C#11528

NATIONAL ARBITRATION PANEL

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| In the Matter of Arbitration<br>between<br>NATIONAL ASSOCIATION OF LETTER CARRIERS<br>and<br>UNITED STATES POSTAL SERVICE<br>and Intervenor<br>AMERICAN POSTAL WORKERS UNION | POST OFFICE: Washington, D.C.<br><br>CASE NO.: H7N-4Q-C 10845 |

BEFORE: Professor Carlton J. Snow

APPEARANCES:
For the American Postal Workers Union:
Mr. Larry Gervais
Mr. Thomas A. Neill
For the National Association of Letter Carriers:

Mr. Stephen D. Hult
Mr. Keith E. Secular

For the United States Postal Service:
Mr. J.K. Hellquist
Mr. John W. Dockings

PLACE OF HEARING: 475 L'Enfant Plaza S.W.
Washington, D.C.

DATE OF HEARING: July 9, 1991

POST-HEARING BRIEFS: October 8, 1991

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that senior employes excessed into the Letter Carrier Craft under terms of Article 12.5.C.5.a must begin a "new period" of seniority pursuant to terms of Article 41.2.G.2 of the parties' National Agreement. Article 41.2.G prevails, and employes reassigned from other crafts must begin a new period of seniority in the Letter Carrier Craft. It is so ordered and awarded.

DATE: 12-19-91

Carlton J. Snow
Professor of Law

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| IN THE MATTER OF ARBITRATION<br><br>BETWEEN<br><br>NATIONAL ASSOCIATION OF LETTER CARRIERS<br><br>AND<br><br>UNITED STATES POSTAL SERVICE<br><br>AND Intervenor<br><br>AMERICAN POSTAL WORKERS UNION<br>(Case No.: W7N-4Q-C 10845) | ANALYSIS AND AWARD<br><br>Carlton J. Snow<br>Arbitrator |

## I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 1, 1987 through November 20, 1990. The American Postal Workers Union intervened in a dispute involving the National Association of Letter Carriers and the United States Postal Service. There was a hearing held in the matter on July 9, 1991 in Room 1P609 of the United Postal Service headquarters building located at 475 L'Enfant Plaza in Washington, D.C. Messrs Larry Gervais, Regional Instruction 399 Special Team Coordinator, and Thomas A. Neill, Industrial Relations Director, represented the American Postal Workers Union. Messrs. Stephen D. Hult, Assistant to the President, and Keith E. Secular, an attorney with the law firm of Cohen, Weiss and Simon in New York City, represented the National Association of Letter Carriers. Messrs. J. K. Hellquist and John W. Dockings, attorneys, represented the United States Postal Service.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The proceeding was recorded by Diversified Reporting Services, Inc. and a transcript provided to the arbitrator. The arbitrator also maintained personal notes during the hearing. All parties were fully and fairly represented by their respective advocates.

The parties stipulated that the matter properly had been submitted to the arbitrator and that there were no jurisdictional challenges requiring consideration. The parties submitted the matter to the arbitrator on the basis of evidence submitted at the hearing and post-hearing briefs. The arbitrator officially closed the hearing on October 8, 1991 after receipt of a letter dated October 3, 1991 from Mr. Gervais which responded to a letter dated September 26 from Mr. Secular.

II. STATEMENT OF THE ISSUE

The parties have stipulated to the issue as set forth in a February, 1991 publication by NALC Vice-president Lawrence G. Hutchins. The issue is as follows:

> There is currently a dispute pending national level arbitration over the seniority of an employee from another craft excessed into the letter carrier craft. The Postal Service asserts that the seniority of employees excessed into the letter carrier craft is governed by Article 12 Section 5.C.a.4 which provides that the seniority should be whichever is the lesser of:
>
> > (a) One day junior to the seniority of the junior full-time employee in the same level and craft or occupational group in the installation to which assigned, or
> > (b) The seniority the employee had in the craft from which reassigned.
>
> It is the position of NALC that Article 12, Section 5.B.10 is controlling in this situation. It provides that:
>
> > Whenever the provisions in this Section establishing seniority are inconsistent with the provisions of the Craft Articles in this agreement, the Craft Articles shall prevail.
>
> The letter carrier craft article states in 41.2.G that a new period of seniority is begun:
>
> > Except as otherwise provided in this Agreement, when an employee from another USPS craft is reassigned voluntarily or involuntarily to the Letter Carrier craft.
>
> Since the seniority provision stated in Article 12 section 5.C.a.4 is inconsistent with Article 41, Section 2.G, it is the position of NALC that Article 41.2.G prevails and that employees reassigned from other crafts must begin a new period of seniority in the letter carrier craft.
>
> A grievance should be filed whenever the seniority of employees reassigned to the letter carrier craft is inconsistent with the provisions of our craft article. All branches should be vigilant in enforcing the seniority provisions of Article 41. (See, Tr. 9).

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 12 - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period, the employee will not be separated for prior scheme failure.

B. The parties recognize that the failure of the Employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

C. When an employee completes the probationary period, seniority will be computed in accordance with this Agreement as of the initial day of full-time or part-time employment.

D. When an employee who is separated from the Postal Service for any reason is re-hired, the employee shall serve a new probationary period. If the separation was due to disability, the employee's seniority shall be established in accordance with Section 2, if applicable.

Section 2. Principles of Seniority

A. Except as specifically provided in this Article, the principles of seniority are established in the craft Articles of this Agreement.

B. An employee who left the bargaining unit on or after July 21, 1973 and returns to the same craft:

1. will begin a new period of seniority if the employee returns from a position outside the Postal Service; or

2. will begin a new period of seniority if the employee returns from a non-bargaining unit position within the Postal Service, unless the employee returns within 2 years from the date the employee left the unit.

Section 3. Principles of Posting

A. To insure a more efficient and stable work force, an employee may be designated a successful bidder no more than five (5) times during the duration of this Agreement unless such bid:

1. is to a job in a higher wage level;

2. is due to elimination or reposting of the employee's duty assignment; or

3. enables an employee to become assigned to a station closer to the employee's polace of residence.

B. Specific provisions for posting for each craft are contained in the craft posting provisions of this Agreement.

Section 4. Principles of Reassignments

A. A primary principle in effecting reassignments will be that dislocation and inconvenience to employees in the regular work force shall be kept to a minimum, consistent with the needs of the service. Reassignments will be made in accordance with this Section and the provisions of Section 5 below.

B. When a major relocation of employees is planned in major metropolitan areas or due to the implementation of national postal mail networks, the Employer will apply this Article in the development of the relocation and reassignment plan. At least 90 days in advance of implementation of such plan, the Employer will meet with the Unions at the national level to fully advise the Unions how it intends to implement the plan. If the Unions believe such plan violates the National Agreement, the matter may be grieved.

Such plan shall include a meeting at the regional level in advance (as much as six months whenever possible) of the reassignments anticipated. The Employer will advise the Unions, based on the best estimates available at the time, of the anticipated impact; the numbers of employees affected by craft; the locations to which they will be reassigned; and, in the case of a new installation, the anticipated complement by tour and craft. The Unions will be periodically updated by the Region should any of the information change due to more current data being available.

C. When employees are excessed out of their installation, the Union at the national level may request a comparative work hour report of the losing installation 60 days after the excessing of such employees.

If a review of the report does not substantiate that business

conditions warranted the action taken, such employees shall have their retreat rights activated. If the retreat right is denied, the employees have the right to the grievance-arbitration procedure.

D. In order to minimize the impact on employees in the regular work force, the Employer agrees to separate, to the extent possible, casual employees working in the affected craft and installation prior to excessing any regular employee in that craft out of the installation. The junior full-time employee who is being excessed has the option of reverting to part-time flexible status in his/her craft, or of being reassigned to the gaining installation.

Section 5. Reassignments

A. Basic Principles and Reassignments

When it is proposed to:

1. Discontinue an independent installation;

2. Consolidate an independent installation (i.e., discontinue the independent identity of an installation by making it part of another and continuing independent installation);

3. Transfer a classified station or classified branch to the jurisdiction of another installation or make an independent installation;

4. Reassign within an installation employees excess to the needs of a section of that installation;

5. Reduce the number of regular work force employees of an installation other than by attrition;

6. Centralized mail processing and/or delivery installation (Clerk Craft only);

7. Reassignment--motor vehicles;

8. Reassignment--part-time flexibles in excess of quota; such actions shall be subject to the following principles and requirements.

B. Principles and Requirements

1. Dislocation and inconvenience to full-time and part-time flexible employees shall be kept to the minimum consistent with the needs of the service.

2. The Regional Postmasters General shall give full consideration to withholding sufficient full-time

and part-time flexible positions within the area for full-time and part-time flexible employees who may be involuntarily reassigned.

3. No employee shall be allowed to displace, or "bump" another employee, properly holding a position or duty assignment.

4. Unions affected shall be notified in advance (as much as six (6) months whenever possible), such notification to be at the regional level, except under A.4 above, which shall be at the local level.

5. Full-time and part-time flexible employees involuntarily detailed or reassigned from one installation to another shall be given not less than 60 days of advance notice, if possible, and shall receive moving, mileage, per diem and reimbursement for movement of household goods, as appropriate, if legally payable, will be governed by the standardized Government travel regulations as set firth in Methods Handbook F-10, "Travel."

6. Any employee volunteering to accept reassignment to another craft or occupational group, another branch of the Postal Service, or another installation shall start a new period of seniority beginning with such assignment, except as provided herein.

7. Whenever changes in mail handlin patterns are undertaken in an area including one or more postal installations with resultant successive reassignments of clerks from those installations to one or more central installations, the reassignment of clerks shall be treated as details for the first 180 days in order to prevent inequities in the seniority lists at the gaining installations. The 180 days is computed from the date of the first detail of a clerk to the central, consolidated or new installation in that specific planning program. If a tie develops in establishing the merged seniority roster at the gaining installation, it shall be broken by total continuous service in the regular work force in the same craft.

8. In determining seniority of special delivery messengers who received career status under Civil Service Regulation 3.101, that period of continuous service as a special delivery messenger prior to attaining career status shall be included.

9. Whenever in this Agreement provision is made for reassignments, it is understood that any full-time or part-time flexible employee reassigned

must meet the qualification requirements of the position to which reassigned.

10. Whenever the provisions of this Section establishing seniority are inconsistent with the provisions of the Craft Articles of this Agreement, the provisions of the Craft Articles shall prevail.

11. It is understood that any employee entitled hereunder to a specific placement may exercise such entitlement only if no other employee has a superior claim hereunder to the same position.

12. Surplus U.S. Postal Service Employees--Surplus U.S. Postal Service employees from non-mail processing and non-mail delivery installations, regional offices, the U.S. Postal Service Headquarters or from other Federal departments or agencies shall be placed at the foot of the part-time flexible roll and begin a new period of seniority effective the date of reassignment.

C. Special Provisions on Reassignments

In addition to the general principles and requirements above specified, the following specific provisions are applicable:

1. Discontinuance of an Independent Installation

a. When an independent installation is discontinued, all full-time and part-time flexible employees shall, to the maximum extent possible, be involuntarily reassigned to continuing postal positions in accordance with the following:

b. Involuntary reassignment of full-time employees with their seniority for duty assignments to vacancies in the same or lower level in the same craft or occupational group in installations within 100 miles of the discontinued installation, or in more distant installations, if after consultation with the affected Unions it is determined that it is necessary. The Postal Service will designate such installations for the reassignment of excess full-time employees. When two or more such vacancies are simultaneously available, first choice of duty assignment shall go to the senior employee entitled by displacement from a discontinued installation to such placement.

c. Involuntary reassignment of full-time employees for whom consultation did not provide for placement under C.1.b above in other crafts or occupational groups in which they meet minimum qualifications

at the same or lower level with permanent seniority for duty assignments under (1) and (2) below, whichever is lesser:

(1) One day junior to the seniority of the junior full-time employee in the same level and craft or occupation in the installation to which assigned, or

(2) The seniority the employee had in the craft from which reassigned. The 5-year rule does not apply.

d. Involuntary reassignment of part-time flexible employees with seniority in any vacancy in the part-time flexible quota in the same craft or occupational group at any installation within 100 miles of the discontinued installation, or in more distant installations, if after consultation with the affected Unions it is determined that it is necessary, the Postal Service will designate such installation for the reassignment of the part-time flexible employees.

e. Involuntary reassignment of part-time flexible employees for whom consultation did not provide for placement under C.1.d above in other crafts or occupational groups in which they meet minimum qualifications at the same or lower level at the foot of the existing part-time flexible roster at the receiving installation and begin a new period of seniority.

f. Full-time employees for whom no full-time vacancies are available by the time the installation is discontinued shall be changed to part-time flexible employees in the same craft and placed as such, but shall for six months retain placement rights to full-time vacancies developing within that time within any installation within 100 miles of the discontinued installation, or in more distant installations, if after consultation with affected Unions it is necessary, U.S. Postal Service will designate such installations for the reassignment of excess full-time employees on the same basis as if they had remained full-time.

g. Employees, full-time or part-time flexible, involuntarily reassigned as above provided shall upon the reestablishment of the discontinued installation be entitled to reassignment with full seniority to the first vacancy in the reestablished installation in the level, craft or occupational group from which reassigned.

2. Consolidation of an Independent Installation

a. When an independent postal installation is consolidated with another postal installation, each full-time or part-time flexible employee shall be involuntarily reassigned to the continuing installation without loss of seniority in the employee's craft or occupational group.

b. Where reassignments under 2.a, preceding, result in an excess of employees in any craft or occupational group in the continuing installation, identification and placement of excess employees shall be accomplished by the continuing installation in accordance with the provisions of this Agreement covering such situations.

c. If the consolidated installation again becomes an independent installation, each full-time and part-time flexible employee whose reassignment was necessitated by the previous consolidation shall be entitled to the first vacancy in the reestablished installation in the level and craft or occupational group held at the time the installation was discontinued.

3. Transfer of a Classified Station or Classified Branch to the Jurisdiction of Another Installation or Made an Independent Installation

a. When a classified station or classified branch is transferred to the jurisdiction of another installation or made an independent installation, all full-time employees shall at their option remain with the classified station or classified branch without loss of seniority, or remain with the installation from which the classified station or classified branch is being transferred.

b. A realistic appraisal shall be made of the number of employees by crafts or occupations who will be needed in the station after transfer, and potential vacancies within these requirements created by the unwillingness of employees to follow the station to the new jurisdiction shall be posted for bid on an office-wide basis in the losing installation.

c. If the postings provided in paragraph 3.b, preceding, do not result in sufficient employees to staff the transferred classified station or classified branch, junior employees, by craft or occupational group on an installation-wide seniority basis in the losing installation, shall be involuntarily reassigned to the classified station or

classified branch and each employee thus involuntarily reassigned shall be entitled to the first vacancy in such employee's level and craft or occupational group in the installation from which transferred.

4. Reassignment Within an Installation of Employees Excess to the Needs of a Section

a. 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.

b. Full-time employees, excess to the needs of a section, starting with that employee who is junior in the same craft or occupational group and in the same level assigned in that section, shall be reassigned outside the section but within the same craft or occupational group. They shall retain their seniority and may bid on any existing vacancies for which they are eligible to bid. If they do not bid, they may be assigned in any vacant duty assignment for which there was no senior bidder in the same craft and installation. Their preference is to be considered if more than one such assignment is available.

c Such reassigned full-time employee retains the right to retreat to the section from which withdrawn only upon the occurrence of the first residual vacancy in the salary level after employees in the section have completed bidding. Such bidding in the section is limited to employees in the same salary level as the vacancy. Failure to bid for the first available vacancy will end such retreat right. The right to retreat to the section is optional with the employee who has retreat rights with respect to a facancy in a lower salary level. Failure to exercise the option does not terminate the retreat rights in the salary level in which the employee was reassigned away from the section. In the Clerk Craft, an employee may exercise the option to retreat to a vacancy in a lower salary level only to an assignment for which the employee would have been otherwise eligible to bid.

d. The duty assignment vacated by the reassignment of the junior full-time employee from the section shall be posted for bid of the full-time employees in the section. If there are no bids, the junior remaining unassigned full-time employee in the section shall be assigned to the vacancy.

5. Reduction in the Number of Employees in an Installation other than by Attrition

a. Reassignments within installation. When for any reason an installation must reduce the number of employees more rapidly than is possible by normal attrition, that installation:

(1) Shall determine by craft and occupational group the number of excess employees;

(2) Shall, to the extent possible, minimize the impact on regular work force employees by separation of all casuals;

(3) Shall, to the extent possible, minimize the impact on full-time positions by reducing part-time flexible hours;

(4) Shall identify as excess the necessary number of junior full-time employees in the salary level, craft, and occupational group affected on an installation-wide basis within the installation; make reassignments of excess full-time employees who meet the minimum qualifications for vacant assignments in other crafts in the same installation; involuntarily reassign them (except as provided for letter carriers and special delivery messengers and vehicle service employees in Section C.5.b below) in the same or lower level with seniority, whichever is the lesser of:

(a) One day junior to the seniority of the junior full-time employee in the same level and craft or occupational group in the installation to which assigned, or

(b) The seniority the employee had in the craft from which reassigned. The 5-year rule does not apply.

(5) The employee shall be returned at the first opportunity to the craft from which reassigned.

(6) When returned, the employee retains seniority previously attained in the craft augmented by intervening employment in the other craft.

(7) The right of election by a senior employee provided in paragraph b(3), below is not available for this cross-craft reassignment within the installation.

b. Reassignments to other installations after making reassignments within the installation:

(1) Involuntarily reassign such excess full-time employees starting with the junior with their seniority for duty assignments to vacancies in the same or lower level in the same craft or occupational group in installations within 100 miles of the losing installation, or in more distant installations if after consultation with the affected Union it is determined that it is necessary, the Postal Service will designate such installations for the reassignment of excess full-time employees. However:

(a) Whenever full-time PS-5 letter carrier routes are transferred from one installation to another, the full-time letter carriers whose complete routes are transferred shall have the option of transferring with their routes with their seniority.

(b) Whenever full-time or part-time motor vehicle craft assignments are discontinued in an installation and there is an excess in a position designation and salary level, the excess shall be adjusted to the maximum extent possible by making voluntary reassignments to vacant motor vehicle craft positions in installations within 100 miles unless the employee applies for a vacancy in a more distant installation. Senior qualified applicants for such vacant positions shall be reassigned. When reassignment is in the same designation and salary level, the reassigned employee retains his/her seniority.

(c) When the entire special delivery messenger unit is moved from one independent installation to another and all special delivery territory is transferred, the special delivery messengers will be reassigned in the gaining unit with full seniority credit for all seniority gained in the craft and installation. When less than the entire special delivery messenger unit is transferred and it is necessary to reassign one or more special delivery messengers to the gaining installation, senior special delivery

messengers shall be given option for reassignment. If no special delivery messenger elects to be reassigned, the junior special delivery messenger shall be reassigned.

(2) Involuntarily reassigned full-time employees for whom consultation did not provide for placement under b(1) above in other crafts or occupational groups in which they meet minimum qualifications at the same or lower level with permanent seniority for duty assignments whichever is less of:

(a) one day junior to the seniority of the junior full-time employee in the same level and craft or occupational group in the installation to which assigned, or

(b) the seniority he/she had in the craft from which reassigned. The 5-year rule does not apply.

(3) Any senior employee in the same craft or occupational group in the same installation may elect to be reassigned to the gaining installation and take the seniority of the senior full-time employee subject to involuntary reassignment. Such senior employees who accept reassignment to the gaining installation do not have retreat rights.

(4) When two or more such vacancies are simultaneously available, first choice of duty assignment shall go to the senior employee entitled by displacement from a discontinued installation to such placement.

(5) A full-time employee shall have the option of changing to part-time flexible in the same craft or occupational group in lieu of involuntary reassignment.

(6) Employees involuntarily reassigned under b(1) and (2) above, other than senior employees who elect to be reassigned in place of junior employees, shall be entitled at the time of such reassignment to file a written request to be returned to the first vacancy in the level, in the craft or occupational group in the installation from which reassigned, and such request shall be honored so long as the employee does not withdraw it or decline to accept an opportunity to return in accordance with such request.

In the Clerk Craft, an employee(s) involuntarily reassigned shall be entitled at the time of such reassignment to file a written request to return to the first vacancy in the same or lower salary level in the installation from which reassigned. Such request for retreat rights must indicate whether the employee(s) desires to retreat to a lower level assignment and, if so, what salary level(s). The employee(s) may retreat to only those lower level assignments for which the employee(s) would have been otherwise eligible to bid. If vacancies are available in a specified lower salary level and in the salary level of the employee when reassigned, the employee will be given the option. Failure to exercise retreat rights to the first available vacancy terminates such rights. Furthermore, employee(s) electing to retreat to a lower level assignment are not entitled to salary protection.

6. Centralized Mail, Processing and/or Delivery Installation (Clerk Craft Only)

a. When the operations at a centralized installation or other mail processing and/or delivery installation result in an excess of full-time clerks at another installation(s), full-time clerks who are excess in a losing installation(s) by reason of the change, shall be reassigned as provided in Section C.5.b. Reassignments of clerks shall be treated as details for the first 180 days to avoid inequities in the selection of preferred duty assignments by full-time clerks in the gaining installation.

b. Previously established preferred duty assignments which become vacant before expiration of the detail period must be posted for bid and awarded to eligible full-time clerks then permanently assigned in the gaining installation. Excess part-time flexible clerks may be reassigned as provided for in Section C.8.

c. All new duty assignments created in the gaining installation and all other vacant duty assignments in the centralized installation shall be posted for bid. One hundred eighty (180) days is computed from the date of the first detail of an employee. Bidding shall be open to all full-time clerks of the craft involved at the gaining installation. This includes full-time clerks assigned to the gaining installation.

d. When the centralized installation is a new one:

(1) Full-time clerks who apply for reassignment from the losing installation, shall be reassigned with their seniority.

(2) Reassignments shall be in the order of seniority and shall not exceed the number of excess full-time clerks in the losing installation.

(3) The provisions of 5.a. above, apply to reassign junior full-time excess clerks, with their seniority, when there are excess full-time clerks after the reassignment of senior full-time clerks who apply for reassignment.

7. Reassignments--Motor Vehicle

a. When a vehicle maintenance facility is established to replace an auxiliary garage, full-time andto replace an auxiliary garage, full-time and part-time flexible craft positions in the gaining installation are to be posted in the losing installation for applications by full-time and part-time flexible employees, respectively. Senior qualified applicants shall be reassigned without loss of seniority, but not to exceed the number of excess employees in the losing installation.

b. When a vehicle maintenance facility is established to replace vehicle maintenance in a perimeter office, full-time and part-time flexible craft positions in the new maintenance facility shall be posted in the losing installation for applications by full-time and part-time flexible employees, respectively. Senior qualified applicants shall be reassigned without loss of seniority, but not to exceed the number of excess employees in the losing installation.

c. When vehicle operations are changed by transfer from one installation to another, new full-time and part-time flexible craft positions shall be posted for applications in the losing installation by full-time and part-time flexible employees in the craft, respectively. Senior qualified applicants shall be reassigned without loss of seniority, but not to exceed the number of excess employees in the losing installation.

d. After all reassignments have been made to the gaining installation, pursuant to Subsection a, b and c, the new full-time assignments in the gaining installation shall be posted for bids.

e. If, after establishment of a new installation, operations result in further excess at losing installation(s), the procedures in Subsections a, b, c, and d, above, apply to reassign senior applicants from the losing installation(s) to positions in the new installation.

8. Reassignment--Part-Time Flexible Employees in Excess of Quota (Other Than Motor Vehicle)

Where there are part-time flexible employees in excess of the part-time flexible quota for the craft for whom work is not available, part-time flexibles lowest on the part-time flexible roll equal in number to such excess may at their option be reassigned to the foot of the part-time flexible roll in the same or another craft in another installation.

a. An excess employee reassigned to another craft in the same or another installation shall be assigned to the foot of the part-time flexible roll and begin a new period of seniority.

b. An excess part-time flexible employee reassigned to the same craft in another installation shall be placed at the foot of the part-time flexible roll. Upon change to full-time from the top of the part-time flexible roll, the employee's seniority for preferred assignments shall include the seniority the employee had in the losing installation augmented by part-time flexible service in the gaining installation.

c. A senior part-time flexible in the same craft or occupational group in the same installation may elect to be reassigned in another installation in the same or another craft and take the seniority, if any, of the senior excess part-time flexible being reassigned, as set forth in a and b, above.

d. The Postal Service will designate, after consultation with the affected Union, vacancies at installations in which excess part-time flexibles may request to be reassigned beginning with vacancies in other crafts in the same installation; then vacancies in the same craft in other installations; and finally vacancies in other crafts in other installations making the designations to minimize relocation hardships to the extent practicable.

e. Part-time flexibles reassigned to another craft in the same installation shall be returned to the first part-time flexible vacancy within the draft and level from which reassigned.

f. Part-time flexibles reassigned to other installations have retreat rights to the next such vacancy according to their standing on the part-time flexible roll in the losing installation but such retreat right does not extend to part-time flexibles who elect to request reassignment in place of the junior part-time flexibles.

g. The right to return is dependent upon a written request made at the time of reassignment from the losing installation and such request shall be honored unless it is withdrawn or an opportunity to return is declined.

D. Part-Time Regular Employees

Part-time regular employees assigned in the craft units shall be considered to be in a separate category. All provisions of this Section apply to part-time regular employees within their own category.

Section 6. Transfers

A. Installation heads will consider requests for transfers submitted by employees from other installations.

B. Providing a written request for a voluntary transfer has been submitted, a written acknowledgement shall be given in a timely manner.

* * *

ARTICLE 41 - LETTER CARRIER CRAFT

G. Changes in Which a New Period of Seniority is Begun

1. When an employee from another agency transfers to the Letter Carrier Craft.

2. Except as otherwise provided in this Agreement, when an employee from another USPS craft is reassigned voluntarily or involuntarily to the Letter Carrier Craft.

3. When a letter carrier transfer from one postal installation to another at the carrier's own request (except as provided in subsection E of this Article).

4. Any former employee of the U.S. Postal Service entering the Letter Carrier Craft by reemployment or reinstatement shall begin a new period of seniority, except as provided in subsections D.1 and D.4 above.

5. Any surplus employees from non-processing and non-mail delivery installations, regional offices or the United States Postal Service Headquarters, begin a new period of seniority effective the date of reassignment.

IV. STATEMENT OF FACTS

In this case, the American Postal Workers Union has intervened, pursuant to Article 15, Section 4.A.9 of the parties' agreement, in a dispute between the Employer and the National Association of Letter Carriers. The dispute between the NALC and the Employer arose as the result of an involuntary transfer of a Clerical Craft employe in the DeSoto, Missouri Post Office to the Letter Carrier Craft in that same installation. Initially, the NALC challenged the necessity of the transfer itself, contending that the Employer violated the parties' collective bargaining agreement because it did not establish a need for such a personnel action. (See, Joint Exhibit No. 2, pp. 12-13).

The Employer denied the NALC grievance at each step of the process to Step 3. On November 16, 1989, the Union appealed the dispute to Step 4 pursuant to Article 15, Section 2 of the collective bargaining agreement. The NALC claimed a violation of Articles 7 and 12 and sought the following corrective action:

The reassignment of the excess clerk into the Carrier Craft to be done in accordance with Article 41,

> Section 2.G.2 so that the employe begins a new period of seniority. Also that any PTF carriers be made whole due to this adverse action. (See, Joint Exhibit No. 2, p. 4).

On May 21, 1990, Mr. Dominic J. Scola, Jr. denied the Step 4 grievance. In denying the grievance at Step 4, Mr. Scola offered the following analysis:

> Article 12, Section 2A states that "Except as specifically provided for in this Article, the principles of seniority are established in the craft Articles of this Agreement." (Emphasis Added). The relevant section of Article 12 in this grievance, i.e. Article 12.5.C.5.a(4), is the specific provision in Article 12 that otherwise provides for seniority as an exception to Article 41.2.G2.
>
> The provisions of Article 12 of the National Agreement are consistent with Article 41. The Postal Service interpretation and application of Article 12, as in the instant case, has been utilized in this manner since the provisions on excessing were first negotiated. Accordingly, based on the above considerations, this grievance is denied. (See, Joint Exhibit No. 2, p. 3, emphasis in the original).

On May 22, 1990, the NALC appealed the Step 4 denial to arbitration. On October 23, 1990, the American Postal Workers Union intervened in the case, pursuant to Article 15, Section 2 of the parties' agreement. When the parties were unable to resolve their differences, the matter came to this forum.

## V. POSITION OF THE PARTIES

### A. The National Association of Letter Carriers

The National Association of Letter Carriers asserts plain language in the parties' agreement requires that employes excessed into the Letter Carrier craft begin a new period of seniority. According to the NALC, the relevant contractual language is found in Article 41, Section 2(G)(2). This article, according to the NALC, takes precedence unless a different seniority rule is "otherwise provided in this Agreement." The NALC specifically rejects any contention that Article 12, Section 5 is such a seniority rule "otherwise provided."

According to the NALC, Article 12, Section 5, which sets forth a "one day junior" seniority rule, cannot establish seniority in the place of the craft provision because Article 12 expressly provides in Section 5.B.10 that craft articles shall prevail in case of an inconsistency between a craft article and the seniority provisions of Article 12.5. It is the position of the NALC that the facial inconsistency between the "one day junior" rule in Article 12.5 and the "new period" rule in Article 41.G.2 activates provisions in Article 12.5.B.10. Accordingly, the NALC concludes that the seniority provisions in the craft article must prevail.

The NALC argues that its position with regard to the application of Article 12.5.B.10 is supported by the parties' bargaining history. According to the NALC, the parties first incorporated Article 12.5.B.10 into the agreement in 1978 with the express intention that craft seniority provisions

prevail when craft membership resulted from reassignment. The NALC contends that the parties clearly understood the impact of Article 12.5.B.10 and the fact that it would change the existing rule allowing craft rules to require a new seniority period when employes were reassigned across craft lines.

Statements of the parties contemporaneous with the incorporation of Article 12.5.B.10 allegedly show that each party understood the effect of the provision. The NALC contends that its own publications in November of 1978, along with publications of the American Postal Workers Union the following year, demonstrate that both unions recognized the fact that Article 12.5.B.10 would allow the unions to require that excess employes reassigned to their craft start a new seniority period. According to the National Association of Letter Carriers, the Employer endorsed these interpretations in its own publications.

The NALC also contends that its institutional conduct since 1978 has been consistent with its interpretation of the parties' contractual intent. According to the NALC, its 1980 Contract Administration Manual as well as each subsequent edition of the Manual clearly show that Article 12.5.B.10 allowed it to require reassigned employes to start a new seniority period. The NALC contends that its consistent adherence to the interpretation given by all the parties to the disputed provision in 1978 demonstrates the correctness of that interpretation, notwithstanding the Employer's and the APWU's application of the old "one day junior" rule in

some reassignment situations since 1978.

The NALC rejects any contention that the admitted practice of the parties since 1978 of applying the "one day junior" rule changes the outcome of this case. According to the NALC, no practice sufficient to overcome the clear intent of the parties has been shown. The NALC argues that the proponent of a past practice bears the burden of establishing the existence of such a course of conduct. It is the belief of the NALC that the burden has not been carried in this case.

The NALC also argues that witnesses offered to show a practice of applying the "one day junior" rule to reassignments after 1978 lack sufficient "nation-wide knowledge" of reassignment practices to establish an contractual custom and past practice of the parties. In addition, the NALC maintains that no documented national level policy statements have been presented to corroborate the existence of a policy calling for the "one day junior" rule to be applied after 1978. Moreover, the NALC argues that it never has acquiesced to the applicability of the "one day junior" rule and that it, therefore, cannot be bound by a policy, even if one existed, that it did not agree to accept.

It is the belief of the NALC that, even if a practice of applying the "one day junior" rule could be shown, such a practice cannot vary the clear language and contractual intent of the parties. According to theNALC, the arbitrator is expressly prohibited from varying or adding to the terms of the parties' agreement. Because it has never agreed to using

the "one day junior" rule, the NALC maintains that the rule is not a part of the parties' agreement and cannot be "added" by an arbitrator.

B. The American Postal Workers Union

The American Postal Workers Union argues that the Employer properly established the seniority date of the excessed clerk in this case. According to the APWU, Article 12.5.C.5.a(4) establishes the clerk's seniority under the "one day junior" rule, notwithstanding Craft Article 41. It is the position of the APWU that Article 41.2.G.2 is consistent with Article 12 and that, therefore, there is no occasion to apply the preference provision of Article 12.5.B.10.

According to the American Postal Workers Union, Article 12.5.B.10 applies only when it can be demonstrated that provisions of Article 12 are "inconsistent" with a Craft Article. The APOWU argues that in this case neither the NALC nor the Employer established the necessary inconsistency. The APWU contends that the language "except as otherwise provided in this Agreement" contained in Article 41.2.G.2 expressly refers to provisions of Article 12 and cannot, therefore, be inconsistent with those provisions.

The APWU argues that the "one day junior" rule has been applied consistently in situations like the one at issue for more than a decade as well as through the negotiation of four collective bargaining units. According to the APWU, this

long application of the rule refutes the other parties' arguments that Article 12.5.B.10 was intended to change the seniority rule with respect to reassignments. The APWU argues that evidence attempting to show it adopted the interpretation the NALC has given Article 12.5.B.10 is unreliable evidence and cannot outweigh the fact that the "one day junior" rule repeatedly has been used since 1978.

The APWU argues that the Employer supported its interpretation of the contractual provisions it asserts in this case through Step 4 of the grievance procedure and noted in its Step 4 denial that the "one day junior" rule always has been applied to the assignments. According to the APWU, the Employer changed its mind without explanation shortly before this arbitration hearing. Such a late shift in position, according to the APWU, demonstrates that the interpretation given to Article 12.5.B.10 by the NALC previously has not been held by the Employer. In addition, the APWU argues that the Employer's recent computerized personnel actions using the "one day junior" rule demonstrate the fact that prior to this arbitration hearing the Employer expected the rule to be applied when it reassigned employes.

Finally, the American Postal Workers Union contends that, during the 1981 contract negotiations, the parties agreed on a Memorandum of Understanding which would have amended Article 12.5.B.10 and had the effect of establishing a "new period" seniority rule in reassignment situations. According to the APWU, the Memorandum of Understanding was to be effective

only if certain conditions were met. The APWU argues that, since the conditions were not met, the "new period" rule did not go into effect.

According to the APWU, the 1981 Memorandum of Understanding demonstrates that the National Association of Letter Carriers was aware of the fact that reassigned employes were being granted "one day junior" seniority. In addition, the APWU argues that, since the NALC sought such an understanding in 1981, this is proof that no "new period" rule was in effect because the NALC would not have sought in 1981 a rule claimed to be in existence since 1978. The APWU contends that the 1981 Memorandum of Understanding supports its claim that the "one day junior" rule was in effect after 1978 and that the parties were at all times aware of this fact.

C. The Employer

The Employer agrees with the National Association of Letter Carriers' interpretation of Article 12.5.B.10. According to the Employer, the plain language and bargaining history of this contractual provision require that Craft Articles prevail when terms of Article 12.5 are inconsistent with Craft Articles. The Employer maintains that the facial inconsistency between the "one day junior" rule found in Article 12.5 and the "new period" rule in Craft Article 41 triggers the preference provision of Article 12.5.B.10.

The Employer also maintains that giving effect to the APWU's interpretation of Article 12.5.B.10 would be inconsistent with established rules used by the Employer to interpret the parties' agreement. According to the Employer, specific provisions of Article 41 should be given effect over the more general provisions of Article 12. The Employer argues that such a preference for the specific over the general is not only consistent with traditional rules of contract construction but also consistent with provisions of Article 12.5.B.10 which were intended to make express in the parties' agreement just such a preference.

In addition to believing the NALC's interpretation of Article 12.5.B.10 to be the correct one, the Employer also contends that there has been a failure to show a consistent past practice of applying the "one day junior" seniority rule in reassignment cases. Alternatively, the Employer maintains that, even if such a practice was in existence, it must yield to the clear and unambiguous language of the parties' agreement. According to the Employer, the arbitrator may not add to the parties' existing agreement by incorporating a seniority provision inconsistent with the language of that agreement.

## VI. ANALYSIS

### A. Interpreting Article 12.5

The question faced in this case is whether the Employer properly established the seniority date of an employe who was involuntarily transferred to the Letter Carrier craft. The American Postal Workers Union has intervened in the dispute between the Employer and the National Association of Letter Carriers. The initial dispute involved the propriety of a reassignment at the DeSoto, Missouri facility. The parties have identified a national interpretive issue involving the proper seniority date of the reassigned employe, assuming the reassignment itself was proper.

At Step 4, the parties explored the national interpretive issue, and management denied the grievance. Subsequent to that denial, the National Association of Letter Carriers and the Employer reached agreement on the seniority issue, with the Employer abandoning its Step 4 position and adopting the position of the National Association of Letter Carriers. The Employer's conversion, however, came after the American Postal Workers Union properly had intervened in the Step 4 dispute, pursuant to Article 15 of the parties' agreement.

The American Postal Workers Union has argued that the Employer's initial position with respect to the seniority of reassigned employes was based on a correct interpretation of the parties' agreement. Accordingly, the National Association of Letter Carriers and the Employer have offered one interpretation of the provisions in dispute, while the American

Postal Workers Union has defended the position initially taken by the Employer.

Article 12, entitled "Principles of Seniority, Posting, and Reassignments," recently drew forth the following arbitral statement:

> The meaning of seniority must find its explanation in the collective bargaining relationship between the parties. An arbitrator's assumption must be that the parties have decided seniority rights encourage loyalty and stability in the work force and have balanced those values against any lost flexibility as a result of using seniority as a basis for making employment decisions. An arbitrator is obligated to interpret and, then, to apply such contractual terms in a given case, recognizing that an application of seniority is almost never neutral. (See, Case Nos. H7N-4U-C 3766, H7N-2A-C 4340, H7N-2U-C 4618, H7N-5K-C 10423, and H4N-5N-C 41526).

In 1954, the highly regarded arbitrator, Ralph Seward, stated the reason that the application of seniority is almost never neutral. He said:

> In seniority matters, the advantage of one employee is the disadvantage of another. To "stretch" the agreement to be "fair," to Smith is to "stretch" it to be "unfair" to Jones. Fairness, then, exists when each employee has the relative seniority right he is entitled to under the agreement--no more and no less. (See, Bethlehem Steel Co., 23 LA 538, 541-542 (1954)).

In this proceeding, the "fairness" of relative seniority between employes is even more dependent on exact terms of the parties' agreement because the issue involves the seniority of employes who are involuntarily transferred by the Employer from one craft to another and, hence, from one union to another.

Article 12.5 of the parties' collective bargaining

agreement sets forth in Subsection A situations in which provisions of Article 12.5 shall apply to the Employer's actions. In this case, Article 12.5.A.5 (reduce the number of regular work force employees of an installation other than by attrition) applied to the Employer's involuntary transfer of a Clerk Craft employe into the Letter Carrier Craft. An employe so reassigned is described as having been "excessed" from one craft to another.

Pursuant to terms of Article 12.5.C.5, it is the Employer's obligation, when reducing the number of employes at an installation more rapidly than is possible by attrition, to follow a prescribed process. The process to be followed depends on whether resulting transfers are to be within an installation or to other installations. The transfer at issue in this particular dispute was within the installation and, therefore, subject to the requirements of Article 12.5.C.5.a in the parties' agreement.

Article 12.5.C.5.a has seven subsections, one of which establishes a seniority rule. It states:

> When for any reason an installation must reduce the number of employees more rapidly than is possible by normal attrition, that installation:
>
> (4) Shall identify as excess the necessary number of junior full-time employees in the salary level, craft, and occupational group affected on an installation-wide basis within the installation; make reassignments of excess full-time employees who meet the minimum qualifications for vacant assignments in other crafts in the same installation; involuntarily reassign them (except as provided for letter carriers and special delivery messengers and vehicle service employees in Section C.5.b below) in the same or lower level with seniority, whichever is the lesser of:

(a) One day junior to the seniority of the junior full-time employee in the same level and craft or occupational group in the installation to which assigned, or

(b) The seniority the employee had in the craft from which reassigned. The 5-year rule does not apply. (See, Joint Exhibit No. 1, pp. 38-39, emphasis added).

The seniority rule of Article 12.5.C.5.a(4) is described by the parties as the "one day junior" rule.

In addition to the seniority provisions of Article 12.5.C.5, the parties' agreement contains in Article 12.5.B a dozen "principles and requirements" applicable to all reassignments. The tenth "principle and requirement" states:

> Whenever the provisions of this Section establishing seniority are inconsistent with the provisions of the Craft Articles of this Agreement, the provisions of the Craft Articles shall prevail. (See, Joint Exhibit No. 1, p. 34, emphasis added).

The meaning of Article 12.5.B.10 is clear and unambiguous, and the provision states that, if craft seniority provisions are inconsistent with seniority provisions of Article 12.5, Craft provisions must be followed. Whether the applicable "Craft Article" in this case is "inconsistent" with the "one day junior" seniority rule of Article 12.5.C.10.a(4) is at the core of this dispute.

There has been no dispute about the fact that the applicable Craft Article is Article 41 (Letter Carrier Craft). Article 41.2 has established the craft seniority rule. It states that:

> This seniority section applies to all regular work force Letter Carrier Craft employees when a guide is necessary for filling assignments and for other purposes and will be so used to the maximum extent possible. (See, Joint Exhibit No. 1, p. 172).

Article 41.2.G lists five circumstances under which a new period of seniority must be begun. This sets forth the "new period" seniority rule. Article 41.2.G.2 makes clear that a new period of seniority is begun, "except as otherwise provided in this Agreement, when an employee from another USPS craft is reassigned voluntarily or involuntarily to the Letter Carrier Craft." (See, Joint Exhibit No. 1, p. 175).

In this particular dispute, management involuntarily reassigned a Clerk Craft employe to the Letter Carrier Craft. Accordingly, Article 41.2.G.2, on its face, applies to the transferred employe.

The American Postal Workers Union has sought to avoid the application of Article 12.5.B.10 (principles and requirements) by maintaining that there is no inconsistency between the seniority provisions of Article 12 and Craft Article 41, notwithstanding the two seemingly inconsistent seniority rules. According to the American Postal Workers Union, the prefatory language "except as otherwise provided in this Agreement" contained in Article 41.2.G.2 negates any substantive inconsistency between the more general "one day junior" seniority rule and the "new period" seniority rule of Article 41.2.G.2. It is the position of the American Postal Workers Union that Article 41.2.G.2 expressly defers to general contractual provisions like Article 12.5.C.5.a(4) and, therefore, cannot be inconsistent with such general provisions.

This argument failed to be persuasive as a matter of contractual construction. The general principles of seniority have

been set forth by the parties in Article 12.2 (principles of seniority). Article 12.2.A states:

> Except as specifically provided in this Article, the principles of seniority are established in the Craft Articles of this Agreement. (See, Joint Exhibit No. 1, p. 30, emphasis added).

Although it is stated in terms of Craft Article preference, Article 12.2.A has expressly given preference to the "specific" seniority provisions of Article 12 over those of the Craft Article.

Craft Article 41.2.G.2 is consistent with the principle of general preference set forth in Article 12.2.A. As a Craft Article, Article 41.2.G.2 applies, by its own terms, only if no specific Article 12 seniority rule is provided. The prefatory language of Article 41.2.G.2 has recognized the general seniority principle found in Article 12.2.A. In other words, Craft Article seniority rules apply "except as otherwise provided in the Agreement."

The "Craft Article preference" provision of Article 12.5.B.10 (principles and requirements) stands as an exception to the general seniority principle just set forth. Article 12.5.B.10 states as a rule of preference in the case of reassignments the opposite preference of the general principle found in Article 12.2.A. In other words, Article 12.5.B.10 reverses the preference by allowing Craft Articles to take preference over the specific seniority provisions of Article 12.5.

Once Article 12.5.B.10 is construed from this perspective, the flaw in the interpretation by the American Postal Workers Union becomes clear. Article 12.5.B.10 is itself inconsistent

with the general preference provision expressed in Article 12.2.A. It is an exception which, in the case of reassignments alone, allows the Craft Articles to state the seniority rule by choosing a rule other than the "one day junior" rule of Article 12.5.C.5.a(4). If one construes the prefatory language of Article 41.2.G.2 in accordance with the interpretation of the American Postal Workers Union, it creates an exception to the exception and renders Article 12.5.B.10 superfluous with respect to the Letter Carrier craft and, in effect, reads Article 41.2.G.2 out of the contract.

The parties are well familiar with the standard Anglo-American principle of contract interpretation which presumes that no part of an agreement is superfluous. As one respected source has stated:

> Where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation is very strongly negated if it would render some provisions superfluous. (See, Restatement (Second) of Contracts, 93 (1981)).

Article 41.2.G.2 cannot be consistent with both Article 12.2.A and Article 12.5.B.10 because the two provisions of Article 12 are inconsistent with one another. It is not reasonable to conclude that the parties intended the clear exception contained in Article 12.5.B.10 to apply to all but the Letter Carrier Craft. This is particularly true where the argument for such an interpretation rests on no more than prefatory language clearly intended to mirror a more general contractual principle.

If the "except as otherwise provided" prefatory language of Article 41.2.G.2 is interpreted as creating consistency with

all seniority provisions of Article 12.5, Article 41.2.G.2 becomes a contractual provision completely without any effect. It is not logical to believe that the parties inserted Article 12.5.B.10 into their agreement and, then, rewrote Article 41.2.G.2 in such a way as to render the provision completely ineffective. Absent contrary evidence, it is more logical to conclude that Article 41.2.G.2 has been drafted in a way to be consistent with the "preference" provisions of Article 12 while remaining inconsistent with the "specific" seniority provisions of that article. It is not reasonable to assume that the parties intended to render a portion of their agreement ineffective, and arbitrators long have followed a principle which calls for interpreting an agreement in a way that leads to a reasonable result. (See, e.g., Crestview Bowl, Inc. v. Wormer Construction Co., 592 P.2d 74 (1979); and Inpertherm, Inc. v. Coronet Imperial Corp., 558 S.W.2d 344 (1977)).

The straightforward meaning of Article 12.5.B.10 finds support in the parties' bargaining history as well as in contemporaneous statements of the parties. Prior to 1978, Article 12.5 contained no "Craft Article preference" provision. Without the preference provision now contained in Article 12.5.B.10, the general provision of Article 12.2.A would demand that the specific seniority provisions of Article 12.5.C.5.a(4) prevail. There was no dispute about the fact that, prior to the agreement of 1978, the "one day junior" rule of Article 12.5.C.5.a(4) determined seniority when management transferred employes across craft lines.

The insertion of Article 12.5.B.10 made clear that Craft Articles prevailed when seniority provisions in Article 12.5 were inconsistent with Craft Articles. Interpreted within the context of the provision's plain meaning, the effect of Article 12.5.B.10 was to reverse the general preference found in Article 12.2.A by giving preference to "inconsistent" craft articles. The construction given Article 41.2.G.2 by the American Postal Workers Union would deny the effect of Article 12.5.B.10 and, in effect, would preserve the pre-1978 seniority rule. Such a construction, however, would leave the bargained-for provisions of Article 12.5.B.10 without effect in the case of letter carrier transfers and, thus, would ignore the express change in the parties' agreement in 1978.

Moreover, contemporaneous statements of Union leaders support the plain meaning of Article 12.5.B.10 as set forth in this report. For example, soon after the 1978 negotiations, the NALC published an article explaining changes in the 1978 contract. The article stated:

> Under the 1975 agreement, a clerk who was excessed into our craft had his seniority established as one day junior to the junior regular. This automatically put them [sic] ahead of all the part-time flexibles in the same office. Now these excessed clerks will begin a new period of seniority, the date they came into the carrier craft. Part-time flexibles will utilize their seniority over these excessed clerks for vacation selection and when the part-time flexibles are converted to regular, they will have a higher seniority date for bidding on assignments. (See, November, 1978 "Postal Record," Employer's Exhibit No. 3).

The American Postal Workers Union mirrored this interpretation of the reassignment seniority provisions in the 1978

agreement. In December of 1978, Mr. Forrest M. Newman, Director of Industrial Relations, explained aspects of the new contractual language in the 1978 agreement. It is an extensive document of approximately 100 pages, and it set forth the following explanation of Article 12.5:

> New Section 5 merges former Appendix A, Section 1 and 2, into a single section covering all applicable crafts. One key change in this section (from the old appendix A) is the requirement that Craft Article seniority provisions determine the seniority of employees excessed from one craft to another. In the Clerk Craft, any employee excessed involuntarily from another craft into the Clerk Craft must begin a new period of seniority. (See, Employer's Exhibit No. 2, p. 36, emphasis in the original).

This contemporaneous explanation of Article 12.5 by a representative of the American Postal Workers Union is consistent with the contemporaneous understanding set forth in the national monthly magazine of the National Association of Letter Carriers.

The American Postal Workers Union has sought to avoid implications of its 1978 interpretation of Article 12.5 by challenging its relevance and, hence, the weight of the evidence. It has set forth its challenge in terms of the legal concepts of hearsay evidence and the lack of personal knowledge, and the APWU has argued that the author of the 1978 interpretation, Mr. Newman, did not testify at the arbitration hearing. In other words, his knowledge, if any, of the 1978 negotiations, therefore, could not be tested.

The "1978 contract interpretations" produced by Mr. Newman for the APWU constituted an official publication from a union official charged with the responsibility of contract interpretation. Such evidence deserved reasonable weight because of its

inherent reliability. It would easily be admissible in a court of law. In view of Mr. Newman's position as Director of Industrial Relations, it would constitute an admission against interest in an official publication of the organization, and the publication itself was self-authenticated because of the trade inscription indicating ownership, control, and origin from the American Postal Workers Union.

There was contemporaneous congruence of the two unions' interpretation of what at the time was new language in Article 12.5.B.10. The effect of this congruence is considerable. First, it activates an important rule in aid of contract interpretation. The rule states that "words and other conduct are interpreted in light of all the circumstances." (See, Restatement (Second) of Contracts, 86 (1981)). The rule is explained as follows:

> The meaning of words and other symbols commonly depend on their context; the meaning of other conduct is even more dependent on the circumstances. In interpreting the words and conduct of the parties to a contract, [an arbitrator] seeks to put [him or herself] in the position they occupied at the time the contract was made. When the parties have adopted a writing as the final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other party had reason to know. (See, Restatement (Second) of Contracts, 87 (1981)).

Second, both interpretations are consistent with the plain meaning of the provision and its construction, considering the other provisions of Article 12 and the Craft Article. Third, both affected unions cited Article 12.5.B.10 as a provision the parties intended to use as a means of changing the status quo. Finally,

both unions considered the changes in Article 12.5 beneficial to their membership. It is clear both unions bargained for a provision that would allow them to favor their existing members over employes transferred from other crafts.

In view of the actual contractual language, its construction, and the bargaining history of Article 12.5.B.10, it is reasonable to conclude that the parties intended the provision to allow the various crafts to choose a seniority rule other than the "one day junior" seniority rule of Article 12.5.C.5.a(4). The National Association of Letter Carriers chose such a rule in the form of the "new period" rule of Article 41.2.G.2. Consistent with the intent of Article 12.5.B.10, this craft seniority rule must be given effect when the Employer transfers employees to the Letter Carrier Craft.

B. The Impact of Past Practice

The American Postal Workers Union argued alternatively that, notwithstanding the language of Article 12.5.B.10, the parties have continued to apply the "one day junior" rule when employes are assigned to new crafts. According to the American Postal Workers Union, the alleged past practice of applying the "one day junior" rule makes clear that the parties did not intend the Craft Articles to be applied to reassignment. Moreover, the American Postal Workers Union has argued that, whatever the intention of the parties in 1978, more than a decade of applying the "one day junior" rule has created a binding past practice

which cannot now be discarded.

The Employer and the National Association of Letter Carriers have met the contention of the American Postal Workers Union on two fronts. First, they argued that the American Postal Workers Union did not carry its evidentiary burden of showing the existence of a past practice. Second, they maintained that, even if such a practice existed, it cannot be used to add to or vary clear and unambiguous provisions of the parties' collective bargaining agreement. They have argued that clear contractual language must prevail over a past practice if it exists in this case.

As the parties realize, the concept of past practice has deep roots in labor arbitration. Arguments based on past practice often surface in two circumstances. First, an assertion of past practice is often used to support or challenge an interpretation of an ambiguous contractual provision. Such a use of past practice is not unlike using evidence about a course of dealing or trade usage in commercial contract disputes. Second, some parties offer evidence about past practice as an indication that the agreement between the parties has been added to or modified. The American Postal Workers Union has made both arguments in this case.

Over three decades ago, Arbitrator Richard Mittenthal served the arbitration process well by setting forth several factors by which to test the existence of a past practice. Arbitrators in literally hundreds of cases have adopted those tests, and they have become a fundamental part of arbitral

literature. Arbitrator Mittenthal required that a past practice have (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; and (4) mutuality. (See, Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, 30, 32-33 (1961)). It is clear that the burden of going forward to establish the elements of these factors is on the party asserting the existence of a past practice.

The four elements of the test put forth by Arbitrator Mittenthal reflect two central concerns when a claim of past practice is made. When a past practice is asserted to aid in the interpretation of an ambiguous contractual provision, the clarity, consistency, longevity, and repetition of the practice supply the certainty necessary in order to evidence the parties' intent with respect to the disputed term. In such a case, acceptance of the practice and its mutuality also add weight to the evidence. When the concern is the intent of the parties with respect to an ambiguous contractual provision, the importance of elements in the Mittenthal test is chiefly evidentiary.

When a claim of past practice is made that attempts to add to or amend a clear term of the parties' agreement, the importance of the four elements in the Mittenthal test is reversed. In such a case, the acceptance and mutuality of the practice are paramount because the claim is fundamentally based on notions of reliance and estoppel. The clarity, consistency, longevity, and repetition of the practice then work to add evidentiary

certainty to a finding that the parties intended to add to or amend their collective bargaining agreement.

In this case, evidence about the practice of applying the "one day junior" rule when employes are transferred across craft lines was not conclusive. Certainly, the Employer's position with respect to the grievance at Step 4 suggested that the Employer routinely applied the "one day junior" rule. The American Postal Workers Union presented evidence in the form of a recent computer program created by the Employer to aid its managers in applying Article 12, and the computer program suggested that the Employer has considered the "one day junior" rule to be in effect. Mr. Thomas A. Neill, Director of Industrial Relations for the American Postal Workers Union, testified without contradiction that he was aware of "hundreds of excesses from one craft the other" in which the "one day junior" seniority rule had prevailed. (See, Tr. 63).

There, was no evidence submitted with respect to the scope of the alleged practice on a national basis. The computer program, for instance, had been developed by regional employes and had not been implemented nation-wide. (See, APWU's Exhibit No. 4). The arbitrator received no evidence of specific instances of reassignments, with supporting documentation, other than the transfer presently at issue, as a part of the evidentiary record.

It is clear from the evidence that a number of postal employes transferred since 1978 have received the benefit of the "one day junior" seniority rule. It may well be that some managers did not change their method of assigning seniority

after the 1978 National Agreement. Certainly, there is evidence that the Employer continued to cite the "one day junior" rule in some of its publications after Article 12.5.B.10 became effective. (See, APWU's Exhibit No. 12).

These facts, however, fail to change the contractual intent of the parties with respect to Article 12.5.B.10. The contractual language and bargaining history of the parties clearly showed an intent by them to use craft seniority rules when employes are reassigned across craft lines. The fact that the Employer had failed to apply the rules in every instance and that no grievance until now has challenged such failures is insufficient evidence of a contrary intent. It is reasonable to recognize that an organization the size of the U. S. Postal Service might continue to apply a historic seniority rule in some areas of the country after the parties had agreed at the national level to change the rules. Such management errors fail to change the contractual intent of the parties.

The assertion that this patchwork of applying the "one day junior" rule must be given effect, notwithstanding the parties' intent in 1978, fail to be persuasive. To reach such a conclusion, it would need to be shown by the clearest of evidence that the parties had agreed, explicitly or implicitly, to ignore their prior contractual agreement and adopt or continue to use the "one day junior" rule. Such a conclusion would need to be firmly based on evidence that the parties to the National Agreement knowingly had accepted the practice and that the acceptance of such practice was mutual. In this case, the arbitrator received no such evidence.

Some arbitrators have interpreted past practice as varying clear contractual language, but it clearly is a minority tradition. As a general rule, arbitrators have been unwilling to alter the undisputed meaning of a contractual provision based on a contrary past practice. As one arbitrator has observed:

> It is a basic and fundamental concept in the arbitration process that an arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary is the principle that, if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. And, when language so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry. (See, Ohio Chemical and Surgical Equipment Company, 49 LA 377, 380-381 (1967)).

Another arbitrator, stating the proposition more starkly, has said:

> It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probitive intent, and to putative intent, always governs. (See, Hecla Mining Company, 81 LA 193, 194 (1983)).

The National Association of Letter Carriers has published its interpretation of Article 12.5.B.10 in a Contract Administration Manual since 1980. It offered the following explanation of the provision:

> This language requires that Craft Article seniority provisions determine the seniority of employees excessed from one craft to another. Employees excessed into the Letter Carrier Craft begin a new period of seniority. They will be junior to all part-time flexibles, and not just one day junior to the junior full-time regular. (See, Employer's Exhibit No. 6, p. 2).

Newer versions of the Contract Administration Manual have continued to present the "new period" seniority rule of Article

41.2.G.2 as applicable in all cases of the assignment except under Article 12.6. (See, NALC Exhibit Nos. 8 and 9).

The point is that at least the NALC never adopted the "one day junior" seniority rule at the national level. Indeed, the National Association of Letter Carriers, in its official publications, consistently interpreted Article 12.5.B.10 as placing in force the "new period" seniority rule of Article 41.2.G.2. Such consistency is important evidence to negate any inference that the National Association of Letter Carriers accepted any alleged practice of applying the "one day junior" rule or that its use was mutual for all parties.

Absent a showing by clear and convincing evidence of a mutual decision by the parties some time after 1978 to ignore their initial interpretation of Article 12.5.B.10 and to return to the previous seniority rule, it is the arbitrator's obligation to give effect to Article 12.5.B.10. The fact that the pre-1978 seniority rule has been applied in some cases since that time does not, in itself, establish a past practice of sufficient clarity, consistency, longevity, and repetition to overcome the parties' express contractual intent as codified in Article 12.5.B.10. It is a common-law standard of contract interpretation that express terms are given greater weight than course of performance, course of dealing, usage of trade, or past practice. (See, Restatement (Second) of Contracts § 203(c), p. 93). The arbitrator received no evidence that the National Association of Letter Carriers accepted a practice of granting transferred employes "one day junior" seniority. Accordingly, it is reasonable to conclude that the asserted practice failed to meet the

test necessary to become a binding part of the parties' National Agreement.

C. The 1981 Memorandum of Understanding

During contract negotiations in 1981, the parties to this dispute reached agreement on a Memorandum of Understanding which amended Article 12.5.B.10. The Memorandum of Understanding by its own terms was to become effective "only in the event that the legality of the effects of reassignments made under these amendments was sustained by the MSPB and by a precedential decision of a court of competent jurisdiction. (See, APWU's Exhibit No. 3, p. 166). Amendments to Article 12.5.B.10 created three exceptions to Article 12.5.B.10 "with regard to assignments to and from the Letter Carrier Craft." (See, APWU's Exhibit No. 3, p. 166).

It is the third exception which is relevant in this case, and it states:

> All reassigned employees must begin a new period of seniority in the craft to which reassigned whether such employees retain regular status or revert to part-time flexible status. However, employees who revert to part-time flexible status retain limited seniority for the sole purpose of promotion to regular status. (See, APWU's Exhibit No. 3, p. 166).

The American Postal Workers Union has argued that this provision of the Memorandum of Understanding supports its contention that the "one day junior" seniority rule was in effect in 1981 and that the National Association of Letter Carriers

was aware of this fact. In addition, the American Postal Workers Union has argued that the contingencies required for implementing provisions of the 1981 Memorandum of Understanding have not been met and that, therefore, the National Association of Letter Carriers cannot claim a right to apply the "new period" seniority rule contained in the third exception to Article 12.5.B.10.

At first blush, the argument has plausibility. If, as the American Postal Workers Union contends, the parties agreed to modify Article 12.5.B.10 expressly to contain a "new period" seniority rule in 1981, it would be logical to infer that such a rule was not already a part of the parties' National Agreement. If the "new period" rule was not already in existence, then the American Postal Workers Union would be correct in contending that the 1981 Memorandum of Understanding did not effect such a rule, assuming its express contingencies had not been met. Such an argument, however, misconstrues the 1981 Memorandum of Understanding.

In addition to the seniority provisions of the 1981 Memorandum of Understanding cited by the American Postal Workers Union, there are two other "exceptions" to Article 12.5.B.10 set forth in the 1981 document. Those provisions deal not with the seniority of reassigned employes but with their "status" as full-time or part-time employes. Indeed, the "amendment" of Article 12.5.B.10 in the 1981 Memorandum of Understanding effects sweeping changes by establishing a process according to which full-time employes reassigned across crafts are reduced to part-time status, while in-craft

part-time employes are elevated to full-time status.

The background of such a change is reflected in the highly unusual contingencies expressed in the Memorandum of Understanding itself. Public employes, under the Constitution or by statute, may have a protected interest in their continued employment. The first two "exceptions" to Article 12.5.B.10 set forth in the 1981 Memorandum of Understanding implicate those interests by affecting an employe's status as a full-time governmental employe. The parties, therefore, made the Memorandum of Understanding contingent on both Merit Systems Protection Board and judicial sanction.

Since the principal purpose of the Memorandum of Understanding was to modify the parties' agreement with respect to employe "status," not seniority, implications that can be drawn from seniority provisions in the Memorandum of Understanding are reduced. This is a reflection of the "principal purpose" rule in aid of contract interpretation. It states that:

> Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable, it is given great weight. (See, Restatement (Second) of Contracts § 202(1), p. 86).

There is nothing inconsistent about expressing an existing seniority rule as part of a rule affecting a change in employe status. The third provision of the 1981 Memorandum of Understanding merely stated the seniority rule to be applied after an employe's status changed as a result of the first two provisions of the Memorandum of Understanding. Such a

statement of seniority to address a "new" employe status rule might or might not restate an existing seniority rule.

The American Postal Workers Union failed to be persuasive in its interpretation of the 1981 Memorandum of Understanding. Indeed, the fact that employes who retained full-time status under the Memorandum of Understanding began a new period of seniority (while those who are reassigned as part-time employes have seniority assigned under a completely different rule) is as much evidence that the existing full-time rule was preserved as it is evidence that a new rule was imposed. The Memorandum of Understanding creates new reassignment rules concerning employe status and assigns seniority dependent on that new status. In such a case, the origin of the seniority rule might well be the existing rule for those employes whose status would be the same whether or not the Memorandum of Understanding was in effect. The Memorandum of Understanding, standing alone, failed to offer any persuasive evidence of the seniority rule in effect at the time of the Memorandum of Understanding.

D. Conclusion

Article 12.5.B.10 clearly and unambiguously provided a rule of preference to be applied when employes are reassigned pursuant to Article 12.5. The provision reversed the general preference expressed in Article 12.2.A by allowing Craft Article seniority provisions to prevail over specific seniority provisions of Article 12. The plain meaning of Article 12.5.B.10 is supported by the parties' bargaining history as well as by their official contemporaneous statements concerning the effect of the provision on reassignment seniority.

Evidence of a past practice which allegedly was in conflict with Article 12.5.B.10 failed to be sufficient to overcome the express intent of the parties clearly set forth in Article 12.5.B.10, bargaining history, and contemporaneous statements of the parties. Certainly, the preference rule bargained into existence in 1978 has not been consistently applied since that time. It cannot be denied that there is some evidence that the parties did not intend the "new period" rule of Article 41 to prevail. Such evidence, however, failed to be sufficient to overcome the clear intent in the express language of Article 12.5.B.10.

Evidence about an alleged past practice fell far short of the standard necessary to support a claim that, by their actions, the parties mutually had accepted a clear and consistent practice contrary to Article 12.5.B.10. Even if one recognized that the parties might develop a practice inconsistent with clear and unambiguous contractual language

which was so clearly accepted by all that fairness dictated recognizing it as an amendment to the agreement, such was not the evidence in this case. Even if past practice could overcome clear and unambiguous contractual language, it would require a high level of evidence to do so; and that level simply was not met in this case.

Finally, implications that can be drawn from language in the 1981 Memorandum of Understanding modifying Article 12.5.B.10 are uncertain at best. The Memorandum of Understanding dealt directly with changes in employe status as a result of cross-craft reassignments. Such changes are far more serious in a legal as well as a collective bargaining sense than changes in seniority. The unusual aspect of including in the Memorandum a requirement of MSPB and judicial approval underlined the fact that the proposed amendments to Article 12.5.B.10 were intended chiefly to affect employe status.

The totality of the circumstances with regard to the 1981 Memorandum of Understanding supports a conclusion that the Memorandum alone failed to supply persuasive evidence about whether or not the parties imported the existing seniority rule into the Memorandum of Understanding or fashioned an entirely new one. It is as likely or more so that the parties would have continued the existing seniority rule for full-time employes when crafting provisions affecting employe status. Under the Memorandum of Understanding, some full-time employes would be reassigned as part-time employes.

It, therefore, was necessary for the parties to reassess existing seniority rules. It, however, was not necessary that they change the existing seniority rules for full-time employes.

Evidence submitted to the arbitrator makes it reasonable to conclude that the parties intended in their 1978 agreement to prefer Craft Article seniority rules when employes are reassigned under Section 5 of Article 12. That contractual intent continues to be expressed in the parties' National Agreement. It, therefore, is an arbitrator's duty to give effect to the bargain of the parties.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that senior employes excessed into the Letter Carrier Craft under terms of Article 12.5.C.5.a must begin a "new period" of seniority pursuant to terms of Article 41.2.G.2 of the parties' National Agreement. Article 41.2.G prevails, and employes reassigned from other crafts must begin a new period of seniority in the Letter Carrier Craft. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 12-19-91