IV. THE POSTAL SERVICE

Moderator: Linda S. Byars, NAA Member, Atlanta, Georgia
Panelists: Randy Anderson, Director of Labor Relations, National Association of Rural Letter Carriers, Alexandria, Virginia
Greg Bell, Director of Industrial Relations, American Postal Workers Union, Washington, DC
Samuel D'Ambrosio, Vice President, Eastern Region, National Postal Mail Handlers Union, Pittsburgh, Pennsylvania
Gary Mullins, National Association of Letter Carriers, Washington, DC
Kevin B. Rachel, Manager, Collective Bargaining and Arbitration, U.S. Postal Service, Washington, DC

Byars: The most pleasurable part of my job is introducing some people whose organizations I have worked for all of my years as an arbitrator. It was through their trusting me with their decisions that I had the chance to start a career, so it is indeed my privilege to introduce them. As moderator I have the authority to decide the order of introduction so I am going to present them in order of seniority.

Samuel D'Ambrosio represents the National Postal Mail Handlers Union. Sam has been with the Mail Handlers since 1967 and has served in various positions including administrative vice president, local president, and currently sits on the National Executive Board as Vice President for the Eastern Region. He made history by running unopposed for that position at the 2000 and 2004 National Conventions. Most important, Sam has held the position of shop steward trainer since 1994.

Gary Mullins represents the National Association of Letter Carriers. Gary began his career with NALC in Wichita Falls, Texas, as a letter carrier in 1971. He served as a shop steward for 18 years, became a branch president, president for the Texas State Association of Letter Carriers, and also served as a National Business Agent. In 1998, he was elected Director of City Delivery where he served until his election in 2002 to the position of Vice President for the national union, where he is responsible for the contract administration unit and national negotiations.

Greg Bell represents the American Postal Workers Union. Greg has been with the APWU since 1973 and has been a national ad-

vocate since 1978. He has held various elected local positions including president of the Philadelphia local and he is currently Director of Industrial Relations. In that position Greg is responsible for labor management issues, safety and health issues, national contract negotiations, and national grievance arbitration.

Next in seniority order is Randy Anderson, representing the National Rural Letter Carriers Association. Randy began his career as an emergency hire in 1974 and became a full-time rural carrier in 1976 in West Virginia. In 1997, he was elected to the national position of Executive Committeeman and, in 2001, he was elected Director of Labor Relations, where he is responsible for the oversight of the steward system and supervises the Step 4 grievance arbitration procedure. I can safely say that Randy has more children than the other panelists with 7, as well as 10 grandchildren.

Last, but not least, is Kevin Rachel, representing the U.S. Postal Service. Kevin has been with the Postal Service since 1979. He has worked in various staff and supervisory positions in the law department. He represents the Postal Service in national contract negotiations, national grievance arbitration, interest arbitration, and judicial proceedings. Currently he is the manager of collective bargaining and arbitration with responsibility for the oversight of national collective bargaining negotiations and arbitration administration.

D'Ambrosio: As Moderator Byars indicated, I am the National Shops Steward Trainer and also the National Trainer for the 300 lodges in arbitration advocacy. I want to comment on the Mittenthal/Vaughn paper. Just cause is found in our national agreement and is part of the parties' agreement that discipline is to be corrective and not punitive as part of progressive discipline.

Our contract interpretation manual includes just cause and includes the seven tests of Arbitrator Carroll Daugherty. This means there is no need to argue about the supervisory manual (EL 921) and whether it is the law or merely guidelines because just cause is in the national agreement.

There is a lot of argument to tracks of discipline. Tracks of discipline are when there are different situations and an employee receives a letter of warning for smoking in an unauthorized area and then the employee receives a letter of warning for attendance. Tracks of discipline are not present in the three rivers of my hometown, Pittsburgh. I lost twice in arbitration on this issue where the arbitrators concluded that progression means a letter of warning is followed by suspension without regard for the violation.

As for last-chance agreements, I have handled about 200 of those agreements in arbitration throughout my career. Within my union we debate whether a last-chance agreement is good or bad as it may be perceived as placing the employee in a probation mode. Usually that employee has a bad record and going before an arbitrator is a losing proposition.

In Pittsburgh, however, the perception is that if an employee signs a last-chance then his or her rights are signed away and that employee should not be before an arbitrator unless there is a stipulation in the last-chance agreement. That is my instruction and training to my advocates. About four years ago, I had to teach an arbitrator that a last-chance was properly in front of him because a determination must be made whether the employee violated it.

All or nothing on reinstatement—it's a nice concept—the all or nothing concept is you provide back pay or the employee is discharged. Arbitrators split the baby. They will reinstate the employee without back pay. The union is glad the employee got his job back although a little disappointed there is no back pay. Sometimes an arbitrator will reinstate with some back pay, maybe 30 or 60 days.

The other topic I want to address is the allegation that the unions are delaying the removals. Frankly, I was miffed when I read that in the paper. In actuality, under our contract the removals are heard first, placed at the top of the docket. There are arbitrators in the room that I'm talking about—at least four that heard cases and needed 18 months to issue an award. Luckily the union prevailed and the employee received 18 months' back pay. A similar situation occurred recently in Pittsburgh where the arbitrator took nine months to render a decision. The delay is not from the union or management, but the arbitrators.

Thank you for the opportunity of addressing arbitrators.

Mullins: I talk a little different than the guy who was just up here in front of me and we have Greg present to translate back and forth so we all understand the terminology. As you can well guess, I may work inside this Beltway but I'm not from here nor do I plan to retire in this area even though I love Washington, DC, as a place to visit.

Let's talk about "just cause." I think there was one thing that got under—to use another Texas term—my saddle in that paper. I know it was a definition the authors were looking at and not the one that I thought about but it was the terminology of "windfall." I don't know if you've ever been an employee without a paycheck

for six months but bills continue to roll in until that decision is issued. Even if back pay is awarded, the employee may have lost his home and car and other items. All of that occurs even when the employee is working at the 7-11 to keep some money coming in. Maybe it's just my area of the country calling it a windfall by getting paid for doing nothing.

When I took over as business agent in Texas and New Mexico, there were 10,000 or 15,000 cases pending. We were processing so many cases so fast, just shoving them into the system, with no way to ever get a decision. Some grievants had retired from the Postal Service and others passed away without ever getting to a hearing.

In 1990 the union and Postal Service started to work on the joint contract administration manual or JCAM. We agreed on about 95 percent of the issues but it was that 5 percent we were fighting all the time. Nationwide, the letter carriers union is dealing with 1,300 cases of which 300 are disciplinary cases. What made it work?

In the JCAM, Article 16, disciplinary procedure and "just cause," we started teaching it to the people on the workroom floor, making both sides understand that you need to look at those individuals. The Postal Service has a trusted value in every employee that works for it. You don't walk in to a post office and start casing mail or understand the importance of getting it delivered right. Those thousands of dollars the company invested need to be protected.

We also know that human life's kind of strange. You have good days, you have bad days, bad weeks, bad months. Someone's got 30, 35 years of service and something goes wrong in his or her life, you have to look at all of that. We convinced the Service to do joint training at the formal A-level and our B teams. Those teams have written sophisticated decisions. Arbitrators tell me that joint packet makes their work a lot easier.

Two-thirds of our disciplinary cases are scheduled for arbitration within 30 to 45 days after appeal. There are three problem sites. Headquarters on the National Association of Letter Carriers (NALC) side and Postal Service management have been working to intervene and get those numbers down. Subtract the three problem sites and the 1,300 cases drops to 500 nationwide. We need to look at the effort and try to determine what to do in the tradition of "just cause" traditions. Arbitrators provided a lot of guidance over the years and we pulled it all together in the JCAM to make it work for us.

Other than the issue about windfall—and I imagine most labor people would fall in that same camp—I enjoyed listening to it. In the federal sector there is not much exposure to the rest of the world. I attended one of your functions in Houston, Texas, around 1991. I was sitting in a room ready to take on all managers and push them off to the end of the earth and get the Postal Service back on track if it took a thousand more grievances. A gentleman from Exxon Corporation, the CEO, was sitting beside me and he was listening to some of the discussions going on between the arbitrators and the panels. He looked at me and said, "How many cases do you do?" I replied that "I just came back from Memphis, Tennessee, where we discussed 672 Step 3 cases in 2 days." He said, "If we discussed that many in a year, they'd close the corporation down." Think about it.

We need to do a better job and I tell the Postal Service advocates that I deal with that I personally feel failure when I can't convince them to find a solution for a particular case in front of us. The last thing I want to do is to go to a neutral party and ask what the answer is even though I know there'll be times that it has to happen. When it does, we should get the answer quickly and let people get on with their lives.

It's been a pleasure to be with you.

Bell: The question that was posed for us to address is: What are the areas in which judgment and discretion are properly within the arbitrator's purview and what are the limits beyond which an arbitrator should not go?

Areas that are properly before an arbitrator, in terms of his or her discretion and the limitations on arbitrator discretion, subject to the terms and conditions of the collective bargaining agreement and whatever mutual understanding that the parties have. The previous speakers made reference to "just cause." With just cause there is an obligation and requirement of the arbitrators to be guided by the collective bargaining agreement and any understandable interpretation that the parties have.

One speaker mentioned that the Postal Service adopted the concept and principles of "just cause" as reflected in its supervisory handbook, EL-921. That handbook states that the criteria are a guide for the basic considerations that management must use before initiating discipline. An arbitrator must also consider Article 16 because it provides that in administration of discipline, a basic principle shall be that discipline is corrective rather than punitive

in nature. When an arbitrator is confronted with a situation where discipline is punitive rather than corrective, there is no discretion to do anything other than reverse the decision of the employer. The contract provides that no employee may be disciplined or discharged for "just cause," so if you reach a determination that there's no "just cause," that discipline must be denied.

Progressive discipline. That's a requirement under the contract. I'm not addressing the extreme situations for emergency placement under Article 16, such as theft or other serious infractions, but infractions that call for progressive discipline. Whether it's a letter of warning or suspension or removal, our contract says you must provide progressive discipline. If you have a case where there's no evidence of progressive discipline, you don't have discretion to do anything other than mitigate that particular action.

Article 16 provides an avenue for the situation where the employer believes that an individual is guilty of a crime by placing that person on immediate suspension. When progressive discipline is in front of you, however, you have no discretion in that matter.

What is "just cause?" What is the employer's definition of "just cause?" What is the employer's regulation regarding "just cause?" Is there a rule? If there was no rule and somebody was disciplined for a rule violation that they were unaware of, the employer is telling you that it had a criterion (rule) in place prior to initiating discipline. If discipline was initiated prior to applying a rule, we believe that you cease to have the discretion to sustain that removal. Is the rule reasonable? Is it consistently and equitably enforced? Was there a thorough investigation? Did the penalty fit the crime? Was discipline issued in a timely fashion?

Postal regulation says those are the criteria that must apply before a supervisor can initiate discipline. From our perspective an arbitrator has no discretion to do anything contrary or make a decision contrary to postal regulations. One can argue that the supervisory handbook or guidelines define just cause but our joint contract interpretation manual defines it. We have moved from a postal rule to a mutual understanding and mutual agreement by the parties. There is no discretion to alter the collective bargaining agreement in discharge cases if any of those rules are violated. We make it easy for you. Based on the facts and circumstances of the case, if the Service did not adhere to the proper criteria, then the case should be either sustained or, if an employee has some culpability, the discipline mitigated based on the criteria that the employer and the unions agreed to use. An arbitrator exceeds his

or her authority to disregard the clear language and obligation under the contract.

Let me comment on the windfall issue. Back pay is not a windfall. Under the APWU contract, we agreed that discharge cases would be heard within 120 days if the number of cases on the docket permitted it so there was not much delay. A determination for back pay should be based on what would have been an appropriate suspension at the time the discipline was issued and without regard to delay in case processing.

I did a little research because sometimes a paper gives the impression that most grievances deal with attendance. Out of roughly 29,000 grievances appealed to Step 3 in 2005, roughly 400 were discipline cases, meaning only 14 percent of the Step 3 grievances were disciplinary. Now that may be good for the purpose of this discussion, but it means that 86 percent were contract violations and that is not good. I have seen papers that make reference to 70 percent or 80 percent of the cases that were discipline. Remember, in 2005 it was 14 percent.

I'll give you one example on the discretion of arbitrators. The arbitrator sustained the grievance, ruled that there was no "just cause" but based on the nature of defense—conduct of a sexual nature—awarded the person back pay but no reinstatement. Notwithstanding the nature of the infraction, the contract states that an employee cannot be discharged if there is no "just cause." When the arbitrator found no just cause, then, legally, there was no basis for discipline.

In closing, the discretion of the arbitrator is subject to the collective bargaining agreement of the parties, the term "just cause" to the mutual understanding and mutual agreement of the parties, and if you digress from that, then you're exceeding your authority.

Anderson: I'm going to make my remarks rather brief. Let me hit a few items because you have read the Mittenthal/Vaughn paper and references to it so I don't know that there's any great need for me to go over it.

I like words and I like semantics but reasonableness and discretion have arrived at the point that they are the norm and not the exception. Let's take a truth serum now. When my union takes a removal to arbitration, there has been an irregularity. If the standard was whether management could prove that—and I'll pick on Brother Mullins from Texas—young Gary said those filthy words to the customer, the removal stands, that's the end of the story.

That's not the real world and people are not without imperfections. I make no apologies. I'm a union person. It's in my soul. We also believe, a lot of us in this trade, in the second chance and I think that's what reasonableness allows in the arbitral world.

Let's talk about the level playing field. I tell my brothers and sisters in the union all the time that if you think it's a level playing field let me sell you some bridges in the desert because it's not. The employer has the upper hand. In West Virginia, where my real home is, we talk about the lay of the land being somewhat sideways or real steep. As union advocates we're trying to climb a steep hill where the employer is on top. Couple that with just cause and the provisions in the handbooks and manuals. All of this means that an employee is fired and he must go find another job to make money to mitigate his losses. Now if that's not traveling uphill, I don't know what is.

I would be remiss without a few words about unwarranted windfall, unjust enrichment—which I hear all the time. In our craft I deal with the Postal Service on interpretive issues. As some of the panelists pointed out, an employee is off work for a long time and the arbitration goes forward. A split decision is issued: reinstatement with no back pay. The grievant feels very wanting because he may have lost his vehicles and house. In some cases a family dissolves because of the loss of income. The employee accepts some responsibility. If I were an arbitrator, I would take that into consideration and not be so tormented about reinstatement with substantial back pay. If you could not see fit to award full back pay, certainly some substantial back pay. By the way, under Employee and Labor Relations Manual (ELM) 436, earned income is taken from that full back pay award. Back pay is less than meets the eye when an employee is working two or three jobs and ends up with little monetary remedy at the end of the day.

Is the arbitrator exceeding his or her authority? I am not discussing the administrative deficiencies associated with that notion because it is more important that the arbitrator not impose a penalty upon the grievant that is greater than what the contract allows management to do. In my experience that has happened a few times.

I have one more issue here. I mentioned how my hair stood on end when I heard about the family as opposed to the criminal proceeding model. I do think the criminal model is appropriate. When I heard the suggestion that the arbitrator not only could

reduce the disciplinary action but also increase it, I nearly fell out of my seat. I just had a terrible trauma at that time. I hope that was merely a provocative thought. If the person who made that comment is in the room and was serious, we need to have a serious talk.

I appreciate being able to address you today. Thank you very much.

Rachel: As the junior member of this panel, I'm pleased to finally have an opportunity to speak with you. When it comes to the issue of "just cause"—I don't know if there are two more important words in the collective bargaining agreement. Important to both parties. Important because it provides the fundamental protection to employees against arbitrary discipline and important to management because, as it is the standard, it becomes a vehicle for management to be able to maintain standards of honesty, efficiency, and competence in the workplace. It's particularly important to talk about this issue of arbitral discretion in penalty determinations because we have traditionally decided "just cause" questions on a case-by-case basis in the Postal Service. As you know, the Postal Service is greatly decentralized , with local decisionmaking importance and I think that circumstance and that context make this issue of arbitral discretion one of genuine relevance.

Three quick—or maybe not so quick—points: the focus of the paper, that there is arbitral discretion in the penalty and discharge cases, begins with a historical context of once upon a time management's decision was given great deference using an abuse of discretion standard and how that's developed to a standard of excessiveness or reasonableness that doesn't give as much deference to management. As the lone management representative on the panel, I concluded that you left it to me to lament that trend.

I do want to say that—and this is in the paper—the fact that the standard is not abuse of discretion but rather whether the penalty is excessive or harsh or unreasonable is not the same thing as substituting the arbitrator's judgment for management. That standard, too, leaves considerable room for appropriate deference to management's selection of the penalty determination.

The paper emphasizes the importance of workplace values in making the penalty decision. I think the existence of those values provide—particularly in the Postal Service—pretty good parameters around arbitral decisionmaking on penalties. A discipline case, just like a contract dispute, has at its beginning the task at

hand of interpreting and enforcing the agreement between the parties. It's the values of the parties in the workplace that have to be applied, not the values of the arbitrator, and the values of the workplace are expressed in the contract rather than expressed in the customs and practices and habits in the industry and arbitral precedent.

The various contract administration manuals help define what is important to the parties. What procedures are important? What procedures aren't important? What offenses does this particular industry take particularly seriously? In the Postal Service, offenses related to the sanctity of the mail have always been in a special category of seriousness. In a time-sensitive industry like the Postal Service, absenteeism is always an issue that management has on a high rung on its scale of values and matters of importance. It's always a difficult task for the arbitrator to reflect the values of the workplace as have been developed between the parties but that is part of what arbitrators are trained and expected to do.

In this regard, the section of the paper dealing with the struggle over arbitral discretion correctly identifies developments such as progressive discipline and last-chance agreements or attendance control policies, as attempts to control arbitrator discretion. Progressive discipline, as the paper points out, creates certain guideposts or benchmarks or requirements in the general run of cases. If those are not followed, then the discipline is brought into serious question. If they are followed, then the discipline presumptively would be sustained.

Last-chance agreements are clearly an attempt—at least from management's point of view—to remove the arbitrator's discretion. The parties are stating that the employee can return to work but another incidence of misconduct will not be subjected to an arbitrator making a value judgment about whether or not this employee comes back to work again.

What should the reaction of the arbitral community be to those types of developments and mechanisms that do and are explicitly intended to place parameters on arbitral decisionmaking on the penalty? On the one hand, the arbitral community may resist those types of developments on the notion that the parties have reduced the discretion to decide the case in the way that seems best. Is it that the parties reduce arbitral discretion because of

some lack of confidence that, as a community, the arbitrators are not making the correct decision in this type of case?

On the other hand, I think the proper way to look at these developments is that the parties are taking more control of the process themselves. The parties are providing more guidance. The parties are establishing parameters for arbitration decisionmaking. Arbitrators in different types of cases tell me they prefer more guidance as to how to rule. Guidance can be found in last-chance agreements, contract provisions, grievance settlements, and progressive discipline provisions. They establish parameters for an arbitrator's decisionmaking, and it is not something to be resisted but embraced.

The third point I want to address is the "special problem" mentioned in the paper. That is the situation where an employee has been adjudged guilty of serious misconduct but, for whatever reason, "just cause" for the removal is not sustained. The purist versus pragmatist approach as it was described in the paper. I was surprised by this "special problem" because a fairly common practice, or at least a not infrequent practice, of returning employees is to return the employee to work without back pay. That is a realistic, common sense pragmatic approach that carries the day over the doctrinaire, ideological purist approach.

When discussing arbitrator discretion on the merits of an issue, one cannot revert to excessive rigidity when it comes to the remedy. I am compelled to offer a few comments to balance some of the statements of concern about use of the term "windfall." Fundamentally, this is a case-by-case analysis situation and no general rule can be applied in every situation where an employee seeks reinstatement with back pay. There may be situations where "windfall" is not an apt description of the situation.

Next to final remark: The paper suggests a last best final offer on remedy and sending it back to the parties in that way. With all respect to Dick Mittenthal, who is right in front of me, I was wary when I read that. I am concerned about use of last best final offer as an arbitral contrivance when that does not emanate from the parties' agreement or any understanding between the parties, particularly in a case where there are no clear criteria as to what the parties were going to face in terms of a standard in making that decision. It does have the value of shifting the burden of decisionmaking from the arbitrator to the parties, but that is not why arbitrators are hired. Arbitrators are hired because the par-

ties shift the burden of decisionmaking to them and generally we don't want it back. There are a number of cases where it is hard to determine the fairest and just and proper result.

This is my concluding comment: There is an inevitable tension between this notion to resolve cases on a case-by-case basis and that of consistency of result among similar cases. That's hard to do. The parties don't want to surrender the case-by-case notion because we want the arbitrators to look at individual cases for the individual facts and circumstances in that particular situation. That's an important value that's imbedded in our "just cause" provision. On the other hand, we want to provide as much guidance and benchmarks as possible, so we have provisions in the contract administration manuals that are designed to guide results to attain consistency of result. In the Postal Service there is sufficient custom and practice and precedent and guidance to establish those types of parameters to help provide an acceptable level of consistency while remaining in the context of basically a case-by-case approach.

Byars: We have time for questions or comments.

Joe Henderson: I'm from northern California and I served on the APWU and National Rural Letter Carrier panels. How do you equate the zero-tolerance policies to progressive discipline and just cause standards? This matter has bothered me for some time.

Rachel: I'm not sure which particular policy you are referring to but, as a general matter, I certainly recognize that if it is something that management unilaterally implemented, then it remains subject to the "just cause" standards. Management's intent and belief is that certain types of misconduct are punishable in a certain way consistent with the "just cause" standard. Sometimes a no-tolerance standard does not necessarily suggest that discharge is appropriate for the first offense but states that this kind of activity concerns management and will not be tolerated.

Anderson: Kevin was very modest when he said there may be a couple of matters covered by these unilateral policies because the Postal Service has zero tolerance for this or for that, but where we part company, none of us, including the unions, are in favor of the behavior or the alleged behavior. We may be talking about somebody physically laying on hands in a sexual way at work, not a pattern, but a one-time episode or there was a dispute and someone threw a Joe Lewis haymaker. None of us uphold the behavior. Where we part company is that managers in the field equate that

behavior with removal. It's automatic. I know that headquarters does not put it in directives and memoranda but in the real world that happens.

In our craft—and I would imagine probably in the NALC more than the others here—we have what we call roll-away/run-away situations with the vehicles. "Roll-away" means the carrier gets out of the vehicle and it was turned off but it somehow rolls away while he or she is delivering mail inside a business or while taking a parcel to the door. The "run-away" occurs where the carrier gets out of an automatic transmission vehicle with the engine running and without having thought about putting the gear shift in park. It runs away. In the real world, nearly every time that person faces a removal action and we take great issue with that.

Unidentified Voice: I think the paper appropriately addressed that issue. A zero-tolerance policy is subject to the "just cause" provision of the collective bargaining agreement. The paper describes it as stating, another way, that the employer will not tolerate this type of infraction or conduct and appropriate action will be taken. The Postal Service has a zero-tolerance policy regarding stealing, but that is still subject to the "just cause" provision of the collective bargaining agreement. Under each and every circumstance the action is still subject to the "just cause" provision. A zero-tolerance program is not something that is incorporated into the collective bargaining agreement.

Molly Bowers: I'm from Baltimore, Maryland, and Walton, Kentucky, and don't ask me where that is. This is addressed to Gary and Kevin. I'm on an NALC panel. I heard Kevin's comments about consistency. There are two areas where I think a lot of us are driven crazy. One is route inspections, which are not discipline and discharge, and the other one is the consequences of the *Snow* decision. Two things seem to be happening in the cases that I have. First of all, tons of awards are being submitted by both parties. That's not a criticism, because they want to show what other arbitrators have done. Some arbitrators are going faster toward issuing awards to discipline management personnel and others have not done it at all and some have been in the middle. Is there any possibility that the parties at the national level are going to give us some guidance so we don't keep reinventing the wheel, or do you think we should keep reinventing the wheel?

Rachel: I cannot address route inspections and on the other one I am not in a position to say what will happen. The real answer

to your last question, I am not aware of anything immediately on the horizon that's going to happen. The impact of the *Snow* decision has been of great concern to management. It's also been a source of concern, certainly, to the union. The fact that you get boatloads of decisions each time is a reflection that both parties perceive a strong interest in what goes on in that area. Management continues to feel a strong interest about what goes on in that area. I won't try to debate the merits of different points of view that might be expressed in those cases. There's a bit of a conundrum there from our perspective that I think we have not worked our way out of yet.

Mullins: NALC has been straightforward with the importance of a national decision issued by a national arbitrator on a national panel. It's not just the *Snow* case. We have other cases that relate to particular areas. When regional arbitrators write decisions that tell us that an arbitrator we hired made a wrong national decision, NALC is not happy. NALC expressed that displeasure to the Postal Service. The *Snow* case is a prime example of how we knock heads.

We talk about zero tolerance and our complaint was that we signed an agreement to lower the stress level on the workroom floor so that people could get along. We had good intentions. From the union view, a letter carrier does something wrong, zero tolerance is in play and out the door he goes while the manager that was involved gets nothing. As Kevin Rachel points out, that is a management right to make that decision. We may go a different route but you take care of your side of the contract. The Postal Service will sit down with all of us in the very near future to start looking at the next contract. NALC truly hopes that we'll reach closure on this.

Andrew Strongin: I'd like to speak in favor of discretion and here's why. One of the first things that I ever learned about arbitration at the heels of my father is that whatever else you do, do not surprise the parties. Take an issue like "just cause," where the parties differ as to what "just cause" is in a given case. I'm not sure how else I can bridge that gap without using discretion and I haven't heard a better alternative. In this situation arbitrators welcome any efforts the parties have to educate us as to what the contract means by way of contract language, binding past awards, their own understandings, conversations shared across the table,

and the conversations in the course of their grievance procedures. That is the very best way to limit an arbitrator's discretion in a way that will not offend an arbitrator but would please an arbitrator, so that the arbitrator can do his or her level best not to surprise the parties but to give them an award that will do what I always like to think of as something of the arbitrator's Hippocratic oath, which is to do no harm. As you bridge that gap between the parties' competing understandings of how a "just cause" standard would apply in a given case, you have some room between exercising discretion, trying to be reasonable, and using good, sound judgment, which I think is why we are selected by the parties. Of course, you think of your closing argument as a statement of your last, best offer. Unless you want an arbitrator to flip a coin when you have two parties hotly contesting an issue, I think it's reasonable to expect that an arbitrator is going to come down somewhere between the two sides. I don't regard that as an exercise in splitting the difference but as an exercise in trying to reconcile the parties' strongly held views that are in conflict.

Bell: First, I don't think the parties are this far apart. In fact, the parties have memorialized their mutual understanding of just cause and the criteria for it and assist arbitrators in making a decision based on those criteria. It's like a contract. One of the provisions of the contract says that an arbitrator is without authority to alter, modify, or change the terms and conditions of the collective bargaining agreement. We have provided for just cause in an interpretive manual so you don't have discretion to digress from that. You can make a decision based on what we tell you and what we employ you to do and what our mutual understanding of "just cause" and the criteria are. It's part of the contract. Arbitrators are limited to making their decisions consistent with the contract.

Byars: Anybody else want to comment on Andrew's comment?

Richard Mittenthal: I don't have much disagreement with anything he said there. As I understand it, the real point is that there is a lot within the development of the grievance and the contract administration manual and all of those things, which inform the arbitrator's judgment on what a penalty decision should necessarily be. One of the points that I made when I spoke was that is the analytical journey that an arbitrator should be making.