that it stated:

> The implementation of the removal date will be held in abeyance for a period not to exceed 14 months from the date of the agreement in order to give the grievant an opportunity to demonstrate improvements in compliance with the conditions stated below. . . .

At page 10 of his decision, Arbitrator Dworkin made the following statement:

> Assuming that such settlements are valid, they characteristically provide that the subject employee cannot rely upon absence of just cause as a bar to a subsequent discharge. The agreement in this case seems to include the same substantive provision. It is, however, uniquely worded. Rather than abolishing the former discharge, it suspends it for a period of fourteen months and recognizes Management's prerogative to reinstitute it if Grievant falls short of keeping her promises. But the result is substantially the same. In either event, the Employer is accorded the right to terminate employment without having to prove a foundation of just cause.

In addition, the Service relies on a decision of Arbitrator Francis in case **W4C-5K-D 9883** and Arbitrator LeWinter in case **W1C-2D-D 6502**. Based on the foregoing decisions, the Service contends that the Arbitrator is without authority to hear and decide this matter because of the Union's and the Grievant's last chance agreement.

Next, the Service contends that the Union may not grieve the tardinesses of September 30 and October 30 because grievances were not filed within 14 days of those occurrences. The terms of the last chance agreement clearly state that the grievant could be late for work on two approved occasions. The Service asserts that the days on which she was late began the running of the period within which the Union had to file a grievance. The Union's failure to file grievances regarding these two tardies precludes the Arbitrator from considering them.

Finally, the Service contends that the grievant violated the terms of the last chance agreement and is subject to discharge thereunder. According to the Service, there is no dispute that the grievant was late for work on September 30 and December 22. She admitted this at the hearing. The Service contends that the preponderance of the evidence clearly establishes that the grievant was late for work on October 25. The Service contends that Mr. McClain credibly testified that the grievant was not at work when he removed her time card from the rack. Furthermore, the grievant has signed a document stating that she reported to work at 7:34. The Arbitrator should consider this admission to be conclusive against the grievant. For the foregoing reasons, the Service contends that the grievance should be denied.

Position of the Union

The first argument of the Union is that neither it nor the grievant has authority to abrogate the terms and conditions of the National Agreement. The Union notes that **article 16 section 1** of the contract provides: "No employee may be disciplined or discharged except for just cause." The Union contends that neither the grievant nor the Union has the right to waive this provision of the contract. The Union states: "To do less is to allow the Service to remove an employee working under the demands of an LCA (last chance agreement) without just cause."

The Union also contends that to the extent that the last chance agreement attempts to restrict the grievant's right to file a grievance, it is in conflict with the National Agreement and hence is unenforceable. The Union contends that several arbitrators at the regional level, including Levak, Cohen, and Axon have all had held that last chance agreements which preport? to abolish the grievant's right to file a grievance for discharge violate the National Agreement and are unenforceable. For example, Arbitrator Cohen in case **C1C-4A-D 3843** (1982) stated: "Obviously, her agreement not to grieve is unenforceable because the National Agreement gives her the right to grieve." Arbitrator Axon in case **W7C-5D-D 9220** (1989) states:

> The responsibility of this arbitrator is to interpret the last chance agreement in light of the just cause requirement of the Collective Bargaining Agreement. In order to resolve the dispute two major issues must be addressed by the arbitrator. First the arbitrator must determine whether or not the grievant was in violation of the last chance

agreement. Second, if the grievant violated the last chance agreement, was removal appropriate?

The Union also notes that for the Arbitrator to deny the grievant the right to grieve in this situation would be a violation of **article 15 section 4 (A)(6)** which states that an arbitrator shall not alter, amend, or modify the National Agreement. For an arbitrator to allow the grievant and the Union to waive the right to the grievance procedure constitutes a modification, alteration, or amendment to the National Agreement.

The Union contends that it has not waived its right to grieve any of the tardies involved in this case by not filing grievances within 14 days of the dates on which the grievant was late to work. The Union contends that it was sufficient that the Union filed a grievance with 14 days of the grievant's removal.

Turning to the merits of the case, the Union contends that just cause is lacking in the Service's attempt to invoke the last chance agreement. Regarding the first tardy on September 30, 1989, the grievant was assured that this tardy would not be held against her. Mr. DeBaca testified that it was his understanding that the September 30 tardy would not be considered in invoking the last chance agreement.

The Service argued that the grievant was eight minutes late to work on October 25, 1989. The grievant denied being late to work

that day. At 7:38 she approached her supervisor after discovering that her time card was not in the card rack. On this occasion the Union contends that the grievant was unaware of a change in her starting time for the route she was scheduled to deliver on October 25. The Union contends that in point of fact the Service pulled the grievant's time card at 7:00 a.m. rather than 7:38 a.m. as Union witnesses claimed at the hearing.

The Union contends that if either of the above referenced tardies are not counted, the grievant has not reached the threshold for invoking the last chance agreement. However, even if the Arbitrator finds against the Union with respect to these two tardies, the Union contends that just cause is lacking. The Union relies on a decision by Arbitrator Levak in case **W7C-5S-D 16792** in which Arbitrator Levak stated:

> In the case of an LCA removal, the focus of an arbitrator is upon: first, whether the incident giving rise to the violation occurred, and second, whether the incident is serious enough under the just cause standard to justify summary removal. To demonstrate an LCA violation meriting removal, the Service ordinarily need establish a significant violation of the LCA, i.e., something more than a mere 'de minimus' or 'technical violation. An extreme example of such a de minimus/technical violation would be an employee with a perfect record during the first eleven months of his one-year LCA term who is then one minute late to work.

The Union contends that the grievant's last two tardies, October 25, 1989 and December 22, 1989 were de minimus in nature. The grievant was making an honest effort to improve her attendance

problems. For the foregoing reasons, the Union requests the Arbitrator to sustain the grievance.

DISCUSSION

Based on the provisions of the contract, the testimony given at the hearing, and the arguments of the representatives of the parties, the Arbitrator has concluded that the grievance is properly before him for consideration on the merits. Considering the grievance on the merits, the Arbitrator has concluded that the grievant violated the last chance agreement and is subject to discharge. For the reasons given in detail below, the grievance is denied.

The Arbitrator must first respond to the Service's argument that the grievance is not properly before him because the last chance agreement contains a binding waiver of the Union's and the grievant's right to the grievance process. The Arbitrator disagree with the Service on this point. The Arbitrator does not think that the last chance agreement says what the Service argued that it does. The Arbitrator recognizes that paragraph 1 of the last chance agreement clearly states that the Union and the Service agreed to hold in abeyance the notice of removal dated July 17, 1989. The Arbitrator thinks that the Service has misread paragraph 4 of that agreement. The paragraph states, in part, "Appeal rights to the grievance arbitration procedure . . . are waived during the 12 month period on this removal action". As the Arbitrator reads the last chance

agreement, the phrase "on this removal action" is a fairly clearly reference to the removal action of July 17, 1989. The Arbitrator does not think that paragraph 4 refers to waiving appeal rights to a violation of the last chance agreement.

Furthermore, the Arbitrator's conclusion on this point is supported by the two decision's upon which the Service most strongly relies. It is very clear from reading Arbitrator Francis' opinion that he did not consider himself precluded from passing on the discharge under the last chance agreement. At page 15, Arbitrator Francis made the following remark, "A careful review of the evidence and testimony at the hearing convinces me that there was just cause for the removal of grievant Williams under the facts elicited on this record". Continuing at page 18, Arbitrator Francis said,

> It is readily apparent that under applicable regulation and **article 10** of the contract, an AWOL is a breach of duty and permits corrective discipline to be issued. Whatever mitigating circumstances are present, must then, be considered in light of the 'last chance' agreement and its impact on the just cause requirement in this instance.

Finally on page 19, Arbitrator Francis stated:

> In the present case, the Service contends that the grievant by his Union signing the April 26 'last chance' settlement agreement was deprived of his right to maintain the usual standard of progressive discipline in excessive absenteeism cases apply.

It is obvious to the Arbitrator from the foregoing quotations from the Francis decision that he did not consider himself without any authority to review action taken by the Service under the last chance agreement.

Similarly the Dworkin decision does not support the Service's argument. At page 9, Arbitrator Dworkin stated:

> The Postal Service contends that the settlement it made with Grievant and her Union on July, 1982, was not a last chance agreement. It views the settlement as something else--something that may look like a last chance agreement on the surface, but is unique because it contains an element of critical difference. The element referred to by the Postal Service is set forth in items 1 and 2 of the agreement, which clearly affirm that the prior removal was for just cause and stipulate that execution of the former removal was simply being held in abeyance for a period not to exceed fourteen months.
>
> In the Arbitrator's opinion, the Postal Service's argument is more a matter of form than of substance. . . .

At page 15 Arbitrator Dworkin stated:

> The foregoing conclusion does not mean that the Arbitrator is divested of all authority to review the facts of this grievance; nor is the Union foreclosed by the July agreement from obtaining a favorable award.

At page 16, Arbitrator Dworkin made the following remarks:

> There was one element of protection that Grievant did not yield. It is universally acknowledged that, when an employer takes action pursuant to its exclusive vested authority and thereby adversely affects a condition of employment, the action is reviewable by an arbitrator and is governed by standards. An employer cannot abuse its authority. It may not act unreasonably, arbitrarily, capriciously, or discriminatorily. Although just cause is not an element of this controversy, the decision to discharge Grievant must still withstand evaluation of its reasonableness. During the hearing, the Postal Service admitted as much. It conceded that if Grievant had been perfect in attendance and if she had maintained a dedication to following her PAR program, her discharge would have been unsupportable, even in light of the prior agreement. In other words, the Postal Service acknowledged that it too made a commitment in the July settlement. It agreed that the discharge would not be implemented if Grievant demonstrated requisite improvement. The Postal Service was as fully bound to its promise as Grievant was to hers. Therefore, it remains to be determined whether the subsequent discharge of Grievant was so unreasonable as to

constitute a violation of the July settlement by the Postal Service.

Thus it cannot also be seen that Arbitrator Dworkin's decision does not support the proposition advanced by the Service.

Neither does the Arbitrator think that the Union was bound to file a grievance within 14 days of September 30 and/or October 25. It is true that on October 25, assuming that the grievant was late, that she had incurred her second tardiness under the last chance agreement. Normally the way the grievance procedure operates in discipline cases is that the Service takes some form of disciplinary action and the Union responds to it. It would appear to the Arbitrator to be highly anomalous for the Union to have filed a grievance on this tardy unless the Service took some disciplinary action against the grievant or administrative action which could lead to disciplinary action. Accordingly, the Arbitrator rejects the Service's timeliness argument.

Turning to the merits of the case, it is the Arbitrator's conclusion that the grievant was properly terminated under the provisions of the last chance agreement. Subject to the kinds of considerations stated by Arbitrator Dworkin, last chance agreements are valid and enforceable under this contract. The only remaining question is whether the grievant violated the terms of that agreement.

It is undisputed that the grievant was late for work on September 30, 1989. The only possible area of confusion about this

tardy is whether the Service would treat it as an AWOL or an excused absence. After some consideration, Mr. Tuminting decided to treat this tardy as the first excused tardy under the last chance agreement. The Arbitrator has concluded that he fully informed the grievant of his decision and that she was not confused about it.

There is conflicting testimony about whether the grievant was late on October 25. The Arbitrator has concluded that a preponderance of the evidence establishes that she was late to work on this occasion. It is undisputed that when the grievant arrived at work that morning, whether or not she was late, her time card had been pulled. The Arbitrator thinks that Mr. McClain pulled the grievant's time card from the rack at 7:30 as he testified. There was no evidence from which the Arbitrator could infer that Mr. McClain pulled the grievant's time card earlier. He testified that his regular practice was to pull the time cards for absent employees at 7:30. If he pulled the time cards earlier, it seems to the Arbitrator that some other employees would have complained that their time cards were not in the rack at the clock in time of 7:30. No such evidence was introduced.

Second, it is clear that the grievant did not seek out a supervisor when she arrived at work that morning. She went straight to her case and began working. It seems to the Arbitrator that given the fact that the grievant knew that she had been counted tardy on September 30, if she was at work at 7:30 and her time card

was not in the rack, the first thing she would have done would have been to have found a supervisor and tell him that she was at work on time. She did not do that. This circumstance, when combined with the fact that there was definite evidence that a Union steward advised her not to clock in if she was late because it would be more difficult for management to prove, supports the conclusion that the grievant did not report to work on time.

Finally, the grievant signed a document which in which she admitted that she arrived at work at 7:34. Her explanation for filling out the form in that manner as a compromise measure is not particularly persuasive. In any event, it is an admission by her that she was late for work that day.

It is also undisputed that the grievant was late for work on December 22. The grievant's testimony that he was late because of car trouble is somewhat questionable. The grievant's mother wrote a note which was in the arbitration file which states:

> On December 22, 1989 I, Sonja Osorio, was called at approximately 6:45 a.m. by my daughter Syndee Osorio, to take her to work in my car. As I was not yet dressed and living a mile away from her, it took me almost 10 minutes to pick her up. We arrived at her place of employment at approximately 7:06 a.m. According to this note, the grievant asked her mother to pick her up and take her to work 15 minutes before she was actually due to be at work.

It is worth noting that the grievant did not call any supervisor prior to 7:00 a.m. that morning and tell the supervisor that she would be late. It is clear that the grievant was dangerously close to being discharged at this time. It is also clear to the the Arbitrator that

the grievant understood that if she was late to work one more time she would be discharged. In these circumstances, the Arbitrator thinks that the grievant was behaving irresponsibly by not being further along in getting ready to go to work at 6:45 a.m. when she called her mother. Thus, even assuming that the grievant's friend's truck would not start that morning, the Arbitrator does not think that the grievant has provided an acceptable excuse for being late to work that day.

Finally, the statement of Robert Gallagher, the individual who repaired the truck, is highly questionable. He states: "I, Robert Gallagher, repaired the fuel injection, clutch, distributor, and replaced the battery for Paul Schenck on his Ford truck at my place of residence." In all candor, the Arbitrator thinks that most motor vehicles do not have that many things wrong with them at the same time. Even assuming the truthfulness of Mr. Gallagher's statement, the grievant would have been totally irresponsible to have been relying on a truck to drive to work that had a defective fuel injection system, a defective clutch, distributor, and a bad battery. Based on the foregoing analysis, the grievance is denied.

AWARD

The grievance is denied.

29 November 1990

EDWIN R RENDER
Arbitrator