C#18159

NATIONAL ARBITRATION PANEL

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| In the Matter of Arbitration<br><br>between<br><br>UNITED STATES POSTAL SERVICE<br><br>and<br><br>NATIONAL ASSOCIATION OF LETTER CARRIERS<br><br>with<br><br>AMERICAN POSTAL WORKERS UNION (Intervenor) | GRIEVANT: J. Sherman<br><br>POST OFFICE: Minneapolis, Minnesota<br><br>CASE NO.: 194N-4I-D 96027608 |

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES:
For the Employer: Ms. Marta Erceg
For the National Association of Letter Carriers: Mr. Keith Secular
For the American Postal Workers Union: Mr. Darryl J. Anderson, Ms. Melinda Holmes

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: November 14, 1997

POST-HEARING BRIEFS: February 19, 1997



RELEVANT CONTRACTUAL PROVISION: Article 29

CONTRACT YEAR: 1994-98

TYPE OF GRIEVANCE: Contract Interpretation

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that Article 29 of the agreement with the National Association of Letter Carriers requires the Employer to make temporary cross-craft assignments in order to provide work for carriers whose occupational driver's license has been suspended or revoked. The Employer is required to do so in a manner consistent with the APWU collective bargaining agreement. In instances where it is impracticable to fulfill its contractual obligation under both agreements, the Employer is without contractual authority to remove such employee. Such individuals shall be placed on leave with pay and reinstated to working status as soon as work is available by placing the employee in a position which will not violate the collective bargaining agreement of either party. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Date: April 8, 1998

Carlton J. Snow
Professor of Law

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| IN THE MATTER OF ARBITRATION<br><br>BETWEEN<br><br>UNITED STATES POSTAL SERVICE<br><br>AND<br><br>NATIONAL ASSOCIATION OF LETTER CARRIERS<br><br>with<br><br>AMERICAN POSTAL WORKERS UNION,<br>(Intervenor)<br>(J. Sherman Grievance)<br>(Case No.: 194N-4I-D 96027608) | 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 June 12, 1991 through November 20, 1994 and extended through November 20, 1998. A hearing occurred on November 14, 1997 in a conference room of Postal Service Headquarters located at 475 L'Enfant Plaza in Washington, D.C. Ms. Marta Erceg, National Litigation Attorney, represented the United States Postal Service. Mr. Keith Secular of the New York law firm of Cohen, Weiss & Simon represented the National Association of Letter Carriers. Mr. Darryl Anderson and Ms. Melinda Holmes of the O'Donnell, Schwartz & Anderson law firm in Washington, D.C. represented the American Postal Workers Union, as Intervenor.

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. Ms. Lisa Sirard of Diversified Reporting Services, Inc. reported the proceeding for the parties and submitted a transcript of 91 pages. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. They authorized the arbitrator to retain jurisdiction in the matter for 90 days following the issuance of an award. The arbitrator officially closed the hearing on February 19, 1998 after receipt of the final post-hearing brief.

## II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Does Article 29 of the USPS-NALC agreement require management to make temporary cross-craft assignments to provide work for a carrier whose driver's license has been suspended or revoked?

If so, what is an appropriate remedy?

*RELEVANT CONTRACTUAL PROVISIONS*

ARTICLE 29 - LIMITATION ON REVOCATION OF DRIVING PRIVILEGES

An employee's **driving privileges** may be revoked or suspended when the on-duty record shows that the employee is an unsafe driver.

Elements of an employee's on-duty record which may be used to determine whether the employee is an unsafe driver include but are not limited to, traffic law violations, accidents or failure to meet required physical or operation standards.

The report of the Safe Driver Award Committee cannot be used as a basis for revoking or suspending an **employee's driving privileges.** When a revocation, suspension or reissuance of an employee's **driving privileges** is under consideration, only the on-duty record will be considered in making a final determination. An employee's **driving privileges** will be automatically revoked or suspended concurrently with any revocation or suspension of State driver's license and restored upon reinstatement. Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts. In the event such revocation or suspension of the State driver's license is with the condition that the employee may operate a vehicle for employment purposes, the **employee's driving privileges** will not be automatically revoked. When revocation or suspension of an employee's **driving privileges** is under consideration based on the on-duty record, such conditional revocation or suspension of the state driver's license may be considered in making a final determination.

Initial issuance--an employee shall be issued a **Certificate of Vehicle Familiarization and Safe Operation** when such employee has a valid State driver's license, passes the driving test of the U.S. Postal Service, and has a satisfactory driving history.

An employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license.

STATEMENT OF FACTS

In this case, the National Association of Letter Carriers challenged the decision of the Employer to remove a Letter Carrier whose driver's license was suspended for three years. There were no nondriving duties in the Letter Carrier craft to permit the continued employment of the grievant, according to the Employer. Generally, underlying facts of the case have not been disputed, and there has been no disagreement about the interpretive nature of the issue.

On July 14, 1995, the State of Minnesota suspended the grievant's driver's license and caused him to forego driving privileges for three years. The grievant reported the suspension to management and requested that he be assigned nondriving duties. On December 19, 1995, management issued the grievant a Notice of Removal after he declined an offer to transfer to the Clerk or Mail Handler craft.

The National Association of Letter Carriers grieved the proposed removal. According to the National Association of Letter Carriers, there were sufficient nondriving duties available in the Letter Carrier craft to permit the grievant's continued employment. The NALC also maintained that management should not have required the grievant to accept a permanent transfer to another craft but, rather, should have given him an opportunity to work in other crafts temporarily while retaining his "letter carrier" seniority, pending restoration of his driving privileges.

A regional arbitrator originally heard the grievance on

September 17-18, 1996. Following its review of the Employer's post-hearing briefs in that matter, the National Association of Letter Carriers determined that the dispute involved national interpretive questions and submitted the matter to national level arbitration. Because the dispute was preempted by the Step 4 process, a regional arbitrator has not yet issued a decision in the matter.

At Step 4 of the grievance procedure, the Employer raised a question regarding whether a temporary cross-craft assignment of Letter Carriers under Article 29 was permissible in view of the fact that the National Association of Letter Carriers and the American Postal Workers Union no longer subscribe to the same collective bargaining agreement. The parties agreed that this constituted the only interpretive question presented to the arbitrator. The Employer acknowledged that Article 29 of the agreement with the National Association of Letter Carriers may require management to offer permanent cross-craft reassignment to Letter Carriers whose driving privileges have been revoked permanently. When the parties were unable to resolve their differences, the matter proceeded to arbitration at the national level.

POSITION OF THE PARTIES

A. The National Association of Letter Carriers

The National Association of Letter Carriers contends that the failure of the NALC and APWU to bargain jointly did not alter the scope of the Employer's obligations under Article 29 of the collective bargaining agreement with the National Association of Letter Carriers. According to the NALC, the meaning of Article 29 was not changed by 1994 negotiations between the parties or the 1995 decision by an interest arbitrator. Moreover, the NALC does not believe the collective bargaining agreement between the Employer and the APWU bars temporary cross-craft assignments under Article 29 of the NALC agreement. Even if such cross-craft assignments violated the APWU labor contract, the NALC argues that its bargaining unit members, who are entitled to temporary reassignments under Article 29, must remain as active employees in pay status. Hence, the NALC concludes that it must prevail in this matter.

B. The American Postal Workers Union

It is the position of the American Postal Workers Union that all work within bargaining units for which the APWU is the exclusive representative is work that must be assigned in accordance with the National Agreement between the American Postal Workers Union and the Employer. If management wishes

to reassign a Letter Carrier with a suspended driver's license to perform duties in an APWU craft (pursuant to Article 29 of the NALC agreement or for any other reason), the Letter Carrier must be reassigned to the APWU craft in a manner that is consistent with the National Agreement between the Employer and the APWU. As long as this objective is accomplished, the APWU believes that the NALC should prevail in this disagreement.

C. The Employer

The Employer argues that the APWU did not agree to cross-craft language in Article 29 of the 1994 NALC agreement. It is the position of the Employer that, because the APWU objects to the application of Article 29 in the NALC agreement to permit temporary reassignment of Letter Carriers to APWU crafts, the Employer is contractually prohibited from making such assignments. Moreover, the Employer argues that remedies proposed by the Unions are not part of the Employer's contractual obligations and should be categorically rejected. Hence, the Employer maintains that it should prevail in this dispute.

ANALYSIS

A. Interpreting Article 29 of the NALC Agreement

Article 29 of the 1994-98 collective bargaining agreement between the Employer and the National Association of Letter Carriers is entitled "Limitation on Revocation of Driving Privileges." The contractual provision describes when and how an employee's driving privileges may be revoked or suspended based on evidence that the employee is an unsafe driver. If it happened that an employee's right to drive a company vehicle was revoked or suspended, the parties negotiated protections for the individual who had to face such an experience. The parties agreed that:

> Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts. (See Joint Exhibit No. 1, p. 2.)

Protection for employees with a revoked or suspended driver's license has a long history in the relationship between the parties and is at least a quarter of a century old. The 1973-75 agreement between the Employer and the APWU, NALC, Mail Handlers, and Rural Letter Carriers stated:

> Every reasonable effort will be made to reassign such employees to non-driving duties in his craft or in other crafts. (See NALC Exhibit No. 22, p. 43.)

Through arbitration decisions, organizational traditions, and past practices, the parties developed a clear understanding of the contractual commitment. Typical of the arbitration decisions is an award by Arbitrator Robert Leventhal in which he granted a grievant back pay because

management failed to assign the Letter Carrier to clerk craft work that was available after the Employer revoked the employee's SF-46 driver's license. (See NALC Exhibit No. 8, p. 17.) It is clear from evidence submitted to this arbitrator that Article 29 of the NALC agreement traditionally has been interpreted to require management to make every reasonable effort to find work for Letter Carriers who lost their occupational driver's license, first, within the Letter Carrier craft. When such work was unavailable, management, then, had a contractual obligation to look to other crafts, typically the clerk craft, for non-driving positions. Unrebutted evidence made clear that management reassigned such carriers whose licenses had been suspended or revoked to a new position on both a temporary and a permanent basis. (See Tr. 48-49.) Based on the record submitted to the arbitrator, there is no room to dispute the fact that the traditional interpretation of Article 29 in the NALC agreement calls for temporary and even permanent reassignment to other crafts, if necessary.

The Employer argued, however, that the traditional application of Article 29 in the NALC agreement ceased to be relevant when the parties discontinued joint bargaining in 1994. Even though the 1994-98 agreement continued the traditional language of Article 29, it emerged in an agreement negotiated individually between the Employer and the NALC. The American Postal Workers Union also negotiated an individual agreement between the clerk craft and the Employer. The Employer maintained that the change in bargaining structure

affected the application of the contractual provision at issue in this case.

This is a dispute about whose meaning should prevail after parties have attached different meanings to a commitment in a contract. The National Association of Letter Carriers argued that language in the parties' agreement enjoyed a commonly understood meaning and that management has attempted to modify the meaning after the agreement came into existence. The Employer responded that the new meaning of the language was self-evident from changed bargaining conditions which gave rise to a new collective bargaining agreement between the Employer and a single union. To unravel such disagreements courts and arbitrators have developed well-established rules for determining whose meaning prevails in such situations.

One highly regarded statements of contract principles offers the following guidance:

> Where parties have attached different meaning to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) That party did not know of any different meaning attached by the other and the other knew the meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party. (See Restatement (Second) of Contracts, § 201(2) 83 (1981).)

When the National Association of Letter Carriers and the Employer negotiated their agreement, the NALC understood how

the disputed language had been interpreted for decades. Moreover, the Employer, based on organizational traditions as well as regional arbitration decisions, knew the meaning attached to the language by the NALC. The NALC had no reason to know that management now ascribed a new meaning to Article 29, unless the Employer expressly manifested its intent at the bargaining table.

Arbitrators use an analytical principle which relies on a presumption that language in a labor contract encrusted with long tradition carries forward the same meaning in a new agreement. (See, e.g., Webster Tobacco Co., 5 LA 164 (1946).) Absent clear and unambiguous language in a new agreement changing the meaning of well-understood language in a prior agreement, language in a new agreement is presumed to continue the prior meaning. (See, e.g., City of Burlington, Iowa, 83 LA 973 (1984).) It is the converse of the principle that unsuccessfully attempting to change contract language at the bargaining table affects the later construction of the language. Making no attempt whatever to change language at the bargaining table also affects its later interpretation. (See, e.g., City of Highland Park, 76 LA 811 (1981); or Mentor Board of Education, 89 LA 292 (1987).)

Evidence put forth by the Employer suggesting that the same contractual language in Article 29 was intended by the parties to carry a different meaning in the new agreement was that the parties did not discuss the impact of the language and also that the parties did not discuss the impact on

contract interpretation of bargaining only with the National Association of Letter Carriers. Such evidence failed to overcome a strong presumption that the parties intended the same contractual language to carry forward the same meaning in a new agreement. Absent some manifestation of an intent to change the meaning of Article 29, it is reasonable to conclude that the failure to bargain jointly with the APWU did not modify the construction of the contractual provision.

If it was the understanding of the Employer that bargaining only with the National Association of Letter Carriers changed a decades-old meaning of Article 29, it was management's obligation to put the Union on notice of that fact. Otherwise, the Union had no reason to know of any different meaning attached by the Employer, but the Employer had reason to know at the bargaining table of the meaning attached by the NALC to Article 29.

B. Impact on the APWU

Choosing whose meaning prevails, however, does not resolve the dispute entirely. The Employer as well as the American Postal Workers Union have argued that the APWU did not agree to language in the agreement between the Employer and the National Association of Letter Carriers and that Article 29 does not bind the APWU. Accordingly, the APWU concluded that Article 29 of the NALC agreement cannot be enforced against the American Postal Workers Union in such a

way that it interferes with implementing the APWU agreement with the Employer. While such an analysis is sound, it, nonetheless, does not relieve the Employer of its obligation under the agreement with the National Association of Letter Carriers.

The Employer argued that, because Article 29 of the NALC agreement may violate the Employer's obligations to the American Postal Workers Union, management should be excused from being required to comply with Article 29 based on the doctrine of impossibility. The common law doctrine of impossibility, or commercial impracticability as the doctrine is designated today, permits a party to be excused from contractual performance. In an earlier day, the world of contract law was more inclined to impose an obligation of strict performance on a party. An excellent description was captured in Paradine v. Jane when the court stated:

> When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. (See 82 Eng. Rep. 897 (1647).)

Modern contract law has developed beyond such a rigid implementation of the doctrine of impracticability. Decision makers interpreting contracts in a modern context ask whether justice requires not following the general expectation that a person who makes a promise will perform it, despite some contingency making it more difficult to perform the obligation.

The modern day focus is on who assumed what risk in the enactment of a bargain. A party seeking to be excused from performing contractual obligations pursuant to the doctrine of impracticability must meet four requirements.

The first requirement is that some event must have made performance as called for by the agreement impracticable. In this case, the Employer argued that the temporary cross-craft transfers which are required by Article 29 of the NALC agreement are barred by the Employer's labor contract with the American Postal Workers Union. Under the circumstances, the supervening event would be the failure of the Employer to obtain the right temporarily to transfer Letter Carriers into the clerk craft without complying with the rest of the APWU agreement. Because of this event, it is reasonable to argue that performance as agreed to by the parties has become impracticable. Arguably, the first requirement of the doctrine has been met by this circumstance.

A second requirement of the doctrine of impracticability is that the nonoccurrence of the event must have been a basic assumption on which the contract was formed. According to Restatement (Second), "determining whether the non-occurrence of a particular event was not a basic assumption involves a judgment as to which party assumed the risk of its nonoccurrence." (See Chapter 11, 311 (1981).) It is appropriate to consider all relevant circumstances in understanding assumptions made by a party. (See, e.g., Campbell v. Hostetter Farms, 380 A.2d 463 (Pa., 1977).) The arbitrator

received no evidence suggesting that a basic assumption regarding Article 29 in the NALC agreement was that the APWU would agree to cross-craft transfers. According to evidence submitted to the arbitrator, the issue was not discussed at the bargaining table. Consequently, this requirement has not been met.

A third requirement of the doctrine of impracticability is that the circumstance of impracticability must not be the fault of the party seeking to be excused from performing contractual obligations. For example, one U.S. Court of Appeals observed that it was "particularly chary of applying the defense of impossibility to relieve [a railroad] of its obligation, where the expense inherent in performance primarily resulted from [the railroad's] own decision to abandon the main rail line." (See Burlington Northern, 715 F.2d 1330 (9th Cir. 1983).)

If a party seeks to be excused from its contractual obligation based on its own lack of careful planning or negligence, it does not qualify to use the doctrine of impracticability. (See, e.g., Lukaszewski, 332 N.W.2d 774 (1983).) In the case before the arbitrator, the Employer failed to include the right temporarily to transfer Letter Carriers into crafts covered by the labor contract with the American Postal Workers Union. The failure to do so interfered with the rights of NALC bargaining unit members under their labor contract with the Employer. As the party seeking to be excused from performing its contractual obligation, the

Employer needed to demonstrate that it is not at fault for the occurrence of the supervening event. In this case, however, it is the Employer who must be charged with the responsibility of failing to include in the APWU agreement arrangements necessary to fulfill its side of the bargain with the NALC. It is not the NALC that seeks to rely on the doctrine of impossibility.

The fourth requirement to be met in order to use the modern doctrine of impracticability is that the party seeking to rely on the doctrine must not have assumed a greater obligation than ordinary contract principles impose. The eminent Oliver Wendell Holmes described this requirement as follows:

> In the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is that he takes the risk of the event, within certain defined limits between himself and the promisee. (See The Common Law 300 (1881).)

If a party agrees to perform a specific contractual obligation even though performance becomes commercially impracticable or impossible, a later impossibility will not excuse performance of the obligation. Even if a party did not expressly assume a greater obligation than ordinary contract principles might impose, such an inference might be made that a party assumed the risk of impracticability. If, for example, a party seeking to be excused on the basis of impracticability had many years of sophisticated experience in implementing contracts, it might justify an inference that a party was making an unconditional, unqualified promise to perform. Some courts have concluded

that, if an event was foreseeable at the time a party entered into a contract, it justifies making an inference of an unconditional, unqualified promise to perform a contract obligation. For example, during the energy crisis in the United States, one court concluded that, "even if [a seller of aviation fuel] had established great hardship [in providing fuel to its customer], the seller would not prevail because the events associated with the so-called energy crisis were reasonably foreseeable at the time the contract was executed." (See Gulf Oil Corp., 415 F. Supp. 429 (F.D. Fla. 1975).)

In the dispute before the arbitrator, it is clear that the supervening event which the Employer would use as a basis for being excused from performance was foreseeable. The fact that cross-craft transfers would impact the rights of the clerk craft was clearly a foreseeable event. No evidence established that the risk of such an impact on the clerk craft was part of the dickered terms between the parties at the bargaining table. The fact that the parties did not discuss the topic at the bargaining table does not alter the conclusion. The clear foreseeability of the event and the failure of the Employer to protect itself against the risk of its occurrence disqualifies the Employer as a candidate for the doctrine of impracticability in this case.

The point is that the Employer is obligated to abide by its agreement with the National Association of Letter Carriers. No evidence has suggested a basis for interpreting Article 29 in other than its traditional application. If it is not

possible to accommodate cross-craft temporary transfers in a way that does not violate the Employer's agreement with the APWU, then the NALC is not entitled to specific performance because doing so would deprive the APWU of the benefit of its bargain and unjustly enrich the Employer. This conclusion, however, does not release the Employer from its obligations under the agreement because doing so similarly would deprive the NALC of a bargained-for benefit. Under such a circumstance, the grievant and the NALC are entitled to some form of a remedy.

C. Do Cross-craft Transfers Violate the APWU Agreement?

The National Association of Letter Carriers argued that temporary cross-craft transfers are not barred by the labor contract between the APWU and the Employer. According to the theory of the case advanced by the NALC, the American Postal Workers Union was a party to the jointly bargained agreements which contained Article 29 language before the NALC entered into its individual agreement with the Employer; and it is the position of the NALC that such language did not change and was carried forward in the individual agreement between the APWU and the Employer. In the opinion of the NALC, this fact is sufficient evidence of a contractual intent to maintain the traditional reassignment practice that existed before the parties began bargaining individual agreement with the

Employer. Moreover, the NALC maintained that, since the Article 29 concept was drafted during the era of joint bargaining and on its face applied to all bargaining unit members, it was not affected by the discontinuation of joint bargaining.

A fundamental problem with the argument of the NALC is its failure to recognize that the American Postal Workers Union is not a party to the agreement between the NALC and the Employer and, likewise, that the NALC is not a party to the agreement between the APWU and the Employer. In such a circumstance, the National Association of Letter Carriers cannot determine what rights and obligations are reqired under the agreement between the APWU and the Employer. It is also true that the NALC cannot determine the meaning of language chosen by other parties in their agreements with the Employer. Nor is the NALC in a position to enforce the language of other agreements against the will of the parties involved in them. These are labor contracts with other parties, and rights and obligations under those agreements are unto themselves, unless there is proof of third party beneficiary rights. No such theory has been asserted in this dispute.

The American Postal Workers Union maintained that cross-craft transfers are not barred per se by the labor contract between the Employer and the APWU. Rather, the APWU asserted that such transfers only become a problem when a reassignment of a Letter Carrier to the clerk craft is done in a-manner not in accordance with the agreement between the Employer

and the APWU. More specifically, the APWU asserted that reassigned Letter Carriers may not displace APWU bargaining unit members in order to perform duties in crafts represented by the APWU. The APWU maintained that any available duty first must be offered to APWU bargaining unit members pursuant to the agreement between the Employer and the APWU. Additionally, the APWU argued that a reassigned Letter Carrier must begin without seniority in a craft represented by the APWU. It is immaterial to the APWU whether or not a transferred Letter Carrier had a right to return to the Letter Carrier Craft. Nor, in the opinion of the APWU, does the voluntariness of a Letter Carrier's transfer impact the APWU's agreement with the Employer.

No evidence submitted to the arbitrator established the basis for subordinating rights and obligations of the APWU won through contract negotiations to rights of the NALC in its agreement with the Employer. The APWU was not a party to the NALC negotiations with the Employer or any subsequent agreements, and rights of bargaining unit members represented by the APWU should not be affected by a negotiation at which it had no opportunity to protect itself. Just as the National Association of Letter Carriers should not be faulted because the Employer promised more than it could deliver, the American Postal Workers Union should not be compelled to bear the burden of the Employer's lack of planning in negotiations. Accordingly, if a Letter Carrier is to be transferred to a craft represented by the American Postal Workers Union, such

an individual must enter the craft in compliance with the collective bargaining agreement between the American Postal Workers Union and the Employer. Where this is not possible, a Letter Carrier is entitled to a different remedy.

D. The Issue of Remedy

Each grievant who, but for the Employer's self-imposed conflicting obligations, would have had an opportunity for continued employment merits a remedy for the Employer's violation of the NALC agreement. Determining an appropriate remedy in each individual case at this level is complex. What is clear is that a remedy is appropriate and available.

Promises are made to be kept. It is in the best interest of the parties, indeed, of society generally, for promises to be enforced. Many ways exist to protect the expectation interests of parties to an agreement. If the parties, themseves, are unable to devise a means of delivering the benefit of the bargain to an injured party, well developed methods exist for measuring harm caused by a contractual violation. If the parties are unable to find a remedy that provides specific performance, economic damages inevitably will play a dominant role.

Although a party injured by a contractual violation is not entitled to more than performance of the contractual obligation would have given, an appropriate remedy should

seek to place a grievant in as good a position as would have been held had the collective bargaining agreement not been violated. The United States Supreme Court has concluded that monetary damages are appropriate in situations where conflicting labor agreements preclude specific performance. (See W. R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 767 (1983).) In that case, the Court upheld the decision of an arbitrator to award monetary damages to employees who were laid off in violation of a seniority provision, even though the employer was precluded from obeying the labor contract as a result of a consent decree entered into with the Equal Employment Opportunities Commission. If the parties are unable to resolve individual cases by using specific performance, any member of the NALC bargaining unit deprived of a right temporarily to transfer to a position in crafts represented by the American Postal Workers Union is entitled to remain on the rolls and paid as though he or she had been transferred to that position. Accordingly, the grievance must be returned to the regional level and resolved in a manner consistent with this report.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that Article 29 of the agreement with the National Association of Letter Carriers requires the Employer to make temporary cross-craft assignments in order to provide work for carriers whose occupational driver's license has been suspended or revoked. The Employer is required to do so in a manner consistent with the APWU collective bargaining agreement. In instances where it is impracticable to fulfill its contractual obligation under both agreements, the Employer is without contractual authority to remove such employee. Such individuals shall be placed on leave with pay and reinstated to working status as soon as work is available by placing the employee in a position which will not violate the collective bargaining agreement of either party. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: April 8, 1998