

You have the right to review information relevant to grievance

Article 17, Section 3 of the National Agreement grants the union the right to “review” the documents to determine if a grievance exists. Article 17, Section 3 of the National Agreement states in relevant 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.

What does the right to “review” mean? Webster’s New Collegiate Dictionary defines review as, “to examine or go over.” This section of the National Agreement allows stewards to examine documents to determine if the information requested shows an alleged violation of the contract or not. If not, then the steward needn’t proceed any further and there is no need to request copies of the information. If only a portion of the reviewed records are necessary to show a violation, then only those records need to be requested. Review does not require that the union obtain copies—that request should come after the review has taken place. Among the information that the steward may review include (as cited in *JCAM*):

- Review relevant documents; Step 4, H4N-3W-C 27743, May 1, 1987 (M-00837).
- Review an employee’s official personnel folder when relevant; Step 4, NC-E 2263, August 18, 1976 (M-00104).


In addition to the language in Article 17, Section 3, Article 31, Section 3 of the National Agreement increases the right of stewards to review documentation. That language states in relevant part:

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

The last sentence in Article 31, Section 3 makes the union subject to be charged for information requested pursuant to Section 3-4.5 of the AS-353 Handbook. The first 100 pages for any request are free; thereafter the union may be charged 15 cents per page.

Remember, you have the right to review and obtain germane information—information relevant to the grievance being investigated and/or worked on. For example, if you are investigating a possible overtime bypass violation for December 10, you have the right to review time records for that date. You do not have a right to review time records for other days unless you have some legitimate belief that a violation took place on those days as well.

Stewards have an obligation to explain to management how the requested information is relevant to a grievance they are investigating or handling. That does not mean that the steward needs to explain the potential grievance in its entirety or convince management of the validity of their grievance in order to review requested information. What the steward must do is explain that, for example, they are investigating a possible overtime violation and want to review time records for a specific date to determine whether the union, not management, believes that a violation occurred.

Remember, “review” does not require the union to obtain copies first—they may review to determine if they want copies for processing a grievance. 

Route inspection: Line 21

Management is planning to conduct a wave of route inspections affecting thousands of letter carriers. Many of those letter carriers have never been through the route inspection process. That's one reason why NALC has just published Chapter One of the new Route Protection Program, which provides the information letter carriers need in a route inspection.

In an inspection, the letter carrier completes the Form 1838-C Worksheet to record mail counts and describe specific job functions he or she performs in the office. The carrier identifies those functions by labeling each one with an appropriate line item number.

Most of the numbered line items refer to particular job functions, but two—Line 21 and Line 22—cover miscellaneous functions. Line 21 is used for any recurring office function not covered by other line items. Line 21 should not be confused with Line 22, which covers miscellaneous functions that are non-recurring and non-continuing.

This distinction is crucial, because letter carriers receive credit in the route evaluation for their time performing Line 21 items—because they are recurring and necessary to the performance of the job. However, no credit is received for non-recurring Line 22 items.

Section 922.51h of the M-41 Handbook explains Line 21:

h. Line 21, Recurring Office Work Not Covered by Form (Use Comment section to identify each activity. Describe activity performed and time spent.) Record time necessary for miscellaneous office activities that cannot be included on lines 1 through 20 (such as window caller, safety talks, etc.).

The letter carrier must write a description of each Line 21 job function in the comments box when completing the Form 1838-C Worksheet. The description is essential because there are so many possible Line 21 functions.

An August 26, 1980 National Settlement Agreement (M-00605) between NALC and USPS lists several functions that fall under Line 21 when they are recurring and necessary to the performance of carrier office duties:

- Performing window caller service.
- Weekly safety talks and other appropriate unit discussions.

- Travel to and from the throwback case or to other designated locations to return mark-up mail and mis-throws.
- Replenishing the forms pouch.
- Wash-up time in excess of the regular 5-minute allowance for personal time, if: (1) it is provided for in a Local Memorandum of Understanding, or (2) pursuant to local past practice, additional or longer wash-up time had been granted and included on Line 21.
- Official communications including, but not limited to, general delivery; CMU Clerk inquiries; and responding to inquiries from supervisors.
- Facing or separating collection mail upon return to office.
- Verifying hold mail.
- Union steward activities (grievance handling), when necessary and if occurring weekly or more often.

Additional office functions that may be appropriate for Line 21 credit include:

- Completing forms 1571 (M-00971) and 3996, if the use of these forms is of a recurring nature. (Management will discount the time used to fill out Form 3996 if it is solely for overtime needed to count mail and fill out PS Form 1838C.)
- Determining the number of pieces of unaddressed flats of a "shared mailing" and placing them at the back of the bundle (M-01288).
- Retrieving and replacing scanners, if not done during the normal process of obtaining accountable items (M-01411).
- Travel to and from, and transport of parcel container to case, etc.
- Travel to and from DPS mail to secure S999 mail for casing.
- Observing amount of DPS mail to estimate need for overtime or auxiliary assistance, if done on office time (M-01366).
- Taking vacation-hold mail to the designated area.
- Returning empty equipment to the designated area.
- Mail measuring and recording by carriers in units where carriers are doing so.
- Taking accountable mis-throw mail to the accountable clerk.
- Taking box-holder mail to the designated area.
- Handling mis-faced mail.
- Checking for sleepers prior to leaving your case for the street.
- Turning off case lights or moving any equipment off the floor.
- Any other recurring, necessary task in the office that is not covered by another line item.

Remember to round up to the next minute when recording the elapsed time for any office function on the Form 1838-C. If you have any questions, please contact your National Business Agent for additional information or clarification. ☒

Route count and inspection consultations

After count and inspection week, and before the 52-day time limit is up, management is required to consult with the regular carrier assigned to each route concerning both the evaluated time of, and any proposed adjustment to, the route. Consultation requirements are specific and mandatory. They go far beyond a short meeting where management announces to the carrier what they intend to do with a route. Carriers should hold management accountable for following these requirements. They should not allow managers to just go through the motions and only pretend to consult.

While the data and averages from the count and inspection are useful in determining fair evaluated times of routes, bona fide consultations are important because the individual letter carrier assigned to a route is in the best position to make that assessment.

Consultation requirements include the following:

- **Provide 1838s and 1840 in advance.** Management must give the carrier copies of completed Form 1838 at least five calendar days in advance, and a partially completed copy of Form 1840 at least one day in advance of the evaluation consultation. Form 1840 must have the front side completed and the reverse side must include any proposed time disallowances and related comments.
- **Discuss certain matters.** At the evaluation consultation, management must discuss mail volume, the evaluation of the route and proposed subtractions from the evaluated street time. If management proposes to adjust a route, it must hold an adjustment consultation and discuss the proposed relief or addition, the reasons for the proposed adjustment, whether the carrier agrees or disagrees, and the comments and recommendations of the carrier.
- **Record the carrier's recommendations and comments.** Management must enter the following on the 1840: The carrier's comments and recommendations, whether the carrier agrees or disagrees with the proposed adjustment, and the reasons for any disagreement.
- **Refrain from requiring the carrier to sign anything.** Management is not allowed to require the carrier to sign a statement during the consultation(s).

- **Consider the carrier's suggestions.** Management is required to consider suggestions from the carrier serving the route.
- **Permit notation by the carrier of absence of documentation of street time disallowances.** If management attempts to adjust the carrier's street time due to alleged improper practices, operational changes, or claimed abnormal conditions during the eight-week analysis, management must document it on the reverse of the 1840 and discuss it with the carrier during the consultation regarding the route evaluation. If management fails to do so document, the carrier has the right during the consultation to note the absence of such documentation by writing a notation, and initialing and dating the 1840.
- **Disallow street time adjustments if documentation is not provided** to carrier within one week of notation by carrier. If the carrier makes a notation on the 1840, as noted above, about the absence of documentation supporting a management time disallowance, management has one week to supply such documentation to the carrier. If management fails to do so within one week, the time adjustment shall be disallowed.
- **Provide completed copy of reverse of 1840 promptly after consultation.** Promptly after consultation, if the carrier requests that the reverse of his or her copy of Form 1840 be completed, the carrier must immediately give the copy to the manager for completion and return no later than seven calendar days.

Carriers who familiarize themselves with these requirements in advance of their consultations will be in the best position to enforce their rights. Carriers should attempt to show Forms 1838-C, 1838, and 1840 to their NALC representative prior to the consultation. The union representatives can help identify any problems or mistakes on the forms. Carriers will therefore be in a better position to protect their rights at the consultation.

If management attempts to reduce a carrier's actual average times by disallowances and has not provided documentation of the disallowances at the consultation, the carrier should exercise the right to challenge the disallowance by making a note on the 1840 of the absence of documentation, initialing and dating the 1840 and returning it to management. Contact your shop steward for grievance investigation and processing if management violates any of the procedures explained above. ☒

Inspector General's agents moving in

The Postal Service has advised NALC that the USPS Office of the Inspector General (OIG) is taking over the investigation of certain types of internal crimes, such as embezzlement, record falsification, workers' compensation fraud, and other non-postal crimes. Allegations of mail theft will continue to be handled by the Inspection Service.

Like Postal Inspectors, OIG agents sometimes seek to interview employees and often act in an aggressive and intimidating manner. However, branch officers, stewards and rank-and-file letter carriers should understand that legally and contractually OIG investigatory interviews are no different than traditional Postal Inspector interviews. In a recent letter to President Young, the Postal Service assured NALC that the transfer of investigative functions from the Inspection Service to the OIG "will not restrict, eliminate, or otherwise adversely affect any rights, privileges, or benefits of either employees of the Postal Service or labor organizations representing employees of the Postal Service." The letter makes clear that unions and employees retain all their rights under the National Labor Relations Act, the Postal Reorganization Act, the National Agreement, and "any handbook or manual affecting employee labor relations."

Moreover, postal employees, like all government employees, are protected by the Fifth Amendment to the U.S. Constitution when questioned by their employer. That means a public employee cannot be disciplined or discharged simply because he or she invokes the Fifth Amendment privilege against self-incrimination, unless the OIG agent gives the employee a legally appropriate warning before asking questions. This warning, which is sometimes referred to as a "Kalkines warning," ensures that any answers given by an employee, or any other evidence discovered as a result of the employee's answers, cannot be used against him or her in a subsequent criminal prosecution.

Of course, an employee may elect to remain silent, even

after being given a *Kalkines* warning. The OIG agent may then threaten the employee with discipline for failure to cooperate in a postal investigation. However, any discipline remains fully subject to the National Agreement. Accordingly, the discipline would have to be issued by an appropriate management official in accordance with Article 16 and must meet the test of just cause. The discipline is, of course, subject to challenge through the grievance-arbitration procedure.

"Branch officers and stewards should not play the role of criminal lawyer."

Union representatives also need to remember that employees have *Weingarten* rights in OIG investigations. Any employee who reasonably believes that an investigatory interview by an OIG agent may lead to discipline has the right, upon request, to have a union representative at the interview.

Branch officers and stewards should not play the role of criminal lawyer. If a letter carrier is directed to participate in an OIG interview, and there is reason to believe that the carrier may be subject to criminal prosecution, advise the individual to consult an attorney as quickly as possible. ☒

Contract Administration Unit

Gary H. Mullins, Vice President
 James Korolowicz, Assistant Secretary-Treasurer
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Grievance investigation— a review

Stewards have broad powers to investigate grievances, as well as problems that may become grievances. These powers are set out in Articles 17 and 31 of the National Contract, and they include:

1. The right to interview people to get the facts. You may interview the grievant (or potential grievant), supervisors, and witnesses—including witnesses who are not postal employees.

2. The right to review and obtain Postal Service documents, files, or other records. It is your right under the contract and under the labor laws to get the information you need to investigate and process grievances and potential grievances. (For more information on this right see the article in the Spring 2005 NALC Activist.)

3. The right to investigate while on the clock. Management may not unreasonably deny your requests to investigate and adjust grievances or possible grievances while on the clock.

These are your basic powers—set out in the contract and backed up by the labor laws. They are explained in greater detail in your JCAM. But how you use them is up to you.

There are no magic formulas telling you how to investigate a grievance. Each grievance is different, so the best way to learn grievance investigation is through experience. But there are a few basic things the steward can do to improve grievance investigation—and thereby improve the quality and strength of our grievances.

First, a grievance should be investigated before it is filed. The facts should be gathered first, and then the decision whether to file a grievance should be made. If a grievance is filed first and questions are asked later, the system gets clogged up with grievances that may be frivolous. Stewards should investigate fully at the outset, and only then decide whether to file at Informal Step A.

Second, you should interview any supervisors connected with the potential grievance before the grievance is initiated. Your right to interview supervisors is established in Article 17, Section 3. The investigation interview is conducted to learn management's version of the facts. The interview is not a grievance meeting or a place to debate the case. Rather, you should simply ask questions and get the

supervisor's answers. When you learn management's version of the facts, you can determine where disputes about the facts exist, and where both sides agree about the facts.


Once you have the supervisor's story, management will have difficulty trying to invent or introduce new facts at later steps of the procedure. Often management's position at the supervisory level is easy to attack—but it gets harder once management's labor relations specialists and attorneys get involved.

How do we know what to investigate? Start with the basics. Who is involved—which letter carrier, which supervisor? What happened—what events are important? Where exactly did it happen—and when—what day and time? Why might it be a grievance—is there a violation of the contract? Which article and section?

Next, try to imagine what management will say about the case, and formulate an argument in response. Note your strong points and face up to any weaknesses. Then go get the answers. Document every point in the union's position and get statements from all relevant witnesses, from the grievant, and from management.

When you have found and documented all of your facts, then you are ready to evaluate the problem and decide whether to file a grievance. If you file, you'll have everything you need. Grievances are won and lost on the basis of your investigation.

One of the hardest parts of a union officer's job is trying to resolve grievances without all the facts. The union depends on the steward for this information. Stewards know the grievant, the supervisor, and the station, and they have the best grasp of the problem.

If you really want to win a grievance, conduct a complete investigation. And if you want to help other union representatives win a grievance you have appealed, then give the Formal A or Step B union people what they need more than anything else—a thorough investigation and a complete file with all the details, all the statements, and all the documents that prove your case. The union's success in the grievance procedure rides on you and the effort you put into your investigation. 

Garrity and Kalkines warnings

With the recent addition of these terms into the vocabulary of union activists comes the need to understand how they may affect letter carriers. In order to assist the activist to understand the application of these warnings, the differences between the two are outlined here. This article also supplements the information provided in the May 2005 Contract Talk article.

The Garrity ruling fundamentally addressed evidentiary issues with regard to criminal proceedings. The case involved police officers who were being investigated for alleged fixing of traffic tickets. During the investigation the officers were told that anything they said might be used against them in any state criminal proceeding and they had the privilege to refuse to answer if the disclosure would tend to incriminate them, but if they refused to answer they would be subject to removal from office. In summary, the court held that a later prosecution cannot constitutionally use statements (or their fruits) coerced from the employee by a threat of removal from office if he/she fails to answer the question.

The Kalkines ruling addressed a situation in which an employee was being investigated for bribery and refused to answer questions based on his Fifth Amendment rights. In summary, the court held that, "In recent years the courts have given more precise content to the obligations of a public employee to answer his employer's work-related questions...where, as here, there is a substantial risk that the employee may be subject to prosecution for actions connected with the subject of management's inquiry. It is now settled that the individual cannot be discharged simply because he invokes his Fifth Amendment...in refusing to respond.... But a governmental employer is not wholly barred from insisting that relevant information be given; the public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case."

The Garrity and Kalkines warnings serve somewhat different purposes. A Garrity warning waives the government's right to discipline an employee for remaining silent, but preserves its right to use any statement the employee voluntarily makes against him/her in a subsequent criminal

prosecution. A Kalkines warning waives the government's right to use voluntary statements in a criminal prosecution, but preserves its right to discipline an employee for refusing to cooperate in the investigation.

In order to conduct investigations that do not run afoul of Garrity and Kalkines the inspector general (OIG) provides information to those employees they plan to interview. A Garrity warning typically contains the following (sample) information:

You have the right to remain silent if your answers may tend to incriminate you. Anything you say or do may be used as evidence in both an administrative proceeding, and any future criminal proceedings involving you. If you refuse to answer the questions posed to you on the grounds that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent. However, your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case. This interview is strictly voluntary and you may leave at any time.

A Kalkines warning typically contains the following (sample) information:

You are going to be asked a number of specific questions concerning the performance of your official duties as an employee of the United States Postal Service. You have a duty to reply to these questions, and agency disciplinary proceedings resulting in your discharge, may be initiated as a result of your answers. However, neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in criminal proceedings. You are subject to disciplinary actions up to and including dismissal if you refuse to answer or fail to respond truthfully and fully to any questions.

Notably absent in both warnings is information about an employee's Weingarten Rights. Despite all the warnings and legal language, employees still have a right to union representation. Employees need to remember that despite assurances that any information will not be used against them in a criminal proceeding; there are no assurances that the information will not be used against them in administrative or disciplinary proceedings.

Branch officers and stewards should not play the role of criminal lawyer. If a letter carrier is directed to participate in an OIG interview, and there is reason to believe that the carrier may be subject to criminal prosecution, advise the individual to consult an attorney immediately. ☒

More casual issues resolved

In a recent National Pre-Arbitration Settlement (M-01541) involving casuals employed under the provisions of the APWU or NPMHU National Agreements who are also employed in the same calendar year under the provisions of the NALC National Agreement, the parties resolved several issues as follows:

Mr. William H. Young
 President
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 100 Indiana Avenue, NW
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D94N-4D-C 98000707
 Class Action, Lexington, KY 40511-9998

F94N-4D-C 96091633
 Class Action, Modesto, CA 95350-9998

F94N-4D-C 97001130
 Class Action, Red Bluff, CA 96080-9998

Dear Mr. Young:

Recently, our representatives met in pre-arbitration discussion of the above-referenced cases.

The interpretive issues in these cases involve casuals employed under the provisions of the APWU or NPMHU National Agreements who are also employed in the same calendar year under the provisions of the NALC National Agreement.

After reviewing this matter the parties agree to the following understanding:

A casual who is employed under the APWU or NPMHU National Agreements and also designated to work in the city letter carrier craft during each 90-day term would not be eligible to be appointed during the same calendar year as a casual under the NALC National Agreement. Casuals employed under the APWU or NPMHU Agreements (casual designation 61-0 for clerk craft and 62-0 for mail handler craft respectively) who will be assigned to perform duties in the city letter carrier craft must be so designated when hired, pursuant to national award Q94N-4Q-C 98038916. For purposes of applying national award Q98C-4Q-C 00100499 (Article 7.1.B.1), such "cross-assigned" casuals are con-

sidered employed (hired) in the letter carrier craft for the time spent performing letter carrier duties.

A casual who is employed under the APWU or NPMHU National Agreements but is not designated when hired (pursuant to the above paragraph) to perform work in the letter carrier craft may not be assigned to work in the letter carrier craft. However, such casuals would not be barred from further casual appointments during the same calendar year under the NALC National Agreement.

Every other pay period the Postal Service will provide the NALC at the national level the NALC On-Rolls Dual Employees report.

This agreement is prospective with regard to the resolution of the interpretive issues: a) how casuals who are employed under another collective bargaining agreement may be assigned to letter carrier work, and b) whether a casual appointment under another collective bargaining agreement counts towards the Article 7.1.B.3 and 7.1.B.4 limitations.

Grievance F94N-4F-C 97001130 (Red Bluff) is remanded to Step B through the NBA to determine whether Article 7.1.B.1 of the National Agreement was violated and, if so, the appropriate remedy. Grievance D94N-4D-C 98000707 (Lexington) is remanded to Step B through the NBA to determine whether Article 7.1.B.2 was violated, and if so, the appropriate remedy. Grievance F94N-4F-C 96091633 (Modesto) is closed based on the resolution of the interpretive issues. The terms of this settlement serve as the basis for resolving cases with the same or similar issues.

Sincerely,

_____/s/s/_____
 Doug A. Tulino
 Manager
 Labor Relations Policies
 Date: 6/21/05

_____/s/s/_____
 William H. Young
 President
 National Association of Letter
 Carriers, AFL-CIO

Please review the articles in this month's *Postal Record* by Vice President Gary H. Mullins and Director of City Delivery Fredric V. Rolando. If you need additional advice, please contact your National Business Agent. ☒

Three FMLA issues resolved

In a recent national level arbitration award (C-25724) before Arbitrator Das, three FMLA issues were resolved.

Nature of illness—The unions contended that asking employees to describe the nature of the illness/injury for which they are calling in absent violates the National Agreement because it is neither permitted by, nor consistent with, the leave provisions of the *ELM*. The Postal Service contended that it is required to make a determination as to whether the condition is covered under the FMLA and that the nature of illness/injury inquiry is crucial to its ability to timely schedule an employee for a fitness-for-duty examination and to enforce the return-to-work provisions in the *ELM*. Arbitrator Das ruled:

Accordingly, I conclude that in applying *ELM* 513.32 in the context of the RMD process, ACS's may ask questions necessary to make FMLA determinations and to determine whether the absence is due to an on-the-job injury or for a condition which requires *ELM* 865 return-to-work procedures, in a manner consistent with these findings, but may not otherwise require employee to describe the nature of their illness/injury.

FMLA second and third opinion process—The Postal Service developed a series of sample form letters to be utilized in the field to facilitate compliance with the FMLA. One of these letters is a letter to an employee after the Postal Service has obtained a second opinion which differs from the initial FMLA certification provided by the employee's health care provider (HCP). The sample letter in dispute reads, in relevant parts:

...If you do not accept these results, you must notify me <name> @ <phone numbers> within five calendar days of receiving this letter, and a third opinion appointment will be scheduled.

...If the employee has not contacted me within the five days, the second opinion will go on record as the final decision.

The unions contended that this process abrogates the responsibilities the FMLA expressly places on the employer and nullifies the purpose of the third doctor's opinion option—that only the employer can require a third doctor's opinion. The Postal Service contended that neither FMLA regulations nor the *ELM* provisions implementing the FMLA contain a clearly delineated process regarding how the third opinion HCP is to be selected.

Arbitrator Das ruled:

...While the FMLA does not spell out a specific process for selecting the third opinion provider, it expressly places responsibility on the employer to determine whether to require that the employee obtain a third opinion. If the employer chooses to do so, the third opinion is controlling.... The Postal Service's current process...clearly departs from and is inconsistent with the statutory scheme. It requires the employee, rather than the employer, to make the decision whether to obtain a third opinion.... Accordingly, I conclude that the Postal Service's current process for initiating FMLA review by a third health care provider is not consistent with the FMLA or with *ELM* 515.1 and 515.54, and that implementation of that process violates Articles 5 and 10.2.A of the National Agreement.

FMLA paid leave documentation—The unions challenged the Postal Service's policy of requiring medical documentation under *ELM* 513.362 in situations where an employee, who has previously provided FMLA certification of a serious health condition indicating the need for intermittent leave, requests paid leave for an absence of four days or more which falls between the certification and a recertification. The unions contended that this policy is improper and impermissible under the National Agreement. The Postal Service asserted that paid leave is beyond the mandate of the FMLA, and that the statute and DOL regulations make clear that an employee seeking to substitute paid leave for unpaid protected FMLA leave must meet the employer's normal requirement for paid leave.

The Das award states the following:

The Postal Service acknowledges that information contained on a FMLA medical certification may also meet the Postal Service's paid sick leave documentation requirements. This occurs, however, only with regard to the particular absence triggering certification or recertification that contains information about incapacity during the current absence sufficient to justify paid leave. For absences not triggering a request for certification or recertification, the Postal Service may separately request sick leave documentation consistent with its regulations.

Arbitrator Das's ruling below must be read in conjunction with the Postal Service's acknowledgment above:

The unions' contention that the protested Postal Service paid leave documentation policy is improper and impermissible under the National Agreement is rejected. ☒

Route Count and Inspection consultations

In an effort to assist letter carriers who have either undergone, or are scheduled for, route inspections during October and November, the following Contract Talk article from the April 2005 *Postal Record* is reprinted below. Letter carriers are reminded to consult the *Route Protection Program Pocket Handbook* that was mailed to every NALC member. In addition, each NALC branch should have received a hard copy of the complete Route Protection Program. The material is also available on the NALC website in PDF format.



After count and inspection week, and before the 52-day time limit is up, management is required to consult with the regular carrier assigned to each route concerning both the evaluated time of, and any proposed adjustment to, the route. Consultation requirements are specific and mandatory. They go far beyond a short meeting where management announces to the carrier what they intend to do with a route. Carriers should hold management accountable for following these requirements. They should not allow managers to just go through the motions and only pretend to consult.

While the data and averages from the count and inspection are useful in determining fair evaluated times of routes, bona fide consultations are important because the individual letter carrier assigned to a route is in the best position to make that assessment.

Consultation requirements include the following:

- **Provide 1838s and 1840 in advance.** Management must give the carrier copies of completed Form 1838 at least five calendar days in advance, and a partially completed copy of Form 1840 at least one day in advance of the evaluation consultation. Form 1840 must have the front side completed and the reverse side must include any proposed time disallowances and related comments.
- **Discuss certain matters.** At the evaluation consultation, management must discuss mail volume, the evaluation of the route and proposed subtractions from the evaluated street time. If management proposes to adjust a route, it must hold an adjustment consultation and discuss the proposed relief or addition, the reasons for the proposed adjustment, whether the carrier agrees or disagrees, and the comments and recommendations of the carrier.
- **Record the carrier's recommendations and comments.** Management must enter the following on the 1840: The carrier's

comments and recommendations, whether the carrier agrees or disagrees with the proposed adjustment, and the reasons for any disagreement.

- **Refrain from requiring the carrier to sign anything.** Management is not allowed to require the carrier to sign a statement during the consultation(s).
- **Consider the carrier's suggestions.** Management is required to consider suggestions from the carrier serving the route.
- **Permit notation by the carrier of absence of documentation of street time disallowances.** If management attempts to adjust the carrier's street time due to alleged improper practices, operational changes, or claimed abnormal conditions during the eight-week analysis, management must document it on the reverse of the 1840 and discuss it with the carrier during the consultation regarding the route evaluation. If management fails to do so, the carrier has the right during the consultation to note the absence of such documentation by writing a notation, and initialing and dating the 1840.
- **Disallow street time adjustments if documentation is not provided** to carrier within one week of notation by carrier. If the carrier makes a notation on the 1840, as noted above, about the absence of documentation supporting a management time disallowance, management has one week to supply such documentation to the carrier. If management fails to do so within one week, the time adjustment shall be disallowed.
- **Provide completed copy of reverse of 1840 promptly after consultation.** Promptly after consultation, if the carrier requests that the reverse of his or her copy of Form 1840 be completed, the carrier must immediately give the copy to the manager for completion and return no later than seven calendar days.

Carriers who familiarize themselves with these requirements in advance of their consultations will be in the best position to enforce their rights. Carriers should attempt to show Forms 1838-C, 1838, and 1840 to their NALC representative prior to the consultation. The union representatives can help identify any problems or mistakes on the forms. Carriers will therefore be in a better position to protect their rights at the consultation.

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ELM 865 revision: medical inquiries limited by Rehabilitation Act

The Rehabilitation Act limits the Postal Service's right to make medical inquiries, such as demands for return-to-work clearance. The restrictions apply to demands made to all employees, not just those with disabilities. The Postal Service has begun to implicitly acknowledge this with changes to its Publication 71 and to *ELM 865*. This column discusses the *ELM 865* changes, which significantly diminish management's right to require return-to-work clearance.

The prior *ELM 865* allowed management to require employees returning to duty after 21 days or more of medical absence or with certain stipulated medical conditions, such as diabetes and seizure disorders, to provide detailed medical documentation of their ability to return to work. The requirement applied to all employees. (However, the Postal Service could not, and still may not, delay a return to work pending receipt of the documentation in the case of on-the-job injuries—see M-01487.)

The new *ELM 865* deletes the language regarding 21 days and specific medical conditions. On its face, the new language applies to a return to work following any illness or injury. However, the revised language includes significant new restrictions on the Postal Service's right to demand medical documentation. It requires the Postal Service to make an individualized assessment of whether there is a reason to require return-to-work documentation. It only allows the Postal Service to require medical documentation when it has reasonable belief, based upon reliable and objective information, that the employee may be unable to perform the essential functions of the position, or may pose a direct threat to the health or safety of him/herself or others due to the medical condition.

The Postal Service provided the NALC with an Article 19 notice of the *ELM 865* revisions on March 3. The notice advised that the purpose of the revisions was to reflect the Postal Service's policy of conducting an individual assessment of employees returning to duty after absence for medical reasons.

However, the Rehabilitation Act prohibits the Postal Service from making medical inquiries unless it has a reasonable belief, based upon reliable and objective infor-

mation, that the employee may be unable to perform the essential functions of the position, or may pose a direct threat to the health or safety of him/herself or others due to the medical condition. The new language in *ELM 865* comes directly out of Rehabilitation Act case law.

The Postal Service later acknowledged as much. On July 26, the Postal Service issued a memorandum related to the FMLA, *ELM 865* and the recent Seventh Circuit Court of Appeals decision, *Harrell v. U.S. Postal Service*. The memorandum explained the recent change to *ELM 865*:

The new ELM provisions authorize return to work clearance when management has a reasonable belief, based upon reliable and objective information, that the employee may be unable to perform the essential functions of his/her position or may pose a direct threat to health or safety. This standard comports with the requirements of the Rehabilitation Act that employers make medical inquiries only when there is a reasonable, objective basis to do so.

“The revised language includes significant new restrictions on the Postal Service's right to demand medical documentation.”

This memorandum has been entered into the MRS at M-01547, and can be accessed on the NALC website.

As a result of the Rehabilitation Act, and in accordance with the new language in *ELM 865*, the Postal Service may no longer automatically demand return-to-work clearance from an employee returning to work after a medical absence. Every medical inquiry, every demand for return-to-work clearance, is now potentially subject to grievance investigation to determine if management made an individualized assessment and had reliable, objective evidence that the employee might be unable to perform the essential functions of the position or might pose a direct threat to him/herself or others. ☒

Vacation bidding

The 2006 leave year is upon us and the process for selection of annual leave should be occurring in your office in the near future. Section 512 of the *Employee and Labor Relations Manual (ELM)* sets forth the regulations for the administration of annual leave. Article 10 of the National Agreement and the *Joint Contract Administration Manual (JCAM)* establish the basic ground rules for vacation planning. Local memorandums of understanding define vacation planning at the local level.

Annual Leave Accrual. Full-time letter carriers earn annual leave based on their years of creditable service. Sub-chapter 512.311 of the *ELM* outlines the three leave categories. Category 4 employees with fewer than three years of creditable service earn four hours of leave for each full biweekly pay period (13 days per 26-period leave year). Category 6 employees with at least three years but fewer than 15 years of creditable service earn six hours for each full biweekly pay period plus four hours in the last full pay period of the calendar year (20 days per 26-period leave year). Category 8 employees with 15 years or more of creditable service earn eight hours for each full biweekly pay period (26 days per 26-period leave year).

Full-time career employees are credited at the beginning of the leave year with the total number of annual leave hours that they will earn for that leave year. The new leave year begins January 7, 2006 which is the first day of the first complete pay period of the new calendar year.

Part-time employees also earn annual leave based on their years of creditable service; however, part-time career employees' annual leave is credited based on the number of hours in which they are in pay status (see Exhibit 512.312). Leave accrues and is credited in whole hours at the end of each biweekly pay period.

Annual leave selection normally begins within a defined "choice period," provided for in Article 10, Section 3.C of the *National Agreement* and further defined in the *JCAM*:

Duration of choice period. The provisions of this section should be read in conjunction with any applicable Local Memorandum of Understanding (LMOU) provisions negotiated pursuant to Article 30, Section B.(5). Article 10, Section 3.C recognizes that the choice vacation period(s) may vary among installations. This section empowers local installation heads and branches to engage in local implementation under

Article 30 to determine the duration of the choice vacation period. The duration varies from one geographical section of the country to another, and among local unions. During implementation, the period's duration is closely related to the issue of how many carriers are permitted to take vacation during the choice period—a subject under Article 10, Section 3.D.1 and 2, and Article 30, Section B.9.

Annual leave will be granted in accordance with Article 10, Section 3.D which establishes that those employees who have less than three years of creditable service will be granted a maximum of 10 continuous days of annual leave. Section 3.D.2. establishes that those employees with more than three years of creditable service will be granted a maximum of 15 continuous days of annual leave for their choice vacation period selection(s).

These provisions do not foreclose the right of an employee to request additional continuous annual leave in accordance with the maximum number of days applicable in Article 10, Section 3.D.1 or 3.D.2. Nor does it preclude an employee being granted additional annual leave during the choice vacation period(s) if there are fewer employees on annual leave than the maximum number or percentage negotiated in a LMOU. The procedure for choosing annual leave in other than the choice period is defined in the *JCAM* Article 10, Section 4.C:

Applying for annual leave outside choice period. The provisions of this section should be read in conjunction with Article 10, Sections 3.A and 3.D.4 and any applicable LMOU provisions established pursuant to Articles 30, Section B.12. The LMOU may provide for two different kinds of leave rules under Article 30.B.12:

(a) Selections outside the choice period. Many LMOUs have established a second round of bidding immediately following the first, enabling carriers to make advance vacation selections during times *outside* the choice vacation period (or during any remaining time during the choice period).

(b) Other requests for annual leave. In addition, a LMOU may specify rules governing other requests for annual leave made as the need arises throughout the year rather than through the annual vacation bidding process. A typical LMOU might specify that such leave requests must be made prior to the posting of the next week's schedule. It also might specify how long management has to reply to such requests, set forth procedures for handling daily leave, and specify priorities—by seniority or first-come, first-served—for both advance and daily requests for annual leave. ☒