Casuals

Article 7.1.B of the National Agreement establishes the "supplemental work force," which consists of casual employees. Since Article 1, Section 2 excludes casual employees from the bargaining unit represented by NALC, casuals do not have the contractual protections enjoyed by career or transitional bargaining-unit employees. Casual employees receive lower pay than career or transitional carriers and they receive no benefits. Sections 1 through 4 of Article 7.1.B contain specific limitations on the hiring and use of casual employees who perform letter carrier work.

Over the years, the application of these casual provisions has been the subject of many disputes and arbitrations at the national level. In fact, we are currently in the midst of separate arbitration proceedings concerning the interpretation of two sections of Article 7.B. One case concerns the Union's position that the Article 7.1.B.1 prohibition against employing casuals "in lieu of full or part time employees" is an enforceable restriction. The second case raises the issue of when a casual is considered to be "employed" in the carrier craft for the purposes of enforcing the provisions of Article 7, Sections 1.B.3 and 4. We anticipate arbitration awards in these cases early this year.

Fortunately, the interpretation and application of Article 7, Section 1.B.2 is not in dispute. This section, which gives career part-time flexible employees straight-time hours priority over casuals, is the casual provision local union representatives are most frequently called upon to enforce. It provides the following:

> **7.1.B.2** During the course of a service week, the Employer will make every effort to insure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals.

This section obligates management to give part-time flexibles working at the straight-time rate a scheduling priority over casual employees. This priority is not absolute. The employer's obligation may be fulfilled over the course of a "service week," and the part-time flexible employees must be "qualified and available." (A "service week" begins at 12:01 a.m. Saturday and ends at 12:00 midnight the following Friday. See Article 8.2.A.)

A successful grievance on this issue must show that management scheduled a casual for work which a PTF carrier could have performed instead, and that the PTF carrier worked less than 40 straight-time hours during the service week. Because the contract language addresses the service week rather than any specific day's assignment, management does not necessarily violate the contract by, for instance, using a casual on a Monday while PTFs are unscheduled. A violation occurs when that assignment causes a PTF who could have performed the Monday work to lose straight-time work hours during the service week. See National Arbitrator Howard Gamser's decision in AC-C-13148, December 20, 1979 (C-00403).

Article 7.1.C.1.b establishes a similar rule giving part-time flexibles working at the straight-time rate a scheduling priority over transitional employees. It provides that:

> **7.1.C.1.b** Transitional employees may be used to replace part-time attrition. Over the course of a pay period, the Employer will make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to transitional employees working in the same work location and on the same tour, *provided that the reporting guarantee for transitional employees is met* (emphasis added).

After some experience the parties realized that trying to implement this provision over the course of a "pay period," rather than over the course of a "service week" as in the case of casuals, was administratively difficult. The parties remedied this problem by agreeing to the following in the Step 4 Settlement M-01241.

> The issue in these grievances involves the scheduling priority to be given part-time flexible employees over transitional employees. During our discussion, we mutually agreed as follows: During the course of a *service week,* the Employer will make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to transitional employees working in the same work location and on the same tour, provided that the reporting guarantee for the transitional employee is met (emphasis added).

Note the other slight difference between the casual rule in Article 7.1.B.2. and the transitional employee rule in Article 7.1.C.1.b. Unlike casual employees, who have no guarantees, Article 8, Section 8.D guarantees transitional employees four hours work or pay if they are scheduled to work and report to work.

What is a grievance?

Article 15, Section 1 of the National Agreement sets forth the following definition of a grievance:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

This broad grievance clause means that most work-related disputes may be pursued through the grievance/arbitration procedure. The language recognizes that most grievances will involve violations of the National Agreement or a Local Memorandum of Understanding. Other types of disputes that may be handled within the grievance procedure may include:

• **Violations of postal regulations:** Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours or working conditions are enforceable through the grievance/arbitration procedure as though they were part of the National Agreement. Locally developed policies or procedures may not vary from nationally established handbook or manual provisions.

• **Violations of other enforceable agreements** between NALC and the Postal Service, such as Building Our Future by Working Together, the Article 16.9 Memorandum (M-00830) and the Joint Statement on Violence and Behavior in the Workplace (M-01242). In his August 16, 1996 award in national case C-15697, Arbitrator Snow found that the Joint Statement constitutes a contractually enforceable agreement between the parties and that the union has access to the grievance procedure to resolve disputes arising under it. Additionally, in his discussion of the case, Snow writes that arbitrators have the flexibility in formulating remedies to consider, if a violation is found, removing a supervisor from his or her "administrative duties."

• **Violations of past practices.** Article 5 prohibits management taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement.

Thus, management may not make unilateral changes affecting wages hours or working conditions by arbitrarily changing or breaching established precedent regarding a customary practice not inconsistent with the national agreement—even if the practice is not formalized in writing.

• **Violations of law.** Article 5 also makes violations of law by the Postal Service grievable matters. In C-06858, March 11, 1987, National Arbitrator Bernstein wrote the following concerning Article 5:

The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism ~~it~~ enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act is persuasive evidence that the parties were especially interested in utilizing the grievance and arbitration procedure spelled out in Article 15 to enforce the Service's NLRB commitments.

However, only disputes concerning violations of law by the Postal Service are grievable under the National Agreement—not violations by other government agencies. Thus disputes concerning eligibility determinations by OWCP are not grievable. On the other hand, procedural violations of OWCP or ELM regulations by the Postal Service are grievable. (See the Contract Talk column in the November 2000 *Postal Record*.)

Some disputes are not grievable matters. For example, Article 12, Section 1 gives the Postal Service a right to separate probationary employees at any time during their probationary period without establishing "just cause." Employees separated during their probationary period are contractually barred from filing a grievance concerning the separation. Furthermore, arbitrators will hold that a grievance concerning the separation of probationary employee under the provisions of Article 12, Section 1 is not arbitrable. Thus, unless there is a dispute concerning whether such a separation was effectively completed within the 90-day probationary period, there would be no reason to pursue such cases. However, employees serving their probationary period are members of the bargaining unit and do have access to the grievance procedure on all matters pertaining to their employment except separation. Similarly, casual employees do not have access to the grievance procedure for any reason since Article 1, Section 2 specifically excludes them from the bargaining unit represented by NALC.

The grievance procedure is a powerful tool negotiated to assist letter carriers in resolving a wide range of work- related disputes. If you believe your rights have been violated, see your shop steward. ✉

Voluntary schedule changes

Full-time regular letter carriers have fixed schedules and starting times. The July 2000 *Postal Record* "Contract Talk" column discussed management-initiated temporary schedule changes to a full-time carrier's regularly scheduled workday or workweek. That column covered the out-of-schedule pay provisions in Section 434.6 of the *Employee and Labor Relations Manual* (ELM) that are applicable when management initiates schedule changes.

There may also be situations in which full-time letter carriers wish to have their regular schedules temporarily changed for their own convenience. This is possible, but in such cases management need not pay out-of-schedule premium. In order to qualify for a voluntary schedule change, the request must meet all three of the following criteria:

U.S. POSTAL SERVICE
Request For Temporary Schedule Change For Personal Convenience

For my own personal convenience, I _____
hereby submit this written request for a temporary change in my regular schedule from

(date)_____ through _____

From Regular Schedule:	Change Schedule To:
BT–	BT–
ET–	ET–
SDO–	SDO–

I understand that should this request be granted, I will not be entitled to the payment of out of schedule premium for hours worked outside of and instead of my regular schedule.

Employee's Signature	Social Security No.	Date Signed	Pay Location

I hereby condone and agree to the above request.

Steward's Signature		Date Signed
☐ APPROVED ☐ DISAPPROVED *(Give reason)*	Processing Date	PSD Tech Initials
Supervisor's Signature		Date Signed

PS Form 3189, February 1986 *U.S. GOVERNMENT PRINTING OFFICE: 1986-642-527/784

1. The requested schedule change must be for the personal convenience of the employee—not for the convenience of management. Two national-level arbitration awards have addressed this issue. National Arbitrator Gamser held in case C-00161 that management could not be relieved of the obligation to pay out-of-schedule premium by informing employees who volunteered for higher-level assignments that such assignments would be considered to be "at the request of the employee." National Arbitrator Mittenthal held in case C-00580 that acting supervisors (204Bs), or the "employee-supervisors" in the grievances before him were "entitled to the out-of-schedule premium during their details as temporary supervisors."

2. The employee must sign a Form 3189, Request for *Temporary Schedule Change for Personal Convenience.*

3. Management and the union's representative (normally the certified steward in the employee's work location) must agree to the change and both must sign the Form 3189. Managers questioning this requirement should be directed to Section 232.23 of the *Time and Attendance Handbook F-21* which provides that:

> "This form [3189] is used by employees to request a temporary schedule change for their personal convenience. By submitting a properly approved form to his (sic) supervisor, the employee agrees (if the request is approved by the supervisor) to forfeit any out-of-schedule premium to which he would otherwise be entitled during the period requested. The union steward (or certified union representative in smaller offices) must agree to the temporary change before the change is presented to the supervisor."

Union stewards should take this responsibility seriously. Of course, most such requests can be routinely approved. However, care must be taken that the proposed schedule change does not adversely affect the rights of other members of the bargaining unit. Stewards should also be sure that employees requesting a change in schedule are not seeking to waive the eight-hour scheduling guarantee for full-time employees (see M-00879). All requests must be considered strictly on their merits, without regard to personal feelings or union membership. When in doubt, shop stewards should seek the advice of a branch officer. ✉

Standards

Linear Measurement, DUVRS, Reference Volume, Demonstrated Performance, POST, DOIS, etc. Over the years experienced letter carriers have heard all these terms. All these programs are variants of the same basic idea— management tools to assess letter carriers' daily workload. Of course, management does have a right to develop whatever tools it wants for its own purposes. However, none of these tools has any contractual significance since there are no daily standards for evaluating letter carrier performance. None of these programs may be used as a basis for discipline or as a shortcut to avoid using the established M-39 procedures for evaluating and adjusting routes.

Some managers seem to have the mistaken notion that the rules have changed since the POST and DOIS programs are "computerized," more "modern," more "accurate," or whatever. We all know that the quantitative data in the DOIS and POST programs is often wildly inaccurate and fails to take into account many of the most significant factors affecting office and street times. But usually this argument is pointless and unnecessary since, in fact, the rules have not changed. Perhaps some supervisors need to be reminded.

The so-called office standards of 18 per minute for letters and eight per minute for flats have one purpose only. They are two of the many factors that the M-39 requires management to use in order to calculate "standard office time" during a route inspection. The office time allowance for a route is established as the lesser of the carrier's average office time during the inspection period, or the average standard office time.

Standard office time is based on the totality of a letter carrier's office performance. It may not be broken down into subcomponents—for example, by determining only how long it takes a letter carrier to case a known number of letters. Even when conducting a special one-day mail count under the provisions of M-39 Section 141.2, management must use and fully complete a Form 1838-C.

Simple failure to meet office standards is never just cause for discipline. Under the terms of a September 3, 1976 Memorandum of Understanding, the M-39 Handbook was modified to underscore this point. Section 242.332 now provides that:

> No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet standards.

"No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards."

This principle was further reinforced in the July 11, 1977 Step 4 Settlement M-00386 which states:

> Management may not charge or impose discipline upon a carrier merely for failing to meet the 18 and 8 casing standards. Any such charge is insufficient. Under the Memorandum of Understanding of September 3, 1976 [now M-39 § 242.332] the only proper charge for disciplining a carrier is "unsatisfactory effort." Such a charge must be based on documented, unacceptable conduct which led to the carrier's failure to meet the 18 and 8 criteria. In such circumstances, *management has the burden of proving* that the carrier was making an "unsatisfactory effort" to establish just cause for any discipline imposed (emphasis added).

In summary, do what letter carriers have always done. Give your best effort every day, follow the rules and do not engage in "unacceptable conduct." As long as you remember these simple guidelines, you shouldn't have to worry about being disciplined for failure to make casing standards. ✉

FMLA update

The Department of Labor (DOL) is clear on the eligibility requirements for taking leave under the Family and Medical Leave Act (FMLA)—or is it? The FMLA allows "eligible" employees to take job-protected paid or unpaid leave up to a total of twelve workweeks in a leave year. An employee can use FMLA because of the birth of a child, placement of a child for foster care and/or adoption, to care for family member with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her own job. An "eligible" employee is one who has been employed by the employer for at least 12 months and has worked 1,250 hours during the 12-month period immediately preceding the commencement of the leave. The DOL regulations provide that whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA).

The April 3, 2001 pre-arbitration settlement M-01436 resolved a dispute concerning the meaning of "worked the minimum 1,250 hours:"

> *When an employee is awarded back pay, the hours an employee would have worked if not for the action which resulted in the back pay period, are counted as work hours for the 1250 work hour eligibility under the Family Medical Leave Act (FMLA).*
>
> *If an employee substitutes annual or sick leave for any part of the back pay period that they were not ready, willing and able to perform their postal job, the leave is not counted as hours for the 1250 work hour eligibility requirement under the FMLA.*
>
> *If a remedy modifies an action, resulting in a period of suspension or leave without pay, that time is not counted as work hours for the 1250 hours eligibility requirement under the FMLA.*

Publication 71 (Pub 71), *Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act,* is a Postal Service publication which informs postal employees of their rights under the Family and Medical Leave Act. If an employee requests leave and the supervisor believes the reason the employee needs the leave is due to a "serious health condition," the employer is required to give the employee a copy of Pub 71.

Recently NALC was notified of changes to Pub 71 under the provisions of Article 19. It is NALC's position that the changes to Pub 71 are inconsistent with the Code of Federal Regulations. On February 8, 2001 the NALC appealed the changes to Pub 71 to national-level arbitration. The revised Pub 71 requires documentation to return to work after using protected leave that is inconsistent with the provisions of the EL-311 and ELM 865. Furthermore, the new requirements are more onerous for bargaining-unit employees than for supervisory employees. Additionally, the revised Pub 71 contains examples of specific information that may be required before returning to work. The Postal Service has admitted that there is no contractual or legal basis for these examples and argued that they are only "guidance" and not "mandatory." Imagine trying to explain this distinction to your supervisor.

Another significant pre-arbitration settlement, M-01437, April 09, 2001, overturned an abusive local management policy. The settlement, which quotes Article 13.4.F in its entirety, says it all:

> *The issue in this grievance is whether a local "blanket policy" requiring an update of medical information every 30 days to continue in a light-duty assignment is a violation of Article 13 of the National Agreement.*
>
> *The parties agree that the local practice of requiring an automatic update of medical information every 30 days is contrary to the intent of Article 13 and, therefore, will be discontinued. Consistent with the provisions of Article 13.4.F of the National Agreement, an installation head may request an employee on light-duty to submit to a medical review at any time: The installation head shall review each light duty reassignment at least once each year, or at any time the installation head has reason to believe the incumbent is able to perform satisfactorily in other than the light duty assignment the employee occupies. This review is to determine the need for continuation of the employee in the light duty assignment. Such employee may be requested to submit to a medical review by a physician designated by the installation head if the installation head believes such examination to be necessary (emphasis added).*

Recent settlements

Last month's column highlighted recent national level pre-arbitration settlements of FMLA-related issues. This article provides an update of various other contract issues recently resolved at the national level. Although each of these settlements concerns a specific narrow issue, we are pleased with the large number of such disputes that we have recently been able to resolve. Actual copies of these and other recent settlements can be found in the CAU section of NALC's web site.

The March 17, 2001 national level prearbitration settlement in case M-01442 put an end to a novel "flexibility" strategy some area Postal Service officials have been trying to implement. PTF letter carriers were told that as a condition of employment they had to agree to be assigned to more than one installation. When hired, their Form 50s were completed to reflect more than one installation as a duty station. They were then required to work for different postmasters in different towns on a day-to-day basis. Needless to say, this arrangement was a contractual nightmare. Where did they accrue seniority? Where could they opt? Where did they sign up for leave? When converted to full-time, where would they finally end up? The settlement provides that:

> *An employee's official Form 50 may reflect only one duty station. A Form 50 which reflects more than one duty station will be amended to reflect one duty station.*

If any NALC branches are aware of other situations where PTFs are assigned to more than on installation, they should contact their national business agent.

The prearbitration settlement M-01438 resolves a long standing dispute concerning the Handbook EL-505, Injury Compensation. NALC had appealed the EL-505 to arbitration under the provisions of Article 19 because of the Postal Service's position that injured letter carriers could be required to take "functional capacity tests." These tests are typically whole body tests that consist of a series of procedures to determine an employee's physical demand level. They are designed to measure the employee's pain or fatigue level. NALC has always insisted that such tests should not be made mandatory because of their demonstrated potential to cause or aggravate injuries. The settlement states that:

> *In applying the language of the EL-505, it is mutually understood that an employee will not be required to take a functional capacity test if the employee's treating physician recommends against it for medical reasons.*

Injured letter carriers should always consult with their treating physician if they have questions or reservations concerning any tests or procedures the Postal Service seeks to have performed.

Article 27 sets forth the rules for 'employee claims" for lost or damaged personal property. It specifically excludes "privately owned motor vehicles and the contents thereof." Over the years, most regional arbitrators have incorrectly held that it excludes bicycles as well. For example, one regional arbitrator reasoned as follows:

> *Means of transportation to and from the employee's place of employment cannot be held a compensable loss under the terms of Article 27. While the word "bicycle" does not appear in the Article, the word "automobile" must be construed as embracing all means of transportation.*

The April 19, 2001 prearbitration settlement M-01440 acknowledges that these regional arbitrators have been wrong and clarifies the application of Article 27.

> *The issue in this grievance is whether Article 27, Employee Claims, is the proper procedure to file a claim for the loss or damage to bicycles, or is a bicycle considered a "motor vehicle" and therefore subject to the procedures of the Federal Tort Claims Act. The parties agreed that Article 27 does not apply to privately owned motor vehicles and the contents thereof. However, we agree that non-motorized bicycles are not considered "privately owned motor vehicles," such as those excluded from the Article 27 procedures. Therefore, a claim for loss or damage to non-motorized bicycles can be made and decided in accordance with the provisions of Article 27.*

Letter carriers seeking to make claims involving a privately owned motor vehicle should check with a steward or branch officer, since such claims must be made under the procedures of the Federal Tort Claims Act rather than Article 27 procedures.

Overtime limits

The Contract Administration Unit has been receiving disturbing reports of widespread violations of the contractual overtime limits in some Postal Service Areas. Once again it has become necessary to review these provisions so that all letter carriers are aware of their rights. There are two separate restrictions on the maximum number of hours a letter carrier craft employee may be required to work. One is found in Article 8, Section 5.G and the other in Section 432.32 of the *Employee and Labor Relations Manual* (ELM)

Article 8, Section 5.G applies to full-time regular and full-time flexible employees only. Excluding December, it limits them to no more than twelve hours of work in a day and no more than sixty hours of work in a service week. National Arbitrator Mittenthal ruled in C-06238 that the 12- and 60-hour limits are absolutes. Excluding December, a full-time employee may neither volunteer nor be required to work beyond those limits. In C-07323 Arbitrator Mittenthal ruled that when a full-time employee reaches sixty hours in a service week, management is required to send the employee home—even in the middle of a scheduled day. He further held that in such cases the employee is entitles to be paid the applicable eight hour guarantee for the remainder of his or her scheduled day.

On October 19, 1988 the national parties signed the following Memorandum of Understanding (M-00859) to implement the Mittenthal awards.

The parties agree that with the exception of December, full-time employees are prohibited from working more than 12 hours in a single work day or 60 hours within a service week. In those limited instances where this provision is or has been violated and a timely grievance filed, full-time employees will be compensated at an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12 or 60 hour limitation. The employment of this remedy shall not be construed as an agreement by the parties that the Employer may exceed the 12 and 60 hour limitation with impunity. As a means of facilitating the foregoing, the parties agree that excluding December, once a full-time employee reaches 20 hours of overtime within a service week, the employee is no longer available for any additional overtime work. Furthermore, the employee's tour of duty shall be terminated once he or she reaches the 60th hour of work, in accordance with Arbitrator Mittenthal's National Level Arbitration Award on this issue, dated September 11, 1987, in case numbers H4N-NA-C 21 (3rd issue) and H4N-NA-C 27.

Arbitrator Snow ruled in C-18926 that the Memorandum of Understanding M-00859 limits the remedy for any violations of the Article 8.5.G to an additional premium of 50 percent of the base hourly straight-time rate.

ELM Section 432.32 provides the following rule that applies to all employees, including casuals and transitional employees (C-15699, National Arbitrator Snow).

Except as designated in labor agreements for bargaining unit employees or in emergency situations as determined by the PMG (or designee), employees may not be required to work more than 12 hours in 1 service day. In addition, the total hours of daily service, including scheduled work hours, overtime, and mealtime, may not be extended over a period longer than 12 consecutive hours. Postmasters, Postal Inspectors, and exempt employees are excluded from these provisions. (Emphasis added)

Because this ELM provision limits total daily service hours, including work and mealtime, to 12 hours, an employee is effectively limited to 11 ½ hours per day of work plus a ½ hour meal. However, the ELM also permits the collective bargaining agreement to create exceptions to this general rule. The only exception to this rule is for full-time regular employees on the overtime desired list who, in accordance with Article 8.5.G, "may be required to work up to twelve (12) hours in a day." Since "work," within the meaning of Article 8.5.G does not include mealtime, the "total hours of daily service" for carriers on the overtime desired list may extend over a period of 12 ½ consecutive hours. Additionally, Article 8.5.G provides that the limits do not apply during December when full-time employees on the overtime desired list may be required to work more than twelve hours. These exceptions do not apply to casuals, transitional employees, part-time employees or full-time employees who are not on the overtime desired list, all of whom are effectively limited to 11 ½ hours of work per day, even during December. It is NALC's position that the Snow decision in C-18926 limiting the remedies to an additional premium of 50 percent of the base hourly straight time rate only applies to violations of the Article 8.5.G. It does not limit remedies for repeated or deliberate violations of ELM 432.32.

Family and Medical Leave Act vs. Sick Leave for Dependent Care

Q. Are the Family and Medical Leave Act (FMLA) and Sick Leave for Dependent Care (SLDC) one and the same?

A. No. FMLA is a 1993 federal law which entitles eligible employees to take up to a total of 12 workweeks of unpaid leave during a 12 month period for the birth of a child and to care for such child, for the placement of a child for adoption or foster care, to care for a spouse or an immediate family member with a serious health condition, or when he or she is unable to work because of a serous health condition.

SLDC is a contractual right which enables a letter carrier to use paid sick leave - up to 80 hours per leave year to care for an ailing family member.

Q. How are the two similar?

A. Just to name a few significant similarities:

- Both were developed to balance the demands of the workplace with the needs of the families.
- The definition of family member is the same (see ELM 515.2).
- Neither FMLA nor SLDC entitle an employee to any leave in addition to what the employee currently earns, rather both FMLA and SLDC allow the employee the right to use leave for a new reason—to care for a family member.
- If the employee needs time off to care for a family member with a serious health condition the employer cannot take disciplinary action against the employee for unscheduled absences.
- If the family member has a serious health condition and the carrier takes SLDC, the time off will count towards both the 80 hour SDLC and 12 week FMLA entitlement.
- As stated in Ron Brown's *Postal Record* column this month, those who are fortunate enough to have a healthy family and thus, who have no need to take leave under either FMLA or SLDC, cannot carry their unused right to FMLA leave or SLDC leave over to following years.
- The entitlement to both FMLA leave and SLDC leave begin with the first day of the postal leave year.

Q. What is a serious health condition?

A. There is no laundry list of what qualifies as a serious health condition but if an illness or injury meets one or more of the criteria listed below then it would be considered a serious health condition.

- An overnight stay in a hospital, hospice or residential medical care facility, including any period of incapacity or subsequent treatment for such care.
- A period of incapacity of more than three consecutive calendar days - including any subsequent treatment or period of incapacity relating to the same condition that also includes treatment two or more times by a member of the health care profession or treatment by the health care professional on at least one occasion which results in a regimen of continuing treatment.
- Pregnancy—any period of incapacity due to pregnancy or for prenatal care, including morning sickness or doctor visits.
- Chronic conditions—conditions which occur repeatedly and require treatment. Some examples of a chronic condition are diabetes, epilepsy or asthma.
- Permanent long-term conditions requiring supervision due to a condition for which treatment may be effective or a cure imminent. Some examples include Alzheimer's, multiple sclerosis or terminal cancer.
- Non-chronic conditions which necessitate the need for multiple treatments such as kidney dialysis or physical therapy after an accident.

Q. How are FMLA and SLDC different?

A. Some significant differences are:

- Unless the illness, injury or other condition is a serious health condition the employee can be disciplined for unscheduled absences when using SLDC whereas when using FMLA the leave is protected and employee cannot be disciplined. FMLA allows the employee 12 workweeks of protected leave (combination of annual, sick or leave without pay depending on the reason for the leave) while SLDC only allows the employee to use 80 hours of earned sick leave.
- The employee can take up to 80 hours of sick leave to attend to a family member with a minor or serious illness, injury or other condition, while FMLA must be taken to attend to a family member with a serious illness, injury or other condition. FMLA is a federal law and unless the law is appealed it will continue until an Act of Congress changes it. SLDC is a contractual right which must be renegotiated at the end of the 1998-2001 National Agreement.

Q. How do I know what my rights are under FMLA and what my rights are under SLDC?

A. An employee's rights under FMLA are outlined in the Employee and Labor Relations Manual (ELM), Section 515. The Department of Labor's Poster 1420 which gives a brief summary of employee rights, by law, must be displayed in every postal facility. If the employer suspects the employee's leave is FMLA related the employer is required to supply the employee with a copy of Publication 71, Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act.

The Memorandum of Understanding on SLDC can be found in the 1998-2001 National Agreement between the NALC and the USPS.

M-01444

LABOR RELATIONS

UNITED STATES POSTAL SERVICE

Re: Q94N-4Q-C 99022154
Q98N-4Q-C 00032161
Class Action
Washington, DC 20001-2144

On several occasions we met in pre-arbitration discussions regarding the above-referenced grievances.

The issue in these grievances is whether or not the Piece Count Recording System (PCRS), Projected Office Street Time (POST), or the Delivery Operations Information System (DOIS) violate the National Agreement.

After reviewing this matter, we mutually agreed to settle these grievances as follows;

Daily piece counts (PCRS) recorded in accordance with the above-referenced systems (POST or DOIS) will not constitute the sole basis for discipline. However, daily counts recorded in accordance with these procedures may be used by the parties in conjunction with other management records and procedures to support or refute any performance-related discipline. This does not change the principle that, pursuant to Section 242.332 of the M-39, "No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards." Furthermore, the pre-arbitration settlement H1N-1N-D 31781, dated October 22, 1985, provides that "there is no set pace at which a carrier must walk and no street standard for walking."

This settlement is made without prejudice to the parties' rights under Article 19 or Article 34 of the National Agreement.

It is additionally understood that the current city letter carrier route adjustment process is outlined in Subchapter 141 and Chapter 2 of the M-39 Handbook. All those functionalities in DOIS, which relate to the route inspection and adjustment process, must be in compliance with these two parts of the M-39 as long as they are in effect.

It is understood that no function performed by POST or DOIS, now or in the future, may violate the National Agreement.

Please sign and return the enclosed copy of this decision as your acknowledgment of your agreement to settle these grievances.

Time limits were extended by mutual consent.

Sincerely,

Doug A. Tulino
Manager
Labor Relations Policies
and Programs

William H. Young
Executive Vice President
National Association of Letter
Carriers, AFL-CIO

Date: 7-30-2001

POST and DOIS settlement

The July 30, 2001 pre-arbitration settlement M-01444, reprinted on the facing page, resolved the long-standing national level disputes concerning the Piece Count Recording System (PCRS), Projected Office Street Time (POST), and Delivery Operations Information System (DOIS) programs. A copy of the settlement in PDF format is also available from the NALC web site at www.nalc.org. The settlement was the culmination of extended discussions and sustains NALC's position on all substantive areas of disagreement.

The settlement unequivocally states that the POST, DOIS and PCRS data will not constitute the sole basis for discipline. The settlement also reaffirms the principle, spelled out in Section 242.332 of the M-39, that "No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards." Computer or volume data, standing alone, is never sufficient to establish just cause for discipline. The settlement also restates the principle from the 1985 pre-arbitration M-00304 that "there is no set pace at which a carrier must walk and no street standard for walking."

"No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards."

The settlement allows both parties to use the information from these programs to support or refute any performance related discipline. Thus any information from these programs necessary to investigate or process a grievance must be made available to the Union under the provisions of Articles 17 and 31.

The settlement makes clear that all route adjustments must be performed in accordance with Subchapter 141 and Chapter 2 of the M-39 Handbook. If DOIS data relating to the route inspection and adjustment process is used, it must be in strict compliance with these handbook provisions. Nothing has changed. DOIS, like any other software, is no better than the data entered. If mistakes are made, the results printed out will be wrong and subject to challenge. It's just that simple.

Finally, the settlement makes clear that "no function performed by POST or DOIS, now or in the future, may violate the national agreement." Shop stewards take note. The DOIS program has an overtime tracking module. In principle it usually can track overtime distribution in accordance with the provisions of Article 8. However, the overtime tracking module is so poorly conceived that it requires numerous time-consuming daily "adjustments" to work correctly. We expect that, as a practical matter, supervisors will not bother so the data will not be contractually correct in many situations. The settlement makes clear that in such cases the provisions of Article 8, not the DOIS program, are controlling.

It has been almost four years since management first notified NALC that it was planning to test the POST and DOIS programs. At that time NALC was advised that the Postal Service believed these new programs would greatly enhance its ability to monitor each carrier's daily performance and capture undertime. More recently, the Postal Service decided to standardize upon DOIS as the best program. The DOIS computer software uses the piece-count information from PCRS to calculate estimated daily route times, track overtime, and even help make route adjustments. It sounded too good to be true—and it was. It simply took four years for the Postal Service to recognize the obvious.

Although this settlement agreement took an inordinate amount of time to negotiate, the final result is a step in the right direction. It recognizes that no computer program can abridge letter carriers' contractual rights. It also recognizes that postal management can use the software as a tool to provide supervisors with information to help make day-to-day decisions. Of course, the debate over how much time it can take to deliver mail has been an ongoing issue for many years. Hopefully this national pre-arbitration decision will make life a little easier on the workroom floor for everyone.

I have met with the Postal Service numerous times over the last two months concerning the Managed Service Points (MSP) program. We have made some headway on the key issue of the times listed and approved by the local manager on the form 1564-A. Let's hope that the Postal Service's second step in the right direction is just right around the corner. ✉

Route adjustments

The right to a special route examinations under the provisions of M-39, Section 271g was most recently addressed in NALC Director of City Delivery, Gary Mullin's column in the January 2000 Postal Record. They are not a pointless exercise. M-39, Section 242.122 requires that inspections result in routes being adjusted to "as nearly eight hours daily work as possible." Furthermore, M-39, Section 211.3 requires that if a special inspection demonstrates that a route is overburdened, adjustments must be made within 52 days of the completion of the mail count unless an exception is approved by the District manager. This provision is the subject of the following memorandum of understanding:

> The United States Postal Service and the National Association of Letter Carriers, AFL-CIO, agree that it is in the best interests of the Postal Service for letter carrier routes to be in proper adjustment. Therefore, where the regular carrier has requested a special mail count and inspection, and the criteria set forth in Part 271g of the Methods Handbook, M-39, have been met, such inspection must be completed within four weeks of the request, and shall not be delayed. If the results of the inspection indicate that the route is to be adjusted, such adjustment must be placed in effect within 52 calendar days of the completion of the mail count in accordance with Section 211.3 of the M-39 Methods Handbook. Exceptions may be granted by a Division General Manager only when warranted by valid operational circumstances, substantiated by a detailed written statement, which shall be submitted to the local union within seven days of the grant of the exception. The union shall then have the right to appeal the granting of the exception directly to Step 3 of the grievance procedure within 14 days.

In the recent regional arbitration award C-21979, the arbitrator sustained the union's grievance concerning a violation of these provisions and awarded a substantial monetary award. The full award is available at the CAU section of the NALC website at www.nalc.org. Other arbitration awards granting monetary awards for violation of these provisions include C-19464, C-17006 and C-16848 and C-22242. Reprinted below are excerpts from the award:

> By requiring this level of specificity in the application for an extension, it is clear that the parties did not contemplate that extensions would be granted for ordinary, foreseeable circumstances of the average inspection. Rather, one can infer that the national representatives intended the phrase to refer to some event that could not be anticipated at the start of an inspection. Other arbitrators are in agreement that in general a "valid operational circumstance" is "an unforeseeable event(s) occurring subsequent to the route inspections which have a demonstrable and direct impact upon daily operations of the Postal Service."
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> Thus, an extension application must be based not only on an unforeseeable event(s), but the event(s) must also have a serious, immediate impact on Postal operations. The events in that category include, but are not limited to: act of God emergencies — floods, fires, earthquakes, blizzards, tornadoes, hurricanes, plagues, riots, major equipment or structural failures, or other situations of that gravity....
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> The Postal Service's format makes unsupported assertions of why it seeks an extension instead of the detailed statement substantiating each ground as required by the §211.3. The grounds of the extension were all administrative in nature, and were all factors and circumstances relating to problems totally within Postal Service control which could have reasonably been anticipated and provided for when the mail count and route inspection was undertaken. Further, the grounds cited by the Postmaster benefitted only the convenience of the Postal Service....
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> It is not the Carriers' problem that the District over-scheduled itself. The instrumentality of mail counts and inspections is wholly in the hands of the Postal Service which has either failed to provide adequate personnel to handle the commitments it assigns itself, or has failed to adequately document the difficulty it encountered in managing so many inspections at the same time. In either case, this ground alone will not support a request for an extension because this ground is purely an administrative convenience....
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> Although the Carriers would have difficulty establishing exact dollar losses, it does not mean they have suffered no harm. This is an atypical case because of the serious abuse of the extension exception. This may not be the same result in a less egregious case, that is why the national parties have set a case-by-case standard of review. The harms cited: prolonged anxiety, the stress of enduring overburdened routes, the frustration of childcare, family, recreational, and bad faith violations of Section 211.3, and the Postal Service's breach of the covenant of good faith and fair dealing.

Recent settlements

The September 20, 2001 Step 4 Settlement M-01446 resolved a national level grievance concerning the scope of ELM Section 437 which establishes procedures for requesting a waiver of a claim made by the USPS against a current or former employee for the recovery of pay which was erroneously paid. The ELM provides in subsection 437.6 that the Postal Service will grant a waiver request if all of the of the following conditions are met:

a. The overpayment occurred through administration error of the USPS. Excluded from consideration for waiver of collection are overpayments resulting from errors in timekeeping, keypunching, machine processing of time cards or time credit, coding, and any typographical errors that are adjusted routinely in the process of current operations.

b. Everyone having an interest in obtaining a waiver acted reasonably under the circumstances, without any indication of fraud, misrepresentation, fault, or lack of good faith.

c. Collection of the claim would be against equity and good conscience and would not be in the best interest of the USPS.

The Postal Service had taken the position that, since withheld insurance premiums are not pay, the ELM 437 waiver provisions do not apply to employer claims resulting from a failure to make proper deduction for insurance premiums. The grievance was resolved as follows:

The issue in this case is whether Section 437 of the Employee and Labor Relations Manual allows employees to request a waiver where the employer erroneously failed to withhold employee insurance premiums. The parties agree that nothing contained in Section 437 of the ELM precludes an employee from requesting a waiver where the employer erroneously failed to withhold employee insurance premiums

The October 9, 2001 Step 4 Settlement M-01447 resolved a dispute concerning the authority of arbitrators. The case arose when a regional arbitrator denied a request by the Postal Service advocate to hear only arbitrability arguments during the first day of hearings and postpone a hearing on the merits of the case until all the procedural issues were resolved. After the arbitrator refused to "bifurcate" the hearing as requested, the Postal Service appealed the case to Step 4. The grievance was resolved as follows:

The issue in this case is whether an arbitrator may approve or deny a request by one of the parties to bifurcate an arbitration proceeding, hear only procedural issues on the first day of hearing and postpone a hearing on the merits until the procedural issues are decided.

During our discussion we mutually agreed that an arbitrator has discretion to approve or deny such a request to bifurcate the hearing of a case.

The September 6, 2001 National Level Prearbitration Settle-ment M-01445 resolved a dispute concerning the remedy in cases where there are multiple violations during the same service week of the 12 and 60 work hour limits in Article 8, Section 5.G. In the settlement the parties agreed that the remedy of 50% of the base hourly straight time rate provided in the Memorandum M-00859 applies for each hour worked in excess of twelve on a service day (excluding December) by a full-time employee. The remedy of 50% of the base hourly straight time rate also applies for each hour worked by a full-time employee in excess of the sixty during the same service week (excluding December) in which the full-time employee has exceeded twelve hours in a service day. For example, if during the same service week a full-time employee worked 14 hours on Monday and 62 hours on Friday, four hours would have been worked in violation of the Article 8.5.G restrictions. The appropriate remedy in this example would be four hours of pay at 50% of the base hourly straight time rate——two for Monday and two for Friday. In this example, management should have instructed the carrier to "clock off" and go home on Friday when sixtieth hour was reached. The employee would then be paid whatever guarantee applied for the remainder of the service day.

In those circumstances where the same work hours of a full-time employee simultaneously violate both the twelve hour and sixty hour limits, only a single remedy of 50% of the base hourly straight time rate is applied. For example if a full-time employee worked 14 hours on Friday, resulting in a 62 hour workweek, only two hours would have been worked in violation of the Article 8.5.G restrictions. The appropriate remedy in this example would be two hours of pay at 50% of the base hourly straight time rate.

A signed copy of these and other recent settlements can be found in the Contract Administration Unit section of the NALC website at www.nalc.org.

Indefinite suspension arbitration

In the October 25, 2001 award C-22652, National Arbitrator Dennis Nolan sustained NALC's position concerning the back pay provisions of Article 16, Section 6.C. The grievance concerned the back pay entitlement of an employee who was removed after having been in an indefinite suspension status for almost two years and was subsequently reinstated by the decision of a Dispute Resolution Team. The contract provisions in dispute provide the following:

Article 16 Section 6. Indefinite Suspensions~~-Crime~~ Situation
A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.
B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.
C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B above.

Arbitrator Nolan rejected the Postal Service's position that the back pay provisions of Article 16.6.C apply only where the Postal Service unilaterally "determines to return the employee to a pay status" and not when the employee is returned to work as a result of a grievance settlement or, as in the case before him, the decision of a Dispute Resolution Team. He explained his decision as follows:

'The Employer' can act in many different ways. Officials at many different levels may have the authority to make reinstatement decisions. Any official making such a decision will necessarily be influenced by a variety of factors including the nature of the criminal charges, the evidence supporting them, the manner of their disposition, arguments and suggestions from the employee and the Union, the likelihood of a grievance if the Employer denies reinstatement, and the prospects for success if such a grievance goes to arbitration. No decision, in other words, is totally unilateral. Union pressure, actual or potential, is a normal part of the process. Moreover, any official's decision is subject to review in the Postal Service hierarchy and to reconsideration at any appropriate level. The Employer's determination can be totally willing or extremely reluctant, but the presence of external concerns and pressures will make the decision no less one by 'the Employer.'
Whether management makes a reinstatement decision before or after a grievance is filed thus changes nothing. A decision to reinstate an employee made before a grievance is filed is a decision by "the Employer," but so is a reinstatement decision made after. So, most importantly, is a reinstatement decision explicitly made to resolve a grievance. A grievance settlement (at least one that does not purport to limit back pay under Paragraph C.) is no less a decision by "the Employer" than any other properly authorized decision.
Membership on the [DRT] teams is not random. To the contrary, each member serves as a "representative" of a party. To put it more clearly, the management-appointed member "represents" the Postal Service while the Union-appointed member "represents" the Union. Decisions of the DRT are thus no different from decisions of any other two representatives who resolve a dispute. That the parties have allowed their DRT "representatives" to act relatively independently changes nothing. The Postal Service joined in stipulating at the hearing that "a DRT decision is the same as the settlement of a grievance, minus some steps." If a formal grievance settlement is a determination by the Employer, so is a DRT decision.

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Award: *The grievance is sustained. Reinstatement of an employee pursuant to a Dispute Resolution Team decision resolving a grievance over that employee's removal entitles that employee to back pay under Article 16, Section 6, Paragraph C., providing the employee was otherwise available for duty. The Grievant is therefore entitled to the appropriate back pay for the period of his emergency suspension exceeding 70 days, less any earnings he had or reasonably should have had during that period.*

Arbitrator Nolan's entire award in C-22652 is available from the NALC Web site at www.nalc.org.