C#5823 A,B

BEFORE THOMAS F. LEVAK, ARBITRATOR

In the Matter of the Regular
Western Regional Arbitration
Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Cypress, California)

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS
THE "UNION"

(Gene Alan Shaw, "Grievant")

DISPUTES AND GRIEVANCES CONCERNING EMERGENCY SUSPENSION AND REMOVAL FOR THREATENING AND ABUSIVE LANGUAGE AGAINST SUPERVISOR AND MISCONDUCT RESULTING IN PERSONAL INJURY TO SELF

W4N-5B-D 6496 ES
W4N-5B-D 6497 REM.

ARBITRATOR'S OPINION AND AWARD

These matter came for hearing before the Arbitrator at 9:00 a.m., February 24, 1986 at the offices of the Service, Cypress, California. The Union was represented by Manuel Peralta. The Service was represented by David Feldman. The Grievant, Gene Shaw, appeared and gave testimony on his own behalf. Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGES AND THE ISSUES.

This case concerns the propriety of an Emergency Suspension and a Notice of Removal issued on June 11, 1985. The Emergency Suspension placed the Grievant in an off-duty (without pay) status effective June 14, 1985; the Notice of Removal notified the Grievant that he would be removed from the Service on July 15, 1985. The charges in both cases are identical and read as follows:

> Charge #1 - Use of Threatening and Abusive Language Against Your Supervisor
>
> On May 30, 1985, at approximately 7:30 AM you asked if a 3996 had been completed by whoever cased mail on your route. I told you I had not reviewed them yet. But you could ask Shirley Hodge if you wished to be sure. You replied, "That's your job. I'm not going to

do your work for you." I told you I was just letting you know who cased your mail up and that I could not state, without having first seen the completed 3996, that it was done for sure. I then asked you if you had filled out a 3996 for overtime spent the day before. You began getting loud and complaining that I had not given you a 3996 with written instructions prior to you leaving the office on May 29, 1985. I reminded you that I gave you verbal instructions to curtail the third class letters unless after strapping out your flat mail you had time to take it and that the overtime assistance was not approved.

You started getting louder and yelled to your shop steward, Chris Swartwout to confirm that I was required to give Form 3996 with written instructions prior to departure. Shop Steward Swarthwout agreed with you and I began to explain to both of you that I was not required to give written instructions in the A.M.

You began swearing loudly saying "Get the fuck away from me! Or else."

Charge #2 - Misconduct Resulting in Personal Injury to Yourself

On May 30, 1985 during the conversation mentioned above - in conjunction with telling me to "Get the fuck away from you - in a very threatening gesture, you swung with your left hand balled in a fist in the direction of Route 31's flat case, just missing my face resulting in an injury to your left hand.

You pushed past the shop steward and me and continued yelling and swearing from the middle of the workroom floor. I then ordered you off the workroom floor. You then went to my desk along with Shop Steward Swarthwout and demanded a CA-1 and a CA-2. You were still yelling at this point and I again ordered you off the workroom floor - accompanied by Stewards Swarthwout and Larry Kight you went into the lunchroom - and was subsequently taken to La Palma Hospital for treatment of your injured left hand for which a CA-1 and CA-16 was issued. (J2)

The stipulated issues are as follows:

Was there just cause under the provisions of the National Agreement for the Emergency

Suspension and subsequent removal of the Grievant? If not, what is the appropriate remedy?

II. FINDINGS OF FACT.

Background.

The Grievant has been employed as a Letter Carrier by the Service for 10 years, and all of those years have been at the Cypress, California office. During that period of time, the Grievant's regular supervisor has been Supervisor of Delivery and Mails Richard Byham. On occasion, the Grievant has also been supervised during that period of time by Supervisor of Delivery and Mails William Monte and by 204-B's, including former 204-B Ernest Valdez. During that 10-year period of time, the Superintendent of Postal Operations at Cypress was Minor McManaway. At the time of the issuance of the Notice of Removal, the Officer in Charge at Cypress was Richard Deyarmond.

The hearing in these cases lasted over 9 hours, and much of the testimony and evidence is irrelevant or immaterial to a resolution of the two charges against the Grievant. However, certain background evidence is relevant for purposes of demonstrating the nature of the relationship between the Grievant and Byham, the cause of their dispute on May 30, 1985, and most importantly, the non-existence of the type of threatening incident which justifies an emergency suspension and summary discharge. The Arbitrator will relate most of those facts in summary fashion.

Since at least 1980, a relatively high level of mail volume at the Cypress office has been a continuing source of difficulty both with management and with the approximately 40 carriers at the office. In general, management has dealt with those problems by strongly discouraging Form 3996 requests for overtime or route assistance, by delaying requests for route adjustments, and by urging and encouraging carriers to work at higher levels of performance, regardless of the levels that they were already working.

Since at least 1980, Byham has been the supervisor who has handled the vast majority of the Form 3996 requests from carriers for overtime or route assistance. A relative few of those requests have been handled by Monte and Valdez and other 204-B's.

The proper procedure for the handling of a 3996 request for overtime or route assistance, and the practice which he uniformly follows, was described by Monte as follows: Whenever a carrier believes he needs overtime pay or assistance to complete his route, he submits a Form 3996 request before leaving on his route. If the supervisor feels that there is some leeway in the request, the supervisor will "negotiate" with the carrier. The

supervisor then either approves or disapproves the request prior to the time the carrier leaves for the street. If the carrier requests a copy of the 3996 in writing, the supervisor gives him the copy prior to the time the carrier leaves for the street.

Since at least 1980, Byham continually has not followed the proper procedure for the handling of 3996 requests. Rather, Byham has pressured carriers into not using the 3996 procedure at all; he has not regularly approved or dissapproved requests prior to the time carriers leave for the street; and he has failed and refused to give carriers of 3996 copies before they leave for the street. Byham testified that carriers are not entitled to approval or disapproval in writing, but only verbally; and also testified that employees are not entitled to copies of supervisors' final instructions on the Form 3996 before leaving for the street. Byham's testimony must be deemed by the Arbitrator to be knowingly false and in conflict with established Service regulations and procedures.

Byham's violation of practice regarding Form 3996's was testified to by several carriers. For example, Carrier James Harrison testified that whenever he has filled out a 3996 request for overtime or route assisitance and submitted them to Byham he has first been ignored completely, and if he later insisted on action by Byham he would be intimidated. He noted two specific examples: On October 11, 1984, he told Byham that he couldn't complete his route within 10 hours and submitted a Form 3996. He testified that Byham became extremely upset and told him that he was going to follow him on the street, which Byham did. On October 19, 1984, the exact same situation and sequence of events occurred. On both occasions, Harrison was unable to complete the route within 10 hours, even though he worked in an entirely proper manner. Harrison testified that he filed an EEO complaint against Byham for intimidation and harassment, and that the settlement under the complaint was that he would no longer be required to work beyond 10 hours without assistance. Harrison testified that even in the face of the settlement, the situation did not change, and that Byham's intimidation and harassment continued when he filed Form 3996's. He testified that after observing Byham repeatedly intimidating the Grievant and other employees who filed Form 3996's, he finally simply decided to not fill them out anymore, which remained his practice to the date of the arbitration hearing. Harrison's testimony appeared candid, forthright and believable.

Carrier Chris Swarthout testified that he experienced the same problems as testified to by the Grievant and Harrison when he filed Form 3996's with Byham. Swarthout's testimony appeared candid and believable.

Carrier Valdez, the former 204-B, testified that when he acted as a 204-B, he always reacted in a timely fashion to Form 3996's, and always responded in writing with a copy to a carrier when a carrier requested such writing prior to leaving for the street. Valdez testified that he was well aware of the problem

between Byham, the Grievant and other carriers concerning 3996's. He further testified he had observed Byham's supervisory methods and had had a conversation with Byham over his concern over those methods. He noted that carriers have argued with Byham for years over the volume of mail and that Byham has antagonized carriers by telling them that they have not been working as hard as possible. He noted that those comments made employees upset, since those employees were working within acceptable and often high levels of performance. He testified that he attempted to counsel employees when Byham made those comments. He testified he asked Byham about those comments, and he was told by Byham that Byham felt he was "just doing his job." The Arbitrator wishes to note that Valdez was a particularly intelligent, perceptive and candid witness, and that his testimony carries a great deal of weight with the Arbitrator.

Carrier Stan Smith testified that the Form 3996 situation at Cypress is "an atrocious problem." He testified that he initially turned in Form 3996's to Byham, but stopped doing so because he received no response, and later was even once called into the office by Byham and threatened and coerced over the matter. He testified that instead of properly turning in requests even where he knew his route requires overtime assistance, he simply goes out on a route and skips lunches and breaks rather than confront Byham. Smith's testimony was patently candid and believable.

Carrier Larry Kight testified that he too has experienced the same type of 3996 problems with Byham. He noted that on one occasion in January 1985 when he turned in a 3996 request for route assistance, Byham simply wadded it up, tore it into pieces and threw it away, stating: "I don't want to see these this early in the morning." He testified that on numerous occasions when he has turned in Form 3996's he has been insulted by Byham for so doing. He testified that on numerous occasions when he turned in the forms, Byham has refused to return copies and has refused to issue full instructions to him. He testified that he no longer turns in Form 3996's and, like Smith, simply absorbs the overtime work himself. Kight's testimony was very believable.

Carrier Jerry Riley testified that over the past few years he has turned in 3996 requests for route assistance "off and on." He testified that while he has received help from supervisors other than Byham, Byham has simply told him that he could handle the work, has never given him any help, and has never responded in writing before he went to the street. Riley's testimony was also believable.

Carrier Don Wilson also testified that his Form 3996 requests to Byham for overtime assistance were simply ignored, and that he too got to the point where he simply no longer completed the forms. Wilson's testimony was candid and forthright.

Carrier Richard Forbes testified that on more than one

occasion he has been told by Byham not to fill out the forms, and that when he has explained to Byham that Byham's mail count was different than his own, Byham has told him that that made no difference. Forbes' testimony was equally believable.

Prior to May 30, 1985, grievances had been filed concerning Byham's handling of the 3996 problems and all were settled in favor of the Union. Byham has ignored those settlements. It is also noted at this point that following the Grievant's removal, another grievance was filed to protest Byham's handling of the 3996 matter, which specifically alleged that Byham continually failed to instruct carriers after they properly submitted their Form 3996's and continually failed to return copies of the forms to them when requested to do so. The grievance again cited the M-39 requirement under Section 122.33.

On July 7, 1985, the grievance was resolved in favor of the Union and a standup meeting was held. The grievance settlement expressly stated that carriers were to submit their Form 3996's within 15 minutes of the last pull of 1st Class mail, and that supervisors were to return the form to the carrier requesting overtime or auxiliary assistance prior to their leaving for their route and a duplicate copy if so requested. The evidence establishes that Byham simply ignored that settlement and continued to treat employees' requests for overtime or route assistance and for copies in the same manner as before, and that he continued to harrass and coerce them into absorbing overtime without pay.

On December 4, 1985, a labor management meeting was held whereunder it was agreed that another standup talk would be held to reaffirm the proper policy. Although such a standup was held, and the results of the labor management meeting were reduced to writing, the evidence is overwhelming that Byham continued to ignore the policy and continued to harass and coerce employees into working overtime without pay.

It is appropriate to emphasize at this point that those post-removal events clearly demonstrate the patent falsity of Byham's hearing testimony concerning the proper 3996 procedure. Indeed, it is simply incredible that Byham continued to claim that he had followed the appropriate procedure with the Grievant on May 29 and May 30, 1985. The Arbitrator finds that Byham's patently false testimony with regard to the 3996 practice given even in the face of overwhelming evidence to the contrary renders the remainder of his testimony unbelievable.

One other longstanding dispute between the Grievant and Byham should be covered, that concerning the Grievant's attempted route adjustment. It should first be noted that the only evidence is that the Grievant was a superior carrier. His unrebutted testimony was that he worked at a high performance level on an "undertime" basis. It is noteworthy that none of the supervisors who testified criticized either his performance level or his general carrier capabilities.

For a period of time prior to September 1983 the Grievant complained that his route was out of adjustment by more than an hour. Prior to November 1983, he properly requested a special route inspection. The inspection was not accorded him within the timelines of the National Agreement and he filed a grievance, which was resolved in his favor on November 2, 1983. The Grievant's route was inspected and the inspection revealed the route to be one hour out of adjustment. Not until April 18, 1984 did the Service take any action to adjust, and then only by a "hand-off." The Grievant was forced to file a grievance against the hand-off, which grievance was finally resolved in favor of the Grievant at Step 3 on December 14, 1984 when the route was readjusted. However, the Grievant's route remained out of adjustment and he was forced to file yet another grievance. The grievance was finally resolved in favor of the Grievant, but not until July 9, 1985, 2 months after his dismissal. At that time, management agreed to readjust the route to as close to 8 hours as possible. The evidence concerning the Grievant's route adjustment problem is relevant to demonstrate that from at least 1983 until the time of his removal, the Grievant was suffering from a continuous need for overtime and route assistance, yet those needs were never met by Byham. Even more importantly, even though Byham was fully aware that the Grievant's complaints were fully justified, he ignored them and continued to harrass and coerce the Grievant.

Byham's actions toward the Grievant either caused, contributed to or exacerbated a "stress condition" suffered by the Grievant. Since 1980, the Grievant had begun to experience on-the-job stress-related symptoms such as shakiness, a feeling of anxiety, shortness of breath, dizziness, blurred vision, headaches and tearfulness. In 1980 and 1982, he was absent from work for a period of time due to the condition. One of the absences has been adjudicated by the Dept. of Labor to be job-related, the other has not and is on appeal by the Grievant.

On November 2, 1984, the Grievant filled out a request for overtime on a Form 3996 and submitted it to Byham. A dispute arose between them, and Byham had the Grievant fill out two more forms. The Grievant asked Byham why employees who filled out Form 3996's were being harassed, and Byham responded that the Grievant was the only one who was having any problems, because he always wanted the 3996's completed before he left the office. A heated argument ensued at the end of which Byham stated words to the effect of: "If you don't like working my way, you might as well quit." It was the Grievant's unrebutted testimony that Byham brought the Grievant a resignation form and attempted to coerce the Grievant to resign his employment.

The Grievant suffered a "stress attack" as a result of that encounter with Byham and sought medical treatment. He was off work for a period of time and was returned to work following a fitness for duty psychiatric examination on January 23, 1985 by Dr. Craig Ross. Ross' report indicates no mental disability or

disorder and reports a diagnostic impression of recurrent major depression followed by the Grievant's response with acute anxiety to a stressful situation on the job. He returned the Grievant to work without restriction.

It should be noted at this point that there is no medical evidence that the Grievant was suffering from any form of mental illness or disorder. The Service does not contend that such disorder or illness exists, and the Union raised no affirmative defense in this case based upon mental illness or disorder.

The Events of May 28, 29 and 30, 1985.

Approximately one month before May 28, a route inspection determined that the Grievant's route was 1 hour 17 minutes too long. On May 28, 1985, the Grievant filed a grievance because of the Service's failure to adjust his route within 45 days. It was the Grievant's unrebutted testimony that at the time he filed the grievance on May 28, he asked Byham why the route hadn't been cut and that Byham refused to respond and simply walked away. Byham's refusal to respond made the Grievant angry and upset.

On May 29, 1985, the Grievant made his last pull at about 8:30 and filled out a Form 3996 request for overtime or auxiliary assistance. At about 9:00 a.m., Byham called the Grievant to his desk and told the Grievant that he didn't understand the reason for the request. It is clear from the evidence that the request was fully justified. The Grievant told Byham that Penny-Savers and Merchants had negated any adjustment, and that he also had four large parcels at a gas station stop that day, so he needed 3/4 hour overtime or assistance. Byham simply instructed the Grievant to go back to his case. At about 9:30 a.m., Byham came to the Grievant's case and told the Grievant to curtail 2 feet of mail, which Byham claimed would negate the Grievant's request for overtime. The Grievant explained to Byham that the deletion of 2 feet of mail would give him about 24 minutes, and that he needed a full 3/4 hour's of assistance. The Grievant asked Byham if Byham wanted him to work the overtime or simply bring back unworked mail. Byham told the Grievant that he did not want him to work overtime and that he did not want him to bring back any mail. Byham then instructed the Grievant to keep casing mail. It is clear to the Arbitrator from the evidence that Byham was again attempting to coerce the Grievant into working overtime without pay.

According to the Grievant's unrebutted testimony, he and Byham spent a total of 25 minutes discussing the matter, so that even with the 2-foot curtailment of the mail, he still needed 3/4 hour overtime. He testified that he told Byham that fact and he again requested specific instructions from Byham, specifically asking that he wanted to know if overtime was authorized. Again, Byham simply walked away.

The Grievant testified that he left the 3996 with the request for overtime assistance at his ledge, worked his route

and came back, having worked 1/2 hour overtime. He noted upon his return that Byham had noted on the 3996 that the 1-foot cut in mail satisfied the need for any overtime. Again, it is clear that Byham was continuing to attempt to coerce the Grievant into absorbing the necessary overtime work without pay.

The Grievant accused Byham of having changed his instructions and told Byham that he wanted an explanation from him. He testified that Byham would not respond. He further asked Byham for an explanation, and testified that Byham explained to him that he was a good carrier, "but all the 3996's were the problem." The Grievant became upset and told Byham that he was tired of working 10-hour days without a route adjustment and that if he did not have his route adjusted to 8 hours within a week he would file another grievance.

The next morning (May 30, 1985) when the Grievant arrived for work, Byham came to the Grievant's case and stated to the Grievant words to the effect of, "Are you going to give me a 3996 for your 'unauthorized' overtime yesterday." The Grievant responded: "The overtime was authorized by you, but if you want another 3996, I'll fill it out." The Grievant also told Byham that he noticed that another carrier, Shirley Hodge, had been assigned by Byham to case on his route and he asked Byham whether Hodge had filled out a 3996. Byham responded that he did not know whether Hodge had completed a 3996, and the Grievant responded, "You're not aware? I don't buy that!" Byham also told the Grievant that he did not know how long Hodge had worked. When the Grievant expressed disbelief, Byham told the Grievant that he could personally go check with Hodge if he wanted to, and the Grievant responded that it wasn't his responsibility to do that.

At this point, the Arbitrator makes a special finding of fact that the facts alleged by Byham in the last sentence of the first paragraph of Charge #1 are not accurate. Byham did not give the Grievant specific instructions disapproving overtime on May 29. He had simply intentionally refused to issue clear instructions with the goal of coercing the Grievant into absorbing the overtime work.

The Grievant then asked Byham why he was being harassed about the 1/2 so-called "unauthorized" overtime for May 29. According to the Grievant, Byham told him that he was acting "like a little child." The Grievant became angry and upset and told Byham that, "from now on I want my 3996 in writing before I leave the office." Byham responded, "I'll never do that." When the Grievant explained to Byham that prior grievance settlements require a supervisor to make written 3996 responses before the carrier went on the street, Byham told the Grievant, "I'm not going to give one to you; I'm the boss and I'll decide what you'll get."

The Grievant began to experience what he recognized to be serious stress symptoms. He began to become extremely nervous,

his body began to shake and his voice raised uncontrollably. He said words to the effect to Byham, "I don't want to lose my job over some stupid 3996 thing. Why don't you just leave me alone."

At that point, the Grievant called Shop Stewart Swartwout, who was working in an adjacent cage, over to him. The Grievant asked Swartwout whether it wasn't true that he was entitled to a written 3996 copy before leaving on his route, and Swartwout agreed with the Grievant. As noted in the second paragraph of Charge #1, Byham told both the Grievant and Swartwout that he was not required to give certain instructions in the morning. At that point, Swartwout and Byham began a somewhat heated argument over the 3996 requirements. The Grievant turned his back to Swartwout and Byham and trembled and shook, and began to cry. He began to do deep breathing and much muscle tension relaxation exercises that he had been taught in an effort to curb his stress.

Swartwout observed the Grievant's state and was afraid that the Grievant was again getting "stressed out." In an effort to aid the Grievant, he stepped more directly into the cage between Byham and the Grievant and stated to Byham, "I'm asking you to leave Shaw's cage." Byham refused refused and Swartwout stated, "Okay, I'm ordering you to leave and I'm filing harassment charges against you." Byham refused, and merely leaned against the side of the case with his hands in his pocket.

At that point, the Grievant remained facing the inside of his case with his back to Byham and Swartwout and began repeating: "Quit fucking with me, Byham; just leave me the fuck alone; get the fuck away from me, Byham." He was trembling and crying. The Grievant was not facing Byham and made no threatening gestures toward him. The Arbitrator makes a special finding of fact that the Grievant did not utter the phrase, "or else," alleged in the last paragraph of Charge #1.

The Grievant and Swartwout then both testified that the Grievant, with his back to Byham, and with Swartwout in between the Grievant and Byham, banged the side of his fist into the back of the case to the Grievant's left. Charge #2 alleges that the Grievant, in a very threatening gesture, swung his balled fist in the direction of the route 31 flat case, just missing Byham's face. The Arbitrator makes a special finding of fact that Byham's allegation is not true. There are several reasons for the Arbitrator's conclusion.

First, Byham's testimony regarding the 3996 policy and his handling of 3996 problems renders his entire credibility and testimony unreliable.

Second, Swartwout's independent testimony supports the Grievant. Swartwout is the only independent witness, and his testimony appeared to be candid and credible in all regards. The Service contends that Swartwout's credibility is suspect because of an alleged bias, which it contends is demonstrated by

Swartwout's own problems with the Service and particularly by a law suit he has filed against Service supervisors. It appears to the Arbitrator that Swartwout's difficulties with the Service have, in large part, been caused by Byham. Thus the fact that Swartwout has experienced 3996 problems and stress problems similar to those experienced by the Grievant cannot act to discredit his testimony, any more than the testimony of other carriers should be discredited because of the problems they have had with Byham.

Third, the Service also contends that the Grievant's testimony should be discredited because of his allegedly preposterous testimony concerning altercations with other supervisors. The Arbitrator finds that the Grievant attempted to give truthful recountings of those altercations, as he viewed them.

Fourth, even assuming that the testimony of Byham and the Grievant appeared to be equally credible, the charge would have to fail. Since this is a discipline case, the Service is charged with the obligation of proving that the charged offense actually occurred. As the Arbitrator has noted in other Service arbitration cases, where a "one on one" altercation occurs between a supervisor and an employee, and the testimony of both individuals appears to be credible, it becomes extremely difficult for the Service to prove its version of the facts. At the best, there is a stand-off. In the instant case, there is no basis for giving Byham's version of the facts any more credence that the Grievant's version. Even assuming, arguendo, that there is some basis in the evidence for discrediting some of the Grievant's testimony, there is more than an equal basis for discrediting Byham's testimony. And of course, in the instant case we do not have a one on one confrontation, since the incident was witnessed by another carrier.

Fifth, even though the Union has not alleged retaliation in this case, there is sufficient reason from the evidence to believe that Byham would color his testimony against the Grievant. To Byham, the Grievant was a long-time thorn in his side. There is no doubt in the mind of the Arbitrator from the evidence but that for some period of time Byham has sought the removal of the Grievant. Thus, Byham's bias and motive is extremely suspect.

Even assuming, arguendo, that the Grievant's balled fist passed a foot or so in front of Byham's face, Charge #2 could not be sustained. First of all, the Grievant's action was not made with the intent to either hit Byham or to scare him, and in fact did not scare him. As the Union argued in its closing, on direct examination Byham testified three times that throughout the entire May 30 incident he was not fearful of the Grievant. In his own words: "I wasn't fearful of him; it was just another incident where he became loud, destructive and profane during discussions."

Next, it should be noted that while the Grievant suffered an injury to his left hand, the injury was both unintended and of a very minor nature. When the Grievant swung his hand into the back of route 31's flat case, it was an obviously spontaneous action. The Arbitrator made an on-floor examination of the case and the manner in which the injury occurred, and three points were obvious: First, the back of the case is flat and springy, and had the Grievant's hand hit the case anywhere but the edge, there would have been no injury. Second, the Grievant's hand inadvertently caught the sharp edge of the case and caused the cut to his hand. Third, the injury was extremely minor, simply a very small cut caused by the sharp exposed edge of the case. The manner in which the injury occurred and the nature of the injury are very important, because they demonstrate that the blow was more in the nature of a tension releasing device, rather than an uncontrolled blow thrown in rage.

The remainder of the factual sequence is somewhat unimportant to a resolution of this case. However, it should be noted that while the second paragraph of Charge #2 alleges that the Grievant pushed past Swartwout and Byham while going to the workroom floor, the testimony establishes rather that the Grievant pushed only past Swartwout and never came into any contact with Byham. As the Grievant walked onto the workroom floor toward Byham's desk, he was followed by Byham. The Grievant again kept stating words to the effect of, "Just stay the fuck away from me and leave me along, Byham." The Grievant went to Byham's desk and sat down in Byham's chair, grasping the chair with his hands. He just sat there, crying and trembling; he made no threating actions and uttered no threatening words. He continued to ask Byham to leave him alone. Byham twice ordered the Grievant off the workroom floor, and the Grievant refused. Swartwout was attempting to convince Byham to give the Grievant a CA-1 and a CA-2, but Byham refused. At that point, Supervisor Monte, seeing an out-of-control incident, simply took control of the situation.

At this point it should be noted that Monte's testimony supports the Grievant's testimony in another regard. Monte testified that as he walked toward Byham's desk, he observed the Grievant stating to Byham, "Just get the fuck away from me, Byham and leave me alone." Monte's testimony supports the fact that the Grievant never directed any profanity toward Byham, such as by saying, "Fuck you," or "Get the fuck away, or else." That is, the Grievant's use of profanity was non-threatening in nature.

Montetestified he simply got the CA-1 and CA-2 forms and gave them to the Grievant, and directed the Grievant and two shop stewards to a swing room. Monte noted that in the swing room the Grievant was crying and upset, but uttered no threatening words.

There was no testimony by any other person that they felt threatened by the Grievant's actions on May 30.

<u>The Grievant's Disciplinary Record.</u>

There are no past elements charged in the Notice of Removal or Notice of Emergency Suspension. While no elements exist, it is significant for the Arbitrator to note that evidence was received from the Union which established that two written warnings issued by Byham against the Grievant during 1984 were grieved, and the warning letters were subsequently rescinded and withdrawn.

Other Alleged Outburst Incidents.

Deyarmond testified that about two weeks before the May 30, 1985 incident, the Grievant became extremely angry and upset in his office over an incident involving an employee who had passed out on the workroom floor. Deyarmond testified that the Grievant came into his office angrily complaining that there was only one supervisor on the floor, Byham, and Byham had refused to call the emergency 911 number. He testified that the Grievant was very angry and had to be calmed down. The Grievant does not dispute that he became angry and upset over the incident. The unrebutted facts are that an employee had in fact passed out on the workroom floor, and that such was the second occurrence of that type of accident. When both incidents occurred, Byham had not taken immediate steps to aid the employee or call the 911 number. The Arbitrator deems the Grievant's anger to be entirely justified under the circumstanes. More importantly, there was no evidence from Deyarmond that the Grievant either threatened him or exhibited any danger to himself or to others during that incident.

McManaway also testified regarding a somewhat stale incident that occurred a number of years ago. According to McManaway, he and the Grievant got into an argument, and the Grievant asked him to go out on the dock and fight. According to the Grievant, McManaway made the invitation to fight. McManaway testified that he requested disciplinary action from the Postmaster, but that the Postmaster declined to take action. The Arbitrator must conclude that the Postmaster found no merit in McManaway's charge.

McManaway also raised another incident involving the Grievant and Monte. McManaway testified that in 1981 Monte was handing the Grievant a letter of suspension in a conference room and that the Grievant abusively stated that he was so upset that he could hit Monte. Monte's testimony was somewhat different. He testified that when he handed the Grievant the suspension letter, the Grievant became upset, and stood up and said, "I have to leave before I hit somebody." Monte testified that the Grievant almost immediately returned with another employee to act as shop steward and that the suspension discussion continued. The Grievant's version of the incident was essentially as Monte's version. The significance of the incident is that the Grievant never in fact threatened Monte, nor made any threatening moves toward him, and he removed himself from the situation to give himself time to cool down. He also immediately obtained a shop

steward and resumed the discussion in a normal manner. Also significant is the fact that Monte never testified that he felt threatened by the Grievant. It, of course, should also be noted that the suspension is too old under the National Agreement to be cited as a past element. For that reason, the Arbitrator is somewhat reluctant to consider the incident at all. However, he feels it is appropriate to cite the incident since it demonstrates that even though the Grievant was extremely upset, no actual threat or assault occurred.

III. SERVICE CONTENTIONS.

The Service has established its case by credible testimony. Testimony of supervisors was straight forward and credible, while the Grievant's testimony can only be characterized as self-serving and incredible. (Arbitrator's Note: It is here noted that credibility resolutions were made by the Arbitrator above under Findings of Fact.)

The Service is entitled to invoke the emergency suspension provision and ultimately remove an employee when it reasonably believes that an employee has or may constitute an immediate and then continuous threat to employees or to Service property or to himself. In this case, any reasonable person would have immediately invoked the emergency suspension provision. Further, just cause was reasonable.

The Grievant was charged with using threatening and abusive language against his supervisor. That charge was proven. The charge was not challenged or denied; the Union's position was that the Grievant's action was provoked. The second charge of misconduct resulting in personal injury to himself has also been proven and not denied.

The workroom floor was disrupted and the supervisor's authority was challenged. He could not conduct normal business although testimony has shown that he, as well as others, went out of their way to accommodate the Grievant.

We say, "enough is enough." The Grievant cannot be allowed to return to work as a letter carrier. By his own admission, the work is too stressful for him.

A supervisor must be able to effectively direct the work force without interference from employees. A threat of physical harm constitutes a direct challenge to the supervisor's office and is therefore more serious than a threat against a fellow employee. This was not the first time this happened; it was not an isolated incident.

The Service is supported by arbitral precedent. See Case No. W8C-5B-D-6346, arbitrator William Eaton, 3/25/80. There was no provocation in the instant case; the supervisor was acting within the normal parameters of being a supervisor. In arguendo,

a supervisor may possess a somewhat cantankerous, overbearing or disagreeable personality, or on occasion may be less than diplomatic, but such characteristics or demeanor do not constitute provocation. Provocation can normally be proved only through evidence of an immediate act. The supervisor in this case is a mild-mannered person, not given to exaggerated manners or boisterous behavior.

Even if mental illness were raised as a defense, such should not be allowed. See Case No. W1N-5B-D-19265, arbitrator George Bowles, 3/16/84. Arbitrator Bowles notes that the Service cannot be expected to operate like a mental health facility or to provide mental health services.

In the instant case, while the Arbitrator may have emphathy for the Grievant's personal problems, management acted properly in its dealing with the Grievant. He was given assistance; he was treated in a fair, reasonable and patient manner; he was given warnings, but made no improvement; and his problem would be likely to continue after all these efforts.

In the instant case, a number of 3996 disputes have arisen between the Grievant and his supervisor; however, it is significant that this is the only case where an assault has occurred. The Grievant is just one of those people who can't take the job, and "if he can't stand the heat, he'll have to get out of the kitchen." The Service doesn't deny that Byham turned down alot of 3996's. Byham may be cantankerous and unreasonable at times but that's not the issue.

If the Grievant were returned to duty, there is no evidence that he could be productive. He isn't remorseful for what he has done and matters would probably be worse since he would feel vindicated.

Finally, the Grievant's language cannot be defended on the grounds that it is mere shop talk. See Case No. C1C-4A-D 16946, arbitrator Walt.

IV. UNION CONTENTIONS.

No just cause existed for either the emergency suspension or the removal. The Service has failed to establish that the Grievant acted in a threatening manner or that he engaged in activity harmful to himself. The Grievant was incessantly provoked, and actually reacted calmly under the circumstances.

The testimony of all Union witnesses established that Byham's conduct toward employees was humiliating, coercive and harassing, and that it caused at least three employees, including the Grievant, to experience severe stress difficulties. However, even though Byham caused the Grievant severe stress, Byham never reacted in a threatening manner on May 30.

While it is undisputed that the Grievant used obscenities, the key is that those obscenities were not directed against the Grievant's supervisor, but were merely uttered in frustration.

There is a complete lack of progressive discipline in this case; so even if some discipline was warranted, the Grievant should have received a lesser penalty.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Service has failed to establish by clear and convincing evidence that the emergency suspension and removal were issued for just cause. Accordingly, the grievances are sustained. The following is the reasoning of the Arbitrator.

Charge No. 1. Use of Threatening and Abusive Language Against Your Supervisor.

The Arbitator accepts the rule advanced by the Service that the existence of immediate and continuing threatening and abusive language against a supervisor constitutes both (1) a basis for an Article 16.7 Emergency Procedure under the "may be injurious to self or others" clause, and (2) also constitutes a form of gross insubordination and therefore is a prima facia basis for summary removal. However, in the instant case, the Service has failed to prove the existence of any threatening and abusive language directed against Supervisor Byham. Therefore, Charge No. 1 must fail.

As noted above in the Findings of Fact, the profane language uttered by the Grievant was not directed toward or against Supervisor Byham. The Grievant never uttered the phrase, "or else," and all profane utterances were spoken generally, without direction toward any person or toward the Service. Also, Byham was never threatened or abused or personally demeaned by those utterances, neither was it the Grievant's intent to cause such a reaction. Further, not only was Byham never threatened, he never personally felt threatened. There simply is no factual basis for Charge No. 1.

Charge No. 2. Misconduct Resulting in Personal Injury to Yourself.

The evidence does not support the allegations set forth in Charge No. 2. First of all, the Grievant did not make a threatening gesture and he did not swing his fist in front of Byham's face. In the second place, the circumstances of the injury do not reasonably bring it under the "may be injurious to self" clause of Article 16.7. Most importantly, the Grievant was not engaging in "misconduct" when he banged his hand into the edge of the adjoining case; he was simply "blowing off steam, and inadvertantly caused a very minor cut on his hand.

Charge No. 2 characterizes the injury as being the result of a threatening swing of the Grievant's fist in front of Byham's face. Such simply never occurred. The evidence establishes that the Grievant merely banged the back of the adjoining case with his fist and that he inadvertantly caused the minor cut. The evidence does not establish the throwing of a threatening blow at or even near Byham. Therefore, Charge No. 2 must also fail.

The Arbitrator wishes to re-emphasize the fact that in reaching his decision, he has resolved all credibility questions in favor of the Grievant and against Byham. The evidence convincingly established that Byham well knew from his long relationship with the Grievant that he was not being threatened on May 30th and that the Grievant was of no danger to himself or others. It is apparent to the Arbitrator that Byham had learned to play the Grievant's emotions "as a musician plays a violin." Thus, not only did he provoke and cause the situation, he well knew that the Grievant's reaction was neither threatening, abusive nor potentially injurious.

For what it is worth, it is also noteworthy that this is not the case of an employee failing to react properly to a "cantankerous" or somewhat unreasonable supervisor. This is a case where a supervisor directly precipitated and exacerbated a situation through continuous harrassment and coercion of an employee, and who failed to act appropriately after his actions had provoked an obvious stress reaction.

Finally, the Arbitrator wishes to note that this case does not involve the Grievant's suitability or lack of suitability for his job because of an admittedly existing stress condition. Whether the Grievant's alleged inability to cope with stressful situations constitutes grounds for a separation from the Service is a matter outside the scope of this arbitration. This arbitration is only concerned with whether the charges are supported by the evidence. The Arbitrator expressly finds that the charges are not so supported and that the grievance must therefore be sustained.

AWARD

The Emergency Suspension and Notice of Removal were not issued for just cause. The grievances are sustained. The Grievant shall be immediately reinstated to his former position with full back pay and benefits and without loss of seniority. The Arbitrator retains jurisdiction of this case solely for the purpose of resolving any dispute between the parties concerning the actual amount of back pay or benefits due the Grievant.

DATED this 11th day of March, 1986.

Thomas F. Levak, Arbitrator.