

Limited duty job offers

In an award dated November 4, 1998 (C-18860), National Arbitrator Snow held that a partially disabled full-time regular letter carrier cannot be forced to accept a part-time position in another craft, even if there is no limited duty work available in the letter carrier craft. The case grew out of a grievance filed by a letter carrier who accepted a limited duty job offer as a PTF clerk "under protest" because of the threat of loss of compensation benefits if she refused to accept the position. NALC's continuing right to represent an employee concerning a position in another craft accepted "under protest" had earlier been established by a January 29, 1993 Memorandum of Understanding (M-01120).

The case was complicated by the intervention of the American Postal Workers Union which argued that any reassignments of injured letter carriers to a full-time regular position in the clerk craft could violate conversion rights of part-time flexible clerks under the terms of the APWU-USPS national agreement. Responding to this argument, Snow wrote that "simply because complying with one agreement would violate the other does not relieve management of its obligation to comply with both."

Snow held that when management forces a full-time regular letter carrier to accept a part-time flexible position in another craft, it denies the employee protections set forth in ELM 546.141 which provides:

546.141 Obligation

When an employee has partially overcome the injury or disability, the USPS has the following obligation:

a. Current Employees. When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the USPS should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

1. To the extent that there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.

2. If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.

3. If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to lim-

ited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.

4. An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.

In his opinion sustaining NALC's position Arbitrator Snow wrote that:

In order to comply with ELM Section 546.141(a) the Employer is not permitted to change the status of a disabled employee when switching crafts; but if the employee is a full-time regular worker and there are part-time flexible workers in the gaining craft, then reassigning the employee as a full-time worker could violate the conversion rights of part-time flexible employees in the gaining craft. Such an assessment, however, must be based on APWU's agreement with the Employer, not that of the NALC. Whether or not such a transaction violated the APWU Agreement is not before the arbitrator in this dispute. The only question to be answered is whether transferring the grievant to a part-time flexible position would violate the Employer's obligation with regard to the NALC. That question must be answered in the affirmative.

Snow dismissed the Postal Service's assertion that the 1993 arbitration award C-13396 was controlling in this case. He distinguished the earlier case by pointing out that it had involved a partially recovered former employee rather than a current employee.

Arbitrator Snow remanded the issue of remedy to the parties "so that they may attempt to agree on a negotiated settlement." We will be meeting with representatives of management in a good faith effort to accomplish this in a manner which fully protects the rights of letter carriers in the many grievances that have been filed concerning this issue. We can only hope that management has finally learned a valuable lesson and will cooperate with NALC in a joint effort to resolve the remaining issues. ☒

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Recent settlements

At a recent regional arbitration the Postal Service advocate tried to be a bit too clever and argued against the admission of the JCAM on the grounds that it had not been explicitly cited during the earlier steps of the grievance procedure and thus constituted new argument or evidence. In the Step 4 Settlement M-01373, the Postal Service headquarters representative agreed to do the right thing and the parties remanded the case right back to the same arbitrator with the following instructions:

The Joint Contract Administration Manual (JCAM) does not constitute argument or evidence; rather, the JCAM is a narrative explanation of the Collective Bargaining Agreement and should be considered dispositive of the joint understanding of the parties at the national level.

In this particular case, the management advocate had been seeking to avoid strong JCAM language expressing the parties' mutual agreement concerning the application of the "just cause" provisions of Article 16, Section 1. However, this case is also a reminder to union representatives to check the JCAM whenever they are processing or discussing a grievance.

In another case recently appealed to Step 4 (M-01372) it was the arbitrator who was out of line. During the hearing she indicated that she disagreed with National Arbitrator Snow's August 16, 1996, decision in C-15697 which concerned the Joint Statement of Violence and Behavior in the Workplace. Once again the Postal Service made a principled decision and agreed to remand the case with the following strong admonition to regional arbitrators:

The whole purpose of the national arbitration scheme is to establish a level of definitive rulings on contract interpretation questions of general applicability. National decisions bind regional arbitrations, and not the reverse.

Postal Service handbook and manual provisions are often jargon ridden, poorly written and virtually undecipherable. The provisions of ELM 514.2 governing PTF sick leave are typical. They provide in relevant part that:

513.421 Part-Time Employees

a. Absences due to illness are charged as sick leave on any day that an hourly rate employee is scheduled to work except national holidays.

b. Except as provided in 513.82, paid sick leave may not exceed the number of hours that the employee would have been scheduled to work, up to:

(1) A maximum of 8 hours in any 1 day.

(2) 40 hours in any 1 week.

(3) 80 hours in any one pay period. If a dispute arises as to the number of hours a part-time flexible employee would have been scheduled to work, the schedule will be considered to have been equal to the average hours worked by other part-time flexible employees in the same work location on the day in question.

c. Limitations in 513.421b apply to paid sick leave only and not to a combination of sick leave and workhours. However, part-time flexible employees who have been credited with 40 hours or more of paid service (work, leave, or a combination of work and leave) in a service week are not granted sick leave during the remainder of that service week. Absences, in such cases, are treated as nonduty time which is not chargeable to paid leave of any kind. (Sick leave is not intended to be used to supplement earnings of employees.)

The Step 4 Settlement M-01374 concerned the grievance of a part-time flexible employee who was denied sick leave even though he had not yet worked forty hours during the week. Management did not dispute that the employee was legitimately sick. Rather it argued that since the employee would work additional hours later in the week, granting the sick leave would violate the 40-hour restriction in ELM 513.421b. Even management's Step 3 representative misunderstood the applicable ELM provisions. The Step 4 settlement sustaining NALC's position provided that:

The restrictions on granting sick leave to PTF employees "who have been credited with 40 hours or more of paid service" applies only to PTF employees who have already been credited with 40 hours of service at the time the request is made. In the circumstances presented in this case the requested sick leave should have been granted since the employee was scheduled to work and had only been credited with 31.9 hours of paid service on the day the request was made.

Undoubtedly employees will continue to experience problems with legitimate sick leave usage. However, this settlement should conclusively resolve at least this one recurring issue. ☒

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PTF scheduling priority

Article 7, Section 1 of the National Agreement gives career part-time flexible letter carriers a scheduling priority over non-career casual and transitional employees. Article 7.1.B.2, which concerns casual employees, provides that:

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 provision obligates management to give part-time flexibles working at the straight-time rate a priority in scheduling 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 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 December 20, 1979 decision C-00403.

Similarly, Article 7, Section 1.C.1.b, which concerns Transitional Employees 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.*

After some experience applying this provision the Postal Service recognized that, as NALC had predicted, it was not administratively feasible to apply this provision over the course of a two week pay period. Consequently, the parties agreed to a mod-

ification in the February 12, 1996 Step 4 Settlement M-01241 which provided that:

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)

Recently some Postal Service Area representatives took the position that these provisions did not apply to part-time flexible letter carriers during their probationary period—presumably on the grounds that they were not yet "qualified." This argument was laid to rest in the January 13, 1999 Step 4 Settlement M-01375 which provided that:

The issue in this case is whether the scheduling priority in Article 7.1.C.1.b to utilize part-time flexibles at the straight timer rate prior to assigning the work to transitional employees includes part-time flexibles in their probationary period.

As a result of our discussion, it was agreed that Article 7.1.C.1.b applies to all part-time flexibles, including those in their probationary period.

The specific facts that gave rise to this grievance settlement concerned management giving work to transitional employees. However, by necessary implication it also applies to management giving work to casual employees rather than part-time flexible employees during their probationary period.

ELM Section 437 contains the provisions for requesting a waiver of employer claims for erroneous pay. These provisions specifically provide in Section 437.32 that such waiver requests should be made by submitting a *PS Form 3074, Request for Waiver of Claim for Erroneous Payment of Pay* to the installation head. Imagine our surprise when we read in *Postal Bulletin 21983* (10-22-98) that the PS Form 3074 was obsolete and would not be replaced. Some installations, acting precipitately, immediately discarded all copies of the form. This was brought to the attention of the Postal Service which acknowledged its mistake and attributed it to some unaccountable bureaucratic snafu. We have been promised that this mistake will be corrected in a *Postal Bulletin* announcement. In the meantime, be assured that PS Form 3074 does exist and that the waiver provisions of ELM 437 remain in full force and effect. ☐

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Sixty-day reviews

Advance planning for DPS implementation is necessary and appropriate under both the Unilateral and the X-Route methods. However, the parties recognized from the beginning that such advance planning is not an exact science. To ensure that the final result would be eight-hour routes, the September 17, 1992 Memorandum of Understanding entitled *Resolution of Issues Left Open by the Mittenhal Award of July 10, 1992* (M-01114) provided that:

Within 60 days of implementing the planned adjustments for future automated events, the parties will revisit those adjustments to ensure that routes are as near to 8 hours daily, as possible. Both the planned adjustments and subsequent minor adjustments that may be necessary to ensure compliance will be based on the most recent route inspection data for the route. However, if the future event occurs after the 18-month time limit expires, a new mail count, route inspection and evaluation must occur, unless the local parties agree otherwise.

This requirement was subsequently incorporated into the M-39 Handbook as Section 243.614 which provides that:

243.614. Under Delivery Point Sequencing (DPS), within 60 days of implementing the planned adjustments for future automated events, the parties will revisit those adjustments to ensure that routes are as near to 8 hours daily as possible. If it is determined that the route(s) are not properly adjusted, the adjustments will be made in accordance with the September 1992 Memorandum of Understanding.

The December 3, 1997 Prearbitration Settlement, M-01268 made clear that the required revisitation is not a mere formality. If the review shows that adjustments are required to make eight-hour routes, they must also be completed. The settlement provides:

The issue in this case deals with the 60-day revisitation of previously implemented DPS planned route adjustments. Specifically, whether or not the review of planned DPS adjustments within "60 days" of their implementation also includes and imposes the same 60-day deadline for implementing any further adjustments (if any) as a result of this review.

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The parties mutually agree that the September 17, 1992, Memorandum entitled, "Resolution of Issues Left Open by the Mittenhal Award of July 10, 1992", requires that planned adjustments be revisited within 60 days after such adjustments are implemented. The parties further agree that adjustments required pursuant to the 60-day review should be implemented within the 60-day review period. The parties recognize, however, that adjustments within the 60-day review period may not be possible where there are valid operational circumstances which warrant an exception.

When management asserts that valid operational circumstances warrant an exception to the 60-day period, it must submit a detailed written statement substantiating the asserted circumstances to the local union within seven days following the expiration of the 60-day period. Disputes concerning the asserted operational circumstances will be resolved through the grievance/arbitration procedure.

Two recent regional arbitration awards demonstrate that the Postal Service cannot violate these contractual commitments with impunity. In C-18917, November 19, 1998, Arbitrator Di-Lauro provided the following remedy for management's failure to implement adjustments required by the sixty day review:

In keeping with Arbitrator Powell's pronouncement in case [C-11919], that a basic principle of the arbitration process is to render an award that will both fairly compensate the affected employees and serve as a detriment to continued violations without becoming punitive, the Postal Service is directed to pay \$100.00 per week, beginning August 26, 1997, which is the beginning of the fourteen day period prior to when the Step 1 meeting was held, until it implements the adjustments resulting from the sixty day review. That amount is to be accrued until the changes are implemented and, when implemented, is to be divided among the full-time carriers who hold bids at the facility.

In C-18964, December 5, 1998 Arbitrator Harris issued an award in a case where the Postal Service failed to conduct any sixty-day reviews at all. He ordered the Postal Service to pay each letter carrier whose route was not revisited a sum of five hundred dollars as remedy, and further directed the Postal Service to ensure that the routes were adjusted to "as nearly eight hours as possible" (M-39 242.122) by a date certain.

Shop stewards should vigilantly enforce the requirement to conduct sixty-day reviews and monitor any adjustments to verify that they result in eight-hour routes. ☐

Medical documentation

Overzealous supervisors continue to cause problems by making unwarranted demands for medical documentation for sick leave use and by insisting that such documentation must contain an exact diagnosis and prognosis. The applicable provisions are contained in Section 513 of the *Employee and Labor Relations Manual (ELM)*.

513.361 Three Days or Less

For periods of absence of 3 days or less, supervisors may accept the employees' statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.37) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

513.362 Over Three Days

For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work.

513.363 Extended Periods

Employees who are on sick leave for extended periods are required to submit at appropriate intervals, but not more frequently than once every 30 days, satisfactory evidence of continued incapacity for work unless some responsible supervisor has knowledge of the employee's continuing incapacity for work.

513.364 Medical Documentation or Other Acceptable Evidence: When employees are required to submit medical documentation pursuant to these regulations, such documentation should be furnished by the employee's attending physician or other attending practitioner. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept proof other than medical documentation if they believe it supports approval of the sick leave application.

In a memorandum dated June 22, 1995 (M-01379) the National Medical Director of the Postal Service explained the documentation requirements as follows:

Medical information which includes a diagnosis and a medical prognosis is not necessary to approve leave. A health care provider can provide an explanation of medical facts sufficient to indicate that an employee is, or will be, incapacitated

for duty without giving a specific diagnosis or medical prognosis. If medical documentation that provides a diagnosis and a medical prognosis is received by an employee's supervisor, it must be forwarded to the health unit or office of the contract medical provider and treated as a "restricted medical record" under Section 214.3 of Handbook EL-806.

In another memorandum, dated November 22, 1995 (M-01378), Postal Service Headquarters Labor Relations elaborated as follows:

Postal Service regulations do not require employees to submit a diagnosis/prognosis when requesting sick leave for themselves or their dependents. However, in cases where employees voluntarily provide this information, supervisors have a responsibility to protect the employees' and dependents' privacy. Therefore, all restricted information is to be submitted to the medical unit to be filed in the employee's medical file, returned to the employee, or destroyed after necessary review.

In other words, the only requirement is that the medical documentation must provide "acceptable evidence of incapacity for work." Supervisors are not physicians. Not only are they prohibited from requiring a specific diagnosis or prognosis, they are not even allowed to retain such documentation if it is voluntarily or inadvertently provided.

Another recurring problem is caused by supervisors who seek to require medical certification by a USPS medical officer or contract physician before allowing an employee to return to work following sick leave use. Such certification is only required in the circumstances described in ELM 864.4.

864.41 Employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. Employees must submit medical evidence of their ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment to assist management in employee placement to jobs where they can perform effectively and safely.

864.42 In cases of occupational illness or injury, the employee will be returned to work upon certification from the treating physician, and the medical report will be reviewed by a medical officer or contract physician as soon as possible thereafter.

In all other circumstances letter carriers must be allowed to return to work when their own treating physician indicates they are recovered. Of course the Postal Service has the right to send an employee for a fitness-for-duty examination but, except as provided in ELM Section 864.4, such an examination must be on-the-clock.

Additional information concerning medical certification may be found under that subject heading in the NALC Materials Reference System (MRS).



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Cross-craft assignments

The Contract Administration Unit has been receiving reports of part-time flexible letter carriers being assigned rural carrier work and of rural carriers performing city carrier work. Such cross-craft assignments between the city and rural carrier crafts are prohibited by the National Agreement.

The provisions of Article 7, Section 2, which give management a limited right to make cross-craft assignments between the APWU crafts, mail handlers and city carriers, *do not* apply to the rural carrier craft. The reason for this exception is the memorandum of understanding (National Agreement page 157) which states in relevant part that:

Re: Article 7, 12 and 13—Cross Craft and Office Size

A. It is understood by the parties that in applying the provisions of Articles 7, 12 and 13 of this Agreement, cross craft assignments of employees, on both a temporary and permanent basis, shall continue as they were made among the six crafts under the 1978 National Agreement.

The effect of this memorandum is to limit the application of the cross-craft provisions of Article 7, Section 2 (among other provisions) to the crafts covered by the 1978 National Agreement. Since the rural letter carriers bargained separately in 1978, they are excluded from the memorandum.

Thus cross-craft assignments between the city and rural carrier crafts can only be made under the provisions of Article 3, Section F which states that management has the right:

3.F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

In order for a situation to constitute an emergency within the meaning of Article 3.F, it must meet three separate conditions. It must be “unforeseen,” it must “call for immediate action,” and it may not be “expected to be of a recurring nature.” If cross-craft assignments are scheduled in advance, they are foreseen. If they happen frequently or consistently they are “of a recurring nature.” Finally, note that the JCAM (page 7-7) flatly

states that “management’s desire to avoid additional expenses such as penalty overtime does *not* constitute an emergency.”

National level settlements M-00836, M-01193, M-01276, as well as JCAM pages 7-5 through 7-7, all confirm the Postal Service’s agreement that the provisions of Article 7, Section 2 do not apply to the rural carrier craft.

Grievances concerning the violation of these provisions should always seek a make-whole remedy. In cases where rural carriers are used in the city carrier craft, an appropriate remedy is provided on page 7-6 of the JCAM which states:

As a general proposition, in those circumstances in which a clear contractual violation is evidenced by the fact circumstances involving the crossing of crafts pursuant to Article 7.2.B&C, a “make whole” remedy involving the payment at the appropriate rate for the work missed to the available, qualified employee who had a contractual right to the work would be appropriate. For example, after determining that management had violated Article 7.2.B, [APWU National] Arbitrator Bloch in case A8-W-0656 (C-04560) ruled that an available Special Delivery Messenger on the ODL should be made whole for missed over-time for special delivery functions performed by a PTF letter carrier.

In cases where city carriers are worked in the rural carrier craft, grievances should seek a monetary remedy for the city carrier most directly harmed by the violation. This could be a full-time carrier forced to work overtime or denied auxiliary assistance because a letter carrier who could have performed the work was instead working in the rural carrier craft. Or the harmed employee could have been denied annual leave because the available replacement was working in the rural carrier craft. Such remedy requests should be formulated on a case-by-case basis depending upon the exact circumstances of the violation.

Dual appointments: ELM Section 323.6 authorizes dual appointments to both relief (RCA or RCR) rural carrier positions and city carrier casual positions under certain circumstances. During the limited period of time that such dual appointment employees may work as casuals in the city carrier craft (see Article 7, Section 1.B.4) their use in the city carrier craft is not considered a cross craft assignment. However, their use is still subject to all the restrictions on the use of casuals contained in Article 7, Section 2. Branches should be especially vigilant to ensure that no employees are allowed to remain in such a dual appointment longer than permitted by Article 7, Section 1.B.4.

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Recent Step 4 settlements

New regulations for the administration of the Federal Employees' Compensation Act became effective January 4, 1999. Some of the more significant changes were discussed in the March 1999 *Postal Record* article by Bert Doyle, Assistant to the President for Compensation.

Among the changes discussed were those at 20 CFR 10.506 which changed the regulations to prohibit management contacting an attending physician "by telephone or through personal visit" both during and after the 45 day COP period. Procedural violations of OWCP regulations by the Postal Service, as opposed to disputes concerning eligibility determinations by OWCP, are grievable matters. This was re-emphasized by the recent Step 4 settlement M-01385 (E94N-4E-C 98037067, June 15, 1999) reprinted below.

The first issue contained in this case is whether management violated the National Agreement when it telephonically contacted limited duty employees' physicians to receive information and/or clarification on a carrier's medical progress.

The second issue is whether management violated the National Agreement when it contacted limited duty employees' physicians to receive information and/or clarification on a carrier's medical progress by letter and did not send a copy of the letter to the carrier.

During our discussion, it was mutually agreed to close this case at this level with the following understanding.

The Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor, issued new regulations governing the administration of the Federal Employees' Compensation (FECA) effective January 4, 1999. The specific regulation that is germane to the instant case is 20 CFR 10.506, which specifically prohibits phone or personal contact initiated by the employer with the physician.

The EL-505 Section 6.3 specifically states that the employee will be sent copies of such correspondence.

Article 15 establishes strict time limits for processing grievances.

For an overview of these time limits see Article 15 in the *Joint Contract Administration Manual (JCAM)*. On occasion it

may be difficult to schedule grievance discussions or meetings in a timely manner. The Contract Administration Unit is occasionally asked whether such meetings may be conducted over the telephone rather than face-to-face. The recent Step 4 Settlement M-01386 (E94N-4E-C 99001405, January 13, 1999) concerned a Step 2 meeting. It confirms the national parties' understanding that "where the local parties are in mutual agreement, grievance discussions may take place via telephone". As the settlement makes clear, mutual consent is required. Either party may insist that the discussions be conducted during a face-to-face meeting. Branches should feel free to ask for telephone grievance discussion when the facts in the case make it useful. Of course, in such cases it is especially important to keep careful notes of the exact time and subject matter of the grievance discussion.

Grievance settlements are often made on a non-citeable or non-precedent basis. The June 15, 1999 Step 4 Settlement M-01384 resolved a dispute concerning the meaning of "non-citeable" that arose during an arbitration hearing. The management advocate tried to prevent the introduction of a non-citeable settlement of a disciplinary grievance. In this case the disciplinary action relied upon by management as a prior element of discipline had, in fact, been retracted and expunged from the grievant's record by an earlier settlement. The Step 4 Settlement provided:

We agreed that a non-citeable, non-precedent settlement can be cited in arbitration to enforce its own terms.

We further agreed that the Subject Letter of Warning cannot be cited as a past element because it was removed from the grievant's record and reduced from the grievant's record via [a] settlement.

Smoking in postal vehicles continues to be a contentious issue.

Some managers have attempted to apply regulations that apply only to GAO vehicle in order to prohibit all smoking in postal vehicles. The GAO regulations do not apply to postal owned vehicles. The Step 4 Settlement M-01387 (C94-4C-C 99067738, January 14, 1999) reconfirms that previously established policy remains in effect. It states that:

The purpose of the revised smoking policy is to prevent non-smokers from having to breathe secondary smoke for reasons of health. If a smoker is in the vehicle alone, then smoking is permitted since no one else would be affected. If, however, the vehicle is carrying more than one person, then there should be no smoking in the vehicle unless every one in the vehicle is a smoker.

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Steward time

Shop stewards have extremely demanding and important jobs. In fact, the demands of the job might be overwhelming were it not for the provisions of Article 17, Section 4 which provide that time spent handling grievances is on the clock. It states the following:

17.4 Section 4. Payment of Stewards

The Employer will authorize payment only under the following conditions:

Grievances: Steps 1 and 2—The aggrieved and one Union steward (only as permitted under the formula in Section 2.A) for time actually spent in grievance handling, including investigation and meetings with the Employer. The Employer will also compensate a steward for the time reasonably necessary to write a grievance. In addition, the Employer will compensate any witnesses for the time required to attend a Step 2 meeting.

Meetings called by the Employer for information exchange and other conditions designated by the Employer concerning contract application.

Employer authorized payment as outlined above will be granted at the applicable straight time rate, providing the time spent is a part of the employee's or steward's (only as provided for under the formula in Section 2.A) regular work day.

These provisions mean that a steward must be given time on the clock to conduct a broad range of activities related to the investigation and adjustment of grievances and of problems that may become grievances. These activities include the right to review relevant documents, files and records, including an employee's Official Personnel Folder. They also include interviewing a potential grievant, supervisors, postal inspectors and witnesses, including postal patrons who are off postal premises. Time must also be given to complete grievance forms and write appeals, including the union's statement of corrections and additions to the Step 2 decision. Likewise, an employee must be given reasonable time to consult with his or her steward, and such reasonable time may not be measured by a predetermined factor.

A steward must ask for supervisory permission for time to investigate a grievance or potential grievance. On the other hand, management cannot unreasonably deny or delay a re-


quest for paid grievance-handling time. Nor may Management determine in advance how much time a steward reasonably needs to investigate a grievance. Rather, the determination of how much time will be necessary is dependent on the issue involved and the amount of information needed for investigative purposes. It is the responsibility of the union and management to decide mutually when the steward will be allowed, subject to business conditions, an opportunity to investigate and adjust grievances. If management delays a steward from investigating a grievance, it should inform the steward of the reasons for the delay and when time will be available.

There are no nationally negotiated guidelines defining what constitutes an "unreasonable" delay in granting steward time. If this issue becomes a problem, it may be useful to cite the guidelines (M-00458) established by former Assistant Postmaster General David Charters when he was Central Region Director of Employee and Labor Relations. The guidelines provide that:

"Reasonable," in our opinion, dictates that in most cases, the grievant and steward should be able to discuss the grievance without delay but 95 percent of the time with no more than a two-hour delay. While circumstances will sometimes necessitate a delay of more than two hours, normally the delay should not extend beyond the tour of duty in which the request is made. This determination will be based on the availability of the parties involved and service conditions.

The parties at the national level have long agreed that the somewhat ambiguous language of Article 17, Section 4 does not give management the right to deny a steward time to discuss a grievance simply because a steward is in overtime status.

Unfortunately, the fact that the contract gives shop stewards such clear rights does not mean that management always observes them. In some work locations management routinely interferes with shop stewards' grievance investigations by denying them the necessary time. Stewards should never jeopardize a grievance or risk missing a time limit just because management denies steward time. The appropriate response in such circumstances is to investigate and process the grievance off the clock, keeping detailed records of exactly how much time was spent and why it was necessary. A separate grievance should then be filed citing a violation of Article 17, Section 4 and seeking, as a remedy, full payment for the time actually required at the applicable rate of pay.

Detailed citations to national level settlements and arbitration awards that support all of the rights and principles described above may be found in the *JCAM*, *NALC JCAM Supplement* and the *NALC Materials Reference System (MRS)*. 

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Employer claims

All too often management accidentally overpays letter carriers and later seeks to recover the overpayments by filing an “employer claim.” This can occur for a variety of reasons, such as failing to withhold the correct insurance premiums or placing an employee in the wrong step after a change in grade. Article 28 of the National Agreement and Section 437 of the *Employee and Labor Relations Manual (ELM)* protect employees who find themselves in this situation.

Article 28 requires that “in advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefor.” Additionally, Article 28, Section 4.A was changed in the 1994-1998 National Agreement to comply with the provisions of the Debt Collection Act. It now prohibits the Postal Service from collecting a debt, regardless of the amount or type of debt, until all grievances concerning the debt have been resolved.

Currently the greatest number of employer claims are made against letter carriers who allegedly were overpaid following a change in grade. This can happen when letter carriers are placed in the wrong step or assigned the wrong date for the next periodic step increase. Typically this is the result of an error made by inadequately trained staff in a local personnel office. Since the rules governing promotions are complex, employees seldom realize that they are being overpaid and the errors often take a long time to be discovered.

The Contract Administration Unit cautions that sometimes the alleged overpayments did not occur or were incorrectly calculated. A letter carrier presented with an employer claim should immediately contact his or her shop steward in order to file a grievance and delay collection of the debt. Shop stewards should also demand, in writing, a detailed explanation and accounting of the alleged debt. In the case of promotion errors this should include, as a minimum, an exact explanation of what the error was, how it occurred, when it was made and who made it. It should also include a detailed pay period by pay period accounting of all the alleged overpayments. The burden should be placed squarely upon the Postal Service to prove the nature and amount of the debt.

Remember to retain all correspondence concerning the alleged debt and to keep careful notes of any discussions.

Local managers typically respond that the issue is much too complicated for them to understand and that the Postal Data Center is unresponsive to their requests for an explanation. Such information can be extremely useful—especially if a grievance cannot be resolved short of arbitration.

Of course, sometimes letter carriers really are overpaid. However, letter carriers also have a right to file for waiver of the claim for overpayment. *ELM* Section 437, titled “Waiver of Claims for Erroneous Payment of Pay” outlines the steps that carriers must follow to request a waiver. This may be done up to three years following the date when the error is discovered. Under this process the carrier files Form 3074 upon receipt of the Postal Service’s letter of demand. The completed form should contain all the information the carrier may have concerning the overpayment, including a statement of the circumstances which the carrier feels would justify a waiver of the claim—typically, that the mistake was the Postal Service’s and was not connected in any way to what the carrier did or did not do, and that it would be unfair to require repayment under the circumstances. The waiver is reviewed by the installation head who adds any relevant facts or circumstances, including the reason for the overpayment. The installation head then makes a recommendation, and forwards the Form 3074 to the appropriate compensation unit, which adds any pertinent comments and forwards the entire file to the Postal Data Center (PDC). *ELM* Section 437.6 provides that:

The PDC will waive the claim if it can determine from a review of the file that all of the following conditions are met.

1. *The overpayment was a result of administrative error of the USPS that was not caught and corrected at any point of the pay process.*
2. *Everyone involved in the request for the waiver acted reasonably under the circumstances, without any indication of fraud, misrepresentation or lack of good faith.*
3. *Collection of the claim would be against equity and good conscience and would not be in the best interests of the USPS.*

If management denies a waiver request, the denial can be made the subject of a separate grievance. NALC has successfully arbitrated many grievances concerning the denial of waiver requests. Finally, it should be noted that *ELM* Subchapter 460 contains additional regulations concerning the collection of debts from bargaining unit employees. These regulations may be helpful if contractual time limits for filing or processing grievances have been missed. ☒

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Excessing from sections

Now that we finally have a new national agreement, NALC branches need to consider local negotiations over the terms of Local Memorandums of Understanding. One of the more arcane subjects of local negotiations is found in Article 30, Section B.18 which provides that branches may negotiate over "the identification of assignments comprising a section, when it is proposed to reassign within an installation employees excess to the needs of a section." The effect of Article 30.B.18 is to give branches the right to negotiate over how the special excessing provisions of Article 12, Section 5.C.4 are to be applied within their installations. Article 12, Section 5.C.4(a) provides that:

The identification of assignments comprising for this purpose a section shall be determined locally by local negotiations. If no sections are established immediately by local negotiations, the entire installation shall comprise the section.

Thus, if a Local Memorandum of Understanding *does not* identify separate sections for excessing purposes, then Article 12, Section 5.C.4(a) applies and the entire installation is considered a section. However, if a Local Memorandum of Understanding *does* identify separate sections for excessing purposes, then the special rules in Article 12, Sections 5.C.4(b) and (c) will apply whenever management proposes to reassign letter carriers within an installation who are excess to the needs of one of the defined sections. The National Agreement should be consulted for the complete text of these provisions.

These rules give excessed letter carriers "retreat rights" to the first residual vacancy in the same grade that occurs in the section. Failure to bid on the first available vacancy at the former grade level in the section ends such retreat rights. In order to implement these retreat rights, Article 12, Section 5.C.4 provides that as long as an excessed employee has retreat rights to the section, bidding for vacant duty assignments in the

grade from which the employee was excessed is subject to the following rules:

- Bidding is limited to employees in the section even if, for example, the Local Memorandum of Understanding ordinarily provides for installation-wide bidding.
- Bidding for positions in the grade from which the employee was excessed is limited to employees in that grade. For example, if a T-6 letter carrier is excessed from a section, only Grade 6 letter carriers from the section may bid on T-6 vacancies in the section. Of course, this special rule will no longer be applicable beginning November 20, 2000 when all letter carriers will be upgraded to Grade 6.

The scope of postings under the provisions of Article 41.3.O can also be affected when a Local Memorandum of Understanding identifies sections for excessing purposes. National Arbitrator Snow ruled in B90N-4B-C-92021294, March 22, 1996 (C-15248), that if a branch has installation-wide bidding for vacant or newly created duty assignments, then assignments made available for bids under the provisions of Article 41.3.O should also be posted on an installation-wide basis. An exception to this general rule occurs if a branch has defined separate sections for excessing purposes and if an employee has been excessed from the section under the provisions of Article 12 Section 5.C.4. Since Article 12.5.C.4(c) provides the reassigned employee with retreat rights in such cases, as long as an employee has such retreat rights to the section, bidding under the provisions of Article 41.3.O is also limited to employees from the section at the same pay grade as the vacancy.

So what should local NALC branches do with respect to these provisions? Generally, identifying sections for excessing purposes makes the most sense for branches representing installations spread over a wide geographic area. In such circumstances, being excessed to another station in another part of the city could be very disruptive for lives of the affected letter carriers. We anticipate very little excessing in the carrier craft during the term of this National Agreement. In fact the number of letter carriers continues to grow. However, the provisions of Article 12, Section 5.C.4 are triggered and applied locally. Local branch leaders are in the best position to know whether their particular local circumstances may result in excessing from sections and what provisions will best serve their members. That is, after all, why the national parties have made this provision a subject of local bargaining. ☐

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Recent settlements

The Memorandum on Transfers incorporated into the National Agreement establishes strong enforceable rights for letter carriers seeking to transfer to other installations. (See JCAM pages 12-27 through 12-31.) A national level grievance was filed after several USPS districts tried to establish unilateral restrictions on who could apply for a transfer. The grievance was resolved by the settlement M-01388. It provides that:

The issue in this grievance is whether the Central and South Florida Districts' policy on transfers violates the National Agreement, wherein, only employees with a minimum of five years service and from only within the district were given consideration. After reviewing this matter, the parties mutually agreed to the following:

1. *Local policies regarding transfers must not be in conflict or inconsistent with the Transfer MOU.*
2. *The subject local policies were rescinded in October 1997.*
3. *The affected employees were contacted as to the change in policy and given the opportunity of requesting transfer consideration.*
4. *This case will be remanded to the parties at Step 3 for further processing or to be scheduled for regular arbitration to determine what remedy, if any, is appropriate.*

The settlement M-01389 resolved a grievance that was filed as a result of a USPS District policy requiring that all routes be considered for reversion rather than being posted for bids within five days as provided by Article 41.1.A.1. The settlement, which remanded the case for determination of possible remedy, provided that:

The parties agreed that a "blanket" policy to consider all vacant routes for reversion prior to posting is inconsistent with the provisions of Article 41.1.A.1. Routes considered for reversion are to be considered on a route by route basis. Accordingly, it was agreed that the Connecticut Vacant Route Policy of December 8, 1998, as well as the March 23, 1999 revised policy, are to be rescinded.

After all these years, one would expect that all USPS labor relations officials understand the scope and purpose of national level Step 4 settlements. Evidently that is expecting too much.

At a recent regional arbitration hearing, the Postal Service advocate argued that the arbitrator should not consider an earlier Step 4 settlement. The case was referred to Step 4 and subsequently remanded right back to the same arbitrator with the following settlement language (M-01391):

As a result of our discussions, the parties agreed there is no dispute between the parties that Step 4 grievance settlements are precedential and binding, unless otherwise agreed between the national parties. Whether or not a particular Step 4 settlement is applicable to a particular case is not an interpretive issue and is suitable for regional arbitration.

ELM Section 432.32 prohibits management from scheduling a part-time flexible employee for more than 12 hours of daily service, including scheduled work hours, overtime and mealtime. The Step 4 settlement M-01390 resolved a grievance that arose when area management representatives argued that since the grievant had already been paid for all work over 12 hours, no additional remedy was permissible for the violation. The settlement acknowledged that a remedy in addition to the pay already received was available. The settlement provided that:

Whether or not a remedy is due in such circumstances is not an interpretive issue. As such, the parties agreed to remand this case to the parties at Step 3 for application of ELM 432.32 and the Joint Contract Administration Manual (JCAM) pages 8-14 and 8-15.

Many Local Memorandums of Understanding provide for incidental leave selection outside of the choice selection period. In a January 29, 1986 award C-05670 (H1C-NA-C-59) national arbitrator Richard Mittenthal held that:

To the extent to which Local Memoranda of Understanding provisions on leave time during non-choice vacation periods allow employees to ignore the choice period and make their initial selection of leave from the non-choice period, such provisions are "inconsistent or in conflict with" the National Agreement. In all other respects, these non-choice vacation period clauses or incidental leave clauses are not "inconsistent or in conflict with" the National Agreement.

The parties at the national level have concluded that the explanation of Arbitrator Mittenthal's award in C-05670 that is found beginning on page 10-8 of the JCAM is misleading. Until the JCAM is corrected in a new edition, local parties should rely upon the actual text of arbitrator Mittenthal's award rather than the explanation of the award that appears in the JCAM. If your local managers do not agree with this position, the matter should be brought to the attention of your national business agent.



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