

PUB 71 Pre-arbitration Settlement

The NALC and the Postal Service have settled a national grievance concerning the Postal Service February 2001 Publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act." The NALC filed a national level grievance in February 2001 when the Pub 71 first became effective. The pre-arbitration settlement, Q98N-4Q-C-01090839, M-01474 dated December 9, 2002 states:

We recently met in pre-arbitration discussion concerning the above referenced grievance. The issue is whether Publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act", violates the National Agreement by requiring "supporting documentation" for an absence of three days or less in order for an employee's absence to be protected under the Family and Medical Leave Act (FMLA).

"The parties agree that in order for leave to be FMLA protected the Postal Service may require an employee to have medical certification on file."

After viewing this matter, we agree that no national interpretive issue is presented. The parties agree to resolve the issue presented based on the following understanding:

The parties agree that the Postal Service may require an employee's leave to be supported by an FMLA medical certification, unless waived by management, in order for the absence to be protected. When an employee uses leave due to a condition already supported by an FMLA certifica-

Pre-arbitration/interpretive step settlements and other important NALC/USPS documents incorporated into the NALC Materials Reference System (MRS) can be found on the NALC website: www.NALC.org.

tion, the employee is not required to provide another certification in order for the absence to be FMLA protected.

We further agree that the documentation requirements for leave for an absence of three days or less are found in Section 513.361 of the Employee and Labor Relations Manual which states in pertinent part that:

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to settle this case and remove it from the pending arbitration listing.

The settlement makes a clear distinction between certification and documentation, something the Employee and Labor Manual (ELM) does not. The parties agree that in order for leave to be FMLA protected the Postal Service may require an employee to have medical certification on file. Management may waive this requirement and should that happen the leave would still be protected. In areas where resource management database is in effect, some attendance control supervisors are telling employees who have FMLA medical certification on file and call in sick three days or less that the employee must bring in documentation in order to return to work. This settlement should put an end to that. Documentation or other evidence of incapacity for work or need to care for a family member is required only in limited situations found in ELM 513.361.

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Veterans' Preference

Article 16, Section 9 was substantially modified in the 2001 National Agreement. That provision governs dual appeals by preference eligible employees both to MSPB and through the grievance/arbitration procedure. The modifications became necessary because changes to Article 15 have made the grievance/arbitration procedure significantly faster than MSPB procedures. The new contract language, which benefits letter carriers, provides the following:

16.9 Veterans' Preference. A preference eligible is not hereunder deprived of whatever rights of appeal are applicable under the Veterans' Preference Act. If the employee appeals under the Veterans' Preference Act, however, the time limits for appeal to arbitration and the normal contractual arbitration scheduling procedures are not to be delayed as a consequence of that appeal; if there is an MSPB appeal pending as of the date the arbitration is scheduled by the parties, the grievant waives access to the grievance-arbitration procedure beyond Step B.

The application of this changed provision is explained in the December 2002 revision of the *Joint Contract Administration Manual* (JCAM) as follows:

MSPB dual filings. The Veterans' Preference Act guarantees "preference eligible" employees certain special rights concerning their job security. (Federal law defines a "preference eligible" veteran at Title 5 United States Code Section 2108; see EL-312, Section 483). A preference eligible employee may file both a grievance and an MSPB appeal on a proposed removal or suspension of more than fourteen days. However, Article 16.9 provides that an employee who exercises appeal rights under the Veterans' Preference Act waives access to arbitration when they have an MSPB appeal pending as of the date the grievance is scheduled for arbitration by the parties. The date of the arbitration scheduling letter is considered "the date the arbitration is scheduled by the parties" for the purposes of Article 16.9.

This language has been modified to reflect the parties' agreement that an employee should receive a hearing on the merits of an adverse action. It supercedes the 1988 Memorandum of Understanding on Article 16.9. While a preference eligible city letter carrier may appeal certain adverse actions to the MSPB, as well as file a grievance on the same action, the employee is not entitled to a hearing on the merits in both forums. This provision is designed to prevent the Postal Service from having to defend the same adverse action in an MSPB hearing as well as in an arbitration hearing. If a city letter carrier has an MSPB appeal pending on or after the date the arbitration scheduling letter is dated, the employee waives the right to arbitration.

The parties agree that the union will be permitted to reactivate an employee's previously waived right to an arbitration hearing if that employee's appeal to the MSPB did not result in a decision on the merits of the adverse action, or the employee withdraws the MSPB appeal prior to a decision on the merits being made. It is understood that this agreement does not preclude the parties from raising other procedural issues from the original arbitration appeal. Additionally, the Union is not precluded from raising as an issue in arbitration whether any Postal Service backpay liability should include the period between the time the right to arbitration was waived by the employee and the time the Union reactivated the arbitration appeal.

EEO and EEO/MSPB mixed cases—no bar to arbitration. Article 16.9 does not apply and thus does not bar the arbitration of a grievance where a grievant has asserted the same claim in an Equal Employment Opportunity (EEO) complaint. Nor does it apply where a preference eligible grievant has appealed the same matter through the EEOC and then to the MSPB under the "mixed case" federal regulations (National Arbitrator Snow, D90N-4D-D 95003945, January 1, 1997, C-16650). **(Emphasis added)**

A similar change has also been made to Article, Section 6.F.3 of the 2001 National Agreement which gives preference eligible employees certain appeal rights to MSPB concerning involuntary layoffs.

Over the years there have been numerous national level arbitration awards concerning the provisions of Article 16.9. Most of these awards are no longer applicable since they concerned contract language which has now been changed. Similarly, as noted in the JCAM explanation above, the 1988 Memorandum of Understanding on Article 16.9 is no longer in effect.

Stewards should be sure that they understand the changed provisions of Article 16.9. Note that block 12 of the *USPS-NALC Joint Step A Grievance Form (PS Form 8190)* specifically asks whether there is a companion MSPB appeal. Be sure to fill it out accurately. Depending upon where the grievance is in the procedure, the branch officers, Step B Team or national business agent should be notified if there are any changes. Our National Business Agents need to have the most current information in order to make arbitration scheduling decisions. ☐

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Excessing from a section

Article 30, Section B, Item 18 provides that during local implementation branches may negotiate concerning “the identification of assignments comprising a section, when it is proposed to reassign within an installation employees excess to the needs of a section.” Article 12, Section 5.C.4 specifies the rules that apply when excessing full-time employees from a section. These rules are **only applicable** when a Local Memorandum of Understanding (LMOU) identifies separate sections within an installation as authorized by Article 30, Section B.18.

The rules Article 12, Section 5.C.4 only apply to full-time regular letter carriers. They do not apply to full-time flexible letter carriers. It is not “excessing” when full-time flexible employees are moved between sections since, by definition, they have flexible reporting times and reporting locations.

If an LMOU **does not identify** separate sections for excessing purposes, Article 12, Section 5.C.4(a) provides that the entire installation is considered a section and none of the rest of Article 12, Section 5.C.4 applies. In such cases, full-time employees are not reassigned within the installation through excessing procedures. Rather, full-time letter carriers move within an installation through the other established contractual mechanisms such as reversion, abolishment, the subsequent posting and bidding under the provisions of Article 41.1, assignment under the provisions of Article 41.1.A.7 and the provisions of Article 41.3.O, where applicable.

If an LMOU **does identify** separate sections for excessing purposes, then the special rules in Article 12, Sections 5.C.4(b-d) apply whenever management proposes to reassign full-time letter carriers within an installation who are excess to the needs of one of the defined sections. These rules give excessed letter carriers “retreat rights” to the first residual vacancy in the same or lower grade that occurs in the section.

In order to implement these retreat rights, Article 12, Section 5.C.4 provides that as long as an excessed employee has retreat rights to the section, bidding for vacant duty assignments in the grade level from which the employee was excessed is subject to the following rules:

- Bidding is limited to full-time employees in the section even if, for example, the LMOU ordinarily provides for installation-wide bidding.
- Bidding for positions in the grade from which the employee was excessed is limited to employees in that grade. For example, if a Grade 2 Carrier Technician is excessed from a section, only Grade 2 letter carriers from the section may bid on Carrier Technician vacancies in the section.

When such restricted bidding within a section results in a residual vacancy, those excessed full-time letter carriers with retreat rights to the section may bid on the vacancy, by seniority. If an employee with retreat rights to a section fails to bid on the first available vacancy at the former grade level, the retreat rights are ended. However, retreat rights are not ended if an employee fails to bid on a residual vacancy at a lower grade level.

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

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Maximization

NALC has negotiated strong provisions into the National Agreement in order to “maximize” the number of full-time employees in our craft. This article will provide a general overview of these various provisions and explain how they are interrelated. Persons needing a more detailed explanation of specific provisions should consult the current edition of the *Joint Contract Administration Manual* (JCAM):

Article 7, Section 3.A establishes the following rule:

The Employer shall staff all postal installations which have 200 or more workyears of employment in the regular work force as of the date of this Agreement with 88 percent full-time employees in the letter carrier craft.

This provision establishes a mandatory fixed minimum staffing ratio in the larger offices where most letter carriers work. An *On Rolls Complement Report* is provided to NALC on an accounting period basis to assist branches in monitoring compliance with the 88 percent full-time requirement for 200 workyear offices.

National Arbitrator Mittenthal ruled in C-10343, October 26, 1990, that management may fall below the Article 7.3.A full-time staffing requirement by the number of full-time positions it is legitimately withholding under Article 12.5.B.2. Under that provision, management may withhold positions for other employees who may be reassigned involuntarily (excessed).

Article 7, Section 3.B provides the following:

The Employer shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules in all postal installations; however, nothing in this paragraph B shall detract from the USPS' ability to use the awarded fulltime/part-time ratio as provided for in paragraph 3.A. above. (*Emphasis added*).

This provision creates a general obligation to maximize the number of full-time employees and minimize the number of part-time flexible employees in all postal installations. Its effect is to force maximization in those offices too small to be covered by Article 7.3.A. In some cases smaller offices may even be required to have a staffing ratio higher than the 88 percent full-time employees required by Article 7.3.A. Note that the last sentence of Article 7.3.B means that if management has met the 88 percent full-time staffing requirement for 200 workyear offices provided by Article 7.3.A, then Article 7.3.B itself does not require any further maximization of full-time positions in those offices. However, the other maximization provisions discussed below are still applicable in such cases.

Article 7, Section 3.C states:

A part-time flexible employee working eight (8) hours within ten (10), on the same five (5) days each week and the same assignment over a six month period will demonstrate the need for converting the assignment to a full-time position.

This provision establishes a stand-alone rule that applies to all size offices. Unlike Articles 7.3.A and 7.3.B, it does not directly address the number of full-time employees or the staffing ratio in an installation. Rather, it requires the establishment of an additional full-time position if the qualifying conditions are met.

Article 7, Section 3.D states:

Where a count and inspection of an auxiliary city delivery assignment indicates that conversion to a full-time position is in order, conversion will be made.

This provision is another stand-alone rule that applies to all size offices. It requires the establishment of an additional full-time position by the conversion of an auxiliary route to full-time when a route inspection shows the route has grown to 40 hours.

The Full-Time Flexible Memorandum creates a separate, additional obligation to maximize full-time positions beyond the maximization obligations of Article 7.3.A-D by converting part-time flexible employees to full-time flexible status. This specific maximization obligation is similar to that of Article 7.3.C, because it is triggered by a PTF carrier working a relatively regular schedule over a six-month period. However, where Article 7.3.C requires work on the *same assignment*, this memorandum requires only that the PTF carrier be performing *letter carrier duties* of any kind.

Even though management has complied, for example, with the 88 percent full-time requirement in a 200 workyear facility (Article 7.3.A), further conversions to full-time flexible may still be required when the requirements of the memorandum are met. Arbitrator Mittenthal held in C-09340 that, if an office fell below the required full-time percentage at the same time that a part-time flexible met the criteria for conversion to full-time flexible under the MOU, “the Postal Service must first convert pursuant to the [88] percent staffing requirement and thereafter convert pursuant to the Memoranda.” Thus, the conversions to full-time flexible under the MOU must be in addition to the conversions to full-time regular necessary to bring the office to 88 percent. However, after full-time flexible positions have been created they may thereafter be counted as full-time toward determining whether the 88 percent requirement in Article 7.3.A has been met.

The rules governing full-time flexibles and the procedures for enforcing the Full-Time Flexible Memorandum are discussed in more detail in this month's column by NALC Director of City Delivery Fred Rolando. □

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Full-time flexibles

The Full-Time Flexible Memorandum, which creates a maximization obligation in addition to those found in Article 7, Section 3 of the National Agreement, provides the following:

Where a part-time flexible has performed letter carrier duties in an installation at least 40 hours a week (8 within 9, or 8 within 10, as applicable), 5 days a week, over a period of 6 months (excluding the duration of seasonal periods on seasonal routes, defined in Article 41, Section 3.R of the National Agreement), the senior part-time flexible shall be converted to full-time carrier status. This criteria shall be applied to postal installations with 125 or more man years of employment.

It is further understood that part-time flexibles converted to full-time under this criteria will have flexible reporting times, flexible nonscheduled days, and flexible reporting locations within the installation depending upon operational requirements as established on the preceding Wednesday.

This specific maximization obligation is similar to that of Article 7.3.C, because it is triggered by a PTF carrier working a relatively regular schedule over a six-month period. However, whereas Article 7.3.C requires work on the same assignment, this memorandum requires only that the PTF carrier be performing letter carrier duties of any kind. So you can easily imagine the inordinate amount of time and effort it could take to examine, on an ongoing basis, the pay records of all the PTF's in a large installation to determine if any of them met the conversion criteria.

To address this issue and make the memorandum easier for both parties to administer, the Postal Service provides the NALC with an Accounting Period (AP) report that lists the names of PTF city letter carriers who have worked 39 hours or more during each service week during the previous six months in offices with 125 or more work years. This report is distributed by the NALC to its branches through its regional offices. It is designed to make it unnecessary for shop stewards to regularly request timekeeping data to monitor the Maximization Memorandum. The February 2003 edition of the *Joint Contract Administration Manual* (JCAM) states the following concerning the proper use of the report:

If a name is listed in an installation, it does not automatically result in the conversion of the senior PTF to full-time flexible in that installation. Local management may examine the work hours of the listed PTF to determine if all the criteria of the MOU has been met.

In order for the hours worked to meet those criteria, the hours worked must be eight hours within nine or eight hours within ten (based on the size of the office), worked over five

days of the service week (not six or seven), not during seasonal periods on a seasonal route, and worked in the performance of city letter carrier craft duties.

Local management may also review the actual number of hours worked each day and week of the six month period. By tracking of 39 hours rather than 40 hours each service week, the parties recognized that a conversion should be made if the PTF missed the 40 hours by only minutes on a day or days during the service week. In addition, local management may examine whether approved leave was used solely to reach the triggering level of hours worked during any of the service weeks during the six-month period.

If there is no dispute that all these criteria have been met, then the senior part-time flexible, not necessarily the part-time flexible listed on the report, shall be converted to full-time flexible city letter carrier status in the installation. **In such cases there is no need for the Union to request additional time-keeping data or conduct any additional investigation.** However, if local management asserts that an employee listed in the report did not meet all the conversion criteria discussed above, the Union should be given the data which management relied upon to make the decision. The Union is not precluded from disputing local management's decision through the grievance procedure. (*Emphasis added*).

Although this new understanding greatly simplifies meeting the burden of proof in such cases, it does not make the Full-time Flexible Memorandum self-executing. Branches still need to monitor compliance to make sure the necessary conversions are made and may still need to file grievances if they are not.

The JCAM also discusses the Letter of Intent implementing the Full-Time Flexible Memorandum. The Letter of Intent states in part that:

In those installations where conversions have been made under this Memorandum of Understanding, and there are subsequent reversions or excessing, any reductions in full-time letter carrier positions shall be from among those position(s) converted pursuant to this Memorandum of Understanding until they are exhausted.

The revised JCAM now provides the following explanation clarifying how this provision is to be implemented.

This paragraph addresses reductions in full-time positions when reversions or excessing outside an installation or to another craft takes place. Nothing in this paragraph changes the parties' understanding that any excessing still must be from the junior full-time carrier by level, regardless of their status as full-time regular or full-time flexible.

What is a grievance?

Experienced shop stewards know that some of the workplace problems brought to their attention are clearly not grievances—for instance, purely personal disagreements between two letter carriers. Others—such as severe disciplinary actions—may be obviously grievable. Many problems, however, fall somewhere between these two extremes and may sometimes be difficult to pigeon-hole. Article 15, Section 1 of the 2001 National Agreement defines a grievance as follows:

Section 1. Definition

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

The February 2003 edition of the *Joint Contract Administration Manual (JCAM)* provides the following explanation of Article 15, Section 1:

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

- Alleged violations of postal handbooks or manuals (see Article 19);
- Alleged violations of other enforceable agreements between NALC and the Postal Service, such as *Building Our Future by Working Together*, and the Joint Statement on Violence and Behavior in the Workplace. In his award in national case Q90N-4F-C 94024977, August 16, 1996 (C-15697) Arbitrator Snow found that the Joint Statement constitutes a contractually enforceable agreement between the parties and that the union has access to the grievance procedure to resolve disputes arising under it. Additionally, in his discussion of the case, Snow writes that arbitrators have the flexibility in formulating remedies to consider, if a violation is found, removing a supervisor from his or her “administrative duties.” (Note: The national parties disagree over the meaning of “administrative duties.”)
- Disputes concerning the rights of ill or injured employees, such as claims concerning fitness-for-duty exams, first aid treatment, compliance with the provisions of ELM Section 540 and other regulations concerning OWCP claims. See Step 4 Settlement G90N-4G-C 95026885, January 28, 1997, M-01264. However, decisions of the Office of Workers’ Com-

pensation Programs (OWCP) are not grievable matters. OWCP has the exclusive authority to adjudicate compensation claims, and to determine the medical suitability of proposed limited duty assignments.

- Other complaints relating to wages, hours or conditions of employment.
- Alleged violations of law (see Article 5);

The *JCAM*'s discussion of Article 5 elaborates upon the enforceability of the Postal Service's legal obligations by quoting the following passage from National Arbitrator Bernstein's March 11, 1987 decision in case C-06858:

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

Finally, disputes concerning the violation of binding past practices, although not formalized in writing, can be resolved through the grievance/arbitration procedure. The *JCAM* has an extensive explanation of past practices under Article 5. It explains how binding past practices arise, how they can be enforced, and under what circumstances they can be terminated.

This article has reviewed the narrow issue of what types of disputes may be handled through the grievance/arbitration procedure. In the real world, of course, stewards are more often confronted with having to determine whether a fellow letter carrier's complaint concerning a grievable matter actually has merit. NALC will continue to provide training and guidance on grieving specific contract disputes in this column and through our numerous other publications and programs. But this advice always applies: investigate the facts thoroughly, study the *JCAM* and other contract resources, seek advice and document everything carefully.

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HIPAA

Recent amendments to the Health Insurance Portability and Accountability Act (HIPAA) became effective on April 14, 2003. The amendments establish an array of federal protections to safeguard the privacy of protected health information and impose numerous obligations on those covered by the law, i.e., health care clearing houses, health plans and most health care providers. Recently there have been instances in which firms or offices have asked the letter carriers who deliver or collect their mail to sign "Business Associate" contracts. This is evidently being done in the mistaken belief that those contracts are required for them to comply with HIPAA privacy obligations. Letter carriers asked to sign such contracts should respectfully decline to do so. In order to help explain the Postal Service and NALC's position to customers, a document titled *Notice to our Customers RE: HIPAA* has been prepared and should be available in all delivery units. It explains that guidance issued by the Department of Health and Human Services (HHS) specifically provides the following:

The Privacy Rule does not require a covered entity to enter into business associate contracts with organizations, such as the US Postal Service, certain private couriers and their electronic equivalents that merely act as conduits for protected health information.

The Contract Administration Unit will continue to provide any new information concerning the impact of HIPAA on the rights and obligations of letter carriers.

Two recent national level settlements have addressed issues concerning the timing of requests for special route inspections made under the provisions of M-39, Section 271.g. The April 29, 2003 settlement M-01486 concerned a grievance in which local management claimed that any grievances concerning special route inspections had to be filed within 14 days of when a route qualified for the inspection. The settlement provides the following:

The issue in this case is whether the time limit for initiating an Informal Step A dispute over the denial of a request for a special route inspection made under Section 271.g of Handbook M-39 begins at the end of the six week qualifying period.

After reviewing this matter, we mutually agree that no national interpretive issue is presented in this case. The parties agree that the time limit for initiating an Informal Step A dispute over the denial of a request for a special route inspection does not begin at the end of the six week qualifying period unless it is the date the request is denied.

The January 22, 2003 prearbitration settlement M-01476 concerned a USPS district policy asserting that the M-39 Section 271.g qualifying period must be the six weeks immediately before the request is made. The settlement provides the following:

The issue in this grievance is whether a local district policy is in violation of Handbook M-39, Section 271.g when it states that the six-week analysis period starts with the most recent Friday prior to the date of the special inspection request and works backward for six consecutive weeks.

While it is anticipated by the parties that a request for a Special Route Inspection pursuant to 271.g of Handbook M-39 will be based on reasonably current data, the local district policy as described above is unreasonably restrictive and will be rescinded.

This agreement is without prejudice to management's right to argue that a request for special inspection under 271.g was unreasonably delayed, or the union's right to contend that such argument is without merit.

National Arbitrator Snow held in C-18926 that the October 19, 1988 Memorandum of Understanding M-00859 provides the exclusive remedy for violations of the 12- and 60-hour work limits in Article 8.5.G.2 which does not apply to part-time flexible letter carriers. The memorandum provides for a remedy of an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12- or 60-hour limitation. See *JCAM* page 8-17.

The August 29, 2002 settlement M-01485 resolved a dispute concerning the remedy in cases where part-time flexible letter carriers were worked beyond 12 hours in a day (including lunch) in violation of ELM Section 432.32. See *JCAM* page 8-18. The settlement provided the following:

The parties agree that Step B Teams have the authority to formulate a remedy when resolving disputes after finding a violation of the National Agreement, including cases where part-time flexibles were required to work beyond the 12 hour limit established in Part 432.32 of the Employee and Labor Relations Manual.

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Return to duty

ELM Section 865 specifies the procedures applicable to employees returning to work after extended illness or injury. These provisions, formerly numbered Section 864.4, provide the following:

865.1 Certification After 21 Days

Employees returning to duty after 21 days or more of absence due to illness or injury must submit medical documentation of their ability to return to work, with or without limitations. The occupational health nurse administrator or postal physician evaluates the medical report and, when required, assists in placing employees in jobs where they can perform effectively and safely.

865.2 Other Required Certification

Employees returning to duty after an absence for communicable or contagious diseases, mental and nervous conditions, diabetes, cardiovascular diseases, or seizure disorders or following hospitalization must submit a physician's statement doing one of the following:

- a. Stating unequivocally that the employee is fit for full duties without hazard to him- or herself or others.
- b. Indicating the restrictions that should be considered for accommodation before return to duty.

Requests for restricted duty are reviewed by postal medical personnel and postal management to consider the availability of accommodated work assignments.

865.3 Contents of Certification

All medical certifications must be detailed medical documentation and not simply a statement of ability to return to work. There must be sufficient information to make a determination that the employee can return to work without hazard to self or others.

In instances of hospitalization for mental or nervous conditions, the attending physician's certificate must also state that the employee has been officially discharged from the hospital.

In diabetes and seizure disorder cases, the certificate must state that the condition is under adequate control and describe the method of treatment used to ensure that control. The occupational health nurse administrator, postal physician, or contract medical provider makes the final medical determination of suitability for return to duty and/or the need for light or limited duty assignment.

In the October 5, 1992 arbitration award C-12424, National Arbitrator Mittenthal held that a local policy requiring medical clearance by a postal medical officer for return to duty following non-occupational illness or injury was not a violation of the Agreement despite the fact that it could result in delays returning to work. To correct this problem, NALC subsequently negotiated the following memorandum of understanding which is printed on page 168 of the 2001 National Agreement:

The parties reaffirm their understanding concerning the review of medical certificates submitted by employees who return to duty following extended absences due to illness. We mutually agree to the following:

1. To avoid undue delay in returning an employee to duty, the on-duty medical officer, contract physician, or nurse should review and make a decision based upon the presented medical information the same day it is submitted. Normally, the employee will be returned to work on his/her next workday provided adequate medical documentation is submitted within sufficient time for review.
2. The reasonableness of the Service in delaying an employee's return beyond his/her next workday shall be a proper subject for the grievance procedure on a case-by-case basis.

In his award C-12424, discussed above, National Arbitrator Mittenthal also held that to the extent a local policy requiring medical clearance by a postal medical officer prior to returning to duty was applied to those returning from an extended absence due to **occupational illness or injury**, it would be in conflict with ELM Section 864.42.

In September 1999 the Postal Service submitted changes to ELM chapter 860 deleting the very provisions that Arbitrator Mittenthal had held protected employees from any delay in returning from an extended absence due to occupational illness or injury. Needless to say, NALC appealed this change to national level arbitration under the provisions of Article 19. This dispute was recently resolved by the May 29, 2003 prearbitration settlement M-01487 which provides the following:

The issue in this case concerns proposed revisions to the Employee and Labor Relations Manual Issue 14, transmitted by letters dated September 29 and November 12, 1999. After reviewing this matter, we mutually agreed to close this case with the following understanding:

The language formerly contained in Section 864.42 of the Employee and Labor Relations Manual (ELM) which stated "in cases of occupational illness or injury, the employee will be returned to work upon certification from the treating physician, and the medical report will be reviewed by the medical officer or contract physician as soon as possible thereafter" is still in full force and effect and will be placed back into the next edition of the ELM. The change will be identified in a future edition of the *Postal Bulletin*. ☐

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Steward time

The contractual right of NALC stewards to be paid to process grievances on-the-clock should be a straightforward matter. However, a recent review by the Contract Administration Unit of grievances appealed to Step B shows that it is still the subject of an inordinate number of grievances. This column reviews the relevant contract provisions. The pertinent sections of Article 17, Sections 3 and 4 of the National Agreement provide the following:

17.3 Section 3. Rights of Stewards (in part)

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

17.4 Section 4. Payment of Stewards (in part)

The Employer will authorize payment only under the following conditions:

Grievances Informal and Formal Step A: The aggrieved and one Union steward (only as permitted under the formula in Section 2.A) for time actually spent in grievance handling, including investigation and meetings with the Employer. The Employer will also compensate a steward for the time reasonably necessary to write a grievance. In addition, the Employer will compensate any witnesses for the time required to attend a Formal Step A meeting. Meetings called by the Employer for information exchange and other conditions designated by the Employer concerning contract application.

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

A steward may conduct a broad range of activities on the clock related to the investigation and adjustment of grievances and of problems that may become grievances. These include, among other things, the following:

- Complete grievance forms, write appeals and write the union statement of corrections and additions to the Formal Step A decision.
- Interview witnesses, including postal patrons who are off postal premises.
- Interview supervisors and postal inspectors.
- Review all relevant documents, including an employee's Official Personnel Folder.

Although a steward must ask for supervisory permission to investigate a grievance or potential grievance, such requests cannot be "unreasonably denied." Nor may management determine in advance how much time a steward reasonably needs to investigate a grievance (C-10835). Rather, the determination of how

much time is considered reasonable is dependent on the issue involved and the amount of information needed for investigation purposes (M-00671). Steward time to discuss a grievance may not be denied solely because a steward is in overtime status (M-00857). It is the responsibility of the union and management to decide mutually when the steward will be allowed, subject to business conditions, an opportunity to investigate and adjust grievances (M-00332). If management delays a steward from investigating a grievance, it should inform the steward of the reasons for the delay and when time will be available. Likewise, the steward has an obligation to request additional time and give the reasons why it is needed. (M-00127).

The current edition of the JCAM provides the following explanation of remedies for stewards improperly denied time:

The appropriate remedy in a case where management has unreasonably denied a steward time on the clock is an order or agreement to cease and desist, plus payment to the steward for the time spent processing the grievance off-the-clock which should have been paid time.

The merits of a grievance that a steward is denied time to investigate are a separate matter from the merits of grievance concerning the denial of steward time. Consequently, in cases where management improperly denies steward time, the steward should do two things. First, the denial of time should be raised as another issue in the original grievance since it may be important for the union representatives handling the grievance at higher steps to be aware of the issue. Then a separate grievance should be filed seeking a cease and desist order and payment to the steward at the appropriate rate (usually overtime) for the time spent processing the grievance off-the-clock.

Of course, grievances concerning the denial of steward time are contractual disputes where the union has the burden of proof. To help meet this burden, the Contract Administration Unit recommends that any grievances concerning this issue document the steward's attempts to obtain the necessary time and management's responses. It is also recommended that the grievance file contain detailed time records showing exactly when the steward worked off-the-clock and exactly what was being done. ☐

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Overtime limits

The Contract Administration Unit has recently reviewed the contract grievances being appealed to Step B and confirmed what many of you probably already suspect—grievances concerning the overtime provisions of Article 8 continue to be the largest single category of disputes. This column and the Director of City Delivery's column review some of the contract's major overtime provisions to ensure that all letter carriers are aware of their rights.

There are two separate restrictions on the maximum number of hours a letter carrier craft employee may be required to work. One is found in Article 8, Section 5.G and the other in Section 432.32 of the *Employee and Labor Relations Manual (ELM)*.

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

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

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

Arbitrator Snow ruled in C-18926 that the Memorandum

of Understanding M-00859 limits the remedy for any violations of the Article 8.5.G to an additional premium of 50 percent of the base hourly straight time rate.

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

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

Because this ELM provision limits total daily service hours, including work and mealtime, to 12 hours, an employee is effectively limited to 11½ hours per day of work plus a half-hour meal. However, the ELM also permits the collective bargaining agreement to create exceptions to this general rule. An exception to this rule is for full-time regular employees on the overtime desired list who, in accordance with Article 8.5.G, "may be required to work up to twelve (12) hours in a day." Since "work," within the meaning of Article 8.5.G does not include mealtime, the "total hours of daily service" for carriers on the overtime desired list may extend over a period of 12 ½ consecutive hours.

Additionally, Article 8.5.G provides that the limits do not apply during December when full-time employees on the overtime desired list may be required to work more than twelve hours. These exceptions do not apply to casuals, transitional employees, part-time employees or full-time employees who are not on the overtime desired list, all of whom are effectively limited to 11½ hours of work per day, even during December. It is NALC's position that the Snow decision in C-18926 limiting the remedies to an additional premium of 50 percent of the base hourly straight time rate only applies to violations of the Article 8.5.G. It does not limit remedies for repeated or deliberate violations of ELM 432.32. ☐

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Overtime distribution

Article 8, Section 5.C.2.b provides that for those carriers who sign the Overtime Desired List, overtime “opportunities” must be distributed “equitably” (i.e., fairly).

5.C.2.b During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the “Overtime Desired” list.

National Arbitrator Bernstein ruled in C-06364 that in determining “*equitable*” distribution of overtime, the number of hours of overtime as well as the number of opportunities for overtime must be considered. However, this does not necessarily mean that actual overtime hours worked must be distributed *equally*. There are two reasons for this. First, not all overtime is considered in determining equitability and second, “availability” to work overtime must be considered in determining whether it has been equitably distributed. These two concepts are often misunderstood and are reviewed below.

Not all overtime is “counted” in determining “equitability.” Article 8.5.C.2.d provides that “recourse to the ‘Overtime Desired’ list is not necessary in the case of a letter carrier working on the employee’s own route on one of the employee’s regularly scheduled days.” As a consequence, overtime worked by a letter carrier working on the carrier’s own route on a regularly scheduled day *is not counted* in determining whether overtime has been “equitably” distributed among carriers on the list.

If opting on an assignment under the provisions of Article 41, Section 2.B.3 results in a six day work week then on the sixth day, only work over eight hours is counted in determining whether overtime has been equitably distributed among carriers on the list. This is because employees assigned overtime in such situations are not “selected from the ‘Overtime Desired’ list” under the provisions of Article 8, Section 5.C.2.a. Rather, they are assigned the overtime under the opting provisions of Article 41, Section 1.C.5.

Much of what is often considered “overtime” worked by full-time employees on their holiday or designated holiday is not overtime. Rather it is “Holiday Worked Pay” or “Holiday Scheduling Premium.” The only work that is contractually overtime for full-time employees working on a holiday or designated holidays is work beyond eight hours in a day (see ELM 432.531). Furthermore, overtime work up to eight hours on a non-scheduled day assigned under the provisions of Article 11, Section 6 is not considered in

determining equitability. This is because the employees assigned the overtime in such situations are not “selected from the ‘Overtime Desired’ list” under the provisions of Article 8.5.C.2.a. Rather, they are selected under the provisions of Article 11, Section 6 and any applicable LMOU provisions.

“Availability” must be considered in determining equitability. If one OTDL carrier is worked instead of another available OTDL carrier, it is considered a missed opportunity that must be made up during the quarter in order to maintain an equitable distribution of overtime. However, if the bypassed carrier was not available, for example, because he/she was on leave or working overtime on his/her own route on a regularly scheduled day etc., it is not considered a missed opportunity that needs to be made up. This is because the carrier was not available to work the overtime. See the July 1, 1982 prearbitration settlement M-00135.

Consequently, a disparity in the total “countable” overtime hours worked by OTDL carriers during a quarter does not necessarily indicate that overtime was not “equitably” distributed. An equitable share of countable overtime may be less for letter carriers who often work overtime on their own routes than for carriers who do not. Similarly, an equitable share of countable overtime may be less for a carriers who used a lot of leave during a quarter than for those who did not. Of course, Article 8, Section 5.C gives management the responsibility for assigning overtime and maintaining equitability. So, management should be prepared to provide a satisfactory explanation if considerations of “availability” account for disparities in the total “countable” overtime hours worked by OTDL carriers during a quarter.

National Arbitrator Howard Gamser ruled in C-3200 that the Postal Service must pay employees deprived of “equitable opportunities” for the overtime hours they did not work only if management’s failure to comply with its contractual obligations under Article 8.5.C.2 shows “a willful disregard or defiance of the contractual provision, a deliberate attempt to grant disparate or favorite treatment to an employee or group of employees, or caused a situation in which the equalizing opportunity could not be afforded within the next quarter.” In all other cases, Gamser held, the proper remedy is to provide “an equalizing opportunity in the next immediate quarter, or pay a compensatory monetary award if this is not done...”



Review of discipline

When discipline is issued, it should be initiated by an employee's immediate supervisor. However, Article 16, Section 8 requires that before a suspension or removal is imposed, it must be reviewed and concurred in by higher-level management. Note that this rule does not apply to letters of warning.

Article 16, Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

The *JCAM* explains Article 16.8 as follows:

Concurrence is a specific contract requirement to the issuance of a suspension or a discharge. It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, however, the discipline must be reviewed and concurred in by a manager who is a higher level than the initiating, or issuing, supervisor. This act of review and concurrence must take place prior to the issuance of the discipline. While there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so he/she may be questioned if there is a concern that appropriate concurrence did not take place.

In the December 3, 2002 award C-23828, NRLCA National Arbitrator Eichen addressed Article 16, Section 6 of the NRLCA National Agreement. That provision is the same as Article 16.8 of the NALC agreement except that it contains an additional requirement, that "such concurrence shall be in writing." Arbitrator Eichen's award provides in relevant part:

Issue No. 1: Article 16.6 Review of Discipline (NRLCA Agreement)

- a) Is not violated if the lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;
- b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;
- c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;
- d) Is not violated if the higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;

e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

f) Is violated if there is no evidence of written review and concurrence prior to the imposition of a suspension or discharge.

Issue No. 2

Proven violations of Article 16.6 as set forth in Issues 1(b), 1(c) or 1(e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with "make-whole" damages.

Although the NALC National Agreement does not require that concurrence be in writing, the Postal Service has agreed in the *JCAM* that "management should be prepared to identify the manager who concurred with a disciplinary action so he/she may be questioned if there is a concern that appropriate concurrence did not take place." Arbitrator Eichen's complete award C-23828 is available at the Contract Administration section of the NALC website at www.NALC.org.

NALC regional arbitrators have long applied the provisions of Article 16.8 in a similar manner. For example, in C-05164, September 19, 1985, NALC Regional Arbitrator LeWinter wrote the following:

Concurrence is a specific and formal contract requirement to the issuance of a suspension or a discharge. It must occur before the issuance of the discipline and not afterwards. The requirement is not met merely because a superior agrees with the discipline. It must be demonstrated that he was requested to concur, and that he reviewed the matter in light of all the current information at the time of concurrence, and that he gave his consent to the issuance of discipline. While the contract does not require a writing to accomplish this, it is the employer's burden to demonstrate it occurred.

Other NALC regional arbitration awards supporting this position include: C-00908, Arbitrator Caraway; C-01477, Arbitrator Holly; C-04156, Arbitrator Goldstein; C-05685, Arbitrator LeWinter; C-06679, Arbitrator Carson; C-14481, Arbitrator Alsher; C-16568, Arbitrator Ames; C-17674, Arbitrator Johnston; and C-18208, Arbitrator Hales. ☐

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Hold down assignments

The recent pre-arbitration settlement M-01500 concerned a part-time flexible letter carrier who was removed from a “hold-down” assignment to provide work for a full-time city carrier on limited duty. The settlement provides the following:

Full-time employees on limited duty as a result of a job-related illness or injury, may ‘bump’ a PTF on a hold-down assignment (or portion of hold-down assignment) **only** if the duties on the ‘hold-down’ assignment are included in the written/verbal (see ELM 545.32) limited duty assignment and there is **no other work available** to satisfy the terms of the limited duty assignment. Consistent with page 41-13 of the *Joint Contract Administration Manual*, the opt is not terminated [rather] the PTF is bumped on a day-to-day basis. (*Emphasis added*)

Part 545.32 of the ELM, referenced in the settlement above, provides a list of items that must be included in an OWCP job offer.

545.32 Suitable Work

To be considered suitable by OWCP, the job offer must include the following:

- a. A description of the duties of the position.
- b. A description of the specific physical requirements of the position and any special demands of the workload or unusual working conditions.
- c. The organizational and geographical location of the job.
- d. The effective date of the position.
- e. The date the employee must accept or refuse the job offer.
- f. Pay rate information for the offered position.

The job offer may be made verbally, as long as a written job offer is provided to the employee within two business days of the verbal job offer.

The pre-arbitration settlement makes clear that management’s right to temporarily bump a PTF off a hold-down assignment in such circumstances is extremely limited. It is allowed only if the duties on the PTF’s hold-down are included in the limited duty job offer, and it is the only work available. If any other work is available, then the PTF may not be bumped. The settlement further provides that a PTF may only be bumped off that portion of the hold-down that is absolutely necessary. For example, if a limited duty employee needs two hours of work, and the only available limited duty job offer work is on the hold-down, the PTF still has the right to work the remaining six hours of the assignment. In other words, PTFs are not permanently removed from a hold-down in such circumstances, but only

bumped on an hour-to-hour or day-to-day basis as necessary.

The *JCAM* describes the following other circumstances that permit a PTF to be temporarily bumped from a hold-down.

■ Removal from hold-down. There are exceptions to the rule against involuntarily removing employees from their hold-downs. Part-time flexible employees may be “bumped” from their hold-downs to provide sufficient work for full-time employees. Full-time employees are guaranteed 40 hours of work per service week. Thus, they may be assigned work on routes held down by part-time employees if there is not sufficient work available for them on a particular day (H1N-5D-C 6601, September 11, 1985, M-0097). In such cases the part-time flexible employees’ opt is not terminated. Rather, they are temporarily “bumped” on a day-to-day basis. Bumping is still a last resort, as reflected in a Step 4 settlement (H1N-5D-C 7441, October 25, 1983, M-0293), which provides that:

A PTF, temporarily assigned to a route under Article 41, Section 2.B, shall work the duty assignment, unless there is no other eight-hour assignment available to which a full-time carrier could be assigned. A regular carrier may be required to work parts or “relays” of routes to make up a full-time assignment. Additionally, the route of the “hold-down” to which the PTF opted may be pivoted if there is insufficient work available to provide a full-time carrier with eight hours of work.

Another exception occurs if the local memorandum allows the regular carrier on a route to “bump” the carrier technician to another route when the regular carrier is called in on a non-scheduled day to work on his or her own route. In such cases, the carrier technician is allowed to displace an employee who has opted on an assignment if none of the other routes on the string are available. In such cases a part-time flexible employee’s opt is not terminated. Rather, he or she is temporarily “bumped” on a day-to-day basis. See Step 4, N8-N-0176, January 9, 1980 (M-00154).

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