

CA# 2287

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration between

NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO

-and-

Case Nos. C8N-4E-D-3179/
NC-C-18775-E;
and C8N-4E-D-3180/
NC-C-18774-D.

Suspension and Removal of
Kenneth R. Whited

UNITED STATES POSTAL SERVICE

ARBITRATION OPINION AND AWARD

This arbitration is pursuant to Article XVI of the 1975 collective bargaining agreement.^{1/} Hearing was held June 19, 1979 in Akron, Ohio, with the Employer represented by Mr. Lawrence G. Handy, Labor Relations Executive, and the Union by Mr. Jack N. Grab, Branch No. 40 President.^{2/} Following submission of post-hearing briefs, the record was closed August 27, 1979.

^{1/} An unfair labor practice charge against the Employer filed with the National Labor Relations Board by grievant on March 5, 1979 was deferred by that Agency on April 6, 1979 pending issuance of the opinion and award in the instant grievances.

^{2/} At the conclusion of the June 19 hearing, the Employer had completed its case and although the Union had presented a number of

On January 24, 1979, both a Notice of Emergency Suspension of Thirty (30) Days or Less and a Notice of Removal issued to grievant. The Notice of Emergency Suspension imposed a suspension "for a period of twenty-nine days, effective close of business January 26, 1979 through February 24, 1979". The Notice of Removal advised of grievant's removal "from the Postal Service on February 25, 1979" for assault and intimidation of a Postal supervisor. Both letters set forth the following reasons for the disciplinary actions:

"On the evening of January 19th, while I was bowling with my family at the Coliseum in Springfield Township, you, along with several companions, directed racial slurs toward me and my family. Your harrassment [sic] kept up throughout the entire bowling game.

"After the bowling game, as I was preparing to leave, you, along with your companion, Mr. Thomas Fullan, followed me to the coat rack. Mr. Fullan stated that he wanted to talk to me. You said, 'Charles, you are not on post office property now, what are you going to do?'

witnesses, it had not rested its direct presentation. Thereafter a number of proposed dates for a second hearing were offered but were not agreeable to the parties. On July 9, I was advised the Union did not desire to present additional evidence and that the Employer had no rebuttal evidence.

"I tried to walk past you several times. Each time I attempted to move by, you stood in front of me and physically assaulted me by shoving me backward with your shoulder.

"Your conduct on January 19th was a direct attempt to intimidate me relative to my position as a postal supervisor.

"Conduct of this nature cannot be tolerated by the Postal Service."

Grievances protesting both the 29 day suspension and the discharge notice were filed at Step 2A on February 8, 1979. In the course of the grievance procedure, the Union objected to the issuance of both a suspension and a discharge for the same charges, contending grievant was subjected to "double jeopardy". Both grievances were duly appealed to arbitration.

A number of witnesses appeared and testified on behalf of the Employer and the Union. In general, the testimony of Union witnesses was in clear conflict with that of the witnesses appearing for the Employer. The testimony of all witnesses will be summarized.

Grievant's immediate supervisor testified he had been assigned as a delivery foreman at the South Arlington Post Office Branch since November 2, 1979. On or about December 14, he had

occasion to examine grievant's route and after some time spent in attempting to locate him, found him in a car talking with another individual, subsequently identified as Thomas Fullan. After grievant left the vehicle, Fullan approached the foreman's car and said, "If I [the foreman] didn't stay off the street and remain behind a desk, I would get hurt." Sometime prior to the events of January 19, 1979 and apparently after the December 14 incident, the foreman issued a letter of warning to grievant for "unsatisfactory performance".^{3/}

On the evening of January 19, 1979, the foreman, his wife, and his stepdaughter were bowling in a church league at the Coliseum Bowling Alley (also known as the Bowl-O-Mat). In the course of the evening, the foreman, whose marriage is interracial, became aware that grievant was in the bowling alley, located in the area behind the lane on which he was bowling. Grievant subsequently approached the foreman as the latter was picking up a bowling ball and said, "How does it feel to turn around and face your case and be quiet." The foreman did not understand the comment and asked that grievant repeat it, which he did. The foreman then realized the statement referred to an earlier incident when he had

^{3/} That discipline subsequently was removed by the Employer.

directed grievant "to turn around, face his case, get to work and be quiet". The foreman, who smelled beer on grievant's breath, laughed and asked grievant "to go away".

In the final three or four frames of the last game bowled by the foreman, grievant began speaking loudly, uttering statements such as, "Wow, look at that. He can really bowl"; "That's it, Chucky boy, let's see if you can hit that pin"; and "Watch that, boy". These continued statements upset the foreman. Upon conclusion of the last game, the foreman's wife obtained the foreman's street shoes and bowling bag which had been placed under a table previously occupied by the foreman's stepdaughter but at which grievant then was seated. As she did so, the foreman heard grievant state, "That's right, fetch that nigger's boots." At that time, the foreman saw Fullan seated with grievant at the table.

As the foreman left the bowling lane and passed near the table at which grievant was seated, Fullan motioned him to the table and said, "Hey, Charles, I'd like to talk to you." The foreman continued to walk toward a hallway where his coat was hanging. When he reached that area, he saw grievant and Fullan approaching; both were carrying beer bottles. Fullan again said

he wanted to talk to the foreman. When the foreman ignored that comment, grievant "came up" and said, "Hey, Charles, I want to talk to you." The foreman also ignored grievant's statement and attempted to walk by him and out of the hallway. As he did so, grievant, who "blocked my passage and shoved me back with his right shoulder", stated "What are you going to do now. You're not at the post office." The foreman attempted to pass a second time but grievant again shoved him back with his shoulder. The foreman then heard someone, not grievant, say, "Don't hit him now."

The foreman testified he was attempting to avoid a physical confrontation and asked grievant to move out of the way. However, he was then angry and on a third attempt to pass grievant, he "pushed harder and got by". Later, the foreman related the foregoing incident to the police.

The foreman's wife, who also is employed by the Postal Service as a foreman, testified she had been grievant's immediate supervisor from November, 1977 to November, 1978. On the evening of January 19, 1979, she was bowling with her husband and in the course of the evening, saw grievant and a number of other men sitting behind their bowling lane. Thereafter, she heard a number of statements from the area where grievant was located: "Chucky, baby,

you can't do that" and "You can't make it; come on, nigger." She later observed grievant say something to her husband but could not hear the statement; however, when her husband sat down after bowling, he told her grievant "said something crazy like 'Stand up at the case'".

When the foreman's wife walked to the table to obtain her husband's street shoes, grievant said, "That's it. That's the nigger's boots." When she returned to her husband, she advised him to stay at the bowling lane while she contacted the police. She left the area and did not observe grievant thereafter.

The foreman's stepdaughter testified that while sitting in back of the area where her mother and stepfather were bowling, she "heard a lot of loud noise" coming from four men, one of whom was the grievant, sitting at a nearby table. She heard grievant utter several statements directed at her stepfather, e.g., "Look at that prissy ass nigger, he will not look back here" and that he hated the foreman "and wanted to get his ass". According to the stepdaughter, grievant continued to utter racial slurs directed to her stepfather throughout the remaining games. She also overheard the statement by grievant to her mother when the latter obtained the foreman's shoes. Thereafter, she heard grievant

say, "We will go outside and kill his ass on his way to his car." She further testified that when her stepfather obtained his coat, Fullan first tried "to get him to come over to the table" and then "they followed him back to the Coat Rack, and started to push him".

A member of the church bowling league who testified he was "not a friend" of the foreman and disapproved of racially mixed marriages, stated that as he came around a corner into the hallway where the coat rack is located, he saw that grievant "had [the foreman] against the wall". Grievant was "pushing" against the foreman with his shoulder, "backing him against the wall". According to this witness, grievant was not attempting to pass the foreman but was "trying to hold him against the wall". He also heard someone with grievant say, "Don't hit him. Let's get out of here. The police are coming."

It was the testimony of Fullan that he, the grievant, and two other persons arrived at the bowling alley on the evening of January 19 looking for grievant's brother. Although they sat at a table behind the lane at which the foreman was bowling, Fullan said grievant left immediately to purchase beer and thereafter, left a second time to look for his brother. He did not deny that "someone" at the table said, "Good boy, Charlie", when the foreman

made a strike. However, he denied racial slurs were uttered and testified that nothing stated at the table was said loud enough for the foreman to hear.

Fullan further testified that as the foreman was leaving the bowling area, he, Fullan, said, "I'd like to talk to you"; it was Fullan's desire to speak with the foreman concerning the occurrence of December 14. However, the foreman "rushed by" and proceeded to the coat rack. Fullan followed and again said he desired to speak with the foreman. According to this witness, the foreman made no answer but grabbed his jacket and as he, Fullan, stepped out of the way, "ran into" grievant who was standing about two steps behind. Fullan stated the foreman "yelled" at grievant, "Get out of my way", and as grievant did so, walked by and left the area.

Darrell Starcher testified he was with grievant and two others on the evening of January 19 when they arrived at the bowling alley to find grievant's brother. Grievant recognized his foreman and mentioned to the others that "his boss was bowling out there". Thereafter, when the foreman's stepdaughter left the table at which she was sitting, the four individuals, including grievant, sat down at that table -- although grievant left soon thereafter. Starcher testified to his belief that all four men had two beers each in

the course of the evening and after "some time had passed" and the foreman was ready to leave, Fullan got up "and started after him". According to this witness, grievant was not at the table at that time. Fullan was speaking with the foreman at the coat rack when grievant walked up. It was Starcher's testimony that as the foreman put on his coat and turned to leave, he saw grievant standing there "and seemed startled and moved back". This witness observed no contact between grievant and the foreman. He also denied that any "racial slurs" were uttered by grievant or the others during the course of the evening.

A police officer dispatched to the bowling alley on the night of January 19 testified that upon his arrival, he spoke with the foreman who said that two or three individuals had approached him and one had "backed him into the wall". The foreman informed the police officer he had neither been touched nor "forced into the wall", and also stated he had not been "threatened" by any of the individuals. According to this witness' testimony, the foreman said that he had "walked backwards" to the wall as grievant, moving toward him, said, "I want to talk to you". The police officer further testified to his concern when, the next day, he read the subsequent report of another officer which related that the fore-

man had been "pushed" by grievant, who had also "threatened to kill him". The police officer denied the foreman had made either claim to him at the bowling alley on the night of the incident.

Pertinent provisions of the labor contract read:

ARTICLE XV

GRIEVANCE-ARBITRATION PROCEDURE

...

Section 3. Arbitration. ... All decisions of the arbitrator shall be limited to the terms and provisions of this Agreement, and in no event, may the terms and provisions of this Agreement be altered, amended or modified by the arbitrator.

...

ARTICLE XVI

DISCIPLINE PROCEDURE

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

could result in reinstatement and restitution, including back pay.

...

Section 2. Suspensions of Less Than 30 Days. In the case of discipline involving suspensions of thirty (30) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against him and shall be further informed that he will be suspended after two (2) working days during which two-day period he shall remain on the job or on the clock (in pay status) at the option of the Employer.

Section 3. Suspensions of More Than 30 Days or Discharge. In the case of suspensions of more than thirty (30) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of his case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. ...

Section 4. Emergency Procedure. An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to himself or others. The em-

ployee shall remain on the rolls (non-pay status) until disposition of his case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge him, the emergency action taken under this Section may be made the subject of a separate grievance.

...

ARTICLE XIX

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

The Employer also cited the following provisions of the Employee and Labor Relations Manual and the City Delivery Carriers Handbook as applicable:

Employee & Labor Relations Manual

666 USPS Standards of Conduct

...

666.2 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

City Delivery Carriers

CHAPTER 1

GENERAL INFORMATION

...

112.5 Neatness and Example

...

.52 Conduct affairs of personal life in a way that will reflect creditably on both you and the Postal Service.

Two issues are presented for resolution:

1. DID THE ISSUANCE OF A TWENTY-NINE DAY SUSPENSION AND A REMOVAL FOR THE SAME ALLEGED ACTS CONSTITUTE "DOUBLE JEOPARDY" IN THAT THE DISCHARGE INCREASED THE SEVERITY OF A PREVIOUSLY ISSUED PENALTY?
2. IF NOT, DID JUST CAUSE EXIST FOR ISSUANCE TO GRIEVANT ON JANUARY 24, 1979 OF THE EMERGENCY SUSPENSION AND THE NOTICE OF REMOVAL AS THE RESULT OF OFF DUTY OCCURRENCES ON THE EVENING OF JANUARY 19, 1979?

It is the Union position that in failing to immediately suspend grievant following the alleged incident of January 19 and by subsequently delaying the effective date of the suspension for two days after its issuance, the suspension was not an emergency procedure under Article XV, §4, but fell within the purview of §2 of that article. If the Union's argument is accepted, grievant clearly would have been penalized twice for the same alleged misconduct with the result that the lesser suspension would be sustained if just cause were found to exist while the discharge would have to be set aside. However, careful analysis of both §§2 and 4 of Article XVI will not support the Union's procedural argument.

The twenty-nine day suspension imposed January 24 is entitled

"Notice of Emergency Suspension of Thirty (30) Days or Less". On its face it alleges racial slurs, harassment, and a physical assault. Section 4 of Article XVI allows an employe to be "immediately placed on an off-duty status ... in cases ... where the employe may be injurious to himself or others". Whether or not the misconduct with which grievant was charged is established, the allegations of harassment, threats, and physical assault clearly are sufficient to invoke the emergency suspension procedures of §4. Grievant was charged with conduct patently "injurious to ... others", namely, his immediate foreman. An employe is not charged with the same misconduct more than once when a suspension imposed under §4 is followed by a discharge under §3. The purpose of §4 is to remove the charged employe from a duty status in certain enumerated cases even though the 30 day removal notice is required under §3.

The thrust of the Union's procedural argument seems to be that by not "immediately" suspending grievant under §4 but in waiting until January 26 to do so, that discipline automatically is converted to a §2 suspension which must be considered the final discipline for the alleged misconduct. But the word "immediately" in §4 cannot be so narrowly construed as to deny the Employer

authority to place an employe on an emergency suspension within a reasonable time following the discovery and investigation of an alleged act of misconduct. In this case, the alleged misconduct occurred on a Friday evening; issuance of an emergency suspension the following Wednesday did not constitute an unreasonable lapse of time. The emergency suspension provisions of Article XVI, §4, properly were invoked and grievant was not placed in "jeopardy" more than once for the same alleged contractual infractions.

A careful review of the record testimony impels a finding that grievant did harass and threaten his immediate supervisor on the evening of January 19, 1979. This conclusion is mandated for several reasons. Whether or not the witness who bowled in the church league with the foreman saw him "pushed" into the wall, it is clear he observed a confrontation where the foreman's free passage was intentionally thwarted by grievant. I find it difficult to accept testimony of either Fullan, who testified the foreman "bumped into" grievant as he, Fullan, moved out of the way, or Starcher, who stated the foreman was "startled" as he turned while putting on his jacket and as a result, moved back and away from grievant. Frankly, this testimony by both Fullan and Starcher seems highly contrived.

Furthermore, I am convinced that racial epithets were spoken to the foreman earlier that evening while the latter was bowling. It is significant that additional racial remarks were made by the individuals seated at the table which were overheard by the foreman's stepdaughter. While some of those statements probably were not intended for the foreman's ears, the fact they were overheard by the stepdaughter enforce other testimony that similar remarks were made to the foreman and to the foreman's wife when she walked to the table to obtain the foreman's shoes.

Nevertheless, it is significant that the first police officer responding at the bowling alley was not informed by the foreman that he had been assaulted by grievant. The foreman advised only that he had been "backed to the wall" by grievant. But even if there is a basis to question the allegation that grievant "physically assaulted" the foreman, no question exists that grievant engaged in a consistent and repeated pattern of harassment and racial slurs throughout the evening, and that he subsequently confronted the foreman, blocking his passage while at least one of his associates stood nearby, and said, "What are you going to do now. You're not at the post office."

Employe action which threatens, intimidates, or harasses

members of supervision constitutes contractual misconduct even when committed off the job. Supervisors have the right to feel secure in their managerial roles while employes have ready access to the grievance procedure where they feel that an injustice has been committed by any supervisor. Grievant's remarks and actions, especially in their racial content, not only were threatening but clearly were designed to humiliate the foreman. Regardless of the action or non-action by civil authorities, the Employer was justified in imposing discipline in this case.

In assessing an appropriate penalty, it must be remembered that grievant, a career employe since 1968, had no record of prior discipline when the events here under review transpired. It should not be quickly assumed that for an employe with significant seniority and a discipline-free record, corrective discipline cannot succeed in eliminating repetition of such conduct as occurred on January 19, 1979. The prescription of Article XVI is "that discipline should be corrective in nature, rather than punitive".

Although grievant's reinstatement will be ordered, the payment of back wages and benefits will not. Regardless of my personal views that a suspension in the first instance would have

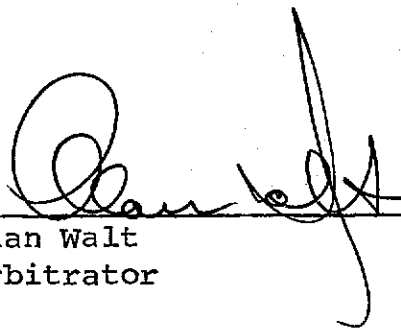
been the appropriate penalty under concepts of corrective and progressive discipline, to award grievant monetary damages in any amount could be taken by other employes as an indication that his actions and conduct were not considered to be most reprehensible. For that reason, grievant's reinstatement will not include payment of any back wages or benefits.

AWARD

The imposition of the twenty-nine day emergency suspension and the Notice of Removal for identical acts of misconduct was proper under Article XVI, §§3 and 4.

On the merits, the grievance protesting the emergency suspension is denied. However, the discharge grievance is granted in part and denied in part.

Grievant forthwith shall be reinstated to his former classification and position with full seniority but without back pay or benefits.

A handwritten signature in black ink, appearing to read 'Alan Walt', is written over a horizontal line. The signature is stylized and cursive.

Alan Walt
Arbitrator

Southfield, Michigan

September 14, 1979