ARBITRATION

IN THE MATTER OF

United States Postal Service, )
Employer, ) Case Nos. SIIN-3W-D-11541,
) -11542.

National Association of Letter ) Patrick Hardin,
Carriers, AFL-CIO and its ) Arbitrator
Central Florida Branch No. 1091, )
Union, )
Ernest L. Ward, )
Grievant. )

APPEARANCES

For the Union:

Wayne E. White
National Business Agent

Joseph C. Cramer
Branch President

For the Postal Service:

Richard A. Rutherford
Labor Relations Representative

John M. Mulkay
Labor Relations Assistant

HEARING

This matter was heard by the arbitrator on March 4, 1983, at Winter Park, Florida. The parties appeared as shown above and were afforded full opportunity to offer evidence and argument. At the conclusion of the hearing, the parties agreed to submit and exchange post-hearing briefs. The arbitrator
took the matter under advisement on March 31, 1983 when the briefs of the parties were received.

ISSUE SUBMITTED

The parties stipulated that the issue in this case is:
Was there just cause within the meaning of Article 16 of the National Agreement for the removal of the grievant Ernest Ward? If not, what should be the remedy?

RELEVANT CONTRACT PROVISIONS

Article 16 of the National Agreement is relevant to the issue submitted.

POSITION OF THE UNION

Carrier Ward did report late the three (3) times referenced in the charges. However, he did call and report that he would be late. Certainly, this does not appear to be an employee who just ignores his reporting responsibility.

The Union believes there has been a disparity in the administration of discipline in the Winter Park Post Office as it pertains to tardiness. Carrier Ward has been singled out and is a victim of discrimination in the instant case.

The Union contends that Postal Management did not follow the rules of progressive discipline even if there should be just cause for some type of discipline against the Grievant. The record in this case will establish that the last disciplinary action received by the Grievant prior to the termination was a Letter of Warning.
The Union feels there is no just cause for the termination as defined and required by Article 16 (Joint Exhibit #1). Just cause requires that disciplinary action against an employee have a basis other than the personal whims or dislikes of an employee. The Union believes a strict application of just cause will dismiss the charges against the Grievant.

POSITION OF THE POSTAL SERVICE

Management had been lenient and corrective in its attempts at encouraging the grievant to improve his attendance and performance over a three-year period. The grievant's poor reporting habits date back to January of 1979, and resulted in his being issued a letter of warning in May of 1979 for eleven instances of tardiness (M-6). On July 3, 1980, the grievant was again issued a letter of warning (M-5) concerning his behavior after reporting late for work. In November, 1981, the grievant was suspended for seven calendar days for his behavior and failure to follow instructions (M-8). By agreement with the union, the suspension was reduced to five calendar days. Also, during the period from February 6, 1981, through December 24, 1981, the grievant had reported late for work on at least eight occasions (M-7).

The grievant was issued a five day suspension dated April 5, 1982, for failure to follow instructions and being AWOL (M-9). Subsequently, the grievant was to have been
suspended for fourteen days on May 7, 1982, for failure to follow instructions and being AWOL. However, by agreement with the union, the fourteen day suspension was reduced to a final letter of warning to correct the grievant's deficient reporting habits (M-4). In spite of these corrective efforts by management, the grievant reported late for work on three occasions during the one and one-half months after his receipt of the final warning. At this point, management could no longer tolerate the grievant's indifference toward his job responsibilities and the grievant was removed from his position.

FACTS

The grievant, Ernest L. Ward, has been employed by the Postal Service since 1970. He has been a city carrier in Winter Park, Florida, since 1974. His performance since 1979 was made a matter of record at the hearing. Since that date, his performance has been marred by several instances of discipline, most of them involving attendance. On July 13, 1982, he was issued a notice of removal. The notice succinctly states the reasons for removal and summarizes his relevant past record (Mgt. Ex. 1):

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

Charge 1. You are charged with continued failure to report for duty as scheduled.
On May 14, 1982, you were issued a final letter of warning in lieu of a 14-day suspension as a final attempt to correct your deficient reporting habits. Since that time you have been tardy three (3) times. These incidents of tardiness are listed below:

- July 1, 1982 - 10 minutes
- June 12, 1982 - 30 minutes
- June 3, 1982 - 11 minutes

The following elements of your past record will be considered in determining the disciplinary action to be imposed if the charges are sustained:

I issued you a final letter of warning dated May 14, 1982, charging you with failure to follow instructions and being absent without approved leave (AWOL).

I issued you a notice of suspension for five (5) calendar days dated April 5, 1982, charging you with failure to follow instructions and being absent without approved leave (AWOL).

I issued you a notice of suspension for seven (7) calendar days dated November 18, 1981, charging you with loud and disruptive behavior and failure to follow instructions, which was subsequently reduced to five days suspension through the grievance procedure.

Mr. B. P. Chap, Supervisor, Delivery & Collection, issued you a letter of warning dated February 6, 1981, charging you with failure to follow instructions and being absent without approved leave (AWOL).

Mr. D. C. Sherman, Supervisor, Delivery & Collection, issued you a letter of warning dated July 3, 1980, charging you with unsatisfactory performance.

Mr. D. L. Becker, Supervisor, Delivery & Collection, issued you a letter of warning dated May 31, 1979, charging you with failure to report for work as scheduled.

* * *

The facts as stated in the notice are not disputed.

ANALYSIS AND CONCLUSIONS

The Union advances essentially three objections to Mr. Ward's removal: that he did not receive progressive discipline;
that he was singled out for disparate treatment; and that one item in his past record was improperly considered by Postal Service management in deciding to impose the removal penalty. These contentions will be examined in turn.

1. Was there progressive discipline?

The National Agreement includes a promise that discipline will be "corrective" rather than "punitive" (Art. 16, sec. 1). Thus, it is expected that progressively more severe penalties will attach to correctible misconduct so that erring employees may, by their own efforts, avoid harsh penalties. In this case, the Union argument rests on the fact that the last discipline imposed on Ward prior to his removal was a letter of warning, rather than a prolonged suspension. The difficulty with the Union's position is that the letter of warning was the result of negotiations to settle an earlier dispute over the discipline of Mr. Ward for absence. As a part of that settlement, the parties agreed that the discipline was to be reduced from a 14-day suspension to "a Final Letter of Warning in lieu thereof" (Mgt. Ex. 9). The letter of warning consequently issued to the grievant on May 14, 1982 was explicit in that respect (Mgt. Ex. 4):

"This official letter of warning, a copy of which will be maintained in your personnel folder, is being issued to you in lieu of a 14-day suspension as a final attempt to correct your deficient reporting habits." (Emphasis added).

The Union, and Mr. Ward, of course, acquiesced in that resolution of the May, 1982, dispute. Neither should now
be heard to complain of the result they then embraced. Mr. Ward has been deprived of nothing to which he is entitled by the Postal Service decision to treat the negotiated final letter of warning as the equivalent of a 14 day suspension.

2. Was there disparate treatment?

The Union offered proof that during roughly the same period of time when Mr. Ward committed the three tardiness infractions for which he was discharged, two other employees, Powell and Frye, were also late several times but received only letters of warning. What is missing, however, is proof that either Powell or Frye was situated similarly to Ward in regard to prior discipline. So far as the record shows, the letters of warning to Frye and Powell were the first discipline of either employee for attendance-related infractions. Disparate treatment consists in treating like cases differently. The Union did not carry its burden of showing that Frye's or Powell's experience was a "like case."

3. Was an improper element of past record considered?

The Postal Service has candidly acknowledged that one of Mr. Ward's prior infractions was improperly considered by his supervisor, Mr. Harris. Specifically, on February 6, 1981, Mr. Ward's supervisor, Mr. Chap, issued Ward a letter of warning for failure to follow instructions and being absent without leave. In May, 1981, however, a grievance concerning the warning letter was settled on the basis that the letter of warning would be removed from the grievant's file after six
months if there were no recurrences of similar infractions. There were no recurrences, and the letter was removed from Mr. Ward's file as promised. Nevertheless, the warning letter was considered by the grievant's current supervisor, Mr. Harris, when he made the initial recommendation of discipline of Mr. Ward in this case. That occurred because the grievance settlement of May 1981 had not been included in the personnel records to which Mr. Harris had access. There is no suggestion that Mr. Harris, a new supervisor, was at fault in this respect.

The impropriety being admitted, there remains only the question of what should be done about it. Of course, Mr. Harris testified that he would have recommended the removal of Ward even if he had not known of Mr. Chap's warning letter. I am confident that Mr. Harris was sincere in that testimony, but I am less certain that he was correct. The supervisor's initial recommendation as to discipline is extremely important because it invokes such a large measure of discretion. The Postal Service discipline system is designed to support the exercise of that discretion. In this case, there is little reason to doubt that Mr. Harris could have effectively recommended, say, a 28 day suspension. The point is important because although Ward had 14 years of service, Harris had been his supervisor just one year. What Harris knew of Ward's prior record he, perforce, knew through the records of the Postal Service or through non-supervisory channels. All of this is

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simply prelude to the elementary observation that the influence of those records on Mr. Harris was, though important, difficult to quantify. As historians are fond of pointing out, it is difficult enough to know what happened - what might have happened if things had been different is always a matter of conjecture. What did happen in this case is that management acted on a record of discipline in violation of its promise not to do so. What would have happened otherwise can, of course, be estimated with care, but ultimately only estimated.

In this case, it seems clear, there is some risk that Mr. Ward has been disadvantaged by the improper consideration of an item of his past record. That risk, in turn, involves a threat to the integrity of the grievance resolution process. Both labor and management must have confidence that voluntary grievance resolutions will be respected and complied with. The violation of a settlement term, even when in all good faith, must be closely examined and very carefully justified. Otherwise, the parties will be inhibited in the settlement of their disputes. For all of these reasons I conclude that Postal Service management has not proved that Mr. Harris's consideration of the grievant's 1981 letter of warning was a harmless error. The grievance must be sustained.

4. What Remedy is Appropriate?

Mr. Ward's prior record, even when "properly" considered, is hardly edifying. The Postal Service surely has the
authority (never mind the duty) to insist that its employees arrive at work on time, and Mr. Ward has not done so. I conclude that reinstatement without back pay is the appropriate corrective discipline in this case, in light of the grievant's past record. Needless to say if he fails hereafter to meet the attendance standards uniformly applied to all, he is subject to removal.

AWARD

The grievance is sustained. The removal of the grievant is rescinded. The grievant shall be promptly reinstated, but without back pay.

May 11, 1983
Knoxville, Tenn.

Patrick Hardin
Arbitrator