C 3231

UNITED STATES POSTAL SERVICE	Case No. NC-NAT-16,285
and	ISSUED: November 19, 1979
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BACKGROUND

In this National Level grievance the NALC seeks a ruling on the following stated issues: 1

> "Whether, under the 1975 or 1978 National Agreements, USPS may properly impose discipline upon employees for 'excessive absenteeism' or 'failure to maintain a regular schedule' even though the absences upon which those charges are based, are instances where
> (1) the employee was granted approved sick leave;
> (2) the employee was on continuation of pay due to a traumatic on-the-job injury; or
> (3) the employee was on OWCP approved workmen's compensation."

This case represents the culmination of a basic disagreement between the parties which initially took form in an April 5, 1977 letter of the then NALC President, Joseph Vacca, 2

to the then Senior Assistant Postmaster General - Employee and Labor Relations, James Conway. The letter read--

> "It has come to my attention that Postal Service Management in the Central Region, Northeast Region and Southern Region has embarked upon a shockingly disgraceful program of 'absenteeism control' whereby they have taken the position that it is, under our National Agreement, permissible to discipline and even discharge employees for legitimate use of annually earned or accrued sick leave on the grounds that an employee who uses all such leave is not 'maintaining a regular work schedule.' Examples of this program are attached to this letter for your information and review.
>
> "NALC stringently disagrees that such programs are permissible under Articles III, X and XVI of our National Agreement and Federal Statutes guaranteeing postal employees the right to earned and accumulated sick leave. Therefore, I hereby request that you inform me whether or not Postal Service Management at the National level agrees with the interpretation of the National Agreement evidenced by the Central, Northeast, and Southern Region directives attached hereto.
>
> "Should you inform me that National Postal Management agrees with that interpretation of our contract, I shall be forced to conclude that there exists 'a dispute between

> "'the Union and the Employer as to the interpretation of (the National) Agreement' within the meaning of Article XV, Section 2, last paragraph, and initiate, hereby, a grievance at the National level over that dispute and request an immediate Step 4 discussion to attempt to resolve the same."

Vacca's letter enclosed copies of three USPS internal 3
Management directives which had come to the attention of the NALC. Two were of limited application only, being signed respectively by the Postmaster at Marblehead, Massachusetts and the Sectional Center Manager/Postmaster at Jacksonville, Florida. The third directive, however, applied throughout the Central Region, having been issued by the Regional Director for Employee and Labor Relations, David Charters, in a major effort to reduce excessive absenteeism in that Region.

An attempt to summarize the Charters memorandum here 4
might be misleading in depicting its essential nature. Its full text was:

> "POLICY ON ABSENTEEISM CONTROL
>
> "1.) In all cases of discipline regarding the absentee problem the charges to use is 'failure to maintain a regular work schedule.' This can be modified by adding terminology such as, absenteeism, tardiness, failure to report off and AWOL. This basis of this discipline is that an employee has a basic responsibility to the Postal Service to be at work. The failure to be at work for whatever reason may result in disciplinary action against an employee.

"'I wish to stress that the fact that an employee is sick and receives sick leave benefits, does not relieve that employee from this basic responsibility. If an employee is absent with such frequency, as to interfere with scheduling, productivity, etc., then that employee may be disciplined.'

"2.) It will be necessary for you to meet with your union representatives to make sure that the policy is understood by them. You should point out, for example, that we do not treat an employee who has been a good employee for 19 years then has a heart attack, the same way we treat an employee who has been trouble for a term of employment of three or four years. You should stress to the Unions that we will be fair and reasonable, but that we will enforce the proper discipline in absentee cases.

"3.) Establish a system wherein the employee may be warned and counseled, then a letter of warning, five or seven day suspension, ten or fourteen day suspension, discharged. While there is no nationally specified progression of discipline, it is my determination that the above meets the minimum requirement of the concept of progressive discipline. This shows an impartial person, such as an arbitrator, that we have taken certain steps to correct deficiencies, none of the lower steps have done their job and that we have had to take increasingly severe action in an effort to correct the problem.

"The concept of progressive discipline is a necessary and essential element in winning cases in arbitration.

"4.) While the Central Region, has set goals, the following are the objectives that you should keep in mind.

"First of all, an employee earns 13 days of sick leave a year. If an employee uses all his sick leave (13 days) that means he is off at least 5% of the time is wholly unsatisfactory to us nor does it allow the employee to build up any protection for himself in the future. Therefore, you should examine very closely any employee presently absent 5% or more of the time. I would imagine that these employees in all probability need immediate attention.

"The next category you should look at are those employees absent 3% or more of the time. If we can get our rate down to 3% with the problem employees, then our total employee rates will be very satisfactory and well under the goals set for you.

"5.) LWOP should be used sparingly. It appears to me that many times we grant LWOP that may be more properly charged to AWOL. Also, there is no requirment for the Postal Service to give LWOP for prime time vacation. If an employee uses all his annual leave prior to his vacation period, it is up to the Postmaster to look at the facts of the situation to determine whether or not to give the employee time off. You should notify the unions of this also.

"The use of LWOP by itself generally indicates some failure of an employee to maintain his work schedule. You should have your managers look at all employees using LWOP and determine why they are using it and if they are into the progressive disciplinary procedure as yet.

"In order to accomplish the necessary analysis and required control required by the Central Region, I will need a report on an Accounting Period basis consisting of the following:

'Total number of hours sick leave used in the MSC office and MSC by bargaining unit and by non-bargaining unit employees and number of employees using leave. I will need the same information in regard to LWOP. Further, include number of counselings, letters of warning, suspensions given for failure to maintain work schedule offenses within your MSC.'"

The Senior Assistant Postmaster General made no formal reply to the Vacca letter, but informal discussions between the parties took place over ensuing months. Late in 1977 the USPS gave all four of the Postal Worker Unions copies of revised leave provisions to be included in a proposed new Employee and Labor Relations Manual, as required under Article XIX of the 1975 National Agreement. The revised provisions were made effective early in 1978, pursuant to Article XIX, after the parties had been unable to agree upon a date when they might be discussed. Then the new leave provisions ultimately were considered in detail during the 1978 negotiations, 5

and in the end the Unions apparently had no disagreement with the language appearing in the new Manual, as revised, on the subject of "Leave," commencing with Part 510 in Chapter 5.

These provisions are silent, however, in respect to 6
the issues stated in the April 5, 1977 Vacca letter. It also was clear throughout the negotiations that the parties remained in disagreement on these matters, with the Union free to press them into arbitration if desired. On October 19, 1978 Vacca finally wrote Assistant Postmaster General, Labor Relations, James Gildea noting that there had been no formal reply to his April 5, 1977 letter and certifying the resultant dispute for hearing by the Impartial Chairman. On October 27, 1978 William Henry, of the Labor Relations Department, replied to the Vacca letter on behalf of Gildea. The concluding paragraph of Henry's letter read--

> "Employees reporting for duty as scheduled is critical to an effective and efficient operation. The responsibility for maintaining an acceptable attendance record rests with each and every employee. Regular attendance and entitlement to paid leave are two separate and distinct things. When an employee submits a request to use paid leave to cover an absence, the individual is simply claiming a benefit granted by the contract. While granting such a request may excuse the absence for pay purposes, it does not negate the fact of the absence or the fact that excessive absences impinge upon the effective and efficient operation of the Postal Service. In such circumstances, the employer can rightfully be expected to take the necessary corrective measures to assure that the efficiency of the Service is properly maintained."

Since the NALC found this statement of the USPS posi- 7
tion to be unsatisfactory, the matter ultimately proceeded to arbitration on January 9, 1979. Briefs thereafter were filed as of March 22, 1979.

The Presentations

1. NALC

Basically, the NALC holds that, under Article XVI of the National Agreement, there can be no "just cause" for any discipline based on an employee absence from work on some form of approved leave--whether it be sick leave, annual leave, leave without pay, or leave while recuperating from on-the-job injury. The imposition of discipline in any such situation would deprive employees of their right to enjoy leave benefits protected by Article X of the National Agreement, as well as under applicable Federal law. 8

Once sick leave has been approved, therefore, the USPS cannot thereafter complain that efficiency was impaired because of the employee's absence on such leave. In this respect, the NALC greatly stresses that, in early 1978, the Bureau of Policies and Standards of the U.S. Civil Service Commission issued a policy directive to the FEAA stating-- 9

> "Given an agency's authority to deny leave under many circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."

The Civil Service Commission Policy, as thus stated, is controlling in respect to all USPS preference eligible veterans who elect to appeal the imposition of discipline under Civil Service procedures rather than under the grievance procedure established in the National Agreement. In the NALC view, 10

it is absurd to have two different disciplinary policies applicable to USPS employees working under the same Agreement, depending on whether or not an employee happens to be a preference eligible veteran. In its judgment, therefore, the USPS now should be required to embrace the CSC policy.

The NALC also emphasizes the obvious incongruity of trying to apply "corrective" discipline to discourage an employee from being injured or becoming ill. Under Article XVI all discipline must be corrective in nature, not punitive. In the case of employees on OWCP approved workmen's compensation (or continuation of pay status because of on-the-job injury), these are benefits to which employees are entitled by Federal law. The NALC concludes that the disputed USPS policies thus ignore the fact that, under Article III of the National Agreement, the USPS is obliged to honor all applicable laws. 11

2. The USPS

The Service denies at the outset that it ever seeks to discipline an employee for the "use of leave benefits provided by the Office of Workers Compensation Program." It also asserts that the NALC has failed to provide any example of discipline because an employee "was on continuation of pay due to a traumatic on-the-job injury." Thus in its view the only issue before the Impartial Chairman is-- 12

> "Does the Postal Service's discipline or discharge of employees for failing to maintain a regular work schedule in instances where the use of sick leave has been approved for such absences constitute a violation of the National Agreement?"

As to this stated issue, the Service relies on the proposition that: "It is a well established principal of arbitral labor law that excessive absenteeism, even though due to illness beyond the control of the employee, may result in disciplinary action, including termination of employment." Numerous quotations from arbitrator's opinions are provided in support of this basic USPS position. Of the greatest significance, for present purposes, are several dozen opinions by various USPS arbitrators including Gamser, Holly, Casselman, Cushman, Cohen, Di Leone, Larson, Epstein, Jensen, Moberly, Krimsley, Fasser, Myers, Rubin, Scearce, Seitz, Warns, and Willingham. 13

All of these opinions, in the USPS view, support the broad proposition--as stated by the Elkouri's, in "How Arbitration Works" (3rd Ed., 1973) at pages 545-546--to the effect that-- 14

> "The right to terminate the employees for excessive absences, even where they are due to illness, is generally recognized by arbitrators."

More pertinent language, for USPS purposes, appears in an Opinion by Arbitrator Cushman in Case AC-S-9936-D, involving the APWU (decided June 6, 1977). Cushman wrote:

> "The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has the right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons.

* * * * * *

"This Arbitrator is sympathetic to employees whose absenteeism is due to illness, and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. (USPS, /Vera D. Bugg/ AB-S-6-102-D.) The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He is simply being terminated for irregularity and undependability of attendance. Such situations are really not disciplinary in nature..."

(Underscoring added.)

In addition to relying on the cited opinions of numerous USPS arbitrators, the USPS suggests that the NALC now seeks to obtain, through arbitration, a concession which it failed to secure in the 1978 negotiations, when the parties had full opportunity to discuss the leave provisions in Chapter 5 of the new Employee and Labor Relations Manual. During the 1978 negotiations, indeed, the NALC specifically, but unsuccessfully, sought to prohibit the use of approved sick leave for disciplinary purposes. 15

Finally the Service deems the contrary Civil Service Commission policy on the issue to be irrelevant, stressing that the CSC "has no authority over adverse actions taken against postal employees who are not preference eligibles...." On this score, it quotes the following from a decision by Arbitrator Moberly: 16

> "Of course, this Arbitrator is bound by the collective bargaining agreement rather than the holdings of the Civil Service Commission. Under this agreement, as it has been interpreted in the past, the Postal Service is justified in removing employees under the circumstances here. No comment is made herein with respect to the rights of similarly-situated employees under other laws, rules or regulations. The Arbitrator is interpreting the collective bargaining agreement, and nothing more."

Finally, the Service urges that the policy announced by the CSC's Bureau of Policies and Standards is not necessarily the CSC's "final decision" on the matter, since not as yet been considered by the CSC Appeals Review Board.

FINDINGS

1. Scope of the Issue

17 The USPS brief sees no real issue here in respect to the imposition of discipline where an employee is absent (1) on continuation of pay due to a traumatic on-the-job injury, or (2) on OWCP - approved Workers Compensation. The USPS, says the brief, does not discipline employees for use of leave benefits provided by the Office of Workers Compensation Program (OWCP). The NALC has presented no evidence to the contrary. Nothing in the memoranda from the Central Region, Marblehead, or Jacksonville specifically states that discipline should be imposed on employees for absences on OWCP approved Workmen's Compensation or on continuation of pay due to traumatic on-the-job injury. Given the assurances embodied in the USPS brief, therefore, the present analysis is limited to considering whether the imposition of discipline because of absences on approved sick leave may involve violation of the National Agreement.

18 According to the NALC an employee's absence from work on approved sick leave never may provide a proper basis for discipline or termination of an employee's services. It believes this position to be supported fully by the Civil Service Commission policy, as quoted earlier.

19 The USPS apparently does not claim that all sick leave absences may provide a basis for discipline. It does hold, however, that where such absences result in failure to be "regular in attendance" this may subject the employee to disciplinary action. For this purpose, it holds the CSC policy statement to be irrelevant.

While it is difficult to deal meaningfully with such broad interpretive questions, in the absence of detailed facts in specific grievances to define an issue, this is not unusual in national level grievances. There are clear areas of disagreement and confusion in the present case, moreover, which seem susceptible to clarification through this Opinion. 20

2. Earlier Opinions by USPS Regional Arbitrators

It is instructive at the outset to analyze some of the major earlier decisions by Regional Arbitrators. The record includes two dozen Regional decisions as well as an advisory Opinion by National Level Arbitrator Howard Gamser. All but one of the Regional decisions are cited by the USPS to support the view that an employee may be disciplined for failure to maintain a regular work schedule because of absences on approved sick leave. 21

The most significant Regional case, for present purposes, was decided in the Southern Region December 17, 1975 by Fred Holly, a highly respected and eminently qualified arbitrator, in Case AB-S-6102-D (herein called the Bugg Case). There the grievant had a little over 3 years of service when discharged in late 1974. Within two months of being hired she had established an unsatisfactory attendance record, which was called to her attention by two separate supervisors. After five months of employment, she again was told to improve her attendance record. About a month later she was warned by letter that her attendance was unsatisfactory and was placed on restricted sick leave. Ultimately, she was sent to a USPS designated physician for an examination to determine her fitness for duty because of a continued poor attendance record. On February 18, 1974 the physician reported that she was able to perform her job from the medical standpoint. Three months 22

later she again was warned about continuing absenteeism. In September of 1974 an analysis of her attendance record over recent months was prepared. This resulted in the decision to discharge. During her last 7½ months of employment she had been absent more than one third of her scheduled hours. There is no suggestion in Holly's Opinion that the grievant was suffering from any single, identifiable illness which might have been responsible for all, or most, of her repeated absences from work.

A key paragraph in the Opinion in the Bugg case 23
reads--

> "Such an excessive rate of absenteeism has been consistently held to be unacceptable and a proper cause for termination. Employers have a right to expect acceptable levels of attendance from their employees, and when such attendance is not forthcoming termination is approved even though the absences may be for valid medical reasons. This principle is so well established in arbitration that it does not demand documentation here."
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> (Underscoring added.)

On April 28, 1976 Arbitrator Howard Myers sustained 24
a discharge in Case NB-S-6079-D where an employee had been absent repetitively over a period starting at least as far back as 1972 and running into June of 1975. During the last 18 months of his employment he missed 15% of his scheduled shifts and frequently failed to provide any documentation or medical certificate to explain his absence. This Opinion concluded with the following dicta--

"It has been well established by arbitration decisions that when an employee becomes undependable as to adequate attendance, so as to impede operations, the employer may finally discharge, regardless of what reasons cause the undependability or unfitness.

The employer has no contractual obligation to retain an employee whose services are irregular or where absences are due to disability over a long period....Regardless of causes of continuing absences, a just cause for removal exists where reasonable corrective steps have not changed a deficient performance so as to meet the established standards."

(Underscoring added.)

The next significant Opinion was issued by Arbitrator Harry Casselman on April 7, 1977 in Case AC-C-10,295-D. There the grievant was reinstated without back pay. The Arbitrator's Opinion, included the following pertinent passages-- 25

"...there is nothing in Article X, Section 4, which states, or...implies, that absences due to sick leave, whether covered by sick leave, or beyond such coverage, cannot be used as a basis of discipline when combined with other absences, or as a basis of discharge for disability without fault standing by itself, where such disability to perform on an acceptable basis is fully established by medical evidence.

* * * * * *

"It should be obvious that Management is powerless to go behind a doctor's certification of illness, unless it has independant medical or other evidence to the contrary; even if the Union were correct, which I find they are not, that the approval of each instance of sick leave is not just an approval for pay purposes, which I find it is, but also an approval of the underlying leave, this does not mean that when an employee's overall absences based on sick leave and other leave makes his continued service untenable because of its effect on the organization...discipline cannot be assessed."

(Underscoring added.)

The Bugg case was cited by Arbitrator Bernard Cushman 26
in a May 9, 1977 decision in Case AC-S-12,796-D. There Cushman sustained a discharge where the employee had an extremely poor attendance record. His Opinion included the following--

"Under all the circumstances, the Arbitrator finds that some absences attributed by the grievant to other causes were due to the grievant's own internal problems rather than the lack of management affirmative action and that her absentee record could fairly be considered by management as it stood without any substantial discount for alleged causation somehow attributable to management. This Arbitrator holds that the absentee record of the grievant was excessive and was a proper cause for removal.

"The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from their employees and that when such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. Vera D. Bugg, AB-S-6102-D.

The Union also contends that in this case discipline was not corrective but punitive on the ground that it is not progressive discipline to proceed from a five-day suspension to a discharge. In a case of excessive absenteeism progressive discipline in the form of disciplinary suspensions is inappropriate if the absenteeism genuinely arises from a physical or medical problem."

(Underscoring added.)

On June 6, 1977 Arbitrator Cushman also decided Case AC-S-9,936-D, finding just cause for a "termination." The grievant there was a ZMT Operator who had only about two years of service when discharged in August of 1976. Within only 8 months of his hire he had been counselled for excessive absenteeism, and 2 months later was placed on restricted sick leave. Thereafter he received a letter of warning, a 5-day suspension, and a 14-day suspension because of his continuing absenteeism. He did not reply to the June 25, 1976 notice of proposed removal. Between March 27 and July 2, 1976 he was absent on 68.57% of his scheduled work days. All of his absences either 27

were on approved sick leave or approved leave without pay. After again citing the Bugg Opinion, Cushman wrote--

> "This Arbitrator is sympathetic to employees whose absenteeism is due to illness and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He simply is being terminated for irregularity and undependability of attendance. Such situations are not really disciplinary in nature. And that is why this Arbitrator has stated in Case AC-S-12,796-D that in a case of excessive absenteeism if the absenteeism genuinely arises from a physical or medical problem discipline in the form of disciplinary suspensions is inappropriate."
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> (Underscoring added.)

On September 27, 1977 Regional Arbitrator Peter Seitz 28
decided Case AC-N-16,605-D where a ZMT Operator with less than 4 years of service was discharged because of an attendance record found by the Arbitrator to be "deplorable and unfortunate," since she had worked only about 20% of her scheduled hours. The Seitz Opinion reflects a somewhat different approach from that developed in the Bugg Case and its progeny. It includes two particularly significant paragraphs:

> "The Service does not question the genuineness of the reasons given for all of these absences. It states that it has no information on which to do so. Under such circumstances, it must be assumed that the grievant was not 'at fault.' Accordingly, this is not a case in which discipline or discharge are appropriate for any wrongful conduct or behavior which breached her employment duties or the requirements of the collective agreement.
>
> Under such circumstances the case, necessarily, turns on the question whether the Service had grounds to terminate (not 'discharge') the grievant because it had reason to apprehend that, on the basis of the attendance record referred to, the grievant would not maintain a reasonable attendance record in the future. In other words, and in effect, the Service's position is that the absence record demonstrates that the grievant does not possess the physical qualifications to maintain a satisfactory attendance record in the future."
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> (Underscoring added.)

A number of other Regional decisions were issued between September of 1977 and the hearing in the present case. All but one of these opinions included statements tending to support the present USPS position. Two of these opinions, however, dealt directly with the question of whether the CSC policy was relevant. They reached opposite conclusions. These decisions will be noted in more detail later. 29

There is, among the more recent cases, perhaps one other which merits specific mention here since it was presented by the NALC. Case NC-S-8197-D was decided by Arbitrator Cushman on February 4, 1978. Discharge for frequent and repetitive absenteeism was found proper. The Arbitrator commented-- 30

> "The Union argues, however, that all of the absences during the October 5, 1976 to April 22, 1977 period, the Charge 1 period, were stipulated to have been for approved sick leave, and therefore, may not properly be considered as a basis for removal. That argument is without merit. As stated above, this Arbitrator, in common with many other arbitrators, has held that an employer has a right to expect acceptable levels of attendance from employees and that where such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. As stated by Arbitrator Meyers in a recent case, USPS and APWU (Pamela Allen), approval of a sick leave slip means only that an employee's absence will be processed for pay purposes. A satisfactorily documented sick leave request affords no basis for supervisory disapproval, but the absences remain on the record."
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> (Underscoring added.)

3. Significance of the Earlier Regional Opinions

The problem faced by the USPS in seeking to reduce absenteeism is not unique. A Central Region memorandum which accompanied the Charters Memorandum, quoted under Background above, nonetheless suggests that in recent years the USPS has faced a particularly serious problem of this sort. 31

Management properly may assume that most USPS employees are conscientious and not prone to abuse the sick leave program. Medical certificates understandably are not generally required to support every one or two day absence because of claimed illness. Even where medical certificates are required they may not be difficult to obtain, even by a malingerer. There is no practical way for the USPS to question their validity, moreover, except as other evidence may surface to reveal that a given employee has been malingering. 32

No doubt in light of these considerations National Level Arbitrator Gamser observed in Case AC-N-14,034 that excused sick leave cannot "be considered a grant of immunity." If USPS Management is to be able to hold absenteeism within reasonable limits over the long run, it may be important in individual cases to cite an employee's entire record of absences, including those on sick leave, in establishing proper cause for discipline. 33

Some of the problem envisioned by the NALC in the present case, moreover, may arise from unnecessarily broad generalizations embraced in some of the Regional opinions which imply that the application of discipline always will be proper when the USPS can show "excessive absences" from work. Indeed, the USPS brief quotes from the Elkouri text, "How Arbitration Works" (3rd Ed. 1973) at p. 545, a sentence to the effect that an employer has a "right" to terminate an employee for excessive 34

absences even when due to illness. Reliance on such broad and misleading generalizations may obscure the fundamental consideration that the true issue, under Article XVI of the National Agreement, is whether the employer has established "just cause" for the given discipline in the specific case. The presence or absence of "just cause" is a fact question which properly may be determined only after all relevant factors in a case have been weighed carefully. The length of the employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the types and frequency of all of the employee's absences, the nature of the diagnosis, the medical history and prognosis, the type of medical documentation, the possible availability of other suitable USPS jobs or a disability pension, the employee's personal characteristics and overall record, the presence or absence of supervisory bias, the treatment of similarly situated employees, and many other factors all may be relevant in any given case.

In short, an arbitrator cannot properly uphold the 35
imposition of discipline under Article XVI, except after conscientious analysis of all relevant evidence in the specific case. This basic consideration seems to be reflected in the advisory Opinion of National Level Arbitrator Howard Gamser in Case AC-N-14,034, decided February 2, 1978. After quoting from a Regional Arbitrator's Opinion in Case AC-S-9,936-D, (and noting that other Regional opinions had included similar language) Gamser wrote these cautionary comments--

> "In addition, the undersigned is constrained to add the following comments. Of course properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. However, neither can excused sick leave be considered as a grant of immunity to an

"employee against the employer's right to receive regular and dependable attendance and to take steps necessary to insure the existence of a reliable workforce to do the work at hand.

When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the fact that this employee's attendance record supports the conclusion that the employee is incapable of providing regular and dependable attendance without corrective action being taken. Management cannot inhibit an employee in the exercise of his contractual right to employ sick leave in the manner contemplated to cover legitimate periods of absence due to illness of other physical incapacity. Management must give every consideration to the fact that there is a sick leave program and that an employee's absence has been covered by accrued and earned sick leave or projected sick leave. Having given this consideration appropriate weight, the employer may still decide that an attendance record so erratic and undependable due to physical incapacity to do the assigned work requires that action be taken to insure that the work is covered in an efficient and reliable manner."

Given the specific facts in most of the cases before them, it occasions no surprise that many Regional Arbitrators have indicated that repetitive, excessive absenteeism--even 36

including absences on approved sick leave--may provide "just cause" for discipline or discharge. Such extreme situations are not hard to find. The facts in the original Bugg case, as well as those before Arbitrators Cushman in Case AC-S-9,936-D and Seitz in Case AC-N-16,605-D serve to illustrate this point.

It follows that there is no basis in this record for an award which would bar the Service from seeking to apply discipline to combat serious, repetitive absenteeism by individual employees, even though absences on sick leave or approved leave without pay may be involved. The Marblehead, Jacksonville, and Central Region memoranda all seem to embody instructions in furtherance of such a basic policy. Even if such memoranda include statements or implications which appear unnecessarily broad or inaccurate, it is not the function of an Arbitrator to rewrite such internal Management instructions. Should an apparent abuse arise in any future instance, the issue of "just cause" in the given case may be determined through the filing of an individual grievance. 37

4. Relevance of Civil Service Commission Policy

Article XVI, Section 3 of the National Agreement recognizes that any USPS employee who is "preference eligible" may elect to appeal the imposition of discharge, or a suspension of more than 30 days, to the Civil Service Commission instead of filing a grievance claiming violation of Article XVI. This alternative, of course, is available only to those bargaining unit employees who happen to be preference eligible. All other employees covered by the National Agreement may seek redress for discharge, or suspension of more than 30 days, only through the grievance procedure. 38

Article XVI states that discipline must be corrective in nature, not punitive, and that it may be imposed only for "just cause." The basic Civil Service policy, in contrast, apparently is that discipline may be upheld whenever it is found to be "for such cause as will promote the efficiency of the service." 39

As already indicated, the Bureau of Policies and Standards of the Civil Service Commission recently issued a policy directive to the FEAA which would apply in any case where a USPS preference eligible employee had elected to appeal a discharge or suspension of more than 30 days to the CSC. While the full text of the policy statement is not in evidence, one joint exhibit reveals, that a principal sentence reads-- 40

> "Given an agency's authority to deny leave under many circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."
>
> (Underscoring added.)

Another joint exhibit embodies a paragraph of the CSC policy statement reading-- 41

> "When an agency exercises its authority to approve leave the employee is released from his obligation to report for duty and his absence does not constitute a breach of the employer-employee relationship. As a result, an adverse action based on approved leave in

> "any amount is not normally a cause that will promote the efficiency of the service. Such an adverse action, then, should be reversed on appeal for failure to state a cause of action."
>
> (Underscoring added.)

Following implementation of this CSC pronouncement, the USPS advised all of its Regional Directors--Employee and Labor Relations: 42

> "In light of this new Commission policy, 'failure to meet position requirements' or 'undependability' based upon excessive approved absences should not be used as grounds for taking adverse actions against preference eligible employees, unless and until we are successful in reversing Commission policy through the vehicle of a motion for reopening on a 'test' case."
>
> (Underscoring added.)

The NALC reads the CSC policy statement to mean that the USPS is not entitled, under any circumstances, to impose discharge or a suspension of more than 30 days because of a preference eligible employee's absence on approved leave. In view of the above quoted portions of the policy statement this interpretation may be accepted as correct, for present purposes, in the absence of any evidence to the contrary. 43

The result is obviously incongruous. One policy applies in respect to preference eligible employees who appeal to the CSC and another governs all other bargaining unit employees and those preference eligible employees who file a grievance. The NALC argument that the new CSC policy should be applied to all employees thus has the superficial appeal of seeming to assure uniformity in the administration of discipline among all potentially involved employees. The fact is, however, that the special treatment accorded preference eligible employees is required under Section 1005-(a)-(2) of the Postal Reorganization Act and cannot be changed by the parties in collective bargaining. 44

Two Regional Arbitrators already have had an opportunity to consider whether the CSC policy statement should be embraced for purposes of applying the "just cause" test under Article XVI to employees who file grievances under Article XV rather than appealing to the CSC. The NALC was involved in both of these cases and both involved preference eligible employees. 45

In NC-S-14,301-D, decided September 25, 1978, Arbitrator Robert Moberly sustained a discharge where the employee had been absent from work frequently on approved sick leave, or on leave without pay. Moberly's Opinion noted the conflict between the CSC policy statement and the earlier rulings by Regional USPS arbitrators. He concluded that he was "bound by the collective bargaining agreement rather than the holdings of the Civil Service Commission," since--"The Arbitrator is interpreting the collective bargaining agreements, and nothing more." 46

A different view emerged in NC-C-5949-D, decided in December of 1978. There Arbitrator Peter Di Leone indicated that, but for the CSC policy directive, he would have sustained the discharge under review. He then wrote-- 47

> "Pursuant to Article III of the 1975 National Agreement this Arbitrator must view the action of the Employer in the light of applicable law and regulations. The Federal Ruling issued in accordance with the responsibilities Congress has imposed upon the Employer by law is such an applicable regulation governing the Employer's action here.
>
> Therefore, since Biggs' discharge was based on a record of approved leaves of absences from February 1, 1975, when he injured his knee, to December 7, 1975, when he was discharged, the action of the Employer must be set aside."

Neither of these Regional Cases represents a precedent for purposes of a National Level interpretive case. Indeed, it would be unfair to suggest that either arbitrator--in the absence of the detailed presentations in the present record--was in any position to develop an authoritative opinion on the subject. 48

In the absence of any helpful precedent it is pertinent to note that under Article XVI two fundamental considerations must control in every discipline case-- 49

(1) No discipline may be upheld unless shown to have been imposed for "just cause," and 50

(2) Whether "just cause" exists requires a fact determination on the basis of all relevant evidence in each individual case. 51

It follows that neither a Regional nor National Level Arbitrator may presume to enunciate or establish any broad general rule contemplating that the imposition of discipline 52

always will either be upheld, or be set aside, in any given category of case. Nor can the pronouncement of the CSC Bureau of Policies and Standards now be accorded such a status by this Arbitrator. To do so would be, in effect, to amend Article XVI.

On the other hand, it is not uncommon for arbitrators, 53
when faced with difficult "just cause" cases, to consider how other arbitrators or authorities have dealt with like problems. Many of the various Regional Arbitrators cited by the USPS in the present case have relied upon opinions expressed by arbitrators in other relationships. Some of the Regional Arbitrators also have relied upon the Elkouri generalization which has been quoted in the USPS brief.

In these circumstances there is no way that this Arbi- 54
trator now could characterize the CSC policy statement as "irrelevant" in respect to a just cause issue under Article XVI. In view of its applicability, in respect to preference eligible USPS employees, it obviously must be accorded at least the kind of consideration as has been accorded to generalizations of other arbitrators, or writers, outside of this bargaining relationship. Beyond that the precise weight or significance to be accorded the new CSC policy, in light of all of the evidence in any given case, should remain a matter of judgment on the part of the arbitrator to whom the case has been entrusted for decision.

Finally, perhaps, it should be observed that any 55
attempt to enunciate an inflexible rule for dealing with every "just cause" issue in a given type of case is a risky business, at best, in view of the multitude of variables which may be present in individual cases. Thus there can be no clear certainty that the present CSC policy statement will remain forever in its present form without any refinement, clarification, or modification.

Conclusions

The following conclusions may be stated on the basis of the presentations in this National Level grievance: 56

1. Whether the USPS properly may impose discipline upon an employee for "excessive absenteeism," or "failure to maintain a regular schedule," when the absences on which the charges are based include absences on approved sick leave, must be determined on a case-by-case basis under the provisions of Article XVI; 57

2. Whether or not the USPS can establish just cause for the imposition of discipline, based wholly or in part upon absenteeism arising from absences on approved leave, is a question of fact to be determined in light of all relevant evidence in the given case; 58

3. The CSC policy statement is not of controlling significance in deciding a "just cause" issue under Article XVI, even though the grievant may be preference eligible; 59

4. The CSC policy statement is relevant in respect to a "just cause" issue under Article XVI, in a case involving absences on approved leave; 60

5. The weight to be given the CSC policy statement, in evaluating a just cause issue under all of the evidence in any such case, lies in the discretion of the arbitrator. 61

AWARD

No formal Award is required in view of the nature of this case. It may be deemed to be closed on the basis of the foregoing opinion. 62

Sylvester Garrett,
Arbitrator