C-22090

SOUTHERN REGULAR DISCIPLINE ARBITRAION PANEL

In the matter of
an arbitration between:

United States Postal Service Employer	)	
	)	Grievant: Steven VanDesande
and	)	
	)	Case No. H94N-4H-D 97053759
	)	Hialeah, Florida
National Association of Letter Carriers, AFL-CIO Union	)	

Before: Leonard C. Bajork, Arbitrator

Appearances:

For the Employer: William C. Thomas III, Advocate

For the Union: Laurie Miale, Advocate

Place of hearing: Hialeah, Florida

Dates of hearing: July 11, 2000, March 22, 23 and April 12, 13, 2001

Award: The Union's grievance is sustained.

Date of award: May 10, 2001

Statement of the Case:

The Union's grievance HIAL96256 arose on September 19, 1996 at the Employer's Promenade Station, Hialeah, Florida postal installation where Mr. Steven VanDesande, the

Grievant, is a regular full-time Letter Carrier with 10 years service.

All dates are 1996 unless otherwise specified. The Grievant is a Veterans' Preference eligible employee.

In early December, 1995, the Grievant orally communicated to Ms. Fredrika Johnson, 204b supervisor, his intention to take leave without pay (LWOP) for the performance of military duties over the coming weekend. On or about the same time, Mr. Martin Moskowitz, Acting Station Manager, Miami Gardens, approached the Grievant, asking him to properly complete and sign a Form 3971 to cover the period of his absence. The Grievant refused, saying, "I've met all my requirements" for taking the leave. In turn, A/Manager Moskowitz completed and signed a Form 3971 for the dates of December 1, 2 and, a second form for December 6. The referenced statement appeared on the face of each form. Each was marked "Disapproved". Following the Grievant's return to work, A/Manager Moskowitz conducted a pre-disciplinary meeting with the Grievant over his absence without leave (AWOL). Apparently, the charge was not reduced to writing, but the potentially chargeable AWOL matter was resolved between the two. LWOP for the three days was ultimately approved.

On December 10, 1995, A/Manager Moskowitz called the Postal Inspection service for assistance in determining whether the Grievant was a military reservist. As a result of the call, Inspector Joe Gonzales requested the assistance of Inspector Guy C. Nelson to conduct an investigation to determine the answer to that question. Inspector Nelson reported the details of his investigation to Miami Postmaster Jesus Galvez on June 21. Following a June 26 pre-disciplinary interview with the Grievant, the Employer issued a September 3 Notice of Removal to the Grievant, effective October 11. The Grievant was charged with Improper Conduct and Falsification of Employment Application.

Following commencement of hearing on July 11, 2001, a dispute arose over the Employer's interest to have the proceeding officially transcribed. The Union opposed. The Arbitrator upheld the Union's objection on contractual grounds. As a result of the ruling, The Employer decided to refer the matter for Step 4 review. Upon review, the parties found no interpretive issue presented and remanded

the case to the parties. Following remand, the case was rescheduled for hearing on March 22, 2001.

Positions of the Parties:

The Employer:

The Grievant was removed for just cause.

Regarding the charge of improper conduct, the Grievant improperly requested leave for the performance of military duty insofar as, a) no military duty was performed on the dates requested for leave and, b) sick leave was requested for days on which the Grievant performed military duty resulting in a double payment to the Grievant for those leave days. Regarding a), the Employer maintains that it is of no consequence that Postal Service pay was not involved. Of consequence is that the Employer either had to provide auxiliary assistance or overtime to other carriers in order to cover the work demand during his absence, both added costs to operations.

Regarding the charge of falsification of employment application, the Grievant knowingly concealed an arrest and a probated conviction incident on his 1986 employment application with the Postal Service. In the 1981 incident, the Grievant pled guilty to reduced charges on two counts of third degree forgery. He received a reduced penalty of a $500 for each count and a 2-year probated sentence. The application clearly explained that a probation is nonetheless considered a conviction and must be reported.

Combined or separately, the charges represent serious violations of established postal rules and regulations warranting the removal penalty. The Employer therefore respectfully urges the Arbitrator to favorably find and deny the Union's grievance in its entirety.

The Union:

As a threshold issue, the Union contends that the Grievant was unlawfully removed in violation of the protections afforded by the Uniformed Services Employment and Reemployment Act of 1994 (USERA). The Employer improperly required advance written notice of leave from the Grievant when the Act but requires verbal notice. Further, the

Employer retaliated against the Grievant because of his performance of scheduled military duty.

Procedurally, the Employer committed harmful error by, a) failing or refusing to conduct a meaningful pre-disciplinary meeting with the Grievant before imposing the removal penalty, b) failing or refusing to conduct a thorough and objective investigation of the circumstances surrounding the charges, c) improperly relying on past elements of discipline and, d) superficially conducting pre-arbitration grievance meetings which foreclosed any meaningful discussion and development of the issues.

Alternatively and on the case's merits, the Grievant was not removed for just cause. Not only are the charges and their support inaccurate but the Employer otherwise failed to present a prima facie case of violation. The Union denies that the Grievant committed the referenced charges. If the Arbitrator finds violation, the Employer nonetheless violated Article 16.1 and 2 by failing to administer discipline correctively. Finally, the Grievant was disparately treated.

Therefore, the Union respectfully asks the Arbitrator to sustain its grievance and to direct a make whole remedy to the Grievant. The Arbitrator is asked to retain jurisdiction for a "reasonable time period for implementation of the award and set a substantial penalty if management delays in full compliance".

The Employer objected to the Union's USERA issue as properly before arbitration in light of the several binding case decisions on belated position. I have reviewed the document evidence and find the Union to have been correct in arguing that it was first raised by the Employer in the Notice of Removal in the limited context of highlighting the Employer's need for proper "advance notice". While this is true, I however find that the Union did not take a position on USERA during the pre-arbitration grievance steps, that is, specifically what the Act proscribes. It would be wholly unfair for the Union to raise at the hearing level what the parties in the pre-arbitration grievance steps failed to discuss. Thus, I find that the Union's position on its USERA threshold issue comes late and therefore may not be considered.

The parties agreed that the issues properly before arbitration for final and binding determination are:

Was the Grievant removed for just cause?

If not, what is the proper remedy?

Each party was given full opportunity to examine and to cross-examine witnesses of their choosing, to introduce relevant document evidence and to make closing oral argument. The parties instead chose to submit post-hearing briefs in lieu of oral argument. The briefs with supporting case authority were timely submitted postmark due April 27, 2001, reviewed and fully considered.

Discussion and Findings:

Questions of Harmful Error

Of the process issues raised by the Union, there is document evidence on but three of the four presented. The fourth came by way of the Employer's direct examination of its witness, Postmaster Galvez who testified that he reviewed the inclusion of the past elements of discipline before concurring in the removal decision. In his effort to be complete with his responses to the question about past discipline on the Request for Discipline form, Station Manager Carlos Arguelles listed time barred incidents of past discipline. But, as the Union correctly argues, they should not have been referenced and, therefore, properly excluded from review and consideration by higher authority.

Postmaster Galvez testified however that the two charges were serious enough so as to constitute exception to Article 16.1's prescription for corrective discipline. The Notice of Removal fails to contain reference to past elements. Precisely, because it did not, the Union had no reason to take a position on it earlier. Had the Postmaster not so testified, the matter would have been a non-issue. However, Postmaster Galvez's stated consideration, later recanted, raised the specter of harmful error warranting arbitral consideration. The Union cites a 1983 case decided by Arbitrator Patrick Hardin which stands for the proposition that consideration of a time barred warning letter was improper since it was a breach of the Employer's promise not to do so a matter

constituting harmful error. He reasoned that it was irrelevant to speculate what the discipline would have amounted to without the influence of a warning letter.

The Union further contends that both the June 26 pre-disciplinary meeting and the consequent investigation prejudiced the Grievant's right to due process. It argues that Manager Arguelles not only was himself ill-equipped to conduct the meeting but also failed to share Inspector Nelson's Investigative Memorandum (I/M) which was in the Employer's possession. He testified that he "just received" the I/M but nonetheless had "studied it." He said that he reviewed the ETC documents which were "in support of the (later) charges." In retrospect, he said that he only referred in discussion to an April 10, 1995 leave incident supported by the Grievant's request for LWOP, E-1, X15. On this limited basis, he said that the Grievant made no comments nor did he ask any questions. He said that the Grievant's representative, Mr. Santos Luyanda, Treasurer Branch 1071, advised the Grievant not to comment. This is consistent with Mr. Luyanda's later testimony.

The Union cites two 1979 cases cited by Arbitrator William E. Rentfro in support of its position. Rentfro makes the point that it is the duty of supervision to inquire of the Grievant his explanation for the conduct under discussion. Not to gain it during the pre-disciplinary interview is to risk the parties positions which he characterized as "frozen" thereafter. In the present case, by Mr. Luyanda's own admission, he told the Grievant not to say a word. In consideration of this fact, I see no application of Rentfro. In his other testimony, Mr. Luyanda stated the rhetorical question, "Why should I give (the Union's) case away? But as I have stated several times in the past, arbitration is not intended to be an "ambush" procedure - it is a hearing, not a trial, and therefore unkind to subtle strategies that have the effect of limiting the record. Of course, many times there are strategies. But when undertaken, there must be an informed assessment of the associated risks. Here, the Union comes with unclean hands with its claim of Employer prejudice to the Grievant's right to fair investigation when itself was the cause for barring the Grievant's explanation of his conduct and the April 10, 1995 leave incident.

This finding is also applicable to the Union's process claim that the entire pre-arbitration discussions of the issues was performed in a perfunctory manner intended to create the illusion that the Grievant's due process rights were satisfied. Mr. Luyanda was also the Union's Step 2 designee. While the evidence suggests that discussions were indeed limited, it became abundantly clear that, as with Rentfro, positions indeed were frozen early on.

Many times have I said that the job of an advocate is to advocate. That is what Step 2 representatives are. One of the ways an advocate advocates is by seeking information from the other party. I note that in its brief, the Union argues that it was due all the documents on which the Employer relied for its removal decision. I explained at hearing over the Union's objection that the Union's right to such information does not comprise the Employer's affirmative duty (with rare exception) to furnish it. While Mr. Luyanda said that he made a request for this information, his testimony was not credible. The request, if there was one, was overly broad and not reduced to writing. Further, in a 1981 case, Arbitrator Raymond Britton explained that Article 15's provisions dealing with the need for the parties' mutual cooperation for properly developing cases was not identical to the parties' enjoying a right by contract. The provisions are, he said, but "emphasis" by the parties to make possible voluntary resolution. In other words, it is ultimately up to the parties whether they wish to fully develop a case through dialogue and exchange of documents. And as seen, there may be a consequence for not doing so. I therefore find no merit to the Union's contention that the Employer was only "going through the motions" in advancing its case. Without doubt, that is a reasonable conclusion, given the case's evidence, but the Union must share that blame.

Also within the same context, the Union claims that the Employer failed to properly conduct an investigation of the case independent of Inspector Nelson's investigation. It argues that the Nelson I/M was flawed through its one-sidedness. I have difficulty understanding this. The I/M may indeed be flawed in that respect. But, regardless of the Union's opinion, it must be initially accorded deference. If it was pretextual, then facts must be brought to produce that conclusion. Findings depend on the presentation of facts. Cases on the merits rise and fall on the quality of investigations. Here, the Union's

argument appears conclusory. I know of no case authority, and the Union advances none, which would require the Employer to duplicate the effort of a postal inspector for conducting an independent investigation in this instance. Notably, in private sector cases where contracts do not have the extensive machinery for voluntary resolution, an employer generally conducts a private and closed investigation, the results of which are not shared with the union. In short, an employer acts at its own peril when an investigation is flawed. So it is with this Employer. Nonetheless, the Union had a right to interview Inspector Nelson, questioning the I/M in detail, but for some unexplained reason chose not to do so.

As the remaining element of unfair investigation, the Union claims that the sheer passage of time between the investigation and the submission of charges is evidence of prejudice. The Union's position is contained within its February 5, 1997 letter of additions and corrections. In its brief, the Union argues this to be a 6-month period. Yet, Inspector Nelson did not submit the 7-page I/M until its date, June 21. Considering that the Notice of Removal was submitted on September 3, less than three months lapsed. While less than argued, it seems reasonable to conclude that almost a three month hiatus, under some circumstances, may still be evidence of unfairness. However, as with its position on independent investigation, the Union made no specific showing supporting its conclusion that prejudice resulted. However, at hearing I noted that witnesses, generally, had difficulty recalling events which occurred five years ago.

The Case's Merits - Improper Conduct

The Grievant was removed for dishonesty. The Notice of Removal is replete with incidents - 35 relating to improper conduct. The charges and their frequency must be overlaid on the unique mission and culture of the U. S. Postal Service as protector of the mails. To this end, through the years. it has earned the public's trust. Unlike other public agencies or private entities, a carrier's dishonest act, no mater how slight, has often been found to warrant removal. And, generally, arbitrators have sustained those decisions.

The Employer's analysis relied on the witness testimony of Sergeant Beverly Ann Todaro, assistant for Law Enforcement

Agencies and Ms. Amy Pelse, supervisor, Customer Support. Sgt. Todaro testified to the absence of military duty records on specific days; Ms. Pelse testified to the ETC records that indicated Employer payments to the Grievant consistent with certain pay codes. Of the 35 instances of charged improper conduct, 6 involve the Grievant requesting LWOP but performing no military duty, 8 involve requesting sick leave although the Grievant performed military duty and 18 instances involving requests for military leave but, as in the above, performing no military duty. The remaining 4 instances were revealed at hearing to be no violation. Therefore, fully 26 of 32 involved instances where there was some form of pay from the Employer, but no military duty was performed.

The Union extensively cross-examined each witness. Its examination revealed that there were several instances where the Grievant reported for military for which he was not paid. Subsequently, the Union argued in its brief that the Grievant's production of his military records attesting to the same was proof of the Employer's efforts "to get" him. Other evidence weakening the Employer's case was, a) Mr. William Burroughs, President South Florida Branch, who testified that the ELM's Section 5.17.92, Monitoring Military Leave, prescribes request for LWOP when military leave exceeds 15 days/year; the Minneapolis Postal Data Center facilitates monitoring same and, b) ETC records do not disclose what type of leave was requested. Further, Ms. Pelse admitted in cross-examination that the ETC records may not properly reflect subsequent adjustments. Finally, timekeepers do not use The ETC records to input military leave without a particular supervisor's assistance, presumably meaning the door for mischief may be opened.

The Employer argued but four instances which it contends are unrebutted by he Union's evidence. Each commonly involve the Grievant having requested sick leave, but performing military duty and receiving military pay. Contested are these:

January 23, 1991 - The Grievant testified and the Union argues that the Grievant performed military duty was performed after hours (presumably, postal hours), there was no violation. Also, the Grievant's inability to perform postal duties did not necessarily mean that he could not perform a duty assignment.

March 16, 1992 - The Union introduced evidence that the Grievant instead requested and received annual leave. A review of the Employer's exhibit reveals that the military exercise was five days in duration (including compensable travel time) - 16 hours were properly credited to sick leave pay, not 24. The rest was either credited to annual or should have been charged to LWOP per the referenced ELM directive.

October 26-27, 1992 - the Grievant testified that these were make-up military commitments caused earlier by Hurricane Andrew's destruction. The Union introduced the Grievant's pay stubs showing a total of 16 hours annual leave requested and received.

February 10, 1994 - the Union introduced evidence that reflected the Grievant's request changed from sick leave to LWOP.

Of the aforementioned instances, the first depends on the Grievant's testimony. The Employer counter-argues that the Grievant's credibility was shown to suffer through the testimony of its witness, Ms. Joycelyn Green, formerly the Grievant's manager. Therefore, the Grievant's testimony should not be credited. Further, the Employer reminds that, because of the seriousness of the offense, a single shown violation was sufficient to warrant the removal penalty.

The Case's Merits - the Falsified Employment Application

The Employer argues that 1981 police records are dispositive of the Grievant's crime of check forgery. The Union rebuts by arguing that the Grievant credibly testified that he relied on the Kentucky judge who told him that, because of the minor nature of the Grievant's involvement, the matter would not affect his otherwise clean record. The Union further introduced documents showing that the Grievant engaged an attorney to clear his record. This he did. In evidence is a March 6, 2001 letter from the Kentucky State Police verifying the Grievant's clean record. The Employer argues however that the document is not only self-serving but irrelevant insofar as it does not cancel the event as having occurred in 1981.

The Union cites a 1998 case decided by Arbitrator Lawrence Roberts who sustained a grievant's removal for falsifying his employment application. He reasoned that in order for an employee to provide false information, he "must first possess a reasonable understanding of the truth". The Union argues that was the case here - he relied on the judge's assurance that, as a result of his pleading, the matter would not remain on his record. Therefore, unlike the classic case on falsification, the Grievant's act was not a knowing attempt to conceal the 1981 incident. The Employer responds that the Grievant's testimony to such effect is hearsay and, thus, unreliable evidence.

The Union's affirmative defense of the Grievant is based on its belief that the Employer retaliated against him for his union activities as a steward. It argues that the Grievant for seven years had been a "successful advocate", that is, aggressive, steward, responsible for filing numerous grievances on behalf of unit employees. Mr. Burroughs testified that supervisors "frequently expressed their feelings over Steve", generally because of scheduling problems due to his many requests for military leave. Specifically, he recalled a 4-month investigation by the DOL regarding alleged remuneration paid by employees to the Grievant for the performance of his representation duties. The investigation occurred shortly before the Grievant was removed for just cause a previous time, September, 1996, and later dropped. He also noted what he believed to be a "tight cluster" of previous discipline administered to the Grievant - seven actions between 1993 and 1995. He also stated that, as South Florida President who oversees an untold number of grievances, it was "very unusual" for the Employer to pursue a falsification of employment application which was 10 years old.

Ironically, the testimony of Ms. Green is significant to the question of union animus. She recalled an exchange between the Grievant and herself when she was Manager of Hialeah Lakes in 1995. Her intention was to provide testimony regarding the Grievant being "uncooperative" as a steward and making a racial slur toward her. She said that before the Grievant became steward, "we (the station employees) were all together. But when he became steward, things changed." The Employer argues, the Grievant approached her and said that she "could do things his way and be successful, or do things her way and fail." She also said that at a time material, the Grievant walked by

her and uttered the word, "nigger". The Grievant denied making the statements. The alleged slur, if made, preceded the parties' contract on Violence and Behavior in the Workplace. Apparently, the Grievant was not charged for having made the slur. The testimony was offered to impeach the Grievant's hearing testimony.

Obviously, the two had several heated exchanges during their time together at Hialeah Lakes when each were advocates. However, the Union cites a 1998 decision by Arbitrator Kathryn Durham which, among other matters, speaks of permissible rhetoric accorded to union stewards in the performance of their representative duties. Applied to the Grievant's remarks as recalled by Ms. Green, I find the first of which, if true, to have been under the ambit of permissible conduct. Troubling however, was Ms. Green's implied reference to the Grievant being the cause of "dividing the station workforce" [Arbitrator's characterization] as a steward. Standing alone, her statement may not have amounted to much. However, when considered in connection with Mr. Burrough's referenced testimony, an image of the Grievant emerges as being "a pain in the neck" [Arbitrator's characterization]. Were this the sum and substance of how the Employer regarded the Grievant as steward, nothing more would need to be said. Stewards are often characterized that way - that is the nature of their job provided they stay within the boundary of permissible conduct. What makes this case different however, was that the Grievant was removed, as argued by the Union, for his union activities.

Of all the evidence on the record, most troubling in consideration of the Union's argument for retaliation, was A/Manager Moskowitz's early involvement in the case. He testified that he felt that the Grievant was not in the military. Again, the cause for his suspicion was the Grievant's refusal to complete and sign a Form 3971 leave request for early December duty. A/Manager Moskowitz was new to the office. Yet, his being new to the office does not explain why the Employer did not know that the Grievant was a reservist. At the time, the Grievant had been a reservist for nine years and no one questioned his military status. Most important, in evidence is a November 13, 1995 memorandum from the Grievant to Postmaster Galvez which constituted the transmittal of his 1995-96 drill schedule. The Employer rebutted, asking the Grievant in cross-examination how he transmitted the drill information. Why

was the November 13, 1995 memorandum not mailed return receipt request? The Grievant answered that the Employer frequently refused signature mail in the past. However, in evidence is a copy of Form 3800, Receipt for Certified Mail stamp-dated November 13, 1995. The fact that the memorandum and its content was sent but certified mail does not effectively rebut the fact that it was sent. Postmaster Galvez may have returned as witness to explain why it was that he had not received the information but did not. Through the Union's introduction of its X-5, this construction of events shows the pretextual basis for A/Manager Moskowitz's request for the assistance of the Inspection Service. The fact that he was new to the office is made irrelevant by Postmaster Galvez having been in possession of the Grievant's 95-96 drill schedule. In arbitration, it is well established that document proof of service is all that is required in support of testimony that information was mailed. The Employer therefore knew that the Grievant was a reservist almost one month before A/Manager Moskowitz contacted the Inspection Service with a request to investigate the Grievant's reservist staus.

I would advise against any attempt to blame Inspector Nelson for any mischief. There is no evidence of his doing anything beyond performing his job which was to investigate a matter called to his attention. Bu, it seems to me that the reason for the investigation was simple. Check the Grievant's military status. Unexplained is why Inspector Nelson did not pull up short and report his finding that the Grievant was indeed a reservist. However, the investigation appeared to be a locomotive going downhill, gaining speed. This however, I find to be the Employer's fault. It is insufficient for Inspector Nelson to have said, "This led me to further inquire... " [Arbitrator's characterization].

Having found pretext, the next question, posed rhetorically by the Union, is how do you "unring the bell" once the investigation, otherwise conducted properly, reveals the Grievant's misconduct. In accordance with the foregoing discussion on the evidence of the case's merits, I find that the Employer failed its burden of proving improper conduct. The evidence is however sufficient to support the conclusion that the Grievant indeed falsified his employment application at the time he completed and signed it. Unlike Durham, the Grievant knowingly concealed his having been found guilty by a Kentucky judge of a criminal

misdemeanor. Ironically, it was the Grievant's attempt to clear his record in March 2001 that best established his state of mind at the time he completed his application. The Grievant's claim that the judge told him not to be concerned about the probated sentence is damaged by his attempt to later clear his record to say nothing about the hearsay nature of his testimony. In this instance, his record was as established by the police authorities in 1981. However, I find to be de minimis as an act of dishonesty. It was 10 years old. Arbitrators in the past have considered a grievant's good record during the intervening years as a mitigating factor to a removal decision. Here, the Grievant's record was, ironically, found to have been the aggravating factor for removal.

Moreover, the Employer's argument that either charge separately would have been sufficient to sustain the removal penalty is respectfully incorrect. The quantum of proof concept and, therefore, the Employer's burden in discipline cases before arbitration requires evidence, measured against a preponderance standard, of each and every charge brought. The axiom is, "charge what you may but prove what you charge" - therefore, the need to cure or amend charges before the commencement of hearing.

In consideration of all the case's evidence, I therefore find that the Employer failed to establish a prima facie case for the Grievant's removal insofar as it was pretextual for it to have sought, early on, assistance from the Postal Inspection Service. There was no rational basis for conducting the investigation. Its results are therefore a nullity. While union animus is not easily proven, in this instance I find that the relevant testimonies from several witnesses, the timing of relevant and material events, an absence of the Employer's effective rebuttal of same and, most important, the massive scope of the investigation when the query about the Grievant's reservist status may have been easily answered through less intrusive means establishes that the decision for removing the Grievant was spawned directly by his employee representative activities.

Having sustained the Union's grievance, the remedy is as follows. The Employer will:

1. Immediately offer reinstatement to the Grievant to his former position.

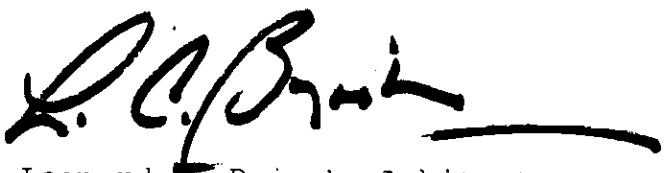
2. Pay the Grievant for all lost earnings and benefits caused by his removal and otherwise make him whole in every respect including the appropriate rate of interest applied to net lost earnings.

3. Purge from the Grievant's file any and all record of this case.

4. In addition, the Employer will discuss with the Grievant, its need for advance notification from him prior to a request for military leave in the future and what that need will entail consistent with USERA. The Union's designated representative will attend insofar as the subject of notification was a material part of this, a discipline case.

I note that the Union in its brief requests the Arbitrator to retain jurisdiction. Typically, when such a request is made upon the conclusion of hearing, I allow the Employer to respond. If there is an objection, my practice has been to rule on the objection before hearing is adjourned. Consistent with this, I will allow the Employer 10 days from receipt of Award during which time to object to the Union's request. It will serve a copy of any objection to the Union. If no objection is made, I will retain jurisdiction of the case until full compliance with Remedy is achieved.

Respectfully,



Leonard C. Bajork, Arbitrator