BEFORE THOMAS F. LEVAK, ARBITRATOR

In the Matter of the Grievance Arbitration between:

U. S. POSTAL SERVICE

THE "SERVICE"

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ON BEHALF OF F. BACON, THE "GRIEVANT"
Portland, OR
THE "UNION"

CASE NO. W1N-5D-D 3543

C01311

DISPUTE AND GRIEVANCE CONCERNING REMOVAL FOR PHYSICAL INABILITY TO SAFELY PERFORM DUTIES

ARBITRATOR'S OPINION AND AWARD

This matter came for hearing before the Arbitrator at 8:30 a.m., July 28, 1982 at the offices of the Service, Portland, Oregon. The Service was represented by Labor Relations Assistant Robert G. Funge. The Union was represented by National Business Agent Jim Edgemon. The Grievant, Floyd P. Bacon, appeared and gave testimony on his own behalf. Testimony and evidence were received. The post-hearing brief of the Service was received by the Arbitrator on August 31, 1982. The post-hearing brief of the Union was received on September 1, 1982. On September 7, 1982 the Arbitrator received a letter from the Service which objected to two exhibits filed with the Union's post-hearing brief and also objected to the Union's request for interest. On September 8, 1982 the Arbitrator received a reply letter from the Union. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

I. THE CHARGE AND THE ISSUE.

The Grievant, a full-time letter carrier, was removed from the Service effective September 11, 1981. The written notice of charges provided the Grievant on July 27, 1981 provided as follows:

> This is notice that it is proposed to remove you from the Postal Service no earlier than thirty (30) days from the date you receive this notice. The reason for this proposed action is:
>
> PHYSICAL INABILITY TO SAFELY PERFORM WITHOUT RE-OCCURRENCE OF INJURIES AND/OR ACCIDENTS THE DUTIES TO WHICH YOU HAVE BEEN ASSIGNED

> On June 10, 1981 [typographical error; the correct date is June 30, 1981] you were given a Fitness-for-Duty examination by Dr. R. L. Guiss, Medical Officer for the Portland MSC. Based on that examination, it has been determined that you are not fit for duty as a City Carrier nor that of Mailhandler.
>
> This determination was based on your immediate problems with the right ankle and prior history of back problems. You were afforded an opportunity to perform duties in the clerk craft, however, you demonstrated that you were physically unable to perform those duties in that you sustained an alleged injury on July 18, 1981 as a result of your right ankle. (Jt. Ex. 2,L)

The Parties were unable to agree upon a statement of the issue. The Service contends that the removal constituted a non-disiplinary administrative action, and would have the Arbitrator frame the issue as follows:

> Whether the U. S. Postal Service's decision to remove Floyd Bacon from the Postal Service effective September 11, 1981, based on his physical inability to perform without re-occurrence of injuries and/or accidents the duties to which he had been assigned was proper? If not, what would be the appropriate remedy?

The Union submits that all removals are subject to the just cause provisions of the National Agreement, and would have the Arbitrator frame the issue as follows:

> Did "just cause" exist as required by Article 16 of the National Agreement for the proposed removal dated July 27, 1981 and subsequent notice of decision - removal dated August 7, 1981? If not, to what remedy is the grievant entitled.

For the following reasons, the Arbitrator adopts the issue as framed by the Union.

First, Article 16 is expressly stated in the disjunctive and covers every type of disciplinary or discharge action. Specifically, it provides that an employee may not be, "disciplined or discharged except for just cause ***." (Emphasis supplied). It further provides: "Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement ***." (Emphasis supplied).

Second, Article 16, Section 1 sets forth express examples for which an employee may be disciplined or discharged, and the examples include at least one infraction that may be properly categorized as nonfeasance, rather than misfeasance, viz., the infraction of incom-

petence.

Third, it is a well-established principle in arbitration that certain types of nonfeasance such as incompetence or simple inability to perform the required work fall into the protection of a just cause clause. Assuming that the charged offense constitutes a dischargeable infraction, it certainly falls under the protection of Article 16 of the National Agreement.

II. THE NATIONAL AGREEMENT.

Article 16, Section 1, Principles, provides:

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

Article 16, Section 2, Discussion, provides:

> For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Article 16, Section 3, Letter of Warning, provides:

> A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

III. FINDINGS OF FACT.

The Grievant was hired as a part-time flexible carrier at the Portland office of the Service on July 16, 1975, and was promoted to full-time city carrier on January 29, 1977.

Since his date of hire, the Grievant has never been disciplined for any act of misfeasance or nonfeasance. More specifically, the Grievant has never been disciplined for acts of carelessness, negligence or for any safety infraction. Neither has the Service ever deferred any step increases granted the Grievant for unsatisfactory performance due to carelessness, negligence, accidents or safety infractions.

From November 1, 1976 until March 22, 1980 the Grievant suffered the following on-the-job injuries: On November 10, 1976 he slipped on some newly painted stairs and hurt the muscles in one of his legs. On May 12, 1976 he was startled by a dog and strained his neck. On November 8, 1976 he slipped on some stairs and strained his back. On November 24, 1977 he lifted a heavy sack and strained his back. On January 5, 1979 a dog chased him across an uneven lawn and he sprained his ankle. On March 20, 1979 he stepped into a hole he did not see and twisted his left ankle. On August 27, 1979 a dog startled him and he tripped over some uneven concrente, spraining his ankle. On March 22, 1980 he slipped off a top step and cut his hand. The Grievant never received a discussion, warning or any other form of discipline for any of those incidents; neither was he ever warned that a repetition of such incidents might lead to his removal.

During the fourteen-month period between March 22, 1980 and May 23, 1981 the Grievant suffered no on-the-job injuries or accidents. On May 23, 1981, while the Grievant was ascending stairs to deliver mail, he was charged by a dog. When he turned to retreat he twisted his right ankle and fell on the stairs, which resulted in a tear of the lateral ligaments of his right ankle. He was first examined by Dr. William Duff of the Bone and Joint Clinic on May 27, 1981, and on June 1, 1981, Dr. Duff wrote a letter to the U. S. Department of Labor, Office of Workers Compensation which provided in part:

> He is placed into a short-leg walking cast today. This should be worn for a full four weeks. He will not be fit

for duty during this time.

The Grievant returned to his carrier duties on June 27, 1981, and cased his mail, but was unable to continue after two and one-half hours because of pain in the right ankle.

In the meantime, on June 12, 1981, the Service's Delivery and Collection Review Board met to review the Grievant's May 23, 1981 accident. (Note: the Delivery and Collection Review Board is composed of managers and administrators.) The Board found that:

> Due to the combination of improper procedures and the inattention of Mr. Bacon in a known problem area, this board must conclude that this accident was preventable. (Union Ex. 10)

Finally, the Board stated:

> Actions to be taken:
>
> 1. Employee recommended for fitness for duty exam as soon as possible.
> 2. Recommend removing Mr. Bacon from the carrier craft due to his consistent inability to cope with dogs and his cronic ankle problems as evidenced by his history of ankle injuries. (Union Ex. 10)

The Service did not discipline the Grievant for causing a preventable accident through improper procedures and inattention. Indeed, it appears that the Grievant was not informed of the findings and recommended actions of the Board.

However, subsequently, the Grievant was ordered to report for a fitness-for-duty examination, and such an examination was conducted on June 30, 1981, by Dr. Russell L. Guiss, a Service medical officer. Dr. Guiss reviewed the Grievant's medical and psychiatric history, discussed the Grievant's general situation and examined the Grievant. Preliminarily, Dr. Guiss noted that at the time of the examination the Grievant was limping badly, and Dr. Guiss questioned the wisdom of the Grievant being expected to do his whole route at the time. He noted that the Grievant's left ankle functioned normally, but that if the Grievant had to work a six-day work week, the ankle would swell and become painful. Further, he noted that the Grievant had been hospitalized for psychiatric problems in 1965 and 1966 and was diagnosed as a paranoid schizophrenic at the latter time. When he discussed the possibility of a craft change with the Grievant, the Grievant objected to any change. The Grievant stated he preferred to work

alone and felt that he had been harassed alot, many times over non-important matters. When Dr. Guiss discussed the Grievant's trouble with dogs at length, the Grievant admitted that with his bad dog experiences, he was forced to run, which in turn frequently resulted in injuries. Dr. Guiss showed the Grievant the list of injuries that the Grievant had suffered, but noted that the Grievant found it difficult to grasp the fact that he had hardly ever had much time free from injuries. Dr. Guiss attached the series of incidents which had resulted in injuries to the Grievant to his report, and noted that the series of events was far more significant in his evaluation than the injury which occurred on May 23, 1981. Dr. Guiss' diagnosis was that the Grievant was suffering a tear in the lateral ligaments of his right ankle, and that the condition was improving, but not healed. He further noted that the Grievant had a normal functioning left ankle. Finally, Dr. Guiss reached the following conclusions:

> This employee has psychiatric problems which under stress will prevent him from coping or always making good judgments. His previous divorce, disciplinary problems with management, and injuries all are examples of such stressful agents.
>
> I believe a change of craft to a Distribution Clerk would improve the work environment in two ways. It would rid him of the ever reoccurring dog attacks, and it would eliminate the many steps which have contributed to his falls. With his history of prior back problems, the Mail Handler's job should not be considered. He gave me no edict as we discussed the Distribution Clerk craft. He would prefer the Carrier craft. One must understand the underlying mental problems. Many of these people's problems stem from close contact. They are more confortable (sic) as "loners". They have difficulty with interpersonal relationships. He repeatedly appeals to me, "just to be left alone".
>
> On the immediate problem of the right ankle, I do not feel that he is fit for duty. He just got out of a cast less than a week ago, and is limping very badly. His doctor, on June 30, 1981, clarified his work restriction as being on feet four (4) hours and off feet for four (4) hours. I would even question a full four hours on his feet at this instant.
>
> On the overall problem of his proneness to accidents, frequent dog bites, and perhaps some instability of the right ankle after he fully convalescences from the current injury, I would recommend a change of craft to a Distribution Clerk. Despite the stress he is currently undergoing and admittedly not always excercising (sic)

the best of judgment, I believe his mental problem is generally in remission. (Union Ex. 1)

The summary of incidents prepared by Dr. Guiss does not coincide exactly with the Workers Compensation reports submitted into evidence by the Service as Management Ex. 1. For example, the August 27, 1980 incident set forth in Dr. Guiss' report is not a part of Management Ex. 1 and was not discussed at the arbitration hearing. Thus, it cannot be determined from the record whether that incident was an on-the-job injury.

Subsequently, the Grievant was examined by Dr. James C. Dineen, who apparently was the Grievant's own doctor. On July 16, 1981, Dr. Dineen released the Grievant for limited duty work, specifically, "limited endurance for weight bearing on right ankle." The Grievant was assigned to return to work as a distribution clerk and reported on July 18, 1981. While working as a distribution clerk, the Grievant's right ankle "gave out" and the Grievant fell. He saw Dr. Dineen who issued a report on July 21, 1981 that stated "low back sprain" and "no work for ten days."

On July 27, 1981 the Grievant was issued the instant proposed removal. The Union filed a grievance, and at Step 3 of the Grievance Procedure the parties agreed to remand the matter back to Step 2 and to refer the Grievant to another doctor, Laurence R. Langston, for a second fitness-for-duty examination. On January 28, 1982, Dr. Langston, an orthopedic surgeon, issued the following written report:

> I examined Floyd P. Bacon, a 34 year old, unemployed individual in my office on January 7, 1982. This was for evaluation of injuries to the right and left ankles for as a result of a fall down a flight of stairs on May 23, 1981. He did not suffer any fracture and continued delivering his route after the fall.
>
> As time progressed, his right ankle and leg became swollen and was painful. He also injured his left ankle on the job and subsequently went to the emergency room of the Portland Adventist Hospital where he was examined. A soft compression cast was applied and he was to see Dr. Duff. He was walking with this for a period of six weeks. After this treatment his ankles still hurt as much as at the beginning. It felt like something was sharp and stabbing. He used hot packs when it was swollen and he tried to work twice. The walking was too much for the ankle according to his wife. His past history reveals he has injured both ankles two times however, has not suffered a

fracture. He has also been in a cast at one time prior to this time. He cannot remember which leg. At one time he stepped into a hole and twisted his ankle. Another time the concrete on a sidewalk was uneven and did not notice it, and injured his ankle. He has worked one day in the month of July, otherwise he has not worked since the injury.

PRESENT STATUS: Right ankle is painful, it is intermittent, he can walk 2½ hours, and it would get tired, he would rest 15 minutes, and this would relieve it. It feels like a pulling on the joint as well as twisting. It gives out occasionally, he won't fall completely. This however has not occurred for the past two months. He locates his discomfort over the medial and lateral side of the subtalor joint. He has not work a leather lacer. He's worn an outside lift to his shoe with a wedge. He also wears a boot and he has worn an elastic lacer. He has not received physical therapy. He doesn't wish continuing to being a carrier, it is too much physical problem to his previous injuries. He has completed two years of college at Clackamas Community College. He does have his own business which consists of motorcycle repair parts and mail order. He is unable to make a living with this. He does repair motorcycles. He was questioned regarding what he thought he could handle. He stated he was unable to handle a mail carrier's job or handling mail. He did not wish to be a distribution clerk. He was considering possibly such things as maintenance or motor pool or mechanical types of work. He has been treated by Dr. Duff for his injuries.

Physical examination reveals a man who locates his symptons of discomfort at the level of his ankle particularly over the area of the sinus tarsi and the lateral aspect of his ankle. There is no evidence of swelling, there is no evidence of ecchymoses. By measurement, the ankle around the malalignment measures 10½" on the right, 10¼ on left, and at the level of the base of the fifth they measure 10¼ on the right and 10 on the left. The circulation, dorsalis pedis, and posterior tibial are full. There is no sensory impairment to pain or light touch. The muscular function, that is the extensor hallisus longus, the extensor digitorm carminus, flexor hallisus longus, flexor digitorm carminus, peroneus longus brevis, tibialis anticus and posticus, and triceps surae are all normal in their function and strength. Palpation of the anterior fibula tatar, the calcaneal fibular and the posterior fibular rotator ligament fail to reveal any evidence of localized tenderness. Inversion stress does not produce any significant discomfort in either plantar or dorsiflexion. He has full normal range of dorsiflexion from 0-20 degrees and plantar flexion from 0-40 degrees. Inversion, eversion is equal to 0-30 degrees of inversion, 0-20 degrees of everson.

X-rays of both ankles which include an AP Lateral right and left oblique views reveal a normal relationship of the

mortise. The soft tissues are negative. There is no evidence fracture or other injury. There is a several millimeter oseous body smoothly defined at the tip of the medial malleous on the left which could be from an old injury or could be an ossicle. Also, on the right there appears to be some calcification which appears to be in the deltoid ligamentous due to previous injuries. The inversion films fail to reveal any tilting of the talus within the mortice.

Impression is essentially normal right and left ankles.

COMMENT: Mr. Bacon, at this time, exhibits subjective complaints only in respect to both right and left ankles. At this time there is no objective evidence to support his complaint. On a physical basis, I would find no reason why is unable to perform his duties. However, in reviewing his records as furnished, as well as discussing this with him, there appears there is a very definite psychological problem which prevents him from carrying out his work as a mail carrier. I believe this would also interfere with any attempt to transfer him to another type of work within the postal service.

I would evaluate the impairment as a result of the accident on 5/23/81 and the right and left ankles as they exist today to be none, and due to this injury to be none. He may return to his occupation as a mail carrier or a similar occupation without limitations. (Jt. Ex. 3)

At the arbitration hearing the Grievant denied that he had told Dr. Langston that he did not wish to continue working as a carrier for the reason that it involved too much physical work and he did not think his legs would hold up. He admitted that he told Dr. Langston that he didn't want to work for the Service, and stated that it was in the context that, "if the Service could fire someone who had any injury, I didn't want to work for it at all." Frankly, it appears to the Arbitrator that the Grievant believed at the time he would never be put back to work and was attempting to lay the foundation for a disability retirement claim. The Arbitrator notes that on May 18, 1982 the Grievant made the following statement to the Service's personnel section:

> Slipped on wet stairs in winter 1975. This weakened lower back to point that creates difficulty in lifting legs while walking up stairs. Has weakened back to point that, I feel, I cannot perform carrier duties. Additionally, have sprained ankles numerous times creating difficulty in walking and/or standing for any length of time. Due to job stress, created nerve and stomach problems. (Mgmt. Ex. 3)

The Grievant did not subsequently complete his application for

disability retirement. It appears to the Arbitrator that he concluded to do so might prejudice his position in the instant grievance.

Based upon Dr. Langston's report, the Service again denied the grievance, and the matter ultimately reached arbitration before the Arbitrator.

IV. CONTENTIONS OF THE PARTIES.

(a) Service Contentions. (i) As noted at the arbitration hearing by Manager of Employee Relations P. F. Urben, who issued the proposed removal, he did not consider nor did he see any other disciplinary actions that could have been issued to the Grievant during his employment. Mr. Urben further testified that physical disability was not a factor, but that physical inability to perform duties without accidents resulting in injury to the Grievant is what the record indicated. (ii) The accident review report does not recommend that discipline be issued to the Grievant; rather, its recommendations were a fitness-for-duty examination and removal from the carrier craft due to the Grievant's inability to cope with dogs and his chronic ankle problems. (iii) The letters of Carl C. Ulsaker, introduced by the Union, are not applicable to this case. The Grievant has never been disciplined for a violation of a safety rule or regulation in any of his accidents, nor does the record indicate that attempts have been made to discourage the Grievant from filing a claim for compensable injury or reporting an accident. There is nothing in Mr. Ulsaker's instructions to the field that prohibits the action taken by the Service. (iv) The Union's introduction of a proposed removal to the Grievant on June 26, 1981 related to another matter does not prove that the Service was engaged in some type of conspiracy to "get" Mr. Bacon one way or another, nor does that removal have relevancy to the proceedings now before the Arbitrator. (v) The Union's contentions that the Grievant's removal was a punitive action have not been proved. On the other hand, the Service has demonstrated that its decision to remove the Grievant from the Service was based on a reasonable and sound managerial judgment. (vi) The Service has attempted to accommodate the Grievant by transferring him to other positions of the Service, consistent with the Service's normal procedures. Yet, even within the clerk craft, which has a more controlled work environment, the Grievant injured himself. The work

assigned to the Grievant at that time was within the scope of his release for duty. (vii) The Grievant's statement to Dr. Langston and to the Service personnel office was consistent with his claim that he is able to work. (viii) There is nothing in Dr. Langston's report or any other medical report that will ensure the Service that the Grievant will not sustain another accident or injury. To the contrary, the Grievant's six-year employment record indicates that it is more likely to happen than not to happen. The Service does not have to wait until the Grievant injures himself seriously or injures someone else. The Service has simply removed the Grievant because of his obvious inability to fit into the work environment of the Service in spite of attempts by the Service to accommodate the Grievant.

(b) Union Contentions. (i) The Union established at the arbitration hearing that no just cause existed for removal of the Grievant. The Grievant has not been charged with violating identifiable safety regulations, but for an accumulation of legitimate accidents sustained over a period of years while performing duties in accordance with the work rules of the Postal Service. The charge itself does not constitute a basis for removal as it does not fall within the just cause concept of Article 16 of the National Agreement. Article 16 states that no employee may be discharged except for just cause, including "failure to observe safety rules or regulations." Certainly then, without proof of anything more than accidents that have occurred, the Service cannot be allowed to imply carelessness was precedent to cause the accidents nor can it be allowed to imply that there was an intentional pattern of a reoccurring nature. Such implication is speculative at best and not borne by evidence. In addition, the Grievant was not charged with negligence or safety infractions. (ii) The testimony is uncontradicted that the Grievant has never been charged, disciplined, nor had a step increase withheld for a safety violation in conjunction with any of the accidents or injuries that he experienced. (iii) Mr. Urben admitted that he removed the Grievant because of the "potential for future accidents." Yet to remove an employee because he might have an accident in the future is comparable to a convicted felon being released and at some future time being arrested again because the police felt it might commit a second robbery. (iv) Accidents sometimes happen to even the most prudent

and exemplary employees and no amount of discipline will prevent them from occurring. (v) Article 16 requires that discipline, including discharge, shall be corrective in nature, rather than punitive. To remove an employee for an accident without prior progressive discipline for safety infractions or accidents, constitutes punitive action rather than corrective action. Too, the Grievant has never been informed that he could be disciplined or charged for simply having too many accidents. (vi) The April 7, 1980 and May 15, 1981 memorandums of Carl Ulsaker, expressly provide that accidents or compensation claims, even when in a manager's view excessive, are not in themselves an appropriate basis for discipline. (vii) Dr. Guiss' fitness-for-duty report somewhat subjectively recommends that the Grievant be transferred to the clerk craft. But the examination of Dr. Langston states quite clearly that the Grievant may return to his occupation as a mail carrier or similar occupation without limitations. Consequently, the sole medical evidence is clear and convincing that the Grievant is capable of performing all the duties to which he could be assigned. (viii) It must be parenthetically noted that the fitness-for-duty request notices to Drs. Guiss and Langston did not request that a qualification be found if the Grievant could work safely, only if he could physically perform duties assigned him, for which each doctor answered in the affirmative. Such was made clear by the November 6, 1981 letter of Regional Labor Relations Representative Max Morelock. (ix) Mr. Urben waffled when he testified that the reason he stuck to the removal of the Grievant was because Dr. Langston's report stated that the Grievant told the doctor he did not want to work for the Service anymore. Ironically, however, Mr. Urben testified that he never contacted the Grievant to clarify the context of the conversation and never contacted Dr. Langston to find out in what manner the conversation came up, and he never contacted other Service officials in regard to the comments in the doctor's report. However, the uncontradicted testimony of the Grievant at the arbitration hearing indicated that his comments to the doctor were to the effect that he was tired of being hassled and couldn't believe he could be fired for having an accident and further, if that were the case, he didn't want to work as a mail carrier under such conditions. (x) It should be strongly noted that the triggering event, if one carefully reads the removal notice, was

the reported injury of July 18, 1981. However, it is obvious that that injury was a mere continuation of the injury of May 23, 1981. The reinjury was the direct result of management's encouragement that the Grievant return to work at a time when his medical limitations dictated otherwise. On July 1, 1981 Dr. Guiss stated that he would question a full four hours on his feet for the Grievant. Yet, the Grievant was required to work a full day on July 18, 1981, and the result was an re-injury to the Grievant's ankle. (xi) It is interesting to note that the Service has made every effort to-date to controvert the Grievant's claim for OWCP benefits for his accident of July 18, 1981, by stating that there is no proof that it occurred as claimed. Clearly, management cannot have it both ways, by attempting to deny the Grievant OWCP benefits contending that the accident didn't happen, as well as removing the Grievant from the Service on the grounds that the accident did happen. (xii) It is clear from the issuance of the two notices of removal that management was "fishing" for a reason to remove the Grievant from the Service. (xiii) Addressing the issue of the unfortunate industrial accidents, it is the uncontroverted testimony that the majority of them were dog-related. Even Postmaster Ben Luscher has acknowledged that 32% of carrier injuries are dog-related. (xiv) The back pay award of the Arbitrator should award interest in accordance with the NLRB Florida Steel Corporation decision.

V. DISCUSSION, REASONING AND CONCLUSION.

The Arbitrator concludes that the Service has failed to establish by clear and convincing evidence that the Grievant was removed for just cause. Accordingly, the grievance is sustained. It shall be the Award of the Arbitrator that the Grievant be immediately reinstated to his former position as letter carrier with full back pay and fringe benefits to the date of his removal and without loss of seniority, less any outside earnings received by the Grievant, and with interest in accordance with the NLRB's Florida Steel Corporation decision. No deduction shall be made for Workers' Compensation benefits received by the Grievant. The following is the reasoning of the Arbitrator.

First, the Service has failed to charge the Grievant with a

dischargeable offense. The reason given by the Service for the removal of the Grievant is both void for vagueness and an obvious attempt to discharge the Grievant for being "accident-prone," a non-offense.

The Service may properly charge an employee with physical inability to perform assigned duties, with psychological inability to perform assigned duties or with specific acts of negligence or violations of established safety standards. However, the Service is not entitled to concoct a bastardized form of infraction in order to remove employees it considers to be accident-prone.

It appears to the Arbitrator that what the Service has attempted to do in a rather transparent manner is invent an infraction that will serve the dual purpose of allowing it to remove an employee (1) without having to comply with the progressive discipline standards ancillary to charges of negligence or lack of compliance with safety standards and (2)without admitting the employee is actually mentally or physically unable to work, an admission that might prejudice its position in any subsequent Workers' Compensation or disability retirement proceeding. The Service cannot "have it both ways" by inventing the offense with which it charged the Grievant. Such is both inconsistent with the National Agreement and with the Service's own internal policy regarding discipline for safety rule violations.

To be perfectly accurate, an employee cannot, of course, be disciplined because of a physical or mental disability. Neither may an employee be discharged or disciplined because he has recorded an accident or filed a claim for compensable injury. Certainly, an employee may be removed from the Service for the reason that he has become permanently disabled. However, to so remove an employee, the Service must both charge and prove the the employee is permanently disabled, and may not be heard to take inconsistent positions on the matter. That an employee may not be discharged for being "accident-prone," and may only be discharged for proof of violation of safety rules and regulations is clearly contemplated and implicit within Article 16, Section 1 of the National Agreement, which expressly provides:

> No employee may be disciplined or discharged except for just cause such as, but not limited to *** failure to observe safety rules and regulations.

Furthermore, the action of the Service is in direct contravention of its own internal policy, as set forth in the following internal memorandums:

May 15, 1981
El:CCUlsaker:hw
Discipline for Safety Rule Violations

Regional Directors
Employee and Labor Relations
All Regions

Reference is made to my memorandum of April 7, 1980, copy attached. Article XVI of the National Agreement clearly makes disciplinary action appropriate for safety rule violation (s). Additionally, Sub-chapter 650 of the Employee and Labor Relations Manual establishes that non-bargaining employees are not exempt from discipline when warranted.

However, it must be fully understood that postal policy prohibits taking any action which discourages the reporting of an accident or the filing of a claim for compensable injury with the Office of Workers' Compensation Programs.

In a safely connected disciplinary situation the actions of a manager, supervisor, or employee which violate postal service safety rules or regulations must be cited. Such disciplinary actions are independent of whether or not an accident is involved.

Supervisors and managers are always expected to take effective action to correct unsafe practices. Our safety and health program cannot be effective without this supervisory and management attention.

Please share this memorandum with district and local offices within your regions.

Carl C. Ulsaker
Senior Assistant Postmaster General
Employee and Labor Relations Group

Attachment.

# # #

ER401:SMoe:tr April 7, 1980
Discipline for Safety Rule Violations

Regional Directors
E&LR, All Regions

This will reemphasize the need for careful attention to situations in which disciplinary action for safety rule violation is considered. While Article XVI of the National Agreement clearly makes discipline for such a cause appro-

priate, we must be mindful of the requirements of the Federal Employees' Compensation Act and our own policies which prohibit taking action discouraging the reporting of an accident or the filing of a claim for compensable injury with the Office of Workers' Compensation Programs.

Accidents or compensation claims, even when in a manager's view excessive, are not in themselves an appropriate basis for discipline. What must be cited in any such disciplinary action are the actions of an employee in a specific situation which are violations of a Postal Service safety rule or regulation.

Carl C. Ulsaker
Senior Assistant Postmaster General
Employee and Labor Relations Group

cc: Mr. Conway
Mr. Gildea
Miss George (Union Ex. 9)

The Service submits that quoted internal directives are not in point. The Arbitrator must disagree. The directives firmly establish that each accident or incident must be judged on its own merits. Where the Service believes that an individual accident or incident involves negligence or a violation of safety rules and regulations, the Service must invoke the progressive discipline procedures of the National Agreement in a timely manner, and its failure to do so constitutes a waiver of its right to take action against the employee. Whether the Service chooses to proceed with a non-disciplinary discussion or with a letter of warning or with a suspension, depends upon the seriousness of the "deficiency or misconduct to be corrected." The fact that an employee is involved in ten automobile accidents in a twelve-month period or is bitten by dogs ten times in a twelve-month period does not establish that the employee has been negligent. And again, the Service may not remove an employee who suffers reoccurring injuries unless it is prepared to charge and prove, ordinarily through competent medical evidence, that the employee suffers from a psychological or physical permanent injury.

Second, the reasoning of the Arbitrator is supported by the case of Healy v. USPS,Merit Systems Protection Board, Case No. CHO 7528110033, dated January 25, 1980. While the decision of the Board is based upon application of a different standard than that found in the National Agreement, the logic and reasoning of the Board are persuasive. In the opinion of the Arbitrator, the Service's allegation

in the Healy case that the employee was "accident-prone" is virtually identical in substance to the charge now before the Arbitrator.

Third, even assuming, for the sake of argument, that the Service had charged the Grievant with the physical inability to perform his duties as a carrier, the Arbitrator would have found in favor of the Grievant. The only medical evidence before the Arbitrator is that the Grievant was physically capable of performing his duties.

Fourth, whether the Service believed that the Grievant was working in a careless manner or whether the Service believed the Grievant was malingering or falsifying injuries, the Service was bound to apply the precepts of progressive discipline set forth in the National Agreement. That it did not do.

Finally, the Arbitrator concludes that under the circumstances of this case, an award of interest is indicated, and that the Florida Steel Corporation formula utilized by arbitrator Snow in Case Nos. W 8N-5D-D-18580 and W8N-5D-D-18037, and by arbitrator Eaton in Case Nos. W8N-5D-D-21424 and W8N-5D-D-21425 is appropriate.

The Arbitrator should also note for the record that Union Exs. A and B, attached to its post-hearing brief, submitted at the arbitration hearing, were disregarded by the Arbitrator and played no part in his decision.

AWARD

(1) Just cause did not exist as required by Article 16 of the National Agreement for the proposed removal dated July 27, 1981 and subsequent notice of decision-removal dated August 7, 1981. The grievance is sustained. The Grievant shall be immediately reinstated with full back pay and fringe benefits and without loss of seniority, less interim earnings, if any. Workers' Compensation benefits received by the Grievant shall not be deducted. Back pay and fringe benefits shall be computed from September 11, 1981.

(2) The Grievant shall receive interest on all monies due him, computed in accordance with the NLRB's Florida Steel Corporation decision and Memorandum 82-5 of the General Council. Interest shall be computed from the date the Grievant last received compensation from the Service until the date of his reinstatement, and shall be computed as the pay denied him as a result of his wrongful discharge would have become due and payable in the normal course of business.

(3) All reference to the removal at issue shall be removed from the Grievant's personnel file.

(4) The Arbitrator retains jurisdiction for a period of thirty (30) days in order to resolve any dispute over the actual amount of back pay or benefits due the Grievant.

Dated this 24½ day of September, 1982

Thomas F. Levak, Arbitrator