C#08352

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION Between UNITED STATES POSTAL SERVICE And NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: Francis D. McDaniel POST OFFICE: Austin, TX CASE NO. S4N-3U-D-64115

BEFORE: P. M. WILLIAMS, ARBITRATOR, SOUTHERN REGION

APPEARANCES:

FOR THE U. S. POSTAL SERVICE:
Donald H. Varenhorst, Labor Relations Representative

FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS:
Alex A. Alcorta , Local Business Agent

PLACE OF HEARING: Post Offic, Austin, TX

DATE OF HEARING: July 22, 1988

DECISION AND AWARD

BACKGROUND:

The grievant was employed as a full time regular letter carrier at the Westlake Station, Austin, Texas. His craft seniority date is May 20, 1979. On July 23, 1987 he was issued (1) an Emergency Placement in an Off Duty Status and (2) a Notice of Proposed Removal. (1) was timely grieved. It was rescinded on August 17th with his being placed on administrative leave retroactively to his receipt of it. Because (1) was rescinded and its content is essentially the same as that which is found in (2) only the latter will be quoted in part:

"*** This is notice that it is proposed to remove you from the Postal Service no earlier than 30 days from the date you receive this letter. The reason for this proposed action is as follows:

"Failure to follow your physician's orders while receiving continuation of pay.

"On May 2, 1987 you filed Form CA-1, claiming an alleged back injury. You were examined by Dr. GRG (initials) and advised to remain at bed rest for 48 hours and to apply heat to the area of the injury. You were placed on total disability from May 2 through May 4, 1987. Along with information, you were given a sheet entitled, 'Employee Responsibilities' which included, in Section 8, this information, 'Please be advised that any on duty or off duty activity on your part, which could aggravate your condition or which is otherwise inconsistent with your physical limitations, may result in appropriate adverse action by the U. S. Postal Service and/or ineligibility of OWCP benefits.' You acknowleged receeipt of this sheet, by signature, on May 2, 1987."

"Later that same day, May 2, 1987, you and retired Postal employee, CW (initials), loaded ice in your pickup truck for a fishing trip. On May 3, 1987, you drove your pickup truck approximately 75 miles for the fishing trip. During the time you were fishing, you were observed rolling out a tent, carrying a tackle box, and helping carry an ice chest. You were also observed running trout (sic) lines and helping clean fish. When the fishing trip was over on Thursday, May 7, 1987, you helped break down the camp and reload all equipment.

"On May 29, 1987, you filed Form CA-2A, Notice of Recurrence of Disability and Claim for Pay Compensation, relative to your alleged injury on May 1, 1987. On May 28, 1987, you were again examined by Dr. GRG. Dr. G again advised you to remain at bed rest for the next 48 hours. Dr. G further indicated that you would be totally disabled from May 28, 1987 through May 31, 1987. On May 30, 1987, you took your daughter fishing.

"On June 2, 1987, you again went fishing with CW. On June 3, 1987, you returned to Dr. G's office complaining of pain in your back and your left lower extremity. Once again, Dr. G instructed you to stay off duty from June 3 through June 5, 1987, to remain at bed rest for the next 48 hours. You were to return to limited duty only beginning June 6, 1987.

"Your actions beginning May 2, 1987 were in direct contradiction to your doctor's orders. Your actions on May 30, 1987, were again in direct contradiction to your doctor's orders. On June 2, 1987, the third time you went fishing, you were under no orders. However, on June 3, 1987, you again returned to the doctor complaining of pain in your back and were once again instructed to stay off duty, on total disability, and to remain at bed rest from June 3, through June 5, 1987. In total, your off duty actions were such that they could aggravate your condition and were otherwise inconsistent with your physical limitations. Further, your actions and your failure to follow your physician's orders while receiving disability payments lengthened your period of incapacity.

"You and/or your representative may review the material relied upon to support the reasons for this notice at 300 East 9th, Main Post Office during normal hours of duty or 8:00AM - 4:30PM, Room M-209, Personnel Section. ...

"You and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing or both before Sectional Center Director, Customer Services, between the hours of 8:00 AM and 4:30PM, Monday-Friday, 300 East 9th Street, Main Post Office. You may also furnish affidavits or other written material to the Section Center Director, Customer Services within 10 days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. After the expiration of the 10 day time limit for reply, all the facts in the case, including any reply you submit, will be given full consideration before decision is rendered. You will receive a written decision from the Sectional Center Director, Customer Services."

"In addition to your right to answer this is notice as explained above, you have the right to appeal this proposed action under the grievance-arbitration procedure set forth in Article XV, Section 2 of the National Agreement within 14 days of your receipt of this notice.

CF, Jr. (initials)
Acting Manager of Stations & Branches"

Under date of August 17, 1987, (received on August 22nd) a "Notice of Decision" letter was issued. In part the letter stated as follows:

"I have given full consideration to your personal answer of August 10, 1987, and all other evidence of record. I find that the charges stated in the notice of July 23, 1987 are fully supported by the evidence and warrant your removal from the Postal Service. Accordingly, it is my decision that you be removed effective September 1, 1987. No elements of past record were cited in the notice of removal dated July 23, 1987. However, your personnel files and the investigation memorandum were both reviewed in detail.

"You have the right to appeal this decision to the Merit Systems Protection Board (MSPB) immediately but no later than 20 days from the date you receive this letter. ..."

The record could be more complete than it is in view of the procedural objection raised by the Employer. (More will be said about this in a moment.) However, included was a "Grievance Worksheet" which, in part, states as follows:

"*** On 7/28/87, grievant received a 'Notice of Proposed Removal' letter signed by Station Mgr. C. F. (intials). He is charged with failure to follow his physician's orders while receiving continuation of pay. This action was taken in accordance with Article 16, Sec. 7 of the National Agreement. These charges were a result of a Postal Inspector's report filed on 7-16-87. This report was requested by the Injury Compensation Specialist in Austin, Texas. The report concerns grievant's activities on 5-2-87, 5-3-87, 5-30-87, 6-2-87, which are dates the grievant is said to have been under physical limitations requested by a physician. On the same date he was placed in 'Emergency off-duty status."

The grievance that was discussed at Step 1 requested, "That grievant be made whole from 7-28-87 until corrective action is inforced (sic), meaning placed 'in' pay status. This action should be taken immediately."

Supervisor VMG (initials) signed off on the grievance form on August 29th, stating that "Corrective action has already been implemented". It is undisputed that the Emergency Suspension was rescinded retroactively on August 17th.

Another grievance form was also made a part of this record. In the "Exactly what happen" space the following is stated:

"*** On 8-22-87, grievant received a 'notice of decision' certified letter that advised him of his removal from the Postal Service as of 9-1-87. A personal appeal was presented on 8-10-87 by the grievant and his representative, RW (initials) to BS, Acting Customer Services"

"Director. The removal is based on information stated in a 'proposed removal' letter of 7-23-87 which charges grievant with failure to follow his physician's orders while receiving continuation of pay (COP). Also stated in the decision letter, was the acknowledgement that the grievant's personel file and an investigative memorandum was reviewed in detail. The 'COP' violations have an accumulated total of 44.55 hrs. ..."

The form reflects the grievance as being No. "87-D-52-N", and that a meeting at Step 1 was held with the acting station manager on 8-31-87. He signed off as giving his decision on the 31st.

Joint Exhibit 6 of the record is dated October 16, 1987 and in part states as follows:

"Step 2 Appeal Decision - Local No. 87-5-52-N
Union No. 1987-240
F. McDaniel"

"*** Management Position: The grievance is procedurally defective. A step 1 grievance was not filed in a timely manner. It is further the position of Management, the Step 1 meeting alleged to be held on August 31, 1987, was not identified as a Step 1 meeting by the Union. Not withstanding, the grievant and the Union were notified in a proposed removal letter dated July 23, 1987, of the agency's intentions to remove him from the Postal Service. Additionally, in the letter of proposed removal dated July 23, 1987, and received by the grievant on July 28, 1987, the grievance is specifically advised of his rights under the grievance procedure.

"Beyond the procedural aspects, the grievance is denied on the merits. The grievant nor the Union deny the facts as stated in the letter of charges. The grievant used 44.81 hours of continuation of pay that was paid on the basis of a subjective complaint of acute back pain. Facts of the investigation reveal that the grievant was placed in a disability status on or about 10:00 AM on May 2, 1987, and shortly thereafter began or continued to make preparations for a fishing trip while he was supposedly in a total disability (bed rest) status and being paid by the U. S. Postal Service for the time that he was not working his regular schedule. The Union's allegations that the grievant was set up and an investigation was conducted by the U. S. Postal Inspection Service was improper are unfounded. The Union does not document a single incidence where an employee requested the presence of a Union representative. Additionally, at no time did Management suggest to the grievant that he indulged in the activity that took place. A detailed investigation conducted by the U. S. Postal Inspection Service documented the improper actions of the grievant. The actions and the reporting of the questionable injury by the grievant is considered a serious offense and the actions taken by Management are fully supported by the record. For the above mentioned reason(s), this grievance is denied.

"If you appeal this decision, please furnish me a copy of your appeal.

"JZO (initials)
"SC Director, E&LR".

On October 23, 1987 the Union completed an Appeal to Step 3 for "Branch Grievance No. 1987-240". It is stamped as having been received by Management on October 26 and also October 27, 1987. In part the Appeal stated as follows:

"*** The Union contends this grievance is timely and is not in any way procedurally defective as management's Step 2 denial states. ...

"*** We contend that Mr. (grievant) was removed unjustly. ..."

Under date of December 16, 1987 the Union's National Business Agent was sent a Step 3 Grievance Decision. It was headed and stated as follows:

"*** S4N-3U-D 64115
Grievant: F. McDaniel
City: Austin, Texas
Local #: 1987-240

"This confirms a recent meeting between yourself and the undersigned to discuss the above-captioned grievance.

"Based upon the information presented by your representative and the evidence contained in the file, the grievance is denied.

"The file reveals that the grievant did in fact fail to follow his physician's orders while receiving continuation of pay.

"For the above stated reason(s), the letter of proposed removal was properly issued and for just cause. Nothing was presented during the discussion which warranted mitigation of the discipline issued. No interpretive issues were raised by either party.

"MVG (initials)
"Management's Representative"

All interested parties appeared at the hearing where they were given an opportunity to present such evidence, through exhibits and the testimony of witnesses as was deemed appropriate under the circumstances. The grievant appeared and testified on his own behalf. All witnesses were placed under oath and were cross-examined by the opposing party. Each party timely submitted a post hearing brief to the undersigned.

At the outset of the hearing the Employer's representative raised a threshold question of the arbitrability of the Union's right to attack the removal action. The basis of its claim was that the Union had failed to timely file a grievance to the Notice of Proposed Removal (Notice). The Employer did not question the appropriateness of the grievance pertaining to the Letter of Decision (Letter). Rather its position was to the effect that because no grievance was timely filed to the Notice the Union was unable to have the matter heard and resolved through the grievance-arbitration precedure of the National Agreement (NA).

Under other circumstances it would be necessary for the undersigned to examine in detail the thrust of the Employer's procedural objection in this case. However, because the Step 3 Decision Letter involved here did not continue to defend against the grievance on the basis of its untimeliness and because a National Award decision (Case Number H8T-5C-C-1160) is to the effect that the defense must be asserted at Step 3 otherwise the defense is deemed waived, he need not go into great detail to explain why he believes the Employer's objection should not be sustained. Rather he will only briefly note that the award cited was made by national arbitrator Benjamim Aaron. It arose in San Rafeal, CA. In processing of the grievance at Step 1 and at Step 2 the Employer claimed it was not arbitrable because it was not timely filed. But at Step 3 it failed to continue to assert its timeliness objection. And at that level its decision was based on the merits of the grievance with no mention being made, at least as far as that record was concerned, of a timeliness issue ever having been raised earlier in both lower Steps.

From the holding in the case cited it seems clear that Professor Aaron deemed the failure to continue to assert the timeliness defense as being a waiver of its use: and he apparently did not believe, as some arbitrators in regional cases have concluded, that an untimely filed grievance should be deemed fatally flawed at the outset and therefore is not processable through the grievance-arbitration procedure of the NA. Instead he seemed to believe that the defense was in the nature of an affirmative one which must continue to be raised at every level of the procedure otherwise it is deemed waived.

It should not escape notice that the Aaron award was issued on July 7, 1982, long before the negotiations for the 1984-87 NA began. However after its issuance the parties did not see fit to alter its effect by negotiating changes to Article 15 to escape its thrust. It seems appropriate to say then that they accepted it as a correct interpretation of their intent regarding what must be done to keep a timeliness issue alive throughout all steps of the grievance-arbitration procedure, and that the mere fact that a grievance was not initially timely filed is not an absolute bar to its being arbitrable. Rather it is what the Employer does thereafter that is determinative.

In the Aaron case the Employer failed to keep the issue alive at Step 3, and it did likewise in this case. The undersigned therefore is of the opinion, and so finds, the Employer's objection to the arbitrability of this grievance is without merit, consequently it should be, and the same hereby is, overruled.

Returning to the substantive background of what happened leading up to the grievant's removal.

It is undisputed that the grievant called a supervisor on friday, May 1, 1987 to report that he had injured his back and that he needed assistance to complete his route. Assistance was provided. The following morning he completed a Form CA-1. Later, while casing his route, he indicated to the same supervisor that unless his back improved he planned to go to a doctor for treatment. It did not improve and at approximately 10:00 AM on May 2nd he left work for the purpose of being examined by the doctor. He returned to the station. He filled out a Form 3971 and gave it to the supervisor. The form requested 3.76 hours of sick leave. The supervisor accepted the form without comment. The grievant then clocked out and left the station.

The Employer acknowledges the fact that later, without the grievant's asking that it be done and without his having filed a second Form 3971, it treated his absence on May 2nd as a continuation of pay (COP) situation, rather than sick leave as was originally requested. Why a change was made and when it was made is somewhat obscure. An Employer witness, BK (initials), said it was made a few days later because the supervisor did not know that standard procedure dictated that any time off taken by an employee after a CA-1 was filed was to be charged to COP, and not sick leave. The witness however did not describe, or offer to, what the procedure would be when the Employer undertook to challenge the existence of an injury, or if in fact one existed that it nevertheless was not job related. In this situation the Employer challenged the OWCP claim filed by the grievant. The record does not show the basis of its challenge. More will be said about this later.

For almost a year the grievant and several other employees at the station had been planning a fishing/camping trip to a lake located about 75 miles NE of Austin. The trip was an annual event and had been going on for several years. Because of the number of employees involved in the outing all other employees at the station were necessarily aware of it even though they might not be participants in it.

Annual leave for the week of May 3rd had been applied for and given to all who were to be involved in it, the grievant being in the group. May 3rd was the pre-arranged date for their departure. They were to return late in the week.

Among the grievant's chores preparatory to leaving on the trip was the filling of several ice chests from the ice machines at the apartment complex where he lived. The ice could be obtained without cost to the group. A retired letter carrier, who had been a regular participant in past outings and who was to make the current one, testified that in the early afternoon of May 2nd the grievant came to him and said he might not be able to make the trip because of his back, and that they should get the ice that afternoon. He said the two of them then went to the apartment complex where he did all of the work connected with putting the ice in the ice chests and loading the chests in the pickup truck.

On sunday, the 3rd, the grievant drove his vehicle to the camp site. He agreed he did some of the light work involved in setting up the camp. He also agreed that during the next few days he was involved in fishing and in running trot lines placed in the lake, and also in the cleaning of fish and tearing down the camp on the last day.

On May 7th, BK (initials), who is the Employer's local Injury Compensation Specialist, contacted a Postal Service Inspector to request that "an investigation be conducted with regard to the recent FECA injury compensation claim filed by [grievant]".

The Postal Inspector involved in the investigation was a witness at the hearing. It was his testimony the BK advised him that the grievant "had used the injury as a pretext so that he could go fishing", and also that "fraud was involved". It was also his testimony that based on what he was told by BK he concluded that an investigation should be made, but that based on what the investigation disclosed he did not believe that fraud was involved.

The Investigative Memorandum of the Postal Inspector was made a part of the record. Its date is July 16, 1987. It does not state the Inspector's conclusion of the grievant not being involved in fraud against the Employer.

The grievant returned to duty on his next regular scheduled day after completing the annual leave he took to participate in the outing.

He agrees that the doctor advised him on the morning of May 2nd to take 48 hours of bed rest. He also agrees that similar instructions were received from the doctor as the Employer claimed in the Notice. He admitted to having gone fishing with a friend on June 2nd, and with his young daughter on May 30th as the Notice said. But he vigorously denied that he did anything to warrant his removal, or that he knew removal was possible or likely for not following the doctor's instructions.

He conceded that on May 2nd, in conjunction with receiving the CA-1 form, he was given a copy of a letter routinely given to injured employees and that contained in ¶8 thereof was the following language:

"8. Since you have claimed an injury that may be compensable under the FECA, possible detriment to your future physical condition becomes a legitimate concern of the U.S. Postal Service. Please be advised that any on-duty or off-duty activity on your part, which could aggravate your condition or which is otherwise inconsistent with your physical limitations, may result in appropriate adverse action by the U.S. Postal Service and/or ineligibility of OWCP benefits."

The Employer conceded that it challenged his right to receive compensation from the OWCP. It did not however also explain the basis of its challenge. The OWCP allowed his original claim and also his later claim of a recurrence to the May 1st injury. He was paid a total of $485.00 in compensation for the following hours not worked on the following listed dates:

"Date	Hours
May 2nd	4.00
May 29th	8.00
May 30th	8.00
June 3rd	8.00
June 4th	8.00
June 5th	8.00
June 6th	4.00

POSITION OF THE PARTIES:

United States Postal Service (Employer):

Apart from the arbitrability issue which has been previously discussed the Employer contended that just cause existed for the removal action. It claimed that by wilfully failing to follow the instructions of the doctor the grievant aggravated and prolonged his recovery and was paid for days when he would have been able to work at either his regular assignment or at least at a light duty assignment but for his having ignored the instructions. It said the circumstances warranted his removal. It asked that the grievance be denied.

National Association of Letter Carriers (Union):

Apart from its position which related to the arbitrability issue raised by the Employer the Union contended that the Employer had failed to prove any of the essential elements of the charges it made against the grievant. Moreover, it claimed that in large measure the allegation made were either inaccurate descriptions of what had happened or were exaggerations of the importance of the rules and regulations cited. It said that just cause for a removal action did not exist therefore the grievance should be sustained with him being reinstated to his former position and made whole for earnings and fringe benefits lost, and with record of the discipline expunged from his personnel files.

ISSUE: (1) Is the grievance arbitrable, and if (1) is answered in the affirmative, (2) was the removal of the grievant for just cause and in accordance with the terms of the NA and applicable rules and regulations, and if not, what is the appropriate remedy?

OPINION:

As has been previously stated and discussed the grievance is deemed arbitrable. It was previously noted however (page 3) that the record is not a complete as it could be in view of the procedural objection that was raised. He will briefly explain what he means.

It has been the undersigned's experience that when a preference eligible employee is involved in an adverse action (removal usually), in most but not all installations, the Employer issues a Notice of Proposed Removal to which it expects and/or requires a grievance to be filed by the employee or the Union. The Notice neither advises the employee of his or her right to appeal the Notice to the Merit Systems Protection Board (MSPB), nor does it set the precise date for the action to become effective. Rather later, after the period set in the Notice for the employee and/or the Union, or both, to appear before the official designated to receive the employee's side of the affair, the designated official most usually issues a Letter of Decision (Letter) to which the Employer also expects and/or requires a grievance to be filed protesting it. The Letter advises the employee of his or her right to appeal to the MSPB and the address to which the appeal should be sent, and it sets the effective date of the discharge.

In this case there is no question but that no grievance was filed to the Notice of Proposed Removal within the 14 day period required by Article 15. One was later filed however. The Employer agrees that a proper grievance was filed over the Emergency Suspension and that it was later sustained, and also that a timely grievance was filed to protest the Letter.

From what is said at the bottom of page 3 and the top of page 4 hereof one can see the meeting with the acting station manager on August 31, 1987 was a Step 1 meeting for the grievance which protested the issuance of the Letter. Indeed the form itself shows it to be Grievance No. 87-D-52-N. It is to this grievance that the Step 2 Decision dated October 16th addresses itself, (See 2nd¶, page 4), and from what is shown on the form itself it is apparent that the meeting on August 31st was a Step 1 meeting, even though the writer of the Step 2 Decision says it was not.

Under the circumstances of the acting station manager having signed off on the Step 1 meeting on August 31st it seems relatively clear to the undersigned that the Employer deemed the grievance which protested the Notice and the one which did likewise to the Letter to be combined into one grievance because its position in the opening paragraph of its Step 2 decision letter addresses the alleged procedural defect brought about by the failure to file a grievance over receipt of the Notice, when its letter, per the grievance number, is in response to the grievance over the Letter which had no such procedural defect.

Moreover, when the appeal to Step 3 was made by the Union, it noted that the Branch Grievance # of that grievance was #1987-240, and it became, per the Step 3 Decision letter, Regional Number S4N-3U-D 64115 (See page 5 hereof). The latter is the case number to which the undersigned received an assignment dated June 20, 1988, to hear and decide it as the arbitrator.

Stated somewhat differently, it appears correct to say from this record that in the processing of the grievance relating to the Letter the Employer considered included therein the grievance relating to the Notice because at Step 2 it spoke of a procedural defect caused by an untimely filing but its argument on that score related only to the Notice grievance: it was inapplicable to the one involving the Letter.

For purposes of this decision and award the undersigned is of the opinion that having not been provided with a record which shows that a grievance as to the Notice and one as to the Letter either should have been or was processed separately it is appropriate that he find that the Employer has willingly combined the 2 mentioned grievances for purposes of processing both at Step 2 and beyond in the grievance-arbitration procedure of the NA. He also is of the opinion, and so finds, that such a combining of grievances is neither improper, nor is it a violation of Article 15 of the NA.

Turning away from the procedural matters involved here and to discuss the events and circumstances relating to the more subtantive matters of the case.

Early in the hearing it was disclosed that the Employer filed a challenge the OWCP claim made by the grievant for his alleged May 1st injury and also to his later claim of a re-injury on May 28th. It was also disclosed that the Department of Labor accepted the claim and rejected the challenge. The Employer therefore is in the position on the one hand of claiming that either the grievant is faking his injury or that it did not happen while he was on duty, and on the other hand of alleging that he did harm to himself by not following the specific instructions of his treating physician, and that that offense is sufficiently deplorable that it warrants his removal because the result of his acts allow him to collect money which does not rightfully belong to him, i.e., COP and potentially OWCP compensation.

Ignoring for the moment the inconsistency in the Employer's position because of its challenge to his claim of on-duty injury and the fact that if he were not injured on-duty it has no say in what he does or does not do insofar as recovery or rehabilitation is concerned, it seems appropriate to emphasize that in making such an allegation of

wrongdoing the Employer is obliged to prove by a preponderance of the evidence in this record that indeed what he did aggravated his condition and thereby delayed his return to work and thus unnecessarily added to its expense.

The Employer presented 4 persons as witnesses. There order of testifying in the Employer's case in chief and their identity was: (1) the on-duty supervisor on May 1st and 2nd, (2) the local injury compensation specialist who contacted the Postal Inspection Service, (3) the postal inspector who conducted the investigation and prepared the Investigative Memorandum, and (4) the acting station manager who issued the Notice. The latter also appeared as a rebuttal witness.

As its Exhibit 1 it produced the Investigative Memorandum (IM) which included narrative reports from the doctor that were written as a result of the doctor's examination of the grievant on May 2nd and 28th, and June 3rd.

The Union did not object to the IM being made a part of the record. Therefore, for purposes of this discussion it will be accepted as a useful document for purposes of helpling or harming the Employer's position because none of its witnesses were qualified by it to for the purpose of expressing a medical opinion concerning whether what the grievant admitted doing insofar as the charges were concerned prolonged his return to duty.

The doctor's narrative report of May 2nd lends nothing to support the Employer's essential allegation here because it makes no mention of the what might happen if the grievant fails to follow the instruction of engaging in 48 hours of bed rest on May 2nd and 3rd.

The Employer concedes that from monday thru sunday, May 4th thru May 10th, the grievant was in an off duty status as a result of his either being on annual leave or on a regular non-scheduled day. It also agrees that he returned to work on May 11th and that he worked each of his regular scheduled days thereafter until May 28th.

Based on what is last said there is no question but that his not immediately following the doctor's instruction by going to bed on May 2nd did not impact upon his ability to work his regular schedule. Consequently to the extent that the Employer attempts to use the May 2nd failure to follow the doctor's instruction as a source for discipline its point is without merit because what it claimed might happen in fact did not happen.

In part the narrative report of May 28th was as follows:

"*** The diagnostic impression is back strain. [Grievant] was advised to remain at bedrest for the next 48 hours and to return to work on Monday, 6-1-87, with restrictions of no lifting over 20 pounds for one week. He was given a Medrol dose pack for inflammation; Naparosyn; and Soma for a muscle relaxant. If pain worsens or persists, he should return here for re-evaluation. ..."

The report gives no hint as to what might happen should the instruction to take 48 hours of bedrest not be followed, or if the medication is not taken as directed.

In part the narrative report of June 3rd stated as follows:

"*** After his visit last week, [Grievant] remained off duty for several days and felt markedly improved. He did remain at bedrest through Thursday and Friday, but on Saturday was up and around. He evidentally returned to duty on Monday, June 1, and was doing well until this morning when he felt the fairly acute onset of pain in the left lower back and also in the left lower extremity. This was not aggravated by any particular motion or activity today. ...

"The diagnostic impression remains back strain with questionable secondary radiculopathy on the left side. Due to the lack of objective neurological findings, it was decided to have [Grievant] stay off of duty for another 48 hours at rest and give him another course of Cortisone and Indocin tablets to take for pain and inflammation. He should return to duty Saturday, but should stay with limited duty and no lifting over 25 pounds for one week. If symptons continue or progress, he will need to see a specialist for further follow-up evaluation."

May 28th was a thursday, June 3rd a wednesday. Based on the testimony of Employer witness (2) the grievant was not paid either COP or workers compensation on June 1st or 2nd, a monday and a tuesday. To the contrary he worked at his regular schedule on those 2 days. It may not be said then that the brief fishing expedition he engaged in with his daughter on saturday, May 30th, likely impeded his return to duty because he reported on June 1st, monday, his next regular scheduled day and worked that day and the next. It was not until wednesday, the 3rd that he encountered another problem with his back.

The IM contains a statement from a retired employee, CW. He originally stated that he and the grievant went fishing for 1 1/2 hours, on June 3rd. When told by the postal inspector however that the grievant had thought it was the 2nd, not the 3rd, he agreed it could have been the 2nd. The Employer alleges the incident took place on the 2nd. Whether it was the 2nd or the 3rd is unimportant because in the narrative report of June 3rd the doctor says, "[t]his morning [he] felt the fairly acute onset of pain in the left lower back and also in the left lower extremity." Moreover, if he could perform his regular duties on the 2nd, the Employer should not complain about his also going fishing.

From the undersigned's examination of the IM, which includes the doctor's narrative reports and his forms CA-17, he finds no medical evidence which would tend to indicate that the grievant's actions or a lack thereof insofar as the doctor's instructions were concerned, caused any harm to the Employer by way of prolonging his receipt of compensation for hours and days when he was not productively engaged in its work. Rather what the record shows on that score is nothing more than unsupported allegations from Employer witnesses (2) and (4), who do not claim to be medically qualified to make such a judgment, but who nonetheless testified (a) that he failed to follow the doctor's instructions and (b) that his doing so delayed his recovery which in turn reduced its efficiency of operation and increased its costs. He finds that in the absence of either being qualified as a medical expert witness the testimony of each concerning the probability of the grievant having aggravated his condition and thereby prolonged his return to duty is nothing more than rank speculation, which does not rise to the level of probative proof of the facts stated.

The undersigned will not lengthen this opinion by going into much detail about the Employer's burden of proof in discharge cases. Rather he will simply say that the Employer has that burden and that it must do so by a preponderance of the evidence. That is to say it must show that what it alleges was the situation, was likely so. In this case having alleged that the grievant did not follow the instructions of the doctor and that as a result his disability was lengthened the Employer was obliged to prove that that was more likely true than not true. In this record it has not done that. To the contrary the record shows that what the grievant did insofar as camping and fishing were concerned had no impact on the outcome of his recovery and its witnesses (2) and (4) who testified that they thought otherwise were not credible in that regard because not only were they not medically qualified to make such a judgment their overall testimony about him is suspect.

At this point it should be recalled that the while the grievant may have been paid COP for 4 hours on May 2nd he did not request it; neither did he know about it until it was received. Rather he had filled out a Form 3971 requesting sick leave for 3.76 hours. Employer witness (2) said he had undertaken to make the "correction" because witness (1) did not know that under correct procedure COP should have been the notation in the first place.

The undersigned finds this last statement somewhat strange in view of the Employer's challenge to the OWCP claim. He believes he knows that COP is required in an injury situation, but he also believes he knows that COP is usually withheld until the OWCP determines whether it will accept the claim after a challenge is made, and pending such a determination COP is not usually voluntarily paid.

It is also noteworthy that it was Witness (2) who telephoned the postal inspector and advised the latter that the grievant should be investigated because he "had used the injury as a pretext so that he could go fishing.", and that "fraud was involved".

The inspector testified that had he not been told this he likely would have declined to investigate. Witness (2) did not disclose the source of his information. Whether he had a source, or whether he deliberately misstated the situation is unknown. However, based on what is said in the Step 2 decision letter, it would appear that (2)'s misstatement was conveyed to the person responsible for that decision because he alluded to the fact that the grievant was paid for the time he spent on the fishing trip and that such payment was improper.

The undersigned need not speculate about the how or the why of the misstatement because the simple truth is: what witness (2) said to the inspector was dead wrong. There was no pretext about the injury to get off work: the grievant had had annual leave approved for the May 3rd outing since January. Moreover, the inspector testified that he found no evidence of fraud.

From the time the investigation began on May 7th until he was issued the Notice no discussion was had with the grievant about the need for him to follow the doctor's instructions and what would likely happen to him if he did not. Rather the acting station manager and the immediate supervisor, a new 204B, indicated at the hearing that neither had communicated with him about his first injury or his re-injury, or about what instructions he was receiving from the doctor. Moreover, he convincingly testified that he had no idea that by not following the instructions he was putting his job in jeopardy.

Before proceeding it is to be recalled that he acknowledged receipt of the letter which contained the ¶8 that is quoted on page 8 hereof. Without question the paragraph alerted him to a need to conduct himself in such manner as to not aggravate his condition. It also alludes to the fact that "appropriate adverse action" may be taken in the event he violates its provisions. The question however is: did he know or should he have known that he could be discharged for not taking 48 hours of bedrest each time the doctor told him to do so?

An adverse action, as the undersigned understands the term to mean, is any disciplinary action which exceeds a 14 day suspension. Consequently, to violate the admonition of ¶8 is a serious offense, and the employee is told that. However, in the undersigned's more than 3 decades of work in the labor relations field this is but the second time (the other being with this Employer and Union also) that he has ever found an Employer to deem the violation to be equally serious to theft, use or sale of drugs on duty, drunkenness on duty, insubordination, felony crime situations, and other deplorable conduct on the part of an employee. Moreover, had the writer of ¶8 thought the offense serious enough to warrant discharge it would have been a simple matter to have said that, but he did not. Had he done so it is likely that the Union would have grieved the impact of the rule, testing its reasonableness, if not its necessity.

In all events the undersigned believes it is too well established in these parties relationship to be seriously debated that until an employee is specifically advised or common sense tells him or her that discharge can or will result from an infraction of the Employer's rules, in the absence of specific notice beforehand, a first offense or series of offenses without intervening notice, is insufficient reason for the Employer to inflict the disciplinary penalty of discharge.

On May 16, 1986 the undersigned had occasion to issue an award in Case No. S4N-3U-D-14338. The grievance in that case involved a removal of a letter carrier assigned to a station in Houston, Texas. She had been charged with "Improper Conduct". The Employer claimed a doctor's instruction was sufficiently similar to its own safety instruction that to fail to follow the former was a removable offense. It said her instruction had been "strict bedrest with elevation and moist heat for 7 days", and that she failed to follow it: a fact she admitted. However the record there, as here, was conclusive that her disregard of the instruction had no material affect on her return to duty.

In sustaining the grievance and summarizing the reason for doing so the following was said:

"[I]f the Employer seeks to liken the doctor's instruction to a safety instruction and to treat a failure to follow the instruction as an insubordinate incident similar to failing to follow an instruction of a supervisor, as a minimum it must also act as it would in an insubordinate circumstance and instruct the employee to follow the instruction of a supervisor and advise him or her of the consequences for his or her failing to follow it. ..."

In the earlier case and in this one the grievant was not told that the instruction(s) must be followed otherwise discharge would result. In the earlier case the Employer's decision was overturned for that reason.

In this case the result would be the same as in the earlier one and for the same reason because the Employer did not show that the grievant either knew, or he should have known, that he could be discharged for not following the doctor's instructions. And this would be nonetheless true had the Employer proved that he was guilty of the charges it made against him, and as has been noted it did not do that.

But the two cases are not as similar as one might expect. In the earlier case the undersigned did not glean from the record any apparent reason from the removal other than the Employer's desire to rid itself of an employee who seemed to have had no interest, over a long span of time, in improving her physical condition so that she could return to duty. Here however he finds cause to believe that the grievant is persona non grata at the station, and that misstatements were made about him in order that higher level management would approve his removal when there was no reason for disciplinary action in the first place.

Simply put, it appears to me that those responsible for watching the grievant stood silently by hoping that he would dig a deep hole so they could bury him in it, and when they figured the hole was deep enough they drew up the Notice, got it approved and issued it. Their action was improper for a great number of reasons. To cite a few, they did not forewarn him, they made misstatements to the Postal Inspection Service about him to gain its involvement, they had no interest in being corrective insofar as he or the other employees at the station were concerned, they made medical judgments they were unqualified to make, and in more than a few important areas they did not work hard enough to find out the real facts and made assumptions that were in error.

Unfortunately the undersigned is unable to grant the grievant immunity from future discipline. He can however advise the next arbitrator who quite likely will be reviewing what he anticipates will be a future discharge of his opinion that a great deal of animosity exists toward the grievant and that certain management officials have let their prejudices overshadow their duty to be fair to him despite all involved being of the same race and sex. Moreover, he has a notion that any future discipline is not likely to be corrective in nature. He believes the current discharge was not intended to be corrective, but instead was 100 % punitive; consequently he antipates that another try will be made at getting rid of the grievant, and that next time those involved will likely be a tad more sophisticated, in which case the next arbitrator should be aware of their propensities.

On the basis of the entire record in this case the undersigned makes the following

AWARD

Just cause did not exist for the removal of the grievant. The grievance is sustained. The grievant shall be reinstated to his former position without loss of seniority not later than 7 days from the date of this award. He shall be made whole for all earnings and fringe benefits lost, including overtime, for the period he has not been allowed to work. The Employer shall institute proper procedure for processing his back pay within 14 days of the date of this award.

P. M. Williams
Arbitrator

Dated at Oklahoma City, Oklahoma
this 23rd day of September, 1988.