IN ARBITRATION PROCEEDINGS PURSUANT TO ARTICLE XV

OF THE NATIONAL AGREEMENT BETWEEN THE PARTIES

CASE NO. WIN-5D-D 3092

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JIM EDGEMON, NBA
National Association Letter Carriers

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	
and	WILLIAM EATON
	Arbitrator
UNITED STATES POSTAL SERVICE Seattle, Washington	
Grievance of A. Pettibone	

APPEARANCES:

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ISSUE AND EVIDENCE

This is an arbitration to determine whether the removal of Grievant of Arloene Pettibone was for just cause under the National Agreement, and if not what the remedy shall be. Hearing was held in the Seattle Post Office on July 22 1982. At that time the Grievant was fully and fairly represented by the Union, was present throughout the hearing, and testified in her own behalf. Following presentation of additional testamentary and documentary evidence, it was agreed that the issue would be submitted to the Arbitrator upon the filing of post-hearing briefs, which was completed on September 9 1982.

The Grievant was hired as a carrier in 1970, and, at the time of her removal, was working as a Level 6 Carrier, doing sixth day relief on five separate carrier routes. Over the years she has sustained several on-the-job injuries, including three involving her lower back.

The present dispute also involves a lower back injury, allegedly received by the Grievant on December 1 1981. She was treated by Dr. Charles R. Leighton, whom she had previously seen concerning similar injuries, and who prescribed approximately thirty days' bed rest under circumstances described below relating to the December 1 injury, releasing her to return to work on January 4 1982.

On December 1 the Grievant was delivering a relief route for fellow carrier Philip Elder, Route 99028, which she had carried for approximately seven years. On the CA-1 Form submitted December 3 1981, two days after the alleged accident, the Grievant reported that she had slipped on a wet brick

sidewalk, and in an effort to prevent falling had pulled her lower back. She had suffered similar injuries on September 27 1979 and July 25 1980. The Postal Service contends that the Grievant has filed a false claim, for which she was removed from the Service. The Union contends that the claim was valid, and asks that the Grievant be reinstated with back pay and all rights under the Agreement.

The Grievant was served a notice of removal dated December 30 1981, informing her that she would be removed from the Postal Service on February 1 1982. The reasons for the removal action were as follows:

> FALSIFYING AN OFFICIAL DOCUMENT. On December 3, 1981 you submitted a CA-1, Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation, for an alleged injury which you state occurred on December 1, 1981 at 12:30 p.m. at 3444 Magnolia Boulevard. You reported that 'in an effort to avoid falling to ground--overcompensated and strained or pulled lower back--causing immeasurable pain.'
>
> While on street observation on December 1, 1981 at approximately 1300 I observed you making a dismount delivery at 4401 W. Bertona, and a dismount delivery at 4319 W. Bertona about one minute later with no obvious discomfort. In fact, you finished the portion of the route in slightly under 2 hours, which normally takes 3 hours; approximately 50% of this territory is car hopping which would be extremely uncomfortable for someone with a back problem. Upon your return to the station at 1514, you did not report to supervision that you had an accident.
>
> On December 2, 1981 after working approximately one hour you reported that you could not carry your route because you had hurt your back, but could case mail, and did not want to go to your doctor. You cased mail and delivered 3 swings on this day. You made no mention of an on-the-job injury even though you are aware that an

on-the-job injury must be reported within two working days of the injury.

The first indication of an alleged on-the-job injury was your call from Dr. Leighton's office at 1315 on December 3, 1981. You had worked that morning and had made no mention that you had been injured on your route on December 1.

Based on the speed with which you were car hopping after your alleged injury on December 1, and the fact that at no time did you report this alleged on-the-job injury until the afternoon of December 3, you did not incur this injury on the job at the time you so state on the CA-1.

During your postal employment, you have reported numerous accidents and have been made aware of the reporting procedure. As stated in Section 661.53 of the Employee and Labor Relations Manual, 'No employee will engage in criminal, dishonest,...or other conduct prejudicial to the Postal Service.' On the CA-1, the Penalty Provision states 'A person who makes any false statement, misrepresentation, concealment of fact, etc., in respect to this claim is subject to criminal prosecution and may be punished by a fine of $2000 or imprisonment for one year, or both--18 U.S.C. 1920.' Falsifying an official document, in this case a CA-1, is unacceptable conduct. For this reason, the notice of removal is issued to you.

Notice of Injury

The Grievant testified that on December 1, at approximately 12:30 p.m., she was walking down a lawn, with one foot on the lawn, the other foot about to step onto a brick sidewalk, when her foot slipped. The sidewalk, she stated, had moss on the bricks, and it was wet from rain. At the time she had flats and letters in her left hand, and a few letters in her right hand.

According to her testimony, she was thrown forward and to the right, holding out her right hand to prevent falling. The right hand hit the sidewalk, preventing her fall, so that her knee did not touch the ground. She stated that at the time she felt no pain, and that there was "nothing to even think about" as a result of the fall. She finished her route, including park and loop segments, and car hopping, completing the work at approximately 2:15 p.m. She said that the first pain she experienced was sometime shortly after dinner that same evening.

On the following day, December 2, she reported to Superintendent for Station and Branch Operations, Dave Holland, that she had "injured my back the day before", not stating at the time, apparently, that the injury had been work-related. Nor did she asked for a Form CA-1 at the time. This was for the reason, according to her testimony, that she did not want to be off work.

Nevertheless, she reported an irritating and "burning sort of thing" in her lower back, so that she asked for office work for a few days. She was assigned office work by Holland for December 2, except for approximately one hour during which she took three swings of park and loop deliveries.

When she reported to work on December 3 she was still in pain, and had driven approximately 25 miles to work. Holland informed her on that day that he could not justify her remaining in the office unless he had a doctor's excuse. Holland testified that he sent the Grievant to a doctor for the protection

of both herself and the Postal Service. Up to this time it appeared that Holland had not inquired as to the nature of the injury, nor had he furnished or suggested a Form CA-1.

The Grievant went to the office of Dr. Leighton, and was there examined by a medical assistant. Following the examination, and after consulting with Dr. Leighton, the assistant prescribed several days off work. The doctor's office then called the Postal Service concerning the matter, which, according to Holland, was the first notice he had that the Grievant claimed that the injury had been sustained on the job.

In response to questions asked in cross-examination, Holland replied that he had never asked the Grievant to demonstrate how the accident had happened, partly for the reason that she was home in bed most of the time between December 1 and the date of her removal notice, December 30, and partly because he felt it unnecessary since he had her own report of how it had occurred.

Several fellow carriers testified at the arbitration hearing as to when the Grievant had informed them that an on-the-job accident had occurred. The regular carrier on Route 28, Elder, testified that on December 2 the Grievant had informed him that she would be working in the office for a few days because of the injury sustained the day before. Elder recalled that this conversation occurred on the 2nd, for the reason that he recalled the Grievant being at the case which she does after his day off, which had been the previous day. As Elder recalled,

the Grievant had mentioned that the accident occurred on his route.

Carrier Linda Kumka presented similar testimony, stating that the Grievant had told her on the morning of December 3 that she had hurt her back two days before while delivering mail on Route 28. Ms. Kumka stated that she could recall the date of the conversation for the reason that it was her first day back after her regular day off, which was December 2.

The Grievant's husband, James Pettibone, is also a carrier, having some 24 years' service in that capacity. He stated that on the evening of December 1, the Grievant mentioned at home that she had a pain in her back, but that she did not state the reason. He discovered the reason, Pettibone testified, in conversing with the Grievant on the following day when he asked her why she was working in the office casing, rather than carrying. At that time, Pettibone stated the Grievant informed him that she had been hurt on her route the previous day. The Grievant's daughter testified that on the evening of December 1 the Grievant told her that her back hurt because of an injury at work that day.

The Form CA-1 was given to Mr. Pettibone on December 3 after Holland received the telephone call from the Grievant's medical clinic. He took it home, the Grievant filled it out, and he returned it on the following day, December 4.

Holland's Observations

Superintendent Holland testified that he had undertaken street supervision of several carriers on December 1, including the Grievant. He was particularly interested in her, he said, because of reports that she had been deviating from her established route in order to help her husband on a route which had been temporarily assigned to him. Accordingly, on December 1, Holland observed the Grievant once on the street, and once in her vehicle parked at lunch, before she returned to the office-- all after 12:30 p.m., the time at which she said she was injured.

The street observation was at approximately 1:00 p.m., at a time when the Grievant was car hopping. Holland testified that her movements appeared normal, that she moved with agility, and that she appeared to be in no kind of pain. Other evidence indicated that the Grievant carried an average load on December 1, apparently in approximately her average time, although there was a route deviation which is not directly related to the question of her injury.

Several days later, Holland visited the Grievant at her home. The date of this visit was on December 9, although Holland originally put it at an earlier time. He testified that he found the Grievant lying on the floor in front of the television, with pillows propped under her legs. The Grievant stated to him at the time that she had been ordered to remain lying down by her doctor. Holland agreed that the Grievant was not aware that he was to visit her on that day.

During his visit, according to Holland, the Grievant got up to answer the telephone three times, each time with apparent ease and no evidence of pain. Even so, the Grievant maintains that Holland observed to her at the time that she appeared to be in a great deal of discomfort, a remark which Holland could not recall having made. The Grievant's husband also testified that Holland had observed to him, after the visit, that she seemed to be in pain, and that he, Holland, hoped for the best.

Medical Diagnosis

Two days prior to Holland's visit to the Grievant's home, she had visited her physician, Dr. Leighton, in his office. Dr. Leighton testified that at that time he observed difficulty in moving, that the Grievant appeared not to be loose, and that she was in apparent pain. He also reported great problems from riding in a car.

On her first visit to the clinic on December 3, Dr. Leighton's medic, after consulting with him, had indicated that the Grievant would be off work for several days, and that she should report back on December 7, which she did. At that time Dr. Leighton saw her, and indicated that she would be off work for at least an additional two weeks. As indicated, she was not released for work by Dr. Leighton until January 4 1982.

In the meantime, the Grievant had been scheduled for a fitness for duty examination in mid-December, due to her injury, which she postponed to December 30. On that day she was examined by Dr. J. Dominik, area medical officer for the Postal Service.

As a result of the December 30 examination, Dr. Dominik determined that the Grievant was fit for limited duty, eight hours per shift, with the limitation that she should not lift over 20 pounds.

Dr. Dominik testified that on December 30 he found no evidence of trauma, although the Grievant complained of a "burning" in her lower back. He testified that he prescribed the 20 pound lifting limitation for the reason that she had been off work for so long. Although he agreed that the accident, as described by the Grievant, could have happened, Dr. Dominik stated that he had trouble "understanding the persistent pain afterwards", since no major injury appeared to have occurred. He contended that he had found no muscle tenderness or pain during the December 30 examination, although the Grievant testified that he did not inquire whether she felt pain at the time, which she maintains she did.

In the meantime, on December 29, Dr. Leighton had determined that the Grievant could case mail for a few hours a day, and that she could start on her route again in approximately ten days thereafter. Dr. Leighton also placed initial limits of 15 pounds, no climbing of steps or working on elevations, or working with hazardous machinery. He also advised limited walking, stooping and bending.

These limitations were subsequently approved by Dr. Dominik, as were further limitations of four hours a day on January 8, lifting limitations on January 14, and similar limitations on January 20 and January 28. All of these

limitations had initially been prescribed by Dr. Leighton. When asked why he had agreed with such limitations, having released the Grievant for eight hours' work on December 30, Dr. Dominik testified that that was "just the way we do business with other doctors", although he still disagreed with Dr. Leighton's diagnosis.

Doctors Leighton and Dominik discussed the matter by telephone, apparently two or three times. Notes and testimony of Dr. Leighton were to the effect that, in his opinion, Dr. Dominik had confused the new injury of December 1 1981 with treatment which had been prescribed for the July 25 1980 injury. Dr. Leighton stated that he had originally called Dr. Dominik to register a protest over the latter's interference in regard to a patient whom he had seen only once, while Dr. Leighton had treated the Grievant from time to time for some four to five years.

On January 5 1982 Dr. Leighton addressed a letter to Superintendent Holland regarding the circumstances of the December 1 injury. In that letter Leighton expressed the opinion that it was a "very common experience" to see patients who had soft tissue strains, especially involving muscles, "whose incapacitating pain did not start for 24 to 48 hours", adding that "not infrequently they have forgotten the actual stress that produced the injury" in such circumstances. Dr. Dominik testified that he did not agree with that statement, and found in the letter no "real medical facts" which he could weigh in evaluating the Grievant's condition.

Testimony of the Grievant, her daughter, her husband, and Dr. Leighton all indicated that she had experienced no back injury or pain in the thirty days or so prior to December 1 1981. Holland agreed that he had not inquired whether any such injuries had been experienced or observed prior to that date.

Past Record

Superintendent Holland testified that, in reaching his decision to remove the Grievant from service, he relied upon several events or elements of her past record which aroused suspicion. One, already noted, was his personal observation of the Grievant, both on December 1 on the street, and on December 9 at her home. He also believed that, on December 1, she had carried the route quite rapidly, another indication that she had not been injured, in Holland's opinion.

The principal element of her past record upon which Holland relied was the fact that on prior occasions she had reported industrial injuries at a time when her annual leave balance had been exhausted. The Grievant agreed that this was so. However, both she and her husband testified, without contradiction, that it had been their habit to take annual leave together shortly after the first of each year. Hence, any injury that might occur later in the year would, as a result, occur at a time when there was no leave balance.

For the year 1981, however, the Grievant had requested leave in December, at a time when she had a leave balance. In the meantime, the plans of the Grievant and her husband had changed, and they had used the leave earlier in the year.

Accordingly, there was some conversation between Holland and both the Grievant and her husband concerning annual leave sometime around December 1 1981.

In his conversation with the Grievant, Holland had indicated approximately a week before December 1 that she had only three days of annual leave left, whereas she had two weeks scheduled. The Grievant stated that she was aware of that fact, and that she had no objection to cancelling the leave as originally scheduled. Holland stated that, as a result, the Grievant had requested LWOP in place of annual leave, a request which the Grievant denies having made. Although Holland had believed that the original request had been for the early part of December, a notation by him dated January 7 1982 indicates that the original leave request had been for the period December 21 1981 through January 2 1982-- not for a leave beginning in the first part of December.

Asked what the Grievant's general competence as a carrier had been, Holland replied that she was "not exceptionally good", and tended to be "a shirker." A Postal Service exhibit, however, indicated that the Grievant's street times were fairly fast.

Holland testified that the Grievant had previously been disciplined for attendance, and had been placed on restrictive sick leave. However, on cross-examination, he conceded that both of these disciplinary measures had been reversed in the grievance procedure. The Grievant testified without

contradiction that sometime earlier in 1981 Holland had told her that she should be in management, and that he would let her know if any opportunities arose.

Concerning the Grievant's prior on-the-job injuries, including prior lower back problems, Holland agreed that he knew of no instance in which the Postal Service had contested the claims. For his part, Dr. Leighton testified that the Grievant had seen him for some four or five years for a variety of reasons, and that she "doesn't come in very often."

Investigation and Removal

The testimony of Superintendent Holland was that, while he could not say exactly when he determined that the Grievant should be removed from service, he had probably made that decision prior to the fitness for duty examination administered by Dr. Dominik on December 30 1981. Asked why, in that event, he had waited nearly thirty days to issue the removal letter, Holland replied that he wanted to make certain that the suspicions that he had were well-founded.

Concerning the element relating to past industrial injuries at a time when annual leave had been exhausted, Holland was asked whether he had inquired of the Grievant how that happened to have occurred. He replied that he had made no such inquiry. The record indicates that such injuries had occurred in the latter months of 1976, 1977, 1979, and 1980.

On a notation made by Holland summarizing the events of this dispute, he indicated that while the Grievant "may well be injured", Holland did "not believe it happened on the job."

In testimony, however, Holland could not suggest any alternative as to when the injury might have occurred.

During the course of his investigation Holland contacted the Postal Inspection Service and recommended prosecution of the Grievant. He testified that the Inspection Service declined to prosecute.

Holland appears not to have been aware of the conversations testified to by carriers Elder, Kumka and Hamilton early in December with the Grievant-- to the effect that she had told them of the on-the-job injury at that time-- when reaching his conclusions that the injury claim was falsified.

DISCUSSION

Postal Service Argument

The foundation of this case is the premise that the Grievant provided her employer with false or misleading statements, either directly or through others, in order to obtain benefits to which she would not otherwise have been entitled. Management's case is based heavily on circumstantial evidence. However, in cases of this sort, this is most of the evidence management can have, particularly with city letter carriers who work unsupervised a majority of the day.

The Grievant has an employment history whose milestones have been industrial injuries and behavior requiring disciplinary action. It is undisputed that each time she has had a compensable accident since 1974, she has had no annual leave to her credit, even though she has [illegible] work days

per year in leave since 1974. Her rate of accidents is significantly above the average individual employed in the same tasks, while her supervisor, Dave Holland, describes her as a "shirker", whose performance was minimally satisfactory.

The Grievant had been denied leave previously scheduled at the beginning of 1981 to be taken at the end of the leave year, due to an insufficient leave balance.

The Grievant was observed on her route only one-half hour after the alleged injury car hopping at a rapid rate of speed. When she entered the station she failed to mention the accident, although she knew all accidents must be reported.

Her various descriptions of the accident differ significantly. On the CA-1, completed two days after the alleged injury, she stated she slipped on a slimy wet brick sloped walkway. She made a similar statement to accident investigator Dennis Thomas on December 16 1981. Her physician was also apparently told that she slipped on wet bricks. However, on the day of the arbitration hearing, she stated she was walking on the lawn, and was about to step onto the sidewalk, when she slipped and fell. The latter description varies significantly from the former ones, and is not compatible with them.

Although she testified she was suffering significant pain on December 2, she drove her husband to and from work while he sat and rested beside her.

According to the Grievant, and witnesses called on her behalf, on the morning of December 2 she gave at least two carriers

very specific information about her alleged accident. But when she informed her supervisor the same day, she merely stated that she had hurt her back and would prefer not to do the street part of her route that day. She did not give her supervisor the same information as the carriers, which would have allowed him to refer her to the area medical officer according to procedure.

Again on December 3, the Grievant drove her husband the 25 miles to work, and again requested to be excused from street duty. She was told then that she should see a physician, but again no indication of the alleged injury having been job related was provided to Supervisor Holland. His first notice that she was indicating an alleged job-related injury was from her doctor's office, based on the opinion of a medic. Holland immediately requested a medical examination to verify any injury. However, upon receipt of the notice, the Grievant called her physician and had him certify that she was too disabled to drive. Nevertheless, she admitted to driving herself to all her appointments, including one on December 7, just a few days before, and one on December 16, two days after the scheduled examination.

Holland observed the Grievant at her home on December 9 moving about without any indication of pain. It is undisputed that her physician, Dr. Leighton, based his opinion on what the Grievant had told him her symptoms were. His total examination of a patient supposedly in "immeasurable pain" four days earlier took about 15 minutes, and did not include taking X-rays.

Management, in reaching its conclusions, has taken notice that the Grievant aborted every effort of management to

obtain the medical evidence needed to support her claim. This, added to the circumstantial evidence which does not support a reasonably probable flow of events, leads to the conclusion that when she completed the CA-1 the information provided at that time, and subsequently through her physician, was in fact false and misleading.

Furthermore, the alleged injury of December 1 1981 was very similar to her alleged injury of July 25 1980, even including the wording on the CA-1. She was treated by the same physician, and thus was well rehearsed in her knowledge of what the symptoms of the injury should be.

Among the improbabilities is testimony that her husband was not aware that she was going to "stay in" on December 2, though she indicated that she had been in "great pain" on that date, and even though the two had ridden the 25 or more miles through heavy city traffic on the way to work. Finally, although the Grievant testified that she spent the evening of December 1 in bed because of pain, her daughter's statement of January 13 1982 indicated that she "ate dinner, read the paper, and watched TV."

Thus, if we were to credit the Grievant's version a number of major conflicts would have to be explained: first, there are the contradictory descriptions of how the accident allegedly occurred; second, her reason for not filing the accident report at once was that she did not want to be off work, an unusual position considering her supervisor's description of her as a "shirker"; third, her frustration of management's efforts

to establish the validity of her claim by medical examination; fourth, the fact that her own doctor does not dispute that he was basing his opinion on the Grievant's verbal description of her symptoms; and, fifth, the striking similarity between the present alleged injury and one previously reported by the Grievant in July of 1980.

All of the testimony in support of the Grievant is verbal, hearsay, and self serving. Not one shred of evidence was offered to establish that an injury occurred. There were no bruises, no broken bones, and no X-rays produced. This combined with the record of the employee, the description of an improbable flow of events, and the other evidence adduced indicate that the employee has received benefits by providing false information. For these reasons the Postal Service asks that the Arbitrator rule in its favor.

Union Argument

The Postal Service in this dispute has sought to exercise its disciplinary authority to punish an employee solely because she dared to assert a right guaranteed her by federal law, the right to continuation of pay after an industrial injury. The record demonstrates that the Postal Service objective was accomplished through a management "investigation" which was deceitful and incompetent.

After receiving her removal notice, the Grievant was allowed to work for most of the 30-day period before the removal took effect. Thus, the Service made the determination that she presented no threat to the integrity of the Service, and no current

or potential risk to the general public. All the while the Postal Service had at its disposal not only the emergency suspension provisions of the National Agreement, but the indefinite suspension-crime situation provisions as well.

The Postal Service was still attempting to investigate the case on January 29 1982, 30 days after the removal notice was issued, when Supervisor Holland inquired of the Grievant whether the accident occurred as she was going up to, or walking away from, the customer's home.

Back injuries are not uncommon in the Postal Service. The regional medical director testified that approximately one-fourth of industrial injuries in the Service are related to one section of the anatomy, the lower back. Thus, it is both possible and probable that the injury to the Grievant happened exactly as claimed, and on the date cited by her.

During its "investigation" it was clearly the objective of the Seattle postal supervision to "build a case" against the Grievant. Not once has anyone from management ever gone, with the Grievant, to the scene of the injury and asked her to demonstrate exactly how it occurred. Worse, Supervisor Holland indicated that, although he could not understand why the Grievant placed certain statements on the CA-1, he did not once ask her about those statements, or give her a chance to explain prior to issuing the discipline. His attitude is reflected by his comment that, "Too many questions provide too many opportunities to lie."

When the Grievant applied for continuation of pay/compensation as a result of her injury, she invoked a right guaranteed

her in common with all federal employees, by statute. It is a criminal offense, punishable by fine and imprisonment, for any "officer or employer of the United States charged with the responsibility" of submitting reports of employee injury to induce, compel, or direct an injured employee to forego filing of any claim for compensation under the FECA 18 U.S.C. §1922.

The Postal Service is equally well protected against dishonest claims. Any person found guilty of having made a fraudulent claim against the United States is subject to a fine of up to $10,000, and imprisonment for as long as five years, under 18 U.S.C. §287. Any person knowingly making a false statement in a claim for compensation under the FECA is subject to a fine of up to $2,000, and imprisonment for as long as one year, under 18 U.S.C. §1920.

Moreover, the National Agreement provides the Postal Service with a degree of recourse against any employee accused of serious crime which is not ordinarily available to employers bound by a "just cause" standard for discipline. Article XVI, Section 6 empowers the employer to suspend or discharge, without the advance notice normally required, any employee where there is reasonable cause to believe the employee guilty of a crime for which a sentence of imprisonment can be imposed. Thus, if "reasonable cause" had existed to believe that the Grievant was guilty of violating either Section 287 or Section 1920 of Title 18, she should have been subject to the serious action of an indefinite suspension as well as removal.

The Postal Service, in fact, undertook to initiate criminal proceedings against the Grievant for fraud. However,

the Postal Inspection Service declined to investigate. The Service also attempted, unsuccessfully, to prevent her claim as authorized by the FECA. Thus, management used every available legitimate method to protect itself againt the possibility that the claim was not authorized. Only when these efforts failed did management resort to disciplinary action.

Turning to the validity of the Grievant's claim, there is no probative evidence contrary to her description of the accident as written on the Form CA-1. The Postal Service processed her claim with one objective in mind, to keep the Grievant as uninformed as possible about its intentions regarding that claim. Not once was any indication of suspicion given prior to the issuing of the removal notice, some 30 days after the accident occurred.

The case against the Grievant is built on the suspicions of Supervisor Holland. He doubted that she was in "immeasurable pain" when she filled out the CA-1 two days after the accident because when he observed her on the afternoon of the accident she did not appear to be in pain. Dr. Leighton's letter indicates that it is very common to see patients who have soft tissue strains, especially involving muscles, whose incapacitating pain does not commence for one or two days after the injury, and frequently where the individual has forgotten the actual stress that produced the injury. Holland testified that he never inquired of the Grievant what she meant by placing the words "immeasurable pain" on the CA-1 form.

Holland testified that another suspicion was that the

Grievant seemed to have an accident when she was on annual leave. Yet it was her testimony, and that of her husband, that they always took their leave at the beginning of each year, so that the chance of an accident occurring when she was out of annual leave was far greater than when she had leave on the books. Holland never asked the Grievant why she did not have any annual leave at the time of the injury.

Another of Holland's suspicions was the speed with which the Grievant finished her route after the injury occurred. The evidence is, however, that the regular carrier finishes the route in approximately the same time, and that the Grievant finished it on December 1 in about her normal time. In any event, this information is irrelevant since incapacitating pain may not begin for a day or two later. Had Holland asked the Grievant or her doctor concerning this matter prior to issuing discipline, his suspicion could have been laid to rest.

Further suspicion resulted from Holland's observations when he visited the Grievant's home on December 9, and found her lying on the floor with her legs elevated, after which he observed her rising with no apparent difficulty. The treatment plan recommended for her condition prescribes exactly what Holland observed. She was to lie on a firm surface with several pillows under her knees, and to walk slowly around the house for ten to fifteen minutes four times a day after the fifth day. Holland found her doing exactly what the doctor prescribed.

Turning from Holland's "suspicions", the Union would now like to address the <u>evidence</u> of the case.

It is uncontroverted that on the morning of December 2 the Grievant told Holland that she had injured her back "the previous day", and requested to remain in the office to case mail for the day. Holland approved, without asking how the injury had taken place. The Grievant testified that she felt that he had understood that she meant that it was an on-the-job injury.

The credibility of the Grievant in this respect is supported by testimony and evidence that both on December 2 and December 3 she told other employees that the reason she was staying in the office and casing mail was that she injured her back while carrying Route 28 on December 1. She said that it was wet, and that the brick walkway was uneven with moss growing between the bricks. Not only is this evidence uncontroverted, but the regular carrier on the route testified that he also had slipped once at the same location.

It is also uncontroverted that the Grievant told Holland on December 2 that she did not want to go to a doctor because he would probably tell her she would have to go to bed. She requested, instead, that she try to case mail and work off the pain she was feeling. Had she been falsifying an injury on the job to obtain time off, why would she not want to see a doctor, and even moreso, why would she volunteer her services to work in the office instead of trying to get time off?

Medical evidence is conclusive. Following her first report to Medic Belau, Dr. Leighton saw and treated her on nine separate occasions for the lower back injury, six times after she received the notice of removal, and three times after the effective date of removal. Dr. Dominik testified that by the

time he examined the Grievant the problem had resolved itself, so that his opinions were subjective, and not based on medical evidence. Even so, Dominik testified that there were symptoms present of burning pain in the lower back, but no physical evidence of trauma.

The Grievant in this dispute was deprived of a full and fair investigation to which she was entitled. She had no opportunity to tell her side of the story before discipline was imposed. Anything short of a full and fair investigation prior to discipline abridges the concept of due process, because it is human nature to stick to and defend a decision already made to discharge. A thorough investigation before discipline is imposed reduces the likelihood of an impulsive and arbitrary decision, such as that taken in the instant case. Such conduct ought not to be tolerated from any employer, and certainly not from an agency of the United States government.

The Union believes that proof beyond a reasonable doubt should be required in this case. In any event, management has failed to produce <u>any</u> evidence or proof of wrongdoing by the Grievant, circumstantial or otherwise. Had the Postal Service produced circumstantial evidence, such evidence would require the closest scrutiny by the Arbitrator. Arbitrator Benjamin Aaron, in Postal Case Nos. W-1219-76N, W-1231-76N, and W-1422-76N stated that "because the evidence is circumstantial, it must necessarily be subjected to the closest scrutiny. A critical issue, therefore, is whether that proof meets the clear and convincing test."

Similarly, Arbitrator Carlton J. Snow in a regular Postal Service arbitration case has held that circumstantial evidence requires that one weigh all of the probabilities, and decide that the only reasonable inference to be drawn from the evidence is the one drawn by the employer. Similar evaluations of circumstantial evidence have been drawn by other arbitrators.

The only "evidence" management has produced is Holland's testimony that he was suspicious of the Grievant's claim. Suspicion, however, no matter how strong, is not a substitute for proof.

For these reasons the Union requests that the grievance be granted, and that the Arbitrator order the Grievant reinstated and made whole for any and all losses sustained as a result of the removal, including full back pay and potential overtime, and that all reference to this discipline be removed from any and all files pertaining to the Grievant.

Conclusions

Through both their evidence and argument both parties have indicated that they consider this to be a dispute of considerable importance. The Postal Service states that the cost of industrial injuries to the Service exceeds $200,000,000 a year. It is not only reasonable, but commendable, that the Service should seek to ferret out and punish false claims. Nevertheless, however commendable this general intent may be, it remains up to the Postal Service to bear the burden of proving

falsification when such a serious charge is alleged-- a charge which, if proved, would terminate the career of a Postal Service employee, and very likely lead to criminal penalties.

In the present dispute, while there may initially have appeared to be reason for suspicion on the part of the Grievant's supervisors, a full examination of the evidence demonstrates that the case has not been proved. In a few instances, some lingering suspicion may remain, but on the whole the evidence simply fails to support the action taken.

It would appear that the first item of suspicion was Supervisor Holland's own observations of the Grievant at a time which would have been within an hour of when she alleges the injury to have occurred. The Postal Service spent considerable effort in proving the Grievant to have performed her work in a swift, even agile, manner at that time. Nor does she deny that she did so. She agrees that she felt no pain at the time of the accident, and states that no symptoms of an injury occurred until some hours afterwards.

As to whether the injury and its symptoms could have occurred in this manner, there is conflicting medical opinion. On the whole, the opinion of Dr. Leighton is persuasive. His credentials include refresher courses in orthopedic medicine, and he was the attending physician of the Grievant throughout. Given Dr. Leighton's testimony at the arbitration hearing, when taken together with his reports of examinations and of prescriptions of both drugs and exercise for the Grievant, there is no

reason to doubt that an injury did in fact occur.

In this respect it is noteworthy that Supervisor Holland himself concedes that, when he visited the Grievant on December 9, she would have had no way of knowing that he was coming. When he arrived she admittedly was in a position which would have relaxed her back according to exercise directions given by Dr. Leighton. Holland's assertions that the Grievant reacted rather nimbly to several telephone calls must be balanced against testimony of the Grievant and others that, either during or subsequent to the same visit, Holland had expressed concern about the Grievant's condition, and hope for her improvement. Moreover, if we believe that the Grievant moved nimbly about during his visit, as testified to by Holland, that would hardly have been consistent with the theory that the Grievant was faking an injury. Nothing would have been easier than for her to appear in some degree of anguish, had that been her intention.

The Grievant's testimony was consistent from the beginning, as were her statements to Holland, that she did not want to consult a doctor on December 2 for fear of being ordered to bed, and hence having to miss work. Again, if Holland suspected the Grievant of a history of questionable injuries, it remains unexplained why he did not immediately inquire how the injury had occurred, what the injury was, and require the Grievant to fill out a CA-1 form at once. The best evidence regarding this portion of the dispute is that the Grievant, in fact, truly

did wish to work out the pain, hoping that no time off would be required, as she testified.

Nor does the "cancelled leave" theory stand up to the facts. That theory is that the Grievant "injured" herself early in December in order to avail herself of a leave scheduled for that time which had been cancelled because her leave eligibility had been used up. It appears that, in fact, the leave had been scheduled for later in the month of December, not for the beginning of the month.

The employer dwells heavily upon the supposed discrepancies between the Grievant's description of her injury on the CA-1 form and her testimony at the arbitration hearing. What she said at the hearing was that she was on the grass, and "about to step on the sidewalk" when she slipped. However, she stated immediately after this that the bricks had moss between them, and that they were slick. While stated in a somewhat different way, this would appear clearly to indicate that it was in stepping on the wet bricks with moss between them that she slipped. Hence, there is no significant discrepancy in her reports of that incident.

There are further difficulties with Holland's testimony. His statement that the Grievant tended to be a "shirker", and that she was not "exceptionally good" as a carrier, would appear to be contradicted by records maintained by the Postal Service indicating that, in fact, she is one of the faster carriers, at least on her street time. Nor is there any indication of overtime.

Holland's position was further undermined by his own attempts to show that she had been subject to prior discipline. On cross-examination he had to admit that both the attendance and restricted sick leave efforts had been coutermanded during the grievance procedure when those disciplinary measures were contested. Hence, there is no such discipline of record.

Perhaps one of the most troublesome aspects of the case, concerning the conclusions which Holland appears to have reached early on, is that he made very little in the way of an independent investigation. He did not ask the Grievant on the December 9 visit to her home why she was lying down with a pillow under her legs, for example. Nor did he call Dr. Leighton to discuss the doctor's opinion concerning the delayed pain which the Grievant might feel from the type of injury she had suffered. Another indication of his apparently premature conclusions is present in the admitted refusal of the postal inspectors to pursue criminal charges, despite the fact that the possibility of such charges had been included in the notice of removal, and had been recommended by Holland.

Nor does it appear that Holland was aware at the time his decision was made that the Grievant had spoken with several other carriers on the 2nd or 3rd of December, stating to each that she had suffered an injury on the job on December 1. There can be little doubt but that the Grievant did suffer an injury, or that repeated examinations by Dr. Leighton convinced him that the injury persisted. There is no evidence of any sort to show

that the injury suffered occurred in any way other than that testified to by the Grievant. Moreover, her history of treatment by Dr. Leighton, as testified to by the doctor, is that she did not appear for treatment frequently, and apparently did not seek treatment which was unnecessary. This tends to underpin her original contention that she delayed seeing a doctor, or reporting the incident at once, for the reason that she hoped to avoid a period of bed rest which she suspected would be ordered, having suffered similar injuries previously.

In one respect, the Postal Service has presented evidence which may be fairly characterized as suspicious. That is the fact that the Grievant cancelled her scheduled December 14 fitness-for-duty examination, of which she was informed by letter dated December 12 by Holland. Her alleged reason was that she could not drive to the appointment. However, as the Postal Service reminds us, she drove herself to examinations by her own physician a few days before, as well as a few days after, the scheduled date of December 14.

Previous Postal Service decisions have been presented by both sides. These cases need not, for the most part, be reviewed. They substantiate without question the proposition that where fraud or misrepresentation in claiming the benefits at issue can be proven, discharge is appropriate. That is undisputed. Each case must be determined on its own facts, as have been the cases offered as precedent, and as the present case itself must be.

The Union has submitted authority, however, which properly reminds us that circumstantial evidence must be evaluated with great care. The accepted rule is that a chain of such evidence used to prove guilt must, generally speaking, be of such persuasive nature that the only reasonable conclusion which can be drawn from the evidence offered is the wrongdoing charged. The evidence in the present dispute clearly falls short of such a showing.

The Award is rendered accordingly.

DECISION

Grievant Arloene Pettibone was not discharged for just cause under the National Agreement. She shall therefore be reinstated with restoration of seniority, and with full back pay.

The Arbitrator retains jurisdiction of the dispute in the event that any questions should arise as to the interpretation or application of the Award.

William Eaton
Arbitrator

September 23 1982