American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

January 6, 2003

TO: Local Presidents
National Business Agents
National Advocates
Regional Coordinators
Resident Officers

FR: Greg Bell, Director
Industrial Relations

RE: NRLCA National Award on Review and Concurrence for Discipline

Enclosed is a recent National Rural Letter Carriers Association national level award by Arbitrator Eischen on the issue of review and concurrence for discipline. The arbitrator found that Article 16.6 of the USPS-NRLCA National Agreement, which is not materially different from Article 16.8 of the USPS-APWU National Agreement, is violated "if there is a 'command decision' from higher authority to impose a suspension or discharge"; "if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge"; or "if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge." He also ruled that these violations are "fatal" and "invalidate the disciplinary action and require a remedy of reinstatement with 'make-whole' damages." *(USPS #E95R-4E-D 01027978; 12/3/2002)*

This case arose after a rural carrier was removed for allegedly driving unsafely and failing to immediately report an accident. As a defense, the NRLCA argued that the Postal Service had not complied with the review and concurrence requirement contained in Article 16.6 of the USPS-NRLCA National Agreement. The Postal Service disagreed and the NRLCA referred the case to Step 4 of the grievance procedure and later appealed the case to arbitration. It should be noted that Article 16.6 of the NRLCA Agreement provides that "[i]n no case may a suspension or discharge be imposed upon an employee unless the proposed disciplinary action has first been reviewed and concurred in by a higher authority. Such concurrence shall be in writing." Between 1971 and 1995, the NRLCA Agreement contained language that remained unchanged and was identical to language that is contained in Article 16.8 of the APWU-USPS National Agreement. The original language was first included in the 1971-1973 Joint Collective Bargaining Agreement between the NRLCA, APWU, NALC, and the Mail Handlers Union.

The NRLCA argued that Article 16.6 requires that there be two separate independent judgments on discipline by an initiating official who proposes discipline and then by a higher

authority who reviews and concurs in the discipline before it is imposed. It asserted that this requirement is violated "(1) when the initiating official does not possess the freedom to make his own independent determination on discipline free of command from higher authority, (2) when the initiating and concurring officials jointly make one decision, or (3) when the concurring official does not meaningfully review the record before concurring in the proposed discipline." The union maintained that if any one of these circumstances exist, an employee has been deprived of due process. Moreover, it contended that the Postal Service's failure to comply with Article 16.6 is fatal and the only appropriate remedy for such a violation is reinstatement with full back pay without considering the merits of a case. The NRLCA argued that there is no requirement that the union show that there has been harmful error as a result of a violation of Article 16.6 since that provision states that in no case may discipline be imposed without compliance with its terms.

The Postal Service countered that Article 16.6 does not modify management's discretion in issuing or imposing suspensions and removals except to require that two management officials concur before a suspension or discharge is imposed. It asserted that compliance with this provision is achieved as long as a management official states that a review has occurred and concurrence is given in writing. Management maintained specifically that there is no violation of Article 16.6 if a reviewing official does not conduct an independent investigation and if a proposing official discusses, communicates with or confers with a reviewing official before deciding to propose discipline. It argued also that even if a violation of Article 16.6 exists, the union has to prove that the grievant has been harmed by this violation. Moreover, the Service asserted that noncompliance with Article 16.6 can be cured at Step 2 when a higher level official reviews the file and decides to deny the grievance which is equivalent to a concurrence with the proposing official's decision. In addition, management contended that the only appropriate remedy for a violation of Article 16.6 would be to place an employee back in pay status until review and concurrence takes place.

First of all, Arbitrator Eischen reviewed the bargaining history and regional level arbitration awards on the issue of concurrence and review. He observed that during the 30 years since the adoption of the language in Article 16.6, a majority of arbitrators have sustained grievances challenging the Postal Service's noncompliance with the requirement to review and concur in discipline. Moreover, "notwithstanding the Postal Service's ostensible opposition to the interpretation and application of that language rendered by virtually all of the area arbitrators in these Article 15.5.D removal cases, the substance of the 'review and concur' language has been repeatedly re-adopted by the Parties, without material change, in every successive National Agreement since 1971-1973," the arbitrator stressed. He further stated that since the parties have not renegotiated "any significant modification of the language of Article 16.6" in spite of the arbitration awards, "those accumulated decisions also constitute persuasive evidence of the mutual intent of the contracting Parties" and "it may well be concluded that the area arbitral interpretation has been incorporated into the Agreement." He thus concluded "the arbitral gloss applied by the area arbitrators has in fact and in practice been largely accepted by both Parties and is reflective of their mutual understanding and intent concerning the interpretation and application of Article 16.6 in removal cases."

Arbitrator Eischen then indicated that "Article 16.6 requires two separate and independent managerial judgments, each based on substantive review of the record evidence, before a suspension or discharge disciplinary action may be imposed on an employee . . . ." He determined that given the need for "two separate and independent judgments" and consistent with "area arbitration decisions rendered by a long line of prominent arbitrators," Article 16.6 is violated when "(1) the initiating official is deprived of freedom to make his own independent determination to discipline by a 'command decision' dictated from higher authority to suspend or discharge, (2) the initiating and reviewing/concurring officials jointly make one consolidated disciplinary action decision, or (3) the higher authority does not review the record and consider all of the available evidence before concurring in the supervisor's proposed discipline." He further indicated that in each of these instances, an employee "is deprived of the essential due process check and balance protection that Article 16.6 is intended to provide."

However, Arbitrator Eischen concluded that a lower level supervisor is not precluded from "consulting, discussing, communicating with or jointly conferring with the higher reviewing authority before deciding to propose discipline." He stressed that so long as the proposing official retains independence of judgment and does not "surrender that independence completely to the person from whom he has sought such advice," communication for "advice and counsel" between this official and a higher authority is permissible. Moreover, he determined that a higher authority is not required by Article 16.6 to make an independent investigation as long as "the higher authority makes a substantive review of and bases the decision to concur on the record developed below." However, the arbitrator emphasized that "[t]he requirement of a separate and independent second step of review and concurrence by the higher authority is not met by just a declaration of agreement with the first step supervisor's proposed disciplinary action." "Compliance with Article 16.6 requires a substantive review of the matter by the higher authority in light of all the current information and the higher authority's concurrence with imposition of the disciplinary action proposed by the supervisor," according to the arbitrator.

Turning to the remedy for violations of Article 16.6, Arbitrator Eischen stated that "[b]ecause these are substantive violations which effectively deny an employee the due process rights granted by Article 16.6, persuasive proof of such fatal violations requires arbitral reversal of the improperly imposed suspension or discharge, without consideration of the underlying merits of the disciplinary action, *i.e.*, reinstatement with 'make whole' damages." He indicated that the union is not required to provide additional proof of actual harm since "the precise terminology of Article 16.6 precludes recourse to that 'harmless error' argument."

attachment

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NATIONAL ARBITRATION
CASE NO. E95R-4E-D 01027978

In the Matter of the Arbitration Between

UNITED STATES POSTAL SERVICE

- and -

NATIONAL RURAL LETTER CARRIER'S ASSOCIATION

Subject:- "Review and Concurrence for Discipline"

Article 16.6

Dana Edward Eischen, National Arbitrator

Appearances

For the NRLCA: Peer & Gan, LLP
by
Dennis D. Clark, Esq.
Michael Gan, Esq., of Counsel

For the U.S.P.S.: John W. Dockins, Esq.
William Daigneault, Lab. Rel. Specialist

Also Present

For the NRLCA

Gus Baffa, President
Randy Anderson, Dir. Labor Relations

For the U.S.P.S.

Olie Turner, Postmaster
Robert Horsdig, Lab. Rel. Spec.
John Ingram, Lab. Rel. Spec.
Jim Hellquist, Lab. Rel. Spec.
Charles Baker, Lab. Rel. Spec.
Frank Keenan, Lab. Rel. Spec. (ret.)
Marty Rothbaum, Lab. Rel. Spec.
Roy Shirkey, Lab. Rel. Spec.

PROCEEDINGS

Article 15, Section 5 of the National Agreement between the United States Postal Service ("USPS" or "Employer") and the National Rural Letter Carrier's Association ("NRLCA" or "Association") provides for two-tier grievance arbitration: Article 15.5.C "National Arbitration" of "certified cases involving national interpretations" and/or "other cases which the parties agree have substantial significance"; and, Article 15.5.D "area arbitration"of "removal cases and contract cases not involving national issues". In December 2001, these Parties designated me to serve as their National Arbitrator, to hear and decide unresolved national level interpretive grievances filed at Step 4, in accordance with Article 15, Section 3.D of the National Agreement.

The record before the National Arbitrator in this case presents a fundamental conflict between the NRLCA and the United States Postal Service concerning the proper interpretation of the "review and concurrence" provision contained in Article 16, Section 6 of their National Agreement. It is not disputed that this review and concurrence language has been a fertile source of controversy over the last thirty (30) years, resulting in scores of decisions by area arbitrators interpreting and applying its provisions. The ostensible vehicle for bringing certain generic issue(s) concerning the interpretation and application of Article 16.6 to this National Arbitration, at this time, was a grievance concerning the removal of rural carrier Ms. Julie DeWitt, from the Buhl, Idaho post office. However, the DeWitt grievance, *per se,* is not before the National Arbitrator for decision in this proceeding.

The Grievant in that case was issued a Notice of Removal dated October 6, 2000, for allegedly driving unsafely and failing to immediately report an accident. As a defense, the NRLCA asserted that there was improper review and concurrence as required by Article 16.6. The Postal

Service disagreed with the NRLCA's interpretation of Article 16.6 and the Association declared the issue to be interpretive.

After the Association referred the instant case to Step 4 of the parties' grievance procedure, the Postal Service referred to Step 4 a number of other removal grievances, which had been denied at Step 3 and were pending area arbitration. The Postal Service determined that each of those cases raised Article 16.6 issues likely be impacted by the national interpretive decision on the issues raised herein. [The record is not entirely clear whether the number of related cases held in abeyance is sixteen (16) or twenty-one (21). It is noted that Attachment H to the NRLCA post-hearing brief is a list of relevant information about sixteen (16) such cases). Each entry contains the name of the Grievant, the location where he or she was employed, the NRLCA case number, the Postal Service case number, subject of the grievance, date of the Step 3 denial, date the case was appealed to area arbitration, date (if any) the case had been scheduled for area arbitration, and the date when the case was referred to Step 4 by the Postal Service (if known).]

Some of these cases apparently involve grievances concerning both an emergency suspension and the subsequent removal of the Grievant, which were consolidated during the grievance procedure. Like the DeWitt case, these related cases have also been held at Step 4, awaiting the resolution of the national interpretive issues presented in this case. The Parties agree that these cases (some of which were appealed to area arbitration as far back as 2000) should be processed in area arbitration as expeditiously as possible. To that end, at the hearing in this case, the parties stipulated that the National Arbitrator should also decide in this proceeding "the issue of what to do with the pending Step 4 cases that have similar issues in them."

The broad, general interpretive issues concerning the "review and concurrence"provision of Article 16.6, as presented in the Step 4 appeal and answer, are decided herein, without reference to the specifics of the DeWitt case. Further, no opinion is expressed or implied by this National Arbitrator concerning the facts or merits of that specific grievance nor concerning the facts and merits of the other related cases which are also pending hearing in area arbitrations; held in abeyance by the Parties, pending the outcome of the national interpretation issue(s) appealed to Step 4 by the Union in the instant case, pursuant to Article 15, Section 3.D of the National Agreement.

A National Arbitration hearing was held at Washington, D.C., on June 4, 2002, at which both Parties were represented by Counsel and afforded full opportunity to present documentary evidence, testimony subject to cross-examination and oral argument. A transcribed certified stenographic record was made and the proceedings were closed with the filing and exchange of briefs and reply briefs. The Parties graciously granted an extension of the contractual time limits for rendition of the Opinion and Award.

PERTINENT NATIONAL AGREEMENT PROVISIONS

ARTICLE 15
GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. General Policy

Grievances which are filed pursuant to this Article are to be processed and adjudicated based on the principle of resolving such grievances at the lowest possible level in an expeditious manner, insuring that all facts and issues are identified and considered by both parties. In the event that a grievance is processed beyond Step 1, both parties are responsible to insure all facts, issues and documentation are provided to the appropriate union and management officials at the next higher level of the grievance procedure. The parties further agree that at any step in the grievance procedure, the Union representative shall have full authority to settle or withdraw the grievance in whole or in part. The Employer representative, likewise, shall have full authority to grant, settle or deny the grievance in whole or in part.

Section 2. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the

complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement.

* * *

Section 4. Grievance Procedure-General

A. Observance of Principles and Procedures

The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible Step and recognize their obligation to achieve that end.

B. Failure to Meet Time Limits

The failure of the employee or the Union at Step 1, or the Union thereafter, to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance.

C. Failure to Schedule Meetings

Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

D. National Level Grievance

It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the President of the Union. Such a grievance shall be initiated in writing and must specify in detail the facts giving rise to the dispute, the precise interpretive issues to be decided and the contention of the Union. Thereafter the parties shall meet at Step 4 within thirty (30) days in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. Should they fail to agree, then, within fifteen (15) days of such meeting, each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to such issues. In the event the parties have failed to reach agreement within sixty (60) days of the initiation of the grievance at Step 4, the Union then may appeal it to arbitration, within thirty (30) days thereafter.

* * *

Section 5. Arbitration

A. General

A request for arbitration must be submitted within the time limit for appeal as specified for the appropriate Step. The National President of the Union must give written authorization of approval to the Employer at the national level before the request for arbitration is submitted.

Grievances referred to arbitration will be placed on a pending arbitration list. Except for discharge cases, the Union will have sixty (60) days from the date of such referral to certify the case to be scheduled for arbitration at the earliest possible date. Cases which are not certified for arbitration within the sixty (60) day period shall be considered waived and removed from the pending arbitration list. Discharge cases referred to arbitration shall be placed on a separate pending arbitration list. The Union will have fifteen (15) days from the date of such referral to certify the case to be scheduled for arbitration at the earliest possible date. Cases which are not certified for arbitration within the fifteen

(15) day period shall be considered waived and removed from the pending arbitration list. If there are other certified disciplinary cases related to the employee's removal grievance, these cases shall be scheduled for hearing along with the removal cases.

The case with the lowest docket number pending before a panel will be scheduled to be heard first. However, the parties may mutually agree to assign such cases for hearing out of numerical sequence in order to fill a vacated hearing date, or to lessen the amount of the arbitrator's travel time and expense or for other valid reasons. Arbitration hearings shall be held during working hours. Employee witnesses shall be on Employer time when appearing at the hearing provided the time spent as a witness is part of the employee's regular working hours.

Any dispute as to arbitrability may be submitted and determined by the arbitrator. The arbitrator's determination shall be final and binding. The arbitrator shall render his award within thirty (30) days of the close of the hearing, or if briefs are submitted, within thirty (30) days of the receipt of such briefs on cases which do not involve interpretation of the Agreement, or are not of a technical or policy making nature. On all other cases, the award shall be rendered within thirty (30) days if possible. 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. Unless otherwise provided in this Article, all costs, fees and expenses charged by an arbitrator will be borne by the party whose position is not sustained by the arbitrator. In those cases of compromise where neither party's position is clearly sustained, the arbitrator shall be responsible for assessing costs on an equitable basis.

B. Selection of Panels

National and Area Arbitration Panels are established as set forth below:

The members of these panels will be selected in accordance with the procedure set forth below and will serve for the term of this Agreement and shall continue to serve for six (6) months thereafter unless the parties otherwise mutually agree. To assure the expeditious processing of grievances, the parties by agreement may increase the size of these panels at any time. Should vacancies occur, or additional members be required on the National or Area panels, such vacancies shall be filled by mutual agreement. In the event the parties cannot agree on individuals to serve on these panels, or to fill any vacancies which may exist, a list of five (5) arbitrators will be supplied by the American Arbitration Association for each selection to be made. The parties shall then proceed by alternately striking names from the list until only one individual remains. Such individual shall be selected to remain on the panel.

C. National Arbitration

Effective August 3, 1996, a National Panel of not more than three (3) arbitrators will be established to hear certified cases involving national interpretations or other cases which the parties agree have substantial significance. Arbitrators on the National Panel will be assigned to hear cases on a rotating basis. Member(s) of the Area Panel may by mutual agreement be member(s) of the National Panel.

Prior to the scheduled hearing each party to the dispute may separately submit to the arbitrator who has been assigned the case, and to the other party to the dispute, a statement setting forth the following:

a. the facts relevant to the grievance;
b. the issue in the case;
c. the position(s) or contention(s) of the party submitting the statement.

The parties may by mutual agreement submit a joint statement to the arbitrator. A stenographic record will be taken if requested by either party to the dispute. In such case, the cost of such record shall be borne by the requesting party. The other party, upon request, will be furnished a copy of the record, in which case the cost of such record shall be borne equally by both parties to the dispute.

D. Area Arbitration

A geographically balanced Area Panel of arbitrators is established to hear removal cases and contract cases not involving national issues.

Normally, a stenographic record shall not be taken at these hearings, nor post hearing briefs filed. However, either party may make exception to this policy. The case with the lowest docket number pending before a panel will be scheduled to be heard first. However, the parties may mutually agree to assign such cases for hearing out of numerical sequence in order to fill a vacated hearing date, or to lessen the amount of the arbitrator's travel time and expense or for other valid reasons.

ARTICLE 16
DISCIPLINE PROCEDURE

Section 1. Statement of Principle

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.

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable.

Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of a prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Section 2. Letter of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning which shall include explanation of a deficiency or misconduct to be corrected.

Section 3. Suspension of 14 Days or Less

In the case of discipline involving suspensions of fourteen (14) 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 the employee and shall be further informed that the employee will be suspended after two (2) working days during which two-day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer. For the term of the 1995 Agreement, the notice period shall be increased to ten (10) calendar days and if the employee initiates a grievance during that period, the

suspension will not be served until disposition of the grievance or issuance of the Step 2 decision, whichever comes first

Section 4. Suspension of More Than 14 Days or Discharge

In the case of suspension of more than fourteen (14) days or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against the employee 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 the employee's case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure.

When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the advance notice requirement shall not apply and such an employee may be immediately removed from a pay status.

Section 5. 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 self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than fourteen (14) days or discharge the employee, the emergency action taken under this section may be made the subject of a separate grievance.

Section 6. Review of Discipline

In no case may a suspension or discharge be imposed upon an employee unless the proposed disciplinary action has first been reviewed and concurred in by a higher authority. Such concurrence shall be in writing. (Emphasis added)

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

* * * * *

ISSUES

The Parties did not formulate a joint submission to arbitration nor did either Party elect to file individual pre-hearing statements of relevant facts, issues and contentions, as suggested by Article 15, Section 5.C. At the arbitration hearing, the Parties submitted differing articulations of the interpretive issues presented for determination in this matter. Before setting forth those respective statements of issues, however, it is instructive to review the process leading to the certification of this case to National Arbitration under Article 15.5.C.

The dispute concerning the proper interpretation of Article 16.6, now under consideration, crystallized during Step 3 discussions of the Dewitt discharge area grievance (E95R-4E-D 01027978). In that context, by letter dated May 11, 2001, Mr. Baffa submitted the matter to Step 4 in accordance with Article 15.4.D and requested national arbitration, as follows:

> The purpose of this letter is to appeal the subject-named grievance to Step 4. The union is appealing the above referenced case from Area Arbitration to Step 4 because the union believes it contains nationally interpretive issues.
>
> This appeal letter does not constitute a waiver by this Union of any issue or violation as it relates to this grievance; it is for the sole purpose of bringing this grievance to a Step 4 hearing.
>
> Please schedule this grievance for an early discussion.

The attached written grievance submitted to national handling at Step 4 by Mr. Baffa read as follows:

> The NRLCA position and interpretation of Article 16, Section 6, which many Area Arbitrators continue to conclude, if the facts of the particular case permit, that Article 16.6 of the National Agreement is violated if:
>
> 1) There is a "command decision" from above;
>
> 2) There is a joint decision to impose a suspension or discharge;
>
> 3) There is a failure of either the initiating or review and concurring official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

4) There is no evidence of written review and concurrence prior to the imposition of a suspension or discharge;

5) There is no showing of harm.

In recent Step 3 decisions, the USPS designee refers to the Association's position on review and concurrence as a "total bastardization of Article 16, Section 6." The Association strongly disagrees with the USPS designee's characterization as expressed in this and other Step 3 decisions involving Article 16.6. The Association's position is grounded in the language of Article 16.6 and the many arbitration awards between the Association and the LISPS. Based on the above referenced Step 3 decisions, is it the position and interpretation of the USPS that Article 16.6, as agreed to in the 1995-99 National Agreement and Extension, bars the Association from citing as violations of Article 16.6 the following:

1) "Command decisions" from above;

2) Joint decisions;

3) Failure of either the initiating or review and concurring official to make an independent substantive review of the evidence, prior to the imposition of a suspension or discharge;

4) No evidence of written review and concurrence prior to the imposition of a suspension or discharge.

Following Step 4 discussions of these Article 16.6 national interpretive issues between USPS Labor Relations Specialist William Daigneault and NRLCA Director of Labor Relations Randy Anderson, Mr. Daigneault denied the national interpretive grievance at Step 4, by letter of September 27, 2001, as follows:

Re: E95R-4E-D 01027978 J. DeWitt Buhl, ID 83316-9998

On several occasions, the most recent being September 14, 2001, I discussed with the Union the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance concerns the interpretation of Article 16.6 of the National Agreement concerning review and concurrence of discipline.

It is the Union's position that a violation of Article 16.6, Review of Discipline has occurred in the following situations:

1. There is a command decision from higher authority that instructs the issuance of a suspension or discharge.

2. The decision by the in initiating official to suspend or discharge is reached jointly with the review and concurring official and was not an independent decision by the initiating official.

3. The initiating official or reviewing official failed to complete an independent substantive review of the evidence prior to the imposition of the suspension or discharge.

4. There is no evidence of written review and concurrence prior to the imposition of the suspension or discharge.

It is the Union's position that a showing of harmful error in relation to review and concurrence is not required to sustain the Union's grievance on the discipline. The Union also contends that their position is "grounded in the language of Article 16.6 and the many arbitration awards between the USPS and NRLCA."

It is the position of the Postal Service that Article 16.6 restricts a supervisor, manager or postmaster from imposing a suspension or discharge upon an employee in the rural carrier bargaining unit without review and concurrence by a higher authority. It protects carriers from a new, inexperienced supervisor that intends to suspend or remove the carrier without just cause. It provides for a higher authority to review the situation (either review of paperwork, discussion with proposing official or general knowledge of the situation giving rise to the charges) to determine whether, on the surface, it appears that the action being proposed is appropriate.. It requires that the higher authority document his/her concurrence with the action being proposed in writing.

Article 16.6 does not require that the concurring official conduct an independent investigation. It does not prohibit the concurring official from having previous knowledge of the charges, discussing the charges with the proposing official, being involved in the investigation with the proposing official or providing advice. It does not restrict management from having more than one concurring official.

In the case at hand, the Union alleges Management violated Article 16.6 claiming the review and concurrence was nothing more than a "rubber stamp." The Union contends that the review and concurrence official did not review anything except the proposing official's request for discipline.

It is Management's position that the concurring officials in the case at hand went above and beyond the requirements of Article 16.6. While the contract only requires review a nd concurrence by one higher authority, several managers in higher authority reviewed the evidence submitted by the proposing official in this case. All the managers agreed the action being proposed was appropriate.

In the absence of any contractual violation, this grievance is denied. Time limits were extended by mutual consent.

At the arbitration hearing in this matter, each Party submitted its own specific statement of national interpretive issues regarding violations and compliance with Article 16.6, upon which it seeks a decision in this case. Additionally, they submitted by joint stipulation two other "issues of national significance", regarding appropriate remedies for proven violations of Article 16.6 and post-National Arbitration administration of the pending area arbitration cases, now held in abeyance. Rather than rewording the issues advanced by the Parties into some form of synthesized issues, I will address in this Opinion and Award the following joint and several interpretive concerns expressed by the Parties, respectively, in their Step 4 correspondence and at the arbitration hearing, *viz.*:

1) Is Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement violated if:

a) The lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;

b) There is a "command decision" from higher authority to impose a suspension or discharge;

c) There is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;

d) The higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;

e) There is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

f) There is no evidence of written review and concurrence prior to the imposition of a suspension or discharge.

2) Does a proven violation of Article 16.6 automatically sustain the grievance and overturn any discipline, absent a showing of "actual harm", *i.e.*, "that the reviewing official would not have concurred with the proposing official and that the discipline would not have been issued in the first instance".

3) What should be done next with those pending Step 4 cases which have been held in abeyance for area arbitration, awaiting the outcome of this National Arbitration case?

POSITIONS OF THE PARTIES

The following statements of position have been edited from the respective posthearing briefs and reply briefs.

NRLCA

It is the Association's position that Article 16.6 requires two separate independent judgments on discipline -- the first by the initiating official who proposes discipline, and the second by a higher authority who reviews and concurs in that discipline before it is imposed. It is the Association's position that such requirement is violated : (1) when the initiating official does not possess the freedom to make his own independent determination on discipline free of command from higher authority, (2) when the initiating and concurring officials jointly make one decision, or (3) when the concurring official does not meaningfully review the record before concurring in the proposed discipline. In each such instance, there have not been two separate independent judgments on discipline, and the rural carrier who is facing the potential loss of his livelihood has been deprived of the due process protection -- the essential "check and balance" -- that Article 16.6 is intended to provide.

Compliance with Article 16.6 is required in every case before a suspension or discharge can be imposed. Failure by the Postal Service to comply with Article 16.6's dictates is fatal to the disciplinary action. Consequently, the appropriate remedy for such violation is reinstatement with full back pay, without consideration of the underlying merits of the disciplinary action. The Postal Service apparently contends that a "harmless error" rule should apply to Article 16.6 violations -- that the disciplinary action should stand notwithstanding such violation if it can be shown that the same action would have been taken even if Article 16.6 had been complied with. The Postal Service is wrong. Article 16.6 says nothing about a "harmful error" requirement but it does say is that "in no case" may discipline be imposed without compliance with Article 16.6's due process requirements. In addition, the Postal Service also offers the totally insupportable notion that in the case of a proven Article 16.6 violation, the aggrieved employee is not to be reinstated to his job but merely to receive backpay from the date of his removal to the date of a Step 2 decision in the grievance process. As in the case of Article 16.6's due process requirement -- two separate independent judgments on discipline -- the arbitral remedy for a violation of Article 16.6 -- reinstatement with full backpay -- has been incorporated into the parties' agreement. The universal arbitral remedy of reinstatement, and the almost universal arbitral remedy of full backpay, has never been addressed by the Postal Service in collective bargaining negotiations.

The language of Article 16.6 has been in the parties' agreements for more than 30 years. The language has been interpreted consistently by area arbitrators throughout this period. The Postal Service has never sought to renegotiate that language to undo any of the interpretations of those arbitrators, and this National Arbitrator should not do now for the Postal Service what it has failed to seek or achieve at the bargaining table.

USPS

Because the language at issue is so clear and unambiguous there is no need to search any further. If the NRLCA wants to impose more stringent standards and criteria of review then they should negotiate such changes at the bargaining table. To pretend that such criteria are present in the long standing

language of Article 16.6 is to ignore the plain meaning of the language itself. Absent any special meaning assigned by the parties to the words "review" and "concur", the Arbitrator is bound by the language of the bargain as expressed in Article 16.6. A careful reading of Article 16.6 reveals that the language does not call for overturning a removal action but states that "In no case may a suspension or discharge be imposed upon an employee unless the proposed disciplinary action has *first* been reviewed and concurred in by a higher authority". (Emphasis added) Therefore, where a violation of Article 16.6 is found to have taken place the only appropriate remedy is to place the employee back into a pay status until review and concurrence takes place. Once review and concurrence takes place the discipline may then be imposed.

In summary, the ability to issue and impose discipline is an exclusive management right expressly incorporated into the Collective Bargaining Agreement at Article 3. Article 16.6 merely requires a procedure that two management officials concur before a suspension or discharge is imposed. It does not in any way alter the exclusive discretion that management has in issuing or imposing suspensions and removals. There is no violation of Article 16.6 if the proposing official consults, discusses, communicates with or jointly confers with the reviewing official before deciding to propose discipline. There is no violation of Article 16.6 if the reviewing official does not conduct an independent investigation and relies on the record submitted by the proposing official. As long as the reviewing official can articulate that a review has occurred and concurrence was given in writing, the Postal Service has met its obligation under Article 16.6. The standard of review required by Article 16.6 is simply and only that each of the management officials is satisfied that suspension or discharge be imposed.

Because the "review and concur" requirement does not factor into the "just cause" determination, any potential remedy should not disturb the final analysis regarding "just cause" in any particular case. Furthermore, any procedural defect of noncompliance with Article 16.6 will have been cured at Step 2 of the grievance procedure because a higher authority will have reviewed the file and issued a written concurrence in the form of a Step 2 denial. Even if a violation of Article 16.6 can be proven, the NRLCA still must demonstrate in each individual case how the grievant has been harmed. A violation of Article 16.6 does not automatically sustain the grievance, but rather the Association has the burden of showing that a harmful error has occurred. At the most, the appropriate remedy would be to delay imposition of the discipline until such written concurrence has occurred. Finally, all pending Step 4 grievances in which the NRLCA alleges a violation of Article 16.6 should be remanded to Step 3 for application of the award in this case.

OPINION OF THE NATIONAL ARBITRATOR

Bargaining History, Arbitral Authority and Mutual Intent

Certification of the instant case to Article 15.5.C National Arbitration marks the first occasion for a definitive resolution of the national interpretive issues presented, *supra*. However, the contract language under analysis in this case has been part of the collectively negotiated contracts between these parties for some thirty (30) years. Thus, a certain valuable perspective is gained by considering the bargaining history and administrative practice thereunder; especially since this very language has been so frequently interpreted and applied in final and binding decisions by scores of arbitrators in Article 15.5.D area arbitration of removal cases.

Turning first to bargaining history, the language which now appears as Article 16.6 of the current USPS/NRLCA National Agreement is essentially unchanged, dating from the 1971-73 Joint Collective Bargaining Agreement. Following passage of the Postal Reorganization Act of 1970, the major craft unions representing postal employees bargained jointly with the Postal Service and entered into a joint collective bargaining agreement covering all crafts. Those unions covered by the first agreement included the NRLCA, as well as the APWU (then known as the United Federation of Postal Clerks), the NALC, the Mail Handlers (and three others which have since been absorbed by the mentioned unions).

Article 16, Section 5 of that seminal agreement provided:

> SECTION 5. REVIEW OF DISCIPLINE. In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or his designee.
>
> In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

Over the intervening years, these unions have sometimes bargained in coalitions of differing combinations and sometimes negotiated separate contracts with the Postal Service, but the review and concur language has remained virtually constant throughout.

As for the NRLCA/Postal Service contracts, since the original language of Article 16.6 was adopted by the Parties in the 1971-73 joint Collective Bargaining Agreement, the language was re-adopted unchanged in the successive agreements negotiated in 1973, 1975, 1978, 1981, 1984, 1988, 1990, and 1993. In 1995, the NRLCA and the Postal Service amended the language of the first paragraph of Article 16.6 to provide as follows: (Emphasis in original, to denominate the changes.)

> In no case may a suspension or discharge be imposed upon an employee unless the proposed disciplinary action has first been reviewed and concurred in by a higher authority. Such concurrence shall be in writing.

It is noted that the NRLCA and the Postal Service jointly prepare and publish an "Analysis of Changes" following renegotiation of their agreements. The 1995 Analysis stated with respect to the above changes in Article 16.6:

> The first change clarifies the parties' position that discipline may be imposed by a manager other than the rural carrier's supervisor. The second change makes it clear that the concurring official need not be the installation head, provided the official is a higher authority, *i.e.*, a higher organizational level or higher grade level. The third change requires that there be written evidence of such review and concurrence.

My focus in this case remains the language of Article 16.6 of the current Agreement, in a national interpretive context; with due regard for bargaining and arbitral history concerning the interpretation and application of that language since 1971, to the extent such evidence assists in determining the mutual intent of the contracting parties. In that connection, from the inception of the first collective bargaining agreement in 1971 to date, a period spanning some 30 years and 11 separately negotiated agreements, the NRLCA and the Postal Service have permitted area arbitrators to interpret and apply the provisions of Article 16.6, without resort to National Arbitration. Indeed,

over the last three decades, area arbitration decisions construing and applying the review and concur language of Article 16.6 have been stacking up like cordwood. [Parenthetically, area arbitrators in cases involving the other crafts likewise have consistently interpreted the meaning of the review and concurrence provision in the same manner].

It is worth re-emphasizing that, notwithstanding the Postal Service's ostensible opposition to the interpretation and application of that language rendered by virtually all of the area arbitrators in these Article 15.5.D removal cases, the substance of the "review and concur" language has been repeatedly re-adopted by the Parties, without material change, in every successive National Agreement since 1971-73. In short, during more than three decades of living with this language as interpreted and applied by the area arbitrators, with a remarkable degree of consistency, in nearly 100 decisions. In all that time, neither Party ever exercised its right to renegotiate the controlling language of Article 16.6. Nor, prior to the instant case, did either Party deem it necessary to submit the review and concurrence language of Article 16.6 for definitive interpretation in Article 15.5.C National Arbitration, as a certified "national interpretive issue".

The Postal Service quite properly points out that, under the two-tier arbitration system adopted by these Parties, National Arbitration decisions govern in matters of national interpretations and the area arbitration decisions therefore are not authoritative precedent in this case. But just because National Arbitration decisions pre-empt area decisions in certified cases of national interpretation does not mean that thirty (30) years' worth of arbitration decisions by scores of prominent arbitrators, consistently construing and applying the language of Article 16.6 in area arbitration cases, are irrelevant, immaterial or unpersuasive in this National Arbitration case.

This National Arbitrator has the power and authority, as the contractual "Court of Last Resort", to interpret Article 16.6 in a manner other than as consistently and uniformly interpreted by scores of distinguished area arbitrators. It is manifest that Article 15.5.C area arbitration decisions are not *res judicata*, *stare decisis*, or in any sense dispositive, in Article 15.5.D National Arbitration. My responsibility to function as the designated National Arbitrator is not fulfilled simply by taking an opinion poll of area arbitrators.

But, in the absence of a National Arbitration decision interpreting a particular provision of the National Agreement, area arbitrators are regularly called upon to interpret and apply the various provisions of that Agreement, including Article 16.6. Area arbitrators have interpreted and applied Article 16.6 for more than 20 years in scores of cases, because the Association and the Postal Service have permitted them to do so and there is no contractual prohibition on them doing so. Of course, the interpretation of Article 16.6 in this National Arbitration case will govern and apply in all future area arbitrations, because National Arbitration under the Agreement represents a ruling by the Parties' designated "Supreme Court". On the other hand, in this particular case, most of those area arbitration decisions do in fact comport with my own interpretation of the language at issue in this case, based upon my independent analysis of the record before me. In short, the great majority of those area arbitration decisions are correct and as the National Arbitrator I reach essentially the same conclusions concerning the meaning of the language of Article 16.6.

Area arbitration may not be the "Supreme Court" under the parties' Agreement, but it most certainly is the "Court of Appeals"and area arbitration decisions are as "final and binding" as National Arbitration awards. If either party disagrees with an interpretation of the Agreement made by one or more area arbitrators, it can initiate a national interpretive grievance at Step 4 and take it

on to national arbitration, to obtain a "Supreme Court" ruling. Unless and until that occurs, however, the area arbitration decisions construing and applying Article 16.6 represented the "law" of the Parties. More importantly, in my considered judgement, those accumulated decisions also constitute persuasive evidence of the mutual intent of the contracting Parties.

Those area arbitrations have laid on a persuasive interpretive gloss to Article 16.6 over a period of thirty(30) years, during which the Parties jointly re-negotiated the controlling National Agreement eleven (11) times, without even seeking, let alone achieving, any significant modification of the language of Article 16.6. When, as here, the area arbitration awards uniformly interpret a contract provision over a long period, and neither party seeks national arbitration or change in the contract language, but rather continually re-adopts the critical contract language time and time again in collective bargaining, it may well be concluded that the area arbitral interpretation has been incorporated into the Agreement. Elkouri & Elkouri, How Arbitration Works (5th edition) (BNA 1997), states the governing principle of incorporation or adoption, at page 615:

> [I]f the agreement is renegotiated without materially changing a provision that has been interpreted by arbitration, the parties may be held to have adopted the award as a part of the contract. Indeed, the binding force of an award may even be strengthened by such renegotiation without change.

The Postal Service may be technically correct, as a matter of logic, that incorporation/re-adoption theory should not be dispositive, because none of the myriad arbitration decisions construing and applying Article 16.6 was in the National Arbitration forum. However, to argue that the adoption theory should not even be considered seems to me an elevation of form over substance in this particular factual record. In my considered judgement, the arbitral gloss applied by the area arbitrators has in fact and in practice been largely accepted by both Parties and is reflective of their

mutual understanding and intent concerning the interpretation and application of Article 16.6 in removal cases.

Issues No. 1(a)-1(f): Article 16.6 Violation/Compliance

When the rhetorical excesses of ardent advocacy are stripped away, I do not perceive any meaningful disagreement between these Parties with the fundamental proposition that Article 16.6. requires two separate and independent managerial judgments, each based on substantive review of the record evidence, before a suspension or discharge disciplinary action may be imposed on an employee: the first by the initiating official who proposes discipline, and the second by a higher authority who must review and concur in the proposed discipline before it is imposed upon the employee.

It necessarily follows that the requirement of two separate and independent judgements, constitutes the very heart and core of Article 16.6, is violated when the reviewing/concurring official "commands" or "dictates" the disciplinary action to the proposing official, when the higher authority merely "rubber-stamps" the disciplinary action proposed by the employee's supervisor and/or when the sequential steps of a separate and independent supervisory initiation, followed by a separate and independent higher authority review/concurrence, are merged into a single consolidated joint decision by the two managers to suspend or discharge the employee.

Just as the area arbitration decisions rendered by a long line of prominent arbitrators have consistently held, I now hold that a violation of Article 16.6 occurs whenever: (1) the initiating official is deprived of freedom to make his own independent determination to discipline by a "command decision" dictated from higher authority to suspend or discharge; (2) the initiating and reviewing/concurring officials jointly make one consolidated disciplinary action decision, or (3) the

higher authority does not review the record and consider all of the available evidence before concurring in the supervisor's proposed discipline. In each such instance, because there have not been two separate and independent judgments on discipline, the employee is deprived of the essential due process check and balance protection that Article 16.6 is intended to provide.

However, so long as the *sine qua non* of Article 16.6, separateness and and independence of judgement in a two-stage process, is not violated by "command" decisions, joint decisions and/or "rubber-stamping", Article 16.6 does not bar the lower level supervisor from consulting, discussing, communicating with or jointly conferring with the higher reviewing authority before deciding to propose discipline. Indeed, it is common, and in many ways commendable and conducive to fulfillment of the intent of Article 16.6, for the lower level authority to communicate with higher management and discuss policies, options, and other factors to be considered, before determining whether, and to what extent, to propose suspension or discharge of an employee. In short, so long as the initiating official retains independence of judgment and is not commanded by higher authority to issue the discipline, such communications for advice and counsel between the initiating official and a higher authority are to be encouraged rather than chilled or prohibited. The determining factor under Article 16.6 is not whether the officer in charge seeks advice and counsel outside his office but whether, once having obtained such information, the initiating official acts independently or surrenders that independence completely to the person from whom he has sought such advice. In the former case, Article 16.6 is not violated but, in the latter case, Article 16.6 is violated.

By the same token, it is not *per se* a violation of Article 16.6 when the higher level authority relies in the reviewing/concurring step upon the record considered by the lower level official in proposing the discipline. The higher authority is not required by Article 16.6 to make an

"independent investigation". In my judgement, the requirements of Article 16.6 are met when the higher authority makes a substantive review of and bases the decision to concur on the record developed below.

Contrary to the position advanced by the Postal Service in this case, however, that process of review and concurrence contemplated by Article 16.6 is not a ministerial formality or a mere technical "laying on of hands" by the reviewing/concurring official. The requirement of a separate and independent second step of review and concurrence by the higher authority is not met by just a declaration of agreement with the first step supervisor's proposed disciplinary action. Compliance with Article 16.6 requires a substantive review of the matter by the higher authority in light of all the current information and the higher authority's concurrence with imposition of the disciplinary action proposed by the supervisor. Since the 1995 amendments, Article 16.6 specifies that this statement of concurrence by the higher authority must be set forth in writing.

Issue No. 1, *supra*, presents a subset of six (6) specific interrogatories concerning Article 16.6 compliance and violation, submitted by the Parties for determination in National Arbitration. Based on all of the foregoing, I conclude that Issues 1(a), and 1(d) are answered in the negative and Issues 1(b), 1(c), 1(e) and 1(f) are answered in the affirmative.

Issue No. 2- - The Remedy for Proven Violations of Article 16.6

The operative language of Article 16.6 provides (emphasis added):

> **In no case** may a suspension or discharge be imposed upon an employee **unless** the proposed disciplinary action **has first** been reviewed and concurred in by a higher authority.

This language clearly and unambiguously mandates that compliance with the two-step, two-stage process set forth in Article 16.6 is a condition precedent to the imposition of a removal or suspension. Accordingly, I concur without equivocation with those many area arbitrators who have concluded that the substantive violations of Article 16.6 set forth in Issues 1(b), 1(c) and 1(e) invalidate the disciplinary action. Because these are substantive violations which effectively deny an employee the due process rights granted by Article 16.6, persuasive proof of such fatal violations requires arbitral reversal of the improperly imposed suspension or discharge, without consideration of the underlying merits of the disciplinary action, *i.e.*, reinstatement with "make whole" damages.

In my considered judgement, those relatively few area arbitration decisions which have engrafted onto the condition precedent language of Article 16.6 an additional requirement of proof of "actual harm", notwithstanding persuasive proof of a "command decision", a "joint decision" or that the reviewing/concurring official merely "rubber-stamped" the proposed disciplinary action, are just plain wrong. Under different contract language, arbitrators might properly overlook procedural defects in administration of discipline which do not unduly compromise the rights of an employee whose suspension or discharge is otherwise justified on the record. However, the precise terminology of Article 16.6 precludes recourse to that "harmless error" argument. If this plain language of Article 16.6 occasionally produces a manifestly unfair result, as undoubtedly it has in some cases, the proper recourse is renegotiation at the bargaining table, not arbitral legislation of "actual harm" or "harmless error" rules which are at odds with the express wording of Article 16.6.

The only *caveat* I would add concerns the procedural violation described in Issue 1(f), *i.e.*, failure of the Postal Service to produce evidence that the higher authority's concurrence was reduced to writing, as required by the 1995 amendment to Article 16.6. Such a failure to express concurrence in written form clearly is a procedural violation of Article 16.6, for which an arbitral remedy might well be appropriate. But it is not so clear that such a violation, standing alone, would invalidate the disciplinary action and require reversal and reinstatement in every case.

The record in this matter is insufficiently developed to make an informed judgement concerning bargaining history and mutual intent regarding the 1995 amendment. The facts and circumstances of each particular case determine whether a procedural failure to concur in writing adversely impacted substantive Article 16.6 rights of an individual suspended or discharged employee. For these reasons, I refrain from making a definitive generic ruling on that single remedial aspect of the submitted issues at this time. Area arbitrators remain free to exercise their own best judgement as to whether, in the facts and circumstances of the individual case, an Issue 1(f) type of violation requires reversal of the disciplinary action or some other remedy. For Issue 1(b), 1(c) and 1(e) violations, however, Article 16.6 requires reversal of the disciplinary action and reinstatement with remedial "make-whole" damages.

AWARD OF THE NATIONAL ARBITRATOR
CASE NO. E95R-4E-D 01027978

Having been designated National Arbitrator in accordance with Article 15, Section 5.C of the National Agreement between the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, I hereby AWARD as follows:

ISSUE NO.1

Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

a) Is not violated if the lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;

b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;

c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;

d) Is not violated if the higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;

e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

f) Is violated if there is no evidence of written review and concurrence prior to the imposition of a suspension or discharge.

ISSUE No. 2

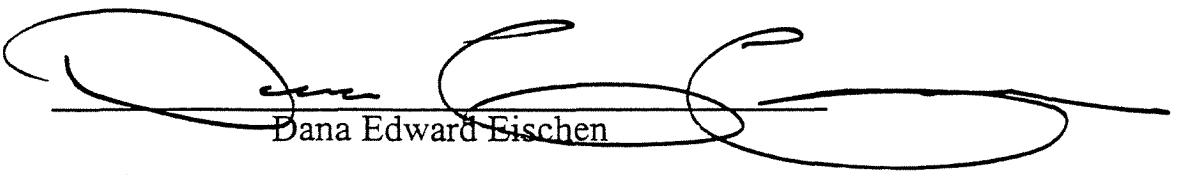
(a) Proven violations of Article 16.6 as set forth in Issues 1 (b), 1(c) or 1(e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with "make-whole" damages.

(b) Whether a violation of Article 16.6 as set forth in Issue 1(f) is fatal, invalidates the disciplinary action and requires a remedy of reinstatement with "make-whole" damages is for the area arbitrator to determine based on the facts and circumstances if the individual case.

ISSUE No. 3

Case No. E95R-4E-D 01027978 and all other similar cases held in abeyance at Step 4, pending this National Arbitration interpretation of Article 16.6, are remanded to area arbitration, for priority scheduling consistent with Article 15, Section 5.A of the National Agreement.

Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning, application or implementation of this National Arbitration Award.



Dana Edward Eischen

Signed at Spencer, New York on December 3, 2002

STATE OF NEW YORK }
COUNTY OF TOMPKINS } SS:

On this 3rd day of December, 2002, I, DANA E. EISCHEN, upon my oath as National Arbitrator, do hereby affirm and certify, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing instrument and I acknowledge that it is my Opinion and Award in Case No. E95R-4E-D 01027978.