

NATIONAL ASSOCIATION OF LETTER CARRIERS

CONTRACT ADMINISTRATION UNIT

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ARTICLE 7, SECTION 1.B.1 HIRING OF CASUALS "IN LIEU OF" CAREER EMPLOYEES

NALC and two other postal unions recently won a historic arbitration victory by establishing powerful limitations on the hiring of casuals "in lieu" of career employees. National Arbitrator Shyam Das sustained the positions of NALC, APWU and the Mail Handlers (NPMHU) that Article 7.1.B.1 prohibits management from hiring casual employees as substitutes for full- or part-time career employees. C-22465, August 29, 2001, available on NALC's website <http://www.nalc.org> under Contract Administration/Arbitration.

This paper outlines Arbitrator Das's award and provides advice to union representatives who seek to enforce Article 7.1.B.1's limitations on casual hiring.

1. THE CONTRACT LANGUAGE

Article 7.1.B.1 is part of Article 7.1.B, Supplemental Work Force, which defines and limits the employment and use of casual employees—the "supplemental workforce."

B. Supplemental Workforce

*7.1.B.1. The supplemental work force shall be comprised of casual employees. **Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees.***

7.1.B.2. During the course of a service week, the Employer will make every effort to insure that qualified and available part-time flexible employees are utilized at the straight time rate prior to assigning such work to casuals.

7.1.B.3. The number of casuals who may be employed in any period, other than December, shall not exceed 3½% of the total number of employees covered by this Agreement.

7.1.B.4. Casuals are limited to two (2) ninety (90) day terms of casual employment in a calendar year. In addition to such employment, casuals may be reemployed during the Christmas period for not more than twenty-one (21) days.

The highlighted sentence has been present in the national collective bargaining agreements of NALC, the APWU and NPMHU since postal collective bargaining began in 1971. The language's meaning had been the subject of numerous disputes which had escaped definitive resolution until Arbitrator Das's award.

2. THE DAS AWARD

The Dispute

In the national-level hearing before Arbitrator Das, the three postal unions took the same essential position on Article 7.1.B.1, arguing that the language established a separate and independent management obligation to limit the hiring of casuals—a limitation in addition to the national 3½ percent national casual cap of 7.1.B.3.

The Postal Service opposed, arguing that Section 7.1.B.1:

... relates solely to the number of casual employees that may be hired and to the limited duration of their employment. Thus, a violation of the National Agreement with respect to the "employing in lieu" of provision can occur only when either the allowable percentage or the limited duration is exceeded.

In short, USPS argued that Section 7.1.B.1 imposed no restriction on management other than those already imposed by Sections 7.1.B.2, 7.1.B.3, and 7.1.B.4. In the unions' view, acceptance of management's interpretation would have rendered Article 7.1.B.1 meaningless.

The Interpretive Record

Arbitrator Das reviewed thoroughly the history of Article 7.1.B.1 and its interpretation over the three decades of postal collective bargaining. The provision was the subject of previous national awards written by such leading arbitrators as Howard Gamser and Richard Mittenthal. It was also the subject of a memorandum issued by postal headquarters management and a number of national settlements and regional awards.

Mittenthal award. One key decision was C-13393, a January 29, 1994 award by Richard Mittenthal. Mittenthal was addressing the question of whether management should pay a monetary remedy at the national level for acknowledged violations of the then-5 percent national casual hiring cap of Article 7.1.B.3. Significantly, Mittenthal separated the 7.1.B.3. national cap conceptually from the "essentially local" nature of 7.1.B.1 violations:

This [management] argument is not persuasive. The section 1.B.1 restriction can be invoked when Management hires casual employees "in lieu of..." career employees. That is a matter to be determined by conditions existing at a particular time at a particular postal facility. A violation of IB1 can occur at the local level even in an accounting period in which the national casual ceiling of 5 percent has been honored. For

the casual ceiling is a Postal Service obligation beyond the essentially local obligation found in 1B1.

...

The Downes Memorandum. The unions also submitted a nationwide instruction issued by headquarters postal manager William Downes in 1986, known as the "Downes Memorandum." The memorandum included this language:

Additionally, questions have arisen regarding the proper utilization of casuals as a supplemental workforce. Generally, casuals are utilized in circumstances such as heavy workload or leave periods, to accommodate any temporary or intermittent service conditions; or in any other circumstances where supplemental workforce needs occur. Where the identified need is for other than supplemental employment the use of career employees is appropriate.

The unions argued that this instruction was not only issued by the highest levels of the Postal Service, but also was used to settle a series of Step 4 Mail Handlers agreements over several years. (See also M-01354, a 1986 Step 4 settlement of an APWU grievance.)

Grievance Sustained

Arbitrator Das ruled forcefully for the unions in an award that tread a firm path through the 30 years of precedent and the parties' conflicting arguments. Das began his discussion by referring to the second sentence of Article 7.1.B.1 and declaring, "These few words have bedeviled the parties off and on for the past thirty years."

Das found that Article 7.1.B.1 clearly establishes an independent violation which is entirely separate from the nation hiring cap:

Adoption of the Postal Service's position ... would read out of the National Agreement a separate restriction on casuals, which, as Arbitrator Mittenthal points out,

imposes an essentially local obligation, separate and apart from the National casual ceiling in Article 7.1.B.3. Under the Postal Service's position, to take an extreme example, the Postal Service could staff an entire facility with a succession of casual employees on an indefinite basis, provided it did not exceed the National casual ceiling, which hardly seems consistent with the language in Article 7.1.B.1....

The Award

Arbitrator Das wrote an award that resolved the questions before him powerfully and definitively in the unions' favor. The award (below) makes crystal-clear the meaning of Article 7.1.B.1. It establishes the independent force of the "in lieu of" restriction on casuals, explicitly defines "employed" as "hired" and "in lieu of" as "instead of, in place of, or in substitution of," and adopts language from the Downes Memorandum as a jointly reached understanding of the operation of Article 7.1.B.1:

Award

Article 7.1.B.1 of the APWU National Agreement (and the corresponding provision in the NALC and NPMHU National Agreements) establishes a separate restriction on the employment of casual employees, in addition to the other restrictions set forth in other paragraphs of Article 7.1.B.

The Postal Service may only employ (hire) casual employees to be utilized as a limited term supplemental work force and not in lieu of (instead of, in place of, or in substitution of) career employees.

The following formulation in the May 29, 1986 Downes Memorandum sets forth a jointly endorsed understanding as to the circumstances under which it is appropriate to employ (hire) casual employees to be utilized as a limited

term supplemental work force consistent with Article 7.1.B.1:

Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate.

Retroactive Remedies Available

Arbitrator Das refused the Postal Service's request that he designate his interpretation of Article 7.1.B.1 as being prospective only. The Postal Service had argued that if Das should rule against the employer, he should not permit damages in cases filed previously and held for resolution in the national case.

As a result of this holding, NALC may seek monetary remedies in cases held for the Das national decision which involved violations that predated the award. Of course, NALC also may file new grievances based on the Das decision.

No Formula for Violations

Arbitrator Das declined to set forth guidelines for determining when, under a particular set of circumstances, the hiring of casuals would violate Article 7.1.B.1:

As Arbitrator Mittenthal noted, a claim that casuals have been "employed in lieu of" career employees is "a matter to be determined by conditions existing at a particular time at a particular postal facility." To paraphrase Gamser I [C-00114, National Arbitrator Gamser, June 28, 1973], the question is whether they were employed or hired for the purpose of being utilized as a limited term supplemental work force or

instead of, in place of, or in substitution of career employees.

3. ADVICE ON GRIEVING

VIOLATIONS OF ARTICLE 7.1 .B.1

Because Arbitrator Das did not provide guidelines, NALC representatives cannot consult a simple formula to determine precisely when a violation of Article 7.1.B.1 has occurred. However, NALC contract enforcers may find the following guidelines useful in evaluating a potential violation of Article 7.1.B.1.

Burden of proof. First, it is important to remember that such cases are contractual rather than disciplinary in nature, so the union bears the burden of proof.

Basic information. The union must obtain documentation from management showing, typically, the following:

- When casuals were hired
- What hours the casuals worked
- How many hours the casuals worked during different periods
- The availability of other letter carriers to perform the work (including career carrier complements and work hours, including overtime hours worked)

This will require information requests—in writing—for such items as: Form 50 for each casual hired, time records including the Employee Activity Reports (EAR), PS Forms 3997, Unit Daily Record (showing daily work in the unit). The various documents and data will have to be organized to form a clear picture of casual hiring and employment over the period in question.

Union representatives also should question supervisors about casual hiring. “Why were these casuals hired? What was the reason for hiring them in this station?” Stewards may receive clear answers that establish a clear violation, or vague answers, or a great deal of hemming and hawing. In any event, it is a good idea to ask first and write down the precise responses given.

Countering management’s justifications.

Local managers may state justifications for the hiring of casuals—reasons that might possibly pass muster under the Das award, such as a temporary and unexpected spike in mail volume, high leave usage during the summer months, or the sudden and temporary loss of several carriers who have been called to active military duty from the Reserves.

Whatever justifications management offers, it is the union’s job to evaluate the reasons and decide whether or not to accept them. If the union decides to reject management’s justification it must collect additional data to counter management’s claims. For instance, if management lost two carriers to the reserves but hired four casuals who worked full-time for the next six months, NALC must collect information pointing out the discrepancy.

Strongest case—year-round employment.

The language of the Das award makes clear that casuals should be hired to take care of temporary problems, generally. So NALC’s strongest case under Article 7.1.B.1 occurs when management has hired casuals in a station on a year-round basis. If a single station has been staffed continuously with casuals, management will have a hard time explaining how the casual employment was “temporary” or “supplemental.”

Even where NALC can show that casuals worked year-round, the union should not rely on that powerful fact alone. To meet management claims of unusual workforce needs, NALC should also collect the types of information listed at left.

Other circumstances. It is impossible to give advice on the huge variety of circumstances that may surround the hiring and use of casuals in the carrier craft. The best advice is to reason from the language of the contract and the Das award, which defines casual employees as a “limited term supplemental work force” and goes on to explain:

Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur.

To build a 7.1.B.1 case, consider whether the casual employment you are challenging appears justified by this language, or banned by it. For instance, ask whether casuals perform work that other employees could be performing instead. If so, then look for justifications that management might raise in its defense. Has there been a temporary period of heavy leave or workload, or some other temporary or intermittent condition that otherwise required casual work hours to get the job done? Or could career employees have done the work?

Likely management arguments. Management may oppose an NALC 7.1.B.1 grievance by arguing that certain routine workforce needs are actually unusual and require the hiring of casuals. For instance, management may claim that casuals are needed year-round to replace other carriers who take sick and annual leave. Or management might argue that casuals were hired because letter carriers were working a lot of overtime hours, or because of seasonal fluctuations in mail volume.

The union should oppose such justifications using two arguments. First, these types of workforce needs are either common or continuous in nature and thus entirely foreseeable. Because they are foreseeable and routine, they cannot justify the hiring of casual employees. Second, the Postal Service has an entire category of workers—part-time flexible employees—whose job it is to fill in when full-time carriers are absent, and to fill in when overtime work is required. The huge PTF workforce gives management a great deal of flexibility in adjusting work hours to workload requirements.

Precedent. NALC representatives can also learn a great deal by examining earlier, regional awards that upheld NALC's position on Article 7.1.B.1. Particularly useful awards include: C-19923, Arbitrator Nancy Hutt, September 5, 1999 (more on this case below); C-18905, Arbitrator Thomas Levak, September 17, 1998; C-20309, Arbitrator William Eaton, May 22, 1995; C-20323(A&B), Arbitrator William Eaton, January 24, 1994 & May 17, 1995; C-20324, Arbitrator Robert Foster, July 25, 1992; C-20325, Arbitrator Earnest Marlatt, December 13, 1994.

As always, when in doubt NALC representatives seeking advice should consult with branch officers and the NALC national business agent's office.

Remedies in Article 7.1.B.1 Cases

As Arbitrator Das noted in his award, "the Union has the burden of proving a violation of Article 7.1.B.1." This is generally true in contract cases, and also generally true with respect to the remedy in contract cases. However, an Article 7.1.B.1 violation raises an unusual question of remedy, for the violation harms the entire bargaining unit rather than any particular employee.

Although Arbitrator Das did not address remedy in his award, another national arbitrator has spoken forcefully on the issue of remedy in a case involving violations of Article 7.1.B's limitations on casual employment. National Arbitrator Mittenthal addressed violations of the national percentage cap on casual employment (Article 7.1.B.3) in C-13393, a 1994 national award cited above. Mittenthal's discussion of remedy is particularly instructive for those facing remedial questions in 7.1.B.1 cases.

Monetary remedy is due even without proof of specific harm to individuals. Most important, Mittenthal specifically rejected a Postal Service argument that no monetary remedy was due in the case because it was not possible to identify which employees were harmed by the violation or to measure the exact amount of the harm caused by the casual employment violations. Mittenthal did acknowledge that very specific harm to particular employees could not be proved:

... Hence, there is no way to identify which bargaining unit employees were harmed by excessive casual usage. Moreover, there are evidently no pay or work records that would prove particular employees were available and willing to work at times when excess casuals were on the job. In short, the possibility of naming those who were injured by the casual violations is slim indeed.

But Mittenthal did not let the Postal Service off the hook simply because specific harm could not be proven:

None of this, however, warrants denying the Unions a remedy in this case. The Postal Service was guilty of a continuing violation

... Some form of money remedy is plainly justified.

The arbitrator decided to remand the remedy issue to the parties for resolution, making what he called a "final observation":

It may not be easy to construct a money remedy or to identify the injured employees. But the parties have been confronted in the past by remedy problems every bit as complicated as this one and they have been able through hard work and imagination to find a mutually acceptable solution. ...

Following the Mittenthal award the national parties did meet and hammer out a remedy agreement (M-01257). The agreement, recognizing that harm to specific employees might be impossible to prove, awarded a flat monetary amount (\$15.10 per accounting period) to each bargaining-unit letter carrier in those installations in which the national casual cap was exceeded. In this fashion the parties provided a remedy to the entire complement of affected bargaining-unit employees. The parties noted that the remedy was solved by "devis[ing] a methodology which is both administratively feasible and best approximates the impact that excessive casual usage may have had on different groups of employees ..."

In constructing a grievance challenging USPS violations of Article 7.1.B.1, the union should provide whatever evidence of specific harm that may be available. However, the union should be ready to cite the Mittenthal award for the proposition that a monetary remedy is due for violations of contractual limitations on casual employment *even where specific harm to specific individuals may be difficult or impossible to show*. Violations of the limits on casuals cause harm to the bargaining unit as a whole, even where specific proof of harm is not available.

Hour-for-hour remedy. Each improper casual workhour is an hour taken from career employees. So union representatives should demand, in addition to the usual make-whole remedy, a specific request for an hour-for-hour monetary remedy—that is, one hour of career letter carrier wages for each hour wrongfully worked by casuals.

4. CANOGA PARK—A POWERFUL CASE OF ARTICLE 7.1.B.1. VIOLATIONS

As noted, prior to the national arbitration over Article 7.1.B.1, several regional arbitrators had heard disputes over the same issue. One noteworthy regional award grew out of a dispute in Canoga Park, California. C-19923, regional Arbitrator Nancy Hutt, September 5, 1999.

The letter carriers in Canoga Park aggressively pursued the Postal Service's increasing and year-round use of casuals during a period when management also reduced the hiring of career employees. In August, 1994 the Canoga Park Post Office carrier complement—management's figure for authorized letter carrier staffing—was 152 full-time and 19 part-time employees. Management used no casuals until February, 1995, when casual hiring began and then escalated. NALC filed a grievance in May, 1996 claiming the casuals were not hired as a "limited term supplemental workforce," but rather were hired "in lieu of full or part-time employees" in violation of Article 7.1.B.1.

A well-developed factual record. In the regional hearing both NALC and the Postal Service made many of the same arguments that were made later at the national hearing before Arbitrator Das. A major difference, however, was that the regional case involved a well-established factual record rather than a purely interpretive dispute over the meaning of Article 7.1.B.1.

The facts were powerful. Local management in Canoga Park hired between 4 and 12 casuals and utilized them continuously for four years. The effects on the career workforce were obvious. The total career complement in November, 1996 was 160 employees, 11 fewer than in 1994. From 1995 through 1998, 5 career employees were hired and 3 PTFs were promoted to regular.

Then in 1998 management reversed itself and stopped hiring and using casual carriers in Canoga Park. In that year management hired 17 career employees and promoted 20 PTFs to regular. By the time of the April, 1999 regional arbitration hearing, the career complement figure had returned to the 171 level with no casuals employed.

NALC presented evidence showing several different types of harm resulting from the violation: PTFs who were not promoted to regular, career employees who were required against their will to work overtime and on holidays, a reduction in vacation slots and reduced incidental leave opportunities. The union argued that the arbitrator had the inherent right to fashion an appropriate remedy.

Regional Arbitrator Hutt sustained the grievance, ruling for NALC on the contractual issue and pointing to the powerful facts of the case:

The constant employment and utilization of casuals over a four year period cannot be considered the use of a "limited term supplemental work force." In the case at hand, once the use of long-term casuals ceased, twenty (20) PTF's were promoted to regular status and seventeen (17) PTF's were hired at the Canoga Park Post Office. This uncontested

factual circumstance certainly leads one to believe the casuals were employed in lieu of full or part-time employees.

Arbitrator Hutt also ordered a monetary remedy. She ordered the parties to calculate the number of hours worked by casuals at Canoga Park between April, 1996 and April, 1999. She further directed them to meet and confer to resolve the amount of money due. The arbitrator retained jurisdiction to resolve any disputes concerning the remedy.

By any reasonable calculation, the remedy should involve a substantial sum of money. The Postal Service refused to agree on a remedy, instead insisting that the interpretive issue of Article 7.1.B.1's meaning first be arbitrated at the national level. The ultimate result was the national Das award, fully upholding Arbitrator Hutt's conclusions and establishing the union's position as the definitive national interpretation of Article 7.1.B.1. At the time of publication, Arbitrator Hutt was poised to deliver a decision on the remedy issue.
