

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADA POST CORPORATION

(the "Corporation" or the "Employer")

AND:

CANADIAN UNION OF POSTAL WORKERS

(the "Union")

(Re: Glynn Manson Dismissal Grievance #740-07-00349)

AWARD

Arbitration Board: **Joan M. Gordon**

For the Corporation: Greg Heywood

For the Union: Stan Guenther

Dates and Place of Hearing: February 1 and June 2 & 24, 2010
New Westminster, B.C.

Date of Award: July 27, 2010

I. Introduction

On April 16, 2009, Glynn Manson, the Grievor, was dismissed from his employment as a Letter Carrier at the New Westminster Delivery Centre (the “NW Depot”). The ground for dismissal was set out in the letter of termination as follows:

... as an employee and a Union representative you knowingly participated [in] and *incited a concerted work disruption* when you and other employees failed to deliver [an IKEA admail flyer].

Mr. Manson, it has been determined that your actions as an employee and a Union representative *directly contributed to* an unlawful work disruption and resulted in the delay of the IKEA mailing by a majority of Letter Carriers in this depot. This is considered a major misconduct for which the appropriate penalty is the termination of your employment from Canada Post Corporation. Your direct actions constitute a serious breach of trust in the relationship between yourself and the Corporation.

(emphasis added)

The Grievor was a Shop Steward at the NW Depot on March 13, 2009, the date of the concerted work disruption referred to in the termination letter. Fifty-three of the 86 Letter Carriers at the NW Depot on March 13 also failed to deliver the IKEA flyer. The Corporation imposed five-day suspensions on those 53 Letter Carriers. Those disciplinary sanctions have been grieved, but are not at issue in this proceeding.

The parties approached and argued this dispute in a manner consistent with the analytical framework in *Wm. Scott & Co. Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. (BCLRB) is applicable to this dispute: 1) Has the employee given just and reasonable cause for some form of discipline by the Employer? 2) If so, was the Employer’s decision to dismiss the employee an excessive response in all of the circumstances of the case? 3) If yes, what alternative measures should be substituted as just and equitable? This approach to discipline grievances has been applied to disputes falling under the *Canada Labour Code*. See, for example, *Canada Tungsten Mining Corporation Limited v. United Steelworkers of America, Local 953 (Sorenson)*, [1984] C.L.A.D. No. 34 (Hope).

The Union concedes that the Grievor attracted discipline when he failed to deliver the IKEA flyers on March 13 as directed by management.

The Employer's position is that dismissal was not an excessive response to the Grievor's conduct on March 13 because he took an active leadership role in organizing the unlawful work stoppage and incited his co-workers to refuse to deliver the IKEA unaddressed admail (the IKEA flyer), which had been compressed for 100% delivery that day and had been the subject of a direct order for delivery in one day. The Employer contends that even though five-day suspensions were imposed on all of the other 53 Letter Carriers who failed to deliver the IKEA flyer on March 13, dismissal was justified in the Grievor's circumstances because his serious misconduct was not protected by Union Representative immunity from discipline, he has expressed no remorse for his conduct, would do the same in the future, and has irreparably breached the trust inherent in the employment relationship between himself and the Corporation.

The Union contends that the Grievor's role in the non-delivery of the IKEA flyer was the same as that of the other 53 Letter Carriers who refused to deliver it. Consequently, says the Union, the imposition of dismissal on the Grievor for the same misconduct as other employees constitutes discriminatory action by the Corporation.

The Union further contends that dismissal was an excessive response because management cast the Grievor in the role of spokesperson, and other employees at the NW Depot turned to him for advice on March 13. The Union maintains that throughout the incident on March 13, management engaged the Grievor in his role as Stop Steward, and although the Grievor admits that some of the remarks he made during management's floor meeting that day fell outside the protection of Shop Steward immunity from discipline, his remarks were not intended to, and did not, incite his co-workers to fail to deliver the IKEA flyer. His remarks instead expressed the members' views to management, and for the most part, constituted valid criticism of management's approach to the compressed delivery of the IKEA flyer that day. Moreover, says the Union, there are significant other mitigating circumstances: the Grievor was a very long service employee who had just returned to the shop floor from six years as a Union Representative and was close to retiring with a clean discipline record for the prior 12 months.

Three witnesses testified in the Employer's case: Mike Locke, Superintendent at the NW Depot; Doug Andrus, Northern Zone Manager for Metro Vancouver; and, Kuldip Nagi, Supervisor at the NW Depot. Three witnesses also testified in the Union's case:

the Grievor; Ken Mooney, Regional Union Grievance Officer; and, Leanne Alstad, Shop Steward and Letter Carrier at the NW Depot.

II. Background

The delivery of unaddressed admail, commonly referred to as “householders” or “flyers”, constitutes a significant portion of the Corporation’s source of revenue. IKEA is one of the Corporation’s largest unaddressed admail accounts. IKEA’s business is worth approximately eight million dollars per year in revenue to the Corporation. The IKEA account was lost for a period of time, and the Corporation had only recently regained the account when the incident in question in this dispute occurred.

For purposes of flyer delivery, Letter Carriers’ routes are divided into three days. Typically, flyers arrive at depots on Tuesday mornings. On their return to the depots from their routes on Tuesday afternoons, Letter Carriers prepare the flyers for delivery by dividing them into three days. Letter Carriers then delivery one-third of the flyers on each of Wednesday, Thursday and Friday, which are typically lighter mail volume days on most Letter Carriers’ routes. Thus, the delivery of flyers typically entails a four-day process -- i.e., preparation on day 1, and delivery to one-third of the points of call on Letter Carriers’ routes on each of the following three days.

If flyers arrive late, management may compress the usual four day process in order to meet the Corporation’s delivery commitment to its customer. The compression of flyers is contemplated under the parties’ collective agreement in Appendix “D” - Householder Mail. Two provisions of Appendix “D” were adverted to during the evidence at the arbitration hearing:

3.0 High Volume Situations

Local Corporate representatives will consult with the local Union representatives any time a high volume of householder mail occurs at a post office, which would cause a hardship or an overburdening situation. Local parties are free to consult and agree on the method to clear the high volume emergency without any precedent being established. Any agreement shall be consonant with the collective agreement, this appendix and prevailing arrangements.

7.1 Where Time Values are Withdrawn From Letter Carrier Walks/Routes

...

- (b) Notwithstanding paragraph 2.01(b), when, as a result of circumstances beyond the control of the local delivery operation, the reduction of delivery days is required in order to meet delivery commitments, an additional per piece payment of two point three cents (2.3¢) will be paid to the letter carrier for each piece of householder mail that requires a compressed letter carrier delivery.

Where flyers are compressed for one-day delivery on Fridays, it is particularly frustrating for Letter Carriers for at least three reasons. First, the compression means that Letter Carriers must visit all or the majority of the points of call on their routes, but the time values associated with their routes are not structured in a way that contemplates this scale of delivery on Fridays. Second, as many Letter Carriers attempt to complete their routes as early as possible on Fridays in an effort to get a head start their personal weekend activities, the requirement to visit all or virtually all points of call on Fridays increases the amount of time it takes to complete their delivery duties, thereby extending their work day. Third, the premium payment provided for under Article 7.1 of the collective agreement is only paid for two of the three compressed days.

The incident at the NW Depot on March 13 occurred against the backdrop of a similar one-day compression of IKEA flyers, which had been experienced less than one month earlier on a Friday. On the earlier occasions, Letter Carriers complied with the compression, observing the “work now, grieve later” principle, but lingering frustration and unhappiness arising from that incident was apparent to all concerned. The lingering frustration and unhappiness was exacerbated by the fact that as of March 13, Letter Carriers at the NW Depot had not yet been paid the premium they were entitled to receive for the earlier IKEA flyer compression. When this earlier incident occurred, the Grievor was off the work floor acting as a workers’ advocate for an employee in relation to a specific issue. In his evidence, the Grievor recalled the way employees nonetheless “made a B-line” to him in the office, seeking his advice about “what they could do contractually to stop it”.

As alluded to in the introductory portion of this Award, the Grievor is a long-time Union activist who, at 62 years of age, was nearing retirement when the incident in question occurred on March 13 at the NW Depot. Approximately one year prior to

March 13, the Grievor resigned as President of the Royal City Local of the Union. His plan was to transition into retirement by returning to the shop floor for approximately one year.

Prior to his Local Union Presidency, the Grievor held various elected Union positions, including Grievance Officer and Executive Chief Shop Steward. On his return to his Letter Carrier position, he was appointed Shop Steward at the NW Depot. At least three other employees at the NW Depot -- Leanne Alstad, Hugh Englouen and Fran McMichen -- were also Shop Stewards on March 13. From the Grievor's perspective, the role a Shop Steward fulfills is a very important function which, among other things, requires the Shop Steward to speak for the membership when issues arise on the shop floor, to represent the members' interests to management, and to defend the collective agreement on the shop floor.

In or about late May 2008, and while still in his role as President of the Royal City Local Union, the Grievor was present in a Maple Ridge depot when a one-hour work stoppage occurred while employees awaited the arrival of the Zone Manager to address an issue arising from an 038 route restructuring situation. The Grievor understands the employees involved in that incident received one-day suspensions for their participation in a work stoppage. He denies taking any leadership role in relation to that incident.

III. Events Immediately Preceding March 13, 2009

A shipment of IKEA flyers was initially scheduled for delivery throughout the Lower Mainland beginning on March 11, 2009. The flyers were being shipped from eastern Canada, and should have arrived at Lower Mainland depots on March 10. Letter Carriers would have prepared the flyers for delivery on March 10, and would then have delivered one third of them on each of March 11, 12 and 13.

During a management conference call on March 12, Mr. Andrus learned that the IKEA flyers would not be arriving in Vancouver on time due to rail transportation problems. He was also advised that the Employer's Regional Labour Relations Representative would contact the Union's Regional Representative to advise of the late IKEA flyer arrival and the need to deliver it in its entirety on Friday, March 13. That consultation apparently occurred, but neither the Regional Grievance Officer nor Local

Union Representatives were so advised. They only learned about the consultation at the Regional level after the events of March 13 at the NW Depot had transpired.

IV. The Events of March 13, 2009

In reaching my findings of fact relating to the events of March 13 at the NW Depot, I find all witnesses testified to the best of their recollections. Where the recollections of the Union's and the Employer's witnesses differed, I have applied the British Columbia Court of Appeal's test in *Faryna v. Chorny*, [1952] 2 D.L.R. at 356-7, and to the limited extent that it was necessary for fact finding purposes, I have preferred the evidence of the Union's witnesses, finding their memories of material events to be somewhat clearer than, and to have more completely withstood cross-examination than, that of the Employer's witnesses. I also found the former witnesses' version of events to be more consistent with the preponderance of the surrounding probabilities.

I find the material facts relating to this dispute to be the following.

At approximately 5:00 a.m. on March 13, Mr. Locke, who was already at the NW Depot, learned from the Surrey Depot #5 that the shipment of IKEA flyers had arrived at the Vancouver Postal Delivery Centre.

When the Grievor and Ms. McMichen arrived at the NW Depot at or about 5:50 a.m., Mr. Locke approached them, asking for a meeting with them in his office. It was Ms. Alstad's evidence that "management tended to go to [the Grievor] first if he was on the floor." Mr. Locke forewarned the Grievor and Ms. McMichen that the IKEA flyers would be arriving late to the NW Depot, and he was not certain if they would arrive on time for delivery that day. The Grievor and Ms. McMichen then collected their mail from various areas in the Depot and proceeded to their cases to sort their mail.

Sometime between 6:30 and 7:00 a.m., Mr. Locke convened a brief meeting in his office with the four Shop Stewards -- i.e., the Grievor, Ms. Alstad, Ms. McMichen and Mr. Englouen. Mr. Locke told them the IKEA flyers would indeed be arriving at the NW Depot, and would have to be compressed for delivery that day. The Grievor asked Mr. Locke when he would advise the staff, and stated that he (the Grievor) would like to take the employees upstairs to the lunchroom for a coffee break thereafter in order to discuss

the matter. In his evidence, Mr. Locke acknowledged that this was “the normal course of events” following floor meetings.

When that meeting ended, the Grievor expressed his upset and concern about the compression of the IKEA flyers to Ms. Alstad, but according to Ms. Alstad, he did not state that he would refuse to deliver them.

At or about 7:30 a.m., Mr. Locke convened a floor meeting of all staff. He apologized to the staff for the inconvenience caused by the delay in receiving the IKEA flyers, explained the importance to the Corporation of IKEA as a customer, and stated that the flyers had to be compressed for delivery that day. Mr. Locke acknowledged in his evidence that the one-day compression of the IKEA flyers was “kind of sprung on the Letter Carriers” who “were not happy for sure.” Some heckling and cat calling occurred during Mr. Locke’s floor meeting, and someone yelled out “we’ll do them Monday”.

When Mr. Locke’s floor meeting ended, the Grievor called out to the staff saying they needed to discuss the situation during a coffee break upstairs in the lunchroom. That meeting occurred, and during the arbitration hearing the Union claimed employee-steward relationship confidentiality under Article 10.05 regarding the communications which transpired during that and other employee-steward meetings on March 13. Article 10.05 provides as follows:

10.05 Employee-Steward Relationship Confidential

The Corporation agrees that communications between an employee and his or her Steward or other Union Representative acting in that capacity are privileged and confidential and cannot be produced in evidence during arbitration.

It was disclosed in the evidence that the Grievor and 10 to 20 other employees, including all three of the other Shop Stewards, spoke during the lunchroom meeting. In cross-examination Ms. Alstad denied the suggestion that the Grievor “did most of the speaking” during that meeting.

Ms. Alstad testified that she decided not to deliver the IKEA flyers after Mr. Locke’s floor meeting because she concluded that the Corporation’s conduct was a direct violation of the collective agreement, and she had still not been paid the premium

applicable to the earlier compression of IKEA flyers despite having complied at that time with the “work now, grieve later” principle. In cross-examination Ms. Alstad emphasized that she made up her own mind that morning about whether or not she would deliver the IKEA flyers. She stated that she was not looking for leadership from the Grievor, although “for some people, [the Grievor] was looked to as the leader.”

The four Shop Stewards then returned to Mr. Locke’s office to report the membership’s decision to not deliver the IKEA flyers that day. The Grievor acted as the spokesperson for the four Shop Stewards because, according to Ms. Alstad, “he had the most experience dealing with management, [having] been a Union President.” The Grievor told Mr. Locke that the staff had decided to follow the collective agreement and prepare the IKEA flyers for delivery that day, and then deliver them on Monday. The Grievor also advised that term employees and those employees with discipline on file would deliver the flyers that day. Ms. McMichen then spoke briefly, following which Mr. Locke told the Shop Stewards he would not release the Corporate keys to Letter Carriers until they agreed to deliver the flyers that day. Another Shop Steward spoke up saying “well, you are delaying the mail then”, and Ms. McMichen remarked that “this may change things then.”

The Shop Stewards left Mr. Locke’s office and called the Letter Carriers to the back of the station to advise that, as their keys would not be distributed, they would be unable to leave the Depot to deliver their mail. This advice provoked a fair amount of yelling and cat-calling. Ms. Alstad’s evidence was that “all hell broke loose” when the Letter Carriers learned that Mr. Locke was holding back their keys.

The Letter Carriers and the Shop Stewards returned to their cases to continue their mail sortation duties. The Grievor attempted to get someone from the Regional or Local Union office to come to the Depot to either resolve or take charge of the situation. He made calls from his case on his cellular phone, and as he did so, he learned about events transpiring at other depots. During this time period, Mr. Locke dropped by the Grievor’s case, where they had several brief, one-on-one conversations about the information they were receiving regarding the delivery or non-delivery of the IKEA flyers by Letter Carriers at Station F in Vancouver and in Port Coquitlam. From Mr. Locke’s perspective, the Grievor appeared a bit “disappointed” when he learned the IKEA flyers would be delivered at those depots, but Mr. Locke agreed in cross-examination that the

Grievor did not broadcast the information he was receiving to the employees on the work floor.

Ms. Alstad recalled approximately 10 employees approaching her to ask questions and discuss their feelings. She initially stated that she was aware of employees going to the Grievor's case as well, but then said she could not see the Grievor's case from where she was situated at that time.

On Mr. Mooney's arrival at the Union office on March 13, sometime prior to 8:00 a.m., he fielded a number of telephone calls from the NW Depot. Mr. Englouen called to ask Mr. Mooney to come to the NW Depot due to an issue relating to IKEA flyers. Mr. Mooney spoke with the Grievor as well, and at some point thereafter, called the Grievor to advise that the earlier non-delivery situation at Station F had changed, and the IKEA flyers would be delivered there after all.

While en route to the NW Depot, Mr. Mooney was advised by someone other than the Grievor that "there had been a refusal to deliver flyers". Mr. Mooney testified that his impression at that time was that a group decision had already been made before he arrived at the NW Depot about whether or not the IKEA flyers would be delivered due to the belief that "the collective agreement had been violated with the compression."

Mr. Andrus arrived at the NW Depot at or about 8:15 a.m. He first met with Mr. Locke, inquiring about the IKEA flyer situation, and then approached the Grievor at his case. Mr. Andrus told the Grievor that if the employees "pursued this course", they would be subject to five-day suspensions up to termination for delay of mail. It was Mr. Andrus' evidence in cross-examination that in part, he "wanted the Shop Stewards to deliver his message" to the employees. The Grievor continued sorting his mail.

Mr. Mooney arrived at the NW Depot with Ed Nichols, another Union Representative, at about the same time as Mr. Andrus. Mr. Mooney greeted the Grievor at his case and continued on to Mr. Locke's office to report his (Mooney's) presence at the workplace. Mr. Mooney asked Mr. Andrus if it was true that the Letter Carriers did not want to deliver the flyers, and Mr. Andrus confirmed that it was. Mr. Mooney then asked Mr. Andrus for permission to speak with a few employees, and Mr. Andrus agreed.

When Mr. Mooney spoke with employees, he was told that a compression of the IKEA flyers to one-day delivery had been implemented without consultation. Mr. Mooney in turn decided that he would try to consult with management “to break this impasse.”

In her evidence Ms. Alstad recalled seeing Cindy MacDonnell, the Local Union President, arrive at the NW Depot at about the same time as Mr. Andrus. Ms. Alstad also recalled the Grievor discussing the situation at Station F with a group of five or six Shop Stewards/Union Representatives in the middle of the work floor. Ms. Alstad testified that when Mr. Mooney queried what the employees wanted to do, she advised that “they do not want to deliver” and, the Grievor asked Mr. Mooney to try and negotiate extra compensation for the one-day compression of the IKEA flyers. She testified that it is “a common procedure to consult and do a memorandum before flyers arrive.”

Returning to the chronology, Mr. Andrus convened a meeting in Mr. Locke’s office which I find was attended by the four Shop Stewards, Mr. Mooney, Mr. Nichols and Ms. MacDonnell. Mr. Andrus discussed the importance of delivering the IKEA flyers, and stated that the Corporation’s Labour Relations department had advised him that a failure to deliver the flyers would be viewed as wilful delay of mail which could result in a five-day suspension up to termination. Mr. Mooney suggested they talk about extra compensation, and questioned why they were being met with “threats and intimidation.” Mr. Mooney expressed the view that the collective agreement had been violated because there had been no consultation. Mr. Andrus disagreed with that contract interpretation, stating that the flyers were normal-sized airmail, and under the collective agreement management had the right to compress delivery in unforeseen circumstances beyond the Corporation’s control. Mr. Andrus stated that he would give a direct order to the Letter Carriers to deliver the IKEA flyers that day. Mr. Mooney asked for and was granted an opportunity to address the Letter Carriers after Mr. Andrus. Mr. Nichols and Ms. McMichen then spoke, and the Grievor told Mr. Andrus the Letter Carriers would prepare the flyers that day and deliver them on Monday. The Grievor also said term employees and employees with discipline on file would deliver the IKEA flyers that day.

Mr. Mooney testified that he did most of the talking during this meeting, proposing an extra payment due to the compression. He said that by making this proposal, he had hoped to “break the impasse”. He recalled Ms. Alstad stating that she had not yet been paid for the last compression and “here they were a second time.” In

response, Mr. Andrus agreed to look into that issue, but said no extra money above the contractual premium would be paid this time and Letter Carriers had to take out the flyers.

When this meeting ended, the Shop Stewards and Union Representatives left Mr. Locke's office. The Grievor asked Mr. Mooney and Mr. Nichols to go back into the office to see if there was any way they could deal with the situation by getting extra compensation for the compressed IKEA flyer delivery. Mr. Mooney did so, returning a minute later saying that management had declined to take that approach and a consultation process would not happen.

At some point between 8:30 and 9:15 a.m., the Supervisors spoke to the Letter Carriers reporting to them in an effort to gauge their support for the delivery/non-delivery issue. Some Letter Carriers were prepared to deliver the flyers that day, many were not, and some were waiting to see what the Union's stance was.

At or about 9:30 a.m., Mr. Andrus called a floor meeting with all staff at the NW Depot. I find Mr. Andrus' remarks were entirely appropriate in the circumstances. He explained why the IKEA flyers had arrived late, said he understood this was the second such occurrence, and assured the staff he would try to obtain answers as to why it had happened. He emphasized that IKEA was an important customer whose business could be lost if the flyers were not delivered, and stated that the employees were required to deliver the flyers that day because the IKEA sale started that weekend. Mr. Andrus told those assembled that the consequences for not delivering the flyers would be five-day suspensions up to termination because a refusal to deliver constituted a wilful delay of mail. Mr. Andrus testified that he told the employees it was "their decision" and he "could not make it for them, but [he] hoped they'd deliver", and he asked for their "cooperation."

Mr. Locke testified that Mr. Andrus gave a "direct order" that the IKEA flyers had to be delivered in one day, and Mr. Nagi's evidence was that Mr. Andrus told the staff they would be paid the compressed rate for this delivery work.

Mr. Nagi observed that before the Grievor spoke, employees were listening to Mr. Andrus, were attentive, and were "waiting to hear and hoping to have three days to deliver" the IKEA flyer. By the end of Mr. Andrus' remarks, there was some "heckling"

and “murmuring” to the effect that “this is bullshit”, “just let us do our job”, “you do your job”, “we’ll deliver on Monday”. An employee then looked at the Grievor and queried “what does our Union have to say?”

Rather than deferring to Mr. Mooney, the most senior Union Representative at the meeting, or Ms. MacDonnell, the Local Union President, the Grievor responded to that query by telling Mr. Andrus that the Corporation’s explanation for why the IKEA flyers were late was “not believable”. The Grievor accused the Corporation of trying to provoke the employees, and stated that this was “another tactic” to achieve one-day delivery of householders, just the RMSC’s. The Grievor went to state that if IKEA was such an important customer, it was not believable that twice in a row the Corporation would make a mistake like this, and if they were that inept, they “did not deserve to have the IKEA contract.” The Grievor claimed the Corporation’s sales representative had “probably sold the contract to IKEA as a one-day delivery” and management was now honouring that commitment. He also stated that employees had not been paid for the last situation, and asked where the compensation for the last compression was. In response to the latter remark, Mr. Andrus assured the Grievor he would look into the compensation issue. Mr. Nagi recalled the Grievor stating that Mr. Andrus was delaying the mail by holding them back, and that one employee, Sue Roberts, called out “yeah, let us do our job.”

The Grievor’s evidence was that, when the employee asked what the Union had to say he felt he had “no option” but to express the staff’s feelings to management. He claimed he did not make his comments with the intent to incite or influence the behaviour of the members: rather, his intention was to impress on Mr. Andrus, “how upset the floor was.” The Grievor admitted in cross-examination that he had “gone too far” with his remark about the Corporation not deserving to have the IKEA contract. He said: “I regret saying the Corporation deserved to lose IKEA as a customer. Those are our jobs and we need the revenue from householders. I got carried away. I definitely do regret it. ... I was getting overwrought and not thinking at my best.”

When asked in his evidence in direct examination to comment on the effect the Grievor’s remarks had on the employees, Mr. Andrus acknowledged that there was a bit of heckling while he spoke, but said people were listening. However, after the Grievor’s remarks were made, the work floor “got agitated again” saying “why did you do this again?”, and “let us deliver the mail.” Mr. Andrus’ evidence was that the Grievor “was

angry, and the crowd got angry, and they took direction from” him. Mr. Nagi testified that after the Grievor spoke, it seemed like the atmosphere got “more tense.”

Mr. Mooney spoke after the Grievor. Mr. Mooney stated that he was frustrated and did not think the way to resolve the impasse was by threatening and bullying people and trying to make them pay for others’ mistakes. Mr. Mooney said he was not impressed with Mr. Andrus’ approach, and said he (Mooney) had tried to negotiate but there was no resolve.

Mr. Andrus recalled Mr. Mooney saying that “instead of violating the collective agreement by not having consultation and making employees deliver the admail, we should sit down with the Union and get more compensation for the Letter Carriers for the one-day delivery and should not be using bullying and threatening tactics with the employees.” In response to the accusation of threatening and bullying, Mr. Andrus defended himself at the floor meeting by saying it was his responsibility to advise employees of the consequences of non-delivery.

When Mr. Mooney finished his remarks, Mr. Locke agreed to release the Corporate keys to the Letter Carriers and the meeting disbursed.

A final meeting of Shop Stewards, Union Representatives and Letter Carriers then occurred at the back of the station, and the Letter Carriers left to deliver their mail.

Mr. Locke and the Supervisors canvassed the Letter Carriers’ cases to determine who had left the IKEA flyers behind. Of 86 Letter Carriers, 54, including the Grievor, did not deliver the IKEA flyer on March 13. Those 54 Letter Carriers delivered the flyers on Monday, on which date the IKEA sale continued.

Letter Carriers at all postal facilities within the Lower Mainland, save for the NW Depot, delivered the IKEA flyers on March 13. IKEA was not lost as a customer due to delivery failure at the NW Depot on March 13.

V. Imposition of Discipline for the March 13th Incident

53 Letter Carriers at the NW Depot received five-day unpaid suspensions for having “knowingly participated in a concerted work effort when you and other employees

failed to deliver [the IKEA admail] product”. In the letters of discipline imposing the five-day suspensions, Mr. Andrus expressed his findings in the following terms:

I find you have committed an act of major misconduct and *the Corporation’s position regarding an unlawful work disruption is a five (5) day suspension on the first occurrence and the termination of your employment for a second occurrence within a twelve (12) month period.* I have reviewed the circumstances of this incident in its entirety and I find no mitigating circumstances which would reduce this disciplinary penalty.

(emphasis added)

As noted above, the five-day suspensions have been grieved.

In a letter dated March 19, 2009, addressed to the Grievor and copied to Mr. Andrus, Mr. Locke recommended the termination of the Grievor’s employment for having “knowingly participated [in] and *incited* a concerted work effort when you and other employees failed to deliver [the IKEA admail] product” (emphasis added). Mr. Locke also concluded that the Grievor’s “actions contributed to an unlawful work disruption that resulted in the delay of the IKEA mailing by a majority of letter carriers in this depot.” In the third paragraph of Mr. Locke’s letter wherein he reviews some of the events of the morning of March 13, he states: “During this floor talk you stated that the employees will not deliver the IKEA mailing on March 13, 2009.” The floor talk he referred to was Mr. Andrus’ floor meeting where the Grievor and Mr. Mooney spoke. Mr. Locke is the only individual to make this allegation. The other participants in Mr. Andrus’ meeting, including Mr. Andrus, confirmed in their evidence that the Grievor did not make this remark during Mr. Andrus’ floor meeting on March 13. On the basis of the evidence as a whole, I find this aspect of Mr. Locke’s allegation against the Grievor to be unfounded.

Mr. Andrus did not conduct an interview of the Grievor prior to deciding to impose the penalty of dismissal for his involvement in the March 13th incident. In cross-examination Mr. Andrus testified that he did not interview the Grievor prior to deciding to terminate his employment because he “already had the facts and ... did not want to hear from him.” When pressed in cross-examination on his failure to interview the Grievor prior to deciding on the dismissal penalty, Mr. Andrus said “nothing he could have said would have affected me.” In his evidence Mr. Andrus stated that he spoke informally to the Grievor prior to reaching his dismissal decision and found that he did

not show any remorse for his involvement in the work stoppage. Mr. Andrus recalled the Grievor asking him about what the discipline would be for other employees and himself. Mr. Andrus testified that he understood there were only two penalties available to him in terms of discipline for the Grievor's conduct on March 13 -- i.e., a five-day suspension or termination. He stated that he did not consider any other penalties because:

those were the only options within the collective agreement. I felt the collective agreement prevented me from imposing a penalty in between a five-day suspension and termination. I got counsel from the Labour Relations group and felt the collective agreement tied my hands. They counselled me that I had only two options.

In weighing these two options in respect of the Grievor, Mr. Andrus concluded that the Grievor "took a prominent role, especially in my meeting with employees, by inciting them not to deliver the piece with his words", and he (Andrus) felt in these circumstances that termination was the "proper penalty." In cross-examination Mr. Andrus acknowledged that while he considered length of service to be a mitigating factor, he did not know how many years of service the Grievor had, and simply knew he was a long service employee "who was imminently to retire." Mr. Andrus said this did not affect his decision and, from his perspective, there were no other mitigating factors.

The Grievor was hired by the Corporation in August 1974. He began his lengthy career as a part-time Letter Carrier in New Westminster, and after approximately two weeks, became a full-time Letter Carrier. As earlier noted, the Grievor is 62 years old and, as of March 13, 2009, his plan had to been to transition into retirement by returning to the work floor and working for approximately one year.

In his evidence the Grievor described several significant economic consequences of the dismissal penalty as opposed to retirement: reduced wages during his last year of employment; ineligibility for post-retirement extended health and dental benefits; loss of eligibility for a \$4,000.00-\$6,000.00 severance pay benefit; and, a reduced pension benefit due to his failure to complete 35 years of service. In cross-examination the Grievor acknowledged that his partner, also a Letter Carrier with the Corporation, has benefits. However, the Grievor noted that he receives reduced benefits because the percentage of his benefit claims which are not covered by his partner's benefits is now not covered by his post-retirement benefits.

The Grievor also acknowledged he was aware on March 13 that he was exposing himself to discipline: he and the other 53 Letter Carriers were prepared to take the risk of discipline which, they believed, would be less than termination. The Grievor opined that he fulfilled the role of a Shop Steward on March 13, but does not believe he took an active leadership role. He emphasized that “on March 13, we collectively agreed not to deliver the IKEA flyer as directed, and I personally agreed with the choice of the group.” When asked in cross-examination what he had done on March 13 that attracted discipline, the Grievor said: “I prepped my flyers and did not deliver them on Friday and delivered them on Monday; therefore, I did not deliver my flyers as directed.” When then asked what he would do differently if the same circumstances presented themselves again, the Grievor said:

I’d have liked to have found a way to get a consultation or a way that management could really listen and solve the problem so we did not have to go over the cliff. I do not know what I could have done differently as a Shop Steward. I could not work at a higher level. I’d have liked to find a way to get management to learn about the anger on the floor.

When then asked whether he would deliver the mail in the same situation in the future, the Grievor said “given that the group was not delivering, I would not.” The Grievor also confirmed that on March 13, he was not aware of the higher level talks between representatives for the Union and the Corporation.

VI. Applicable Principles

Recognizing the inherently adversarial nature of the collective bargaining relationship, arbitrators have determined that union officials acting in a representational capacity are entitled to wide latitude to criticize management and must be able to do so free from the threat of discipline. In the legitimate exercise of the shop steward role, union officials are entitled to a measure of protection from discipline for statements made to management regarding the administration of the collective agreement. Intemperate language directed against members of management may not amount to insubordination if spoken by a union official in the course of performing his/her representational responsibilities. At the same time, the protection from discipline is not absolute. Arbitrators recognize a limited immunity from discipline, and the limit is reached where a union official’s statements are malicious, knowingly or recklessly false, threatening or intimidating. Where a union official is an employee as well, a balance must be struck

between respect for the authority of management to operate the workplace and maintaining the integrity of the adversarial relationship under the collective agreement. See Brown and Beatty, *Canadian Labour Arbitration*, Fourth Edition, at 9:1530.

The issue of a union official's liability for actively participating in, leading or inciting an unlawful work stoppage is addressed in Arbitrator McKee's award between the parties in *Canada Post Corporation v. CUPW (Fowler and Robinet Grievances)*, [1983] C.L.A.D. No. 44. In that case, the majority of the afternoon shift walked off the job on December 19th to complain about changes in scheduling and the handling of grievances. The majority of the employees involved were docked 12 minutes' pay and given a letter of reprimand. Fowler, who was the President of the Local Union, and Robinet, who was the Chief Shop Steward, were suspended from work for three days and one day, respectively.

Arbitrator McKee found that Fowler and Robinet had lead and incited an illegal strike:

After examination of the evidence of what transpired in the office, I am left in no doubt that the other employees by their actions or lack of action recognized Fowler and Robinet as the leaders. After all, Fowler was not just another Shop Steward, but the President of the Local, and Robinet was the Chief Shop Steward. It would be unnatural if they had not been looked to for leadership.

The mere presence of a Union official at an incident does not, of course, immediately confer the status of leader upon him or her. Also, it is not the order in which a person enters a room that determines the leadership role to be played.

The evidence is clear that Fowler and Robinet, while they may not have physically led the group into the office, were undoubtedly the leaders in what transpired in the office.

The grievors have additionally been charged with "... inciting a work disruption." The dictionary description of "incite" is: *to move to action, to stir up, to stimulate, urge, provoke, spur on, instigate*. On the evidence presented, I cannot accept that the incident on the evening of December 19th "just happened". One witness testified that there was discussion of problem areas by the employees during the coffee break... . However, no evidence was presented to show that either Fowler or Robinet took any part in these discussions or incited the employees at that time.

Evidence shows that Fowler's attitude immediately prior to the event when talking to Shelly Bolton, a Shop Steward, was "that it was up to the members to decide what they wanted to do". However, in the meaning of the word "incite" -- to move to action, to stir up, to instigate -- I am of the opinion that the grievors, by their participation in the incident and the withholding of information in their possession from other employees which had a direct bearing on the events at hand, incited and instigated the confrontation.

(paras. 24-30; emphasis added)

In deciding to uphold the higher level of discipline imposed on the grievors, Arbitrator McKee discussed the dual function a Union official/employee plays in the workplace:

The mantle of the union officer is not an easy one to wear.

The behavioural patterns in the workplace of such a person are, of necessity, somewhat unique and usually of a high profile.

The union official, an employee elected by his or her fellow workers to protect and project their interests, is immediately forced into a dual function in the workplace. The elected union official, a cog in the legal mechanism of labour-management relations, is suddenly, and very often with very little preparation, voted into a position of key responsibility. This person, an employee of a company on the one hand, with the need to conform to all the requirements of the supervised workplace, must, on the other hand, conform to a large extent with the wishes and desires of the employees who have elected him/her and also with the policies, procedures and responsibilities of the union he or she represents.

This employee obviously has a dual responsibility. It is also obvious that in representing employees he has inevitably to take a higher profile than his fellow workers. Inevitably, in representing employees, he enters into a potential area of conflict with his employer or the employer's representative. Regardless of the degree of tact, diplomacy or finesse used, such a person will in time become, in the minds of supervision, a part of the problem rather than the solution. It is often hard in the field of human relations to separate the messenger from the message.

Obviously, this person, a legal part of the on-going day-to-day relationship in the workplace, is no longer just an employee. His "place" in the scheme of things has changed; he has been elected to represent the

employees on the equal footing with the supervisor and any other management employee and must have the right to speak freely when conducting union business. *In such a position, he not only has the responsibility for truthfully and responsibly representing his fellow employees and his union, but also for insuring that the existing collective agreement is policed and complied with and that his actions are not disruptive to production and the lawful endeavour of the enterprise, and, moreover, are not illegal.*

(paras. 63-67; emphasis added)

The following year, the same union officials -- Fowler and Robinet -- received five and three-day suspensions respectively for absenting themselves from work for one and three-quarter hours at the outset of a shift in order to participate in Operation Solidarity. The remaining 60 employees who had similarly participated in the illegal work stoppage received written warnings. The Union grieved, alleging that the five and three-day suspensions meted out to the grievors constituted discriminatory or disparate treatment, and as such should be void. The Union contended that the Corporation had singled out the grievors for special harsh treatment under the guise of progressively disciplining them due to their participation nine months earlier in the dispute before by Arbitrator McKee.

Arbitrator T.A.B. Jolliffe began his analysis of the dispute with the following considerations:

It cannot be said, in the context of the grievors' participation in the Operation Solidarity demonstration, that by reason of their union office, they owed any higher duty to the Corporation than their co-workers. The issue of distinctive disciplinary treatment for union officers has often been arbitrated in the context of illegal strikes and unlawful work stoppages [cited cases omitted].

As Mr. Burkett rather succinctly summarizes in his Addendum to the *Port Hope [and District Hospital and Canadian Union of Public Employees, Local 1653]* (1982), 6 L.A.C. (3d) 173] case, after canvassing the numerous decisions in the area "... a union official who becomes actively involved in an unlawful strike exposes himself to greater discipline than a rank and file employee by reason of the fact that he is encouraging the strike to a greater degree than a rank and file employee". He goes on to suggest that a union official "may assume a role of passive involvement in the sense that he refuses to work but does not further involve himself in the activities carried on in connection with the work stoppage. In these

circumstances it would be difficult to argue that the union official is subject more severe discipline than a rank and file employee.”

Now of course, in the case at hand, there is no issue of unlawful strike. However, the above rationale may well have some meaning for us in that *a union official should perhaps not be seen to take on a broader culpability than his co-workers for a disciplinable group action, merely because of his office if his role can be said to be one of passive participation and non-leadership in nature.* That proposition seems to fall nicely in line with the principle that employers ought not to apply discipline in a discriminatory or uneven fashion. I note also Mr. Burkett’s remarks in the *Port Hope* case in introducing the issue before him, namely, that union officials received suspensions for essentially the same act as their co-workers who received written warnings only. He remarked at page 175:

... It is a universally accepted requirement of just cause that discipline be imposed in an even handed and non-discriminatory manner. Employees in essentially identical circumstances are entitled to essentially identical treatment [cited cases and text books omitted].

(pp. 13-15; emphasis added)

Arbitrator Jolliffe determined that for their unauthorized absences, the grievors invited some measure of discipline but were entitled to the same treatment as their co-workers. Accordingly, he directed that their suspensions be reduced to written warnings with compensation for lost wages.

The leadership role inherent in holding union office was discussed in the B.C. Labour Relations Board’s decision in *Noranda Metal Industries Limited and Canadian Association of Industrial, Mechanical and Allied Workers, Local 4 and Office and Technical Employees’ Union, Local No. 15*, [1977] B.C.L.R.B.D. No. 63:

... *the limits of a union officer’s responsibility must be defined with reference to how his conduct affects that of other employees towards the employer.* It will be recalled that in the *Wm. Scott* case (1977) 1 Can. LRBR 1, where this Board indicated the manner in which discipline should be imposed, it was emphasized that employers must adopt a personalized and considered approach to the question of discipline. In our view, that approach is, in the case of collective action by a group of employees, compatible with the meting out of greater discipline to union officers whose action or inaction *can reasonably be assumed to have affected the conduct of other employees.*

... greater “responsibility” should only attach to a union official when the combination of his office and his conduct influence the behaviour of other employees. In that circumstance, the employer does have a legitimate basis upon which to impose greater discipline. And that basis is the recognition that the conduct of the union officer is in fact qualitatively different by virtue of his office than that of other employees.

That is particularly evident in the case of an illegal walkout. A Job Steward who leaves his job in protest in the middle of shift and is followed by the rest of the crew can hardly argue that like his fellow employees he only missed half a shift. In most instances, the conduct of the Steward or officer can reasonably be presumed to have had a direct bearing on the conduct of other employees and would justify a greater discipline. *The greater discipline is not a result of the officer’s position, but flows rather from his responsibilities for the predictable effect his conduct (as a result of his office) will have on other employees.*

(page 7; emphasis added)

The facts before Arbitrator Surdykowski in *Natrel Inc., a Division of Agropor Cooperative v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (Ascione Grievance)*, [2005] O.L.A.A. No 21, were that a union representative stood up in a cafeteria meeting while employees were starting to return to work, pointed at a supervisor, and said no employee should leave until the supervisor gave his assurances that there would be no repercussions against any employee or the union. The arbitrator concluded that the grievor’s message was clear, was understood by all employees and was “reasonably intended” to stop the employees from returning to work. The arbitrator rejected the grievor’s evidence that he was acting for himself and his words had no effect on the employees, and found instead that the grievor’s elected position as vice-president of the union carried weight and influenced the bargaining unit employees.

Arbitrator Surdykowski stated that the status of union officials carries certain protections that other bargaining unit employees do not enjoy, but those protections relate to the legitimate exercise of union duties and responsibilities. Harsher discipline for union officials who actively participate in or lead an illegal work stoppage is appropriate:

It is apparent that it has not been accepted that the greater latitude for protection from discipline that is afforded to union representatives does not extend beyond the legitimate exercise of their labour relations duties and

responsibilities as such. ... Although it may be difficult to distinguish between passive and active participation in an illegal work stoppage, the following emerges from the jurisprudence:

- a) a union representative is under no affirmative obligation to assist in an employer's attempts to enforce a collective agreement or the *Labour Relations Act* and cannot be disciplined for failing to take active measures to prevent an illegal work stoppage or to stop one that is in progress;
- b) a union representative whose participation in an illegal work stoppage is passive cannot be more severely disciplined than a rank and file employee merely because he holds a union office;
- c) a union representative who actively participates in an illegal work stoppage but whose conduct falls short of active leadership is subject to greater discipline than a rank and file bargaining unit employee who actively participated, but less than if he actively led the illegal work stoppage;
- d) a union representative who actively leads an illegal strike is subject to severe discipline, up to and including discharge.

(paras. 57-58)

Arbitrator Surdykowski concluded that the grievor's conduct fell within paragraph "d" because he had prolonged the illegal work stoppage. Despite this finding, and contrary to the employer's assertion in the letter imposing discipline, Arbitrator Surdykowski found that the grievor's conduct would not support the penalty of dismissal. The arbitrator was satisfied that a five-day suspension for a senior union official whose conduct significantly prolonged an illegal strike and who refused to apologize for or even acknowledge his misconduct was within the ballpark of reasonable disciplinary responses. In the result, the five-day suspension was upheld.

VII. Analysis

The parties' succinct and helpful submissions and authorities have been considered and will not be separately summarized in this Award. The most salient features of the parties' positions regarding the disputed issues will be addressed in the course of this analysis.

As the Union concedes the Grievor's non-delivery of the IKEA flyers on March 13 attracted some form of discipline, this proceeding focuses on the measure of discipline imposed. In this case, the Employer bears the onus of justifying the disparate measure of

discipline imposed on the Grievor as compared to that imposed on the other Shop Stewards and Letter Carriers for the March 13th incident. The evaluation of management's disciplinary decision-making must be especially searching, including an assessment of: the seriousness of the misconduct which precipitated the discharge; premeditation or repetitiveness as opposed to a momentary and emotional aberration; provocation; the Grievor's record of service; the Grievor's disciplinary history; earlier and more moderate forms of corrective discipline and the outcome thereof; the consistency of the disciplinary response with the Employer's policies; and, whether management appears to have singled the Grievor out for arbitrary and harsh treatment. Using the above-summarized arbitral principles as a guide, my task is to probe beneath the surface of the immediate events and reach a broad judgement about whether the Grievor, an employee with a very significant investment of service with the Corporation, should lose his job for the misconduct in question. See *Wm. Scott, supra*.

There can be no doubt that in the context of the Corporation's enterprise and obligations to its customers, as well as the fundamental obligation of Letter Carriers to deliver all of the mail dispatched to them each day, the 54 Letter Carriers' concerted refusal to deliver the compressed IKEA flyers on March 13, thereby delaying the mail, constitutes serious workplace misconduct attracting discipline under the Employer's policies.

The authorities cited by the parties establish that union officials may be liable for more severe discipline where it is shown that they took an active leadership role, organizing and/or inciting an unlawful work disruption. The Employer's position at the arbitration hearing was that dismissal was warranted because the Grievor both organized the March 13th concerted refusal to deliver the IKEA flyers and incited the Letter Carriers to refuse to deliver that mail.

With regard to the organizing allegation, I find the evidence does not support a finding that the Grievor actively organized the concerted refusal to deliver the IKEA flyers. The Grievor was one of four Shop Stewards at the NW Depot on March 13, and on the evidence, once all four Shop Stewards had arrived at the station that morning, they all participated in meetings with management and their co-workers. In terms of the all-employee meeting in the lunchroom following Mr. Locke's floor meeting, again, the evidence does not support a finding that the Grievor took a prominent or active leadership

role. There was also evidence that prior to Mr. Andrus' floor meeting, a number of employees looked to Ms. Alstad for assistance in dealing with the developing situation.

The Grievor acted as the primary spokesperson during meetings with management prior to Mr. Andrus' floor meeting, but I accept the Union's submission that management thrust the Grievor into this role. Messrs. Locke and Andrus singled the Grievor out from the Shop Steward group by approaching him specifically and repeatedly at his case. Management's message, that if the employees pursued their intended course of action by refusing to comply with the compressed delivery of the IKEA flyers they would be subject to discipline, was directly communicated to the Grievor. Mr. Andrus hoped the Grievor would deliver this message to the membership on management's behalf.

As well, as explained by Ms. Alstad, the Shop Stewards expected the Grievor to act as their spokesperson in meetings with management because, as a former Local Union President, he had the most experience speaking with management. At the same time, other Shop Stewards spoke; and indeed, during one meeting with management, Ms. Alstad communicated the employees' decision to not deliver the IKEA flyers that day.

In assessing this aspect of the Employer's allegation against the Grievor, the events of March 13 must also be viewed against the backdrop of the one-day compression of IKEA flyers only a few weeks earlier. In the wake of that one-day compression of IKEA flyers on a Friday, plus the exacerbating fact that as of March 13, the Letter Carriers had not yet been paid the premium associated with that experience, feelings of frustration and unhappiness were close to the surface, and many Letter Carriers were likely resistant to another request by management to comply with the one-day compression of IKEA flyers on a Friday.

In this context, the fact that in the main, it fell to the Grievor to communicate the decision of the membership to prepare the flyers on Friday and deliver them on Monday, as well as the decision of the membership that term employees and employees with significant discipline on file would deliver the flyers on Friday, does not support a finding that the Grievor was either the main proponent of the concerted refusal to deliver, or personally organized the concerted refusal to deliver. I am satisfied that, other than being the Shop Steward who actually called the employees into the coffee break meeting in the lunchroom following Mr. Locke's floor meeting, the Grievor did not assume a prominent and active leadership role in organizing the concerted work disruption. I am

further satisfied that he was caste into the primary spokesperson role by management and the Shop Stewards alike. Thus, contrary to the Employer's urging, I cannot infer that the Grievor actively organized the concerted refusal to deliver the IKEA flyers from the time he arrived at the station on March 13. In my view, the concerted work disruption by 54 Letter Carriers began following Mr. Andrus' floor meeting.

I reach a different conclusion, however, with respect to the role the Grievor played in Mr. Andrus' floor meeting.

I pause to address an issue that arose during the evidentiary and closing submission stages of this proceeding. The Union urged me to accept in mitigation the Grievor's evidence that when he said what he did to management in response to the question from the floor during Mr. Andrus' floor meeting, he did not do so with the "intent of inciting other employees". This evidence was buttressed in cross-examination when the Grievor denied making any comments at the floor meeting to "influence" the membership. The Grievor's evidence in cross-examination was that "they [the members] liked hearing what they had already expressed to me being expressed to the Zone Manager."

I am not prepared to decide the incitement issue on the basis of the Grievor's evidence about his subjective intention. The Union's approach to this issue was to claim that the Grievor was motivated by an intention to express to management the feelings and thoughts that the membership had communicated to him in member-shop steward meetings because they were unable or too fearful to do so themselves. At the same time, relying on Article 10.05 plus the shop steward-member privilege principle, the Union objected to any cross-examination which would put the veracity of the Grievor's asserted subjective intention to the test. The Union is entitled to rely on the parties' agreement under Article 10.05, but where it advances a defence of this particular nature and objects to any cross-examination of the veracity of the defence, it must be accepted that the evidence of subjective intention loses evidentiary value for adjudicative purposes. In my view, in these circumstances, the objective assessment standard discussed in the *Noranda Metal Industries Ltd.*, *supra*, case should be, and has been, applied.

On an objective assessment of the evidence before me, I am satisfied that the Grievor's conduct during Mr. Andrus' meeting falls within the concept of incitement as defined by Arbitrator McKee in the above-quoted 1983 award between the parties -- i.e.,

“to move to action, to stir up, to stimulate, urge, provoke, spur on, instigate”. I accept that following Mr. Locke’s floor meeting, many employees, including the Grievor and Ms. Alstad, decided not to comply with the requirement to deliver all of the IKEA flyers that day. However, I find that other employees reached a contrary decision, and still others reserved their decision until they had heard from management as to whether they would be given more time to deliver the flyers, and until they had heard from the Union. I conclude that when management’s direction became clear at Mr. Andrus’ floor meeting and an employee posed the question “what does our Union have to say?”, the Grievor thrust himself into an active leadership/incitement role.

In my view, the Grievor’s evidence relating to why he spoke up when the employee queried the Union’s position is unconvincing for several reasons. It is inconsistent with his, and other Shop Stewards’, earlier calls to the Union office seeking senior Union Representative assistance to deal with the situation at the NW Depot. Immediately following the lunchroom staff meeting earlier that morning, the Grievor and other Shop Stewards attempted to contact their Union Representatives, asking them to come to the station to resolve the matter or deal with management. When Mr. Mooney and the other Union Representatives arrived at the NW Depot, the Grievor appropriately deferred to Mr. Mooney’s senior position and assumed the role of providing Mr. Mooney with suggestions for discussion with management in the hope of averting the concerted action. When Mr. Mooney’s efforts did not succeed, he and the two other Union Representatives, one of whom was the President of the Local Union, attended Mr. Andrus’ floor meeting, Mr. Mooney having obtained permission to address the staff after Mr. Andrus. In this context, and even though the Grievor was situated on the fourth rung of the Union hierarchy ladder, I find he spontaneously took it upon himself to act as the Union’s spokesperson in response to the question from the floor querying what the Union had to say. It is the case that the member who inquired about the Union’s position looked at the Grievor when she posed her question; but the Grievor was not thereby forced to respond. He could have deferred to Mr. Mooney or Ms. MacDonnell to provide the Union’s position.

Additionally, having been present in the meeting with management just prior to Mr. Andrus’ floor meeting, the Grievor knew that Mr. Mooney had requested and received permission to speak to the assembled employees following Mr. Andrus’ remarks. The Grievor did not similarly request permission to speak.

Moreover, if, as the Grievor testified, his intention was to communicate the members' true feelings to Mr. Andrus, he would surely have done so during the prior meeting in Mr. Locke's office at a time when his (the Grievor's) remarks to Mr. Andrus could potentially have had some real impact on either Mr. Andrus' decision about the compression, or Mr. Andrus' manner of approaching the staff during the floor meeting. Alternatively, if the Grievor's intention was to communicate the members' true feelings to Mr. Andrus in the context of a floor meeting, I find he would have expressed those feelings on their behalf, and would not have embarked on, as he did, an attack on the veracity of the explanation and information management had just conveyed to the staff.

On the evidence as a whole, I conclude that, sensing Mr. Andrus' remarks to the employees were having their desired effect, the Grievor lost control of his emotions and leapt into the fray in an attempt to strengthen some members' earlier resolve and persuade undecided members to prepare the flyers that day and deliver them on Monday. I find the essence of Mr. Andrus' message to the employees during the floor meeting was that, as the IKEA flyers had been delayed due to circumstances outside the Corporation's control, and as IKEA was a very important customer, he needed their cooperation to deliver the admittedly compressed flyers so that the Corporation did not lose the business. I further find the Grievor's angry retort, to the effect that if the Corporation could not get the customer's flyers to the depot in time for proper delivery they deserved to lose the contract, effectively delivered a contrary message -- do not cooperate by delivering the flyers.

It is the case that the Grievor did not expressly state that the IKEA flyers should not be delivered, but in the context of his other angry remarks, which cast aspersions on Mr. Andrus' and/or management's truthfulness, I am persuaded that the Grievor's conduct can reasonably be assumed to have affected the actions of some of the employees, including some who were awaiting the Union's position before making their own decision. See *Noranda Metal Industries Limited, supra*. In my view, by responding angrily, and in the terms that he did, to the question from the floor, the reasonably predictable effect of the combination of the Grievor's Union office and conduct stirred up, provoked and/or spurred on some fellow Letter Carriers to refuse to cooperate with Mr. Andrus' plea for cooperation and his order to deliver. See *Canada Post Corporation (Fowler and Robinet)*, 1983 (McKee); and, *Canada Post Corporation (Fowler and Robinet)* 1984 (Jolliffe).

Hence, on the evidence as a whole, the Employer has persuaded me that the Grievor's conduct during Mr. Andrus' floor meeting on March 13 justified more severe discipline because he must bear responsibility for the reasonably predictable and influential effect the combination of his office and his remarks would have on other employees. His incitement of the concerted work disruption attracted "greater discipline than a rank and file bargaining unit employee who actively participated". See *Natrel, supra*. The Grievor's misconduct was more serious than that of the other Shop Stewards and Letter Carriers on March 13. This finding eliminates the need to address the Union's discriminatory treatment argument.

While the Grievor's more serious misconduct justified a more severe disciplinary sanction than that imposed on the other Shop Stewards and Letter Carriers, I find discharge was an excessive response in all of the circumstances of this case, a number of which constitute mitigating factors.

First, prior to Mr. Andrus' floor meeting, the Grievor conducted himself as a responsible Shop Steward who, in response to being sought out by management, communicated to them the information he was receiving from Union Representatives and members of the bargaining unit. The Grievor's conduct prior to his outburst at Mr. Andrus' floor meeting did not move him outside the protected scope of representational activity. His conduct fell outside that protected arena when he conducted himself as he did during Mr. Andrus' floor meeting. I find this conduct was a spontaneous emotional outburst, not a premeditated speech.

Second, the Grievor is a very long service employee who has invested his entire career of almost 35 years of service with the Corporation. He was completing his final year of employment prior to retiring when the events of March 13 occurred, and his employment record was clear of any discipline during the preceding 12 months.

Third, the Grievor was aware of the Employer's view of the seriousness of concerted work stoppages at postal stations, as well as the earlier imposition of one-day suspensions for a concerted work disruption at another postal station. However, the Employer did not comply with the doctrine of progressive, corrective discipline. For reasons not completely clarified in the evidence, Mr. Andrus was led to believe that the collective agreement "tied his hands", and only permitted him to choose between a five-day suspension and dismissal in response to the Grievor's misconduct. I was referred to no collective agreement provision reflecting the parties' agreement to this sort of disciplinary progression in response to one incident such as that which occurred on

March 13. Indeed, letters imposing discipline on the three other Shop Stewards and 50 other Letter Carriers for the March 13th incident identify a policy that termination will be attracted by participation in a second unlawful work disruption within 12 months. Thus, the advice Mr. Andrus received appears to have unduly narrowed his consideration of the proper measure of discipline for the Grievor's misconduct.

Has the employment relationship been irreparably breached? The Employer argues that the answer to this question is yes because the Grievor has failed to show any remorse for his misconduct, and would do the same thing in similar circumstances in the future. In my view, the evidence does not support a finding that the employment relationship has been irreparably breached.

As to the lack of remorse aspect of the Employer's position, it must be recalled that Mr. Andrus did not conduct the usual pre-discipline interview with the Grievor because he (Andrus) believed he had all the facts in hand, having been a witness to the Grievor's outburst on March 13. Mr. Andrus also concluded that nothing the Grievor could have said during an interview would have changed his (Andrus') mind. However, one purpose of the pre-discipline interview is to probe issues such as the employee's motivation, intention, knowledge, acceptance of responsibility, remorse and the like. The absence of an interview in this case meant that these issues were not addressed and evaluated prior to the decision to dismiss being made. In his evidence at the hearing, the Grievor candidly admitted that the remark which I have found crossed the line into disciplinary territory "went too far", and he stated that he "definitely regrets" having made it. I find his evidence also displayed a proper understanding of the importance, to both the Employer and employees, of meeting the Corporation's delivery commitments.

As to the second prong of the Employer's position, the Grievor's evidence in cross-examination is quoted above at page 16. I do not find his evidence supports a finding that he would incite a concerted work stoppage again in the future. The refusal to deliver the compressed IKEA flyers as directed is where the Grievor's conduct matched that of the other Shop Stewards and Letter Carriers, and the disciplinary consequence for a repetition of that conduct is clearly specified in the Corporation's suspension letters. The Grievor's conduct at Mr. Andrus' floor meeting attracted a more severe disciplinary sanction. The Grievor acknowledged the impropriety of his remark and expressed regret in this regard at the hearing, which was the first opportunity he had to do so given the absence of a pre-discipline interview. His evidence was not that he would repeat this conduct in the future.

Moreover, the Employer's policy contemplates termination after participation in a second concerted work disruption in a 12-month period. Thus, a first occurrence does not necessarily sever the employment relationship beyond repair.

Finally, the evidence was that all of the IKEA flyers were delivered the following Monday, while the IKEA sale was still ongoing, and IKEA was not lost as a customer.

On balance, I find dismissal was an excessive response in all of the circumstances of this case. I am satisfied a 10-day suspension should be substituted as the appropriate corrective disciplinary sanction. This significant penalty will also send a clear message of deterrence to all employees, particularly those fulfilling the dual roles of Union official and employee.

IX. Decision

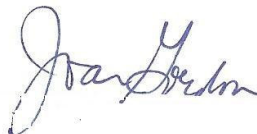
For all of the foregoing reasons, the Grievor's dismissal is set aside. An unpaid, 10-day disciplinary suspension is substituted for dismissal. The Grievor is hereby reinstated to his employment as a Letter Carrier, and his personnel file is to be amended accordingly. The Grievor is entitled to compensation for lost wages, benefits and other contractual perquisites for the period following the 10-day suspension to the date of reinstatement.

I refer the calculation of remedial issues back to the parties for expeditious resolution, and I retain jurisdiction to hear and determine any issues arising out of the implementation of this award.

The grievance succeeds.

It is so awarded.

DATED this 27th day of July, 2010 at Vancouver, British Columbia.



Joan M. Gordon
Arbitrator