NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between **AMERICAN POSTAL WORKERS UNION** and UNITED STATES POSTAL SERVICE with NATIONAL ASSOCIATION OF LETTER CARRIERS (Intervenor) and NATIONAL POSTAL MAIL HANDLERS UNION (Intervenor)	) Case Nos.	H7C-1K-C 31669, **et. al.**

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the American Postal Workers Union:
Mr. Lee W. Jackson

For the U.S. Postal Service:
Mr. Kevin B. Rachel
Ms. Marta Erceg

For the National Association of Letter Carriers: Mr. Keith E. Secular

For the National Postal Mail Handlers Union: Mr. Francis R.A. Sheed

PLACE OF HEARING: Washington D.C.

DATES OF HEARINGS: March 15, 1994
April 15, 1997

POST-HEARING BRIEFS: August 4, 1997

RELEVANT CONTRACTUAL PROVISIONS: Articles 3, 19, and 39; POM, Chapter 7; EL-827, § 120; EL-303, § 110

CONTRACT YEAR: 1987-90 and 1991-94.

TYPE OF Grievance: Contract

AWARD: Grievance denied.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the grievances are denied consistent with the analysis in this report. It is so ordered and awarded.

Date: 11-14-97

Carlton J. Snow
Professor of Law

NATIONAL ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN AMERICAN POSTAL WORKERS UNION AND UNITED STATES POSTAL SERVICE WITH NATIONAL ASSOCIATION OF LETTER CARRIERS (Intervenor) AND NATIONAL POSTAL MAIL HANDLERS UNION (Intervenor) (Case Nos. H7C-1K-C 31669; H7V-3S-C 40533; H7V-1K-C 37022; HOV-3E-C 3100; AND H7V-1N-C 33344) (OF-346 LICENSE GRIEVANCE)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to two collective bargaining agreements between the parties effective from July 21, 1997 through November 20, 1990 and from June 12, 1991 through November 10, 1994. Hearings in this matter took place on March 15, 1994 and April 15, 1997 in a conference room of Postal Headquarters located in Washington, D.C. The first hearing addressed the issue of arbitrability, and the arbitrator found the matter to be arbitrable at the national level. The second hearing examined the merits of the case. Mr. Lee W. Jackson, an attorney with the law firm of O'Donnell,

Schwartz & Anderson in Washington, D.C., represented the American Postal Workers Union. Mr. Kevin B. Rachel, Labor Relations Counsel, and Ms. Marta Erceg, Labor Relations Attorney, represented the United States Postal Service. Mr. Keith E. Secular, attorney with the law firm of Cohen, Weiss & Simon in New York City, represented the National Association of Letter Carriers. Mr. Francis R. A. Sheed, with assistance from Mr. Bruce R. Lerner, attorneys with the law firm of Bredhoff & Kaiser in Washington, D.C., represented the National Postal Mail Handlers Union.

The hearings proceeded in an orderly mannner. The parties had a full opportunity to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. A reporter from Diversified Reporting Services, Inc., recorded the hearing and submitted a transcript in the second hearing of 219 pages. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter properly had been submitted to arbitration and that there were no further issues of substantive or procedural arbitrability to be resolved. They elected to submit the matter on the basis of evidence presented at the hearing as well as post-hearing briefs. The arbitrator officially closed the hearing on August 4, 1997 after receipt of the final post-hearing brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Did the Employer violate the parties' National Agreement by issuing OF-346 licenses which extended driving privileges to bargaining unit employees holding positions which do not mandate such driving duties? If so, what shall the remedy be?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

D. To determine the methods, means, and personnel by which such operations are to be conducted.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

ARTICLE 39 - MOTOR VEHICLE CRAFT

Section 3. Special Provisions

E. All motor vehicle craft positions listed in the P-1 Handbook, designated to the motor vehicle

craft, shall be under the jurisdiction of the Motor Vehicle Division of the American Postal Workers Union, AFL-CIO.

F. When filling details to bargaining unit work in the Motor Vehicle Craft, the Employer shall give first consideration to the assignment of available and qualified motor vehicle craft employees from the immediate work area in which the detail exists.

IV. STATEMENT OF FACTS

In this case, the parties submitted five consolidated grievances that address driving privileges. In March of 1994, the arbitrator concluded that the dispute is arbitrable at the national level. On April 15, 1997, the parties submitted the merits of the case to the arbitrator.

In these grievances, the American Postal Workers Union challenges the Employer's practice of issuing OF-346 drivers' licenses to employees whose jobs do not expressly include driving duties. The issue is quite narrow, and the American Postal Workers Union emphasized that it is not raising a jurisdictional claim with regard to driving duties per se. It is not the duties themselves that elicited a challenge from the American Postal Workers Union. What the APWU challenges is the right of the Employer to authorize particular workers to drive particular vehicles. All parties to the proceeding agreed to the narrow definition of the issue before the arbitrator.

The American Postal Workers Union initially filed the

five grievances in 1990 and 1991. Each grievance arose in a different location when the Employer issued OF-346 drivers' licenses with vehicle endorsements to employees whose Position Descriptions did not require them to drive the particular vehicle endorsed by the license. At that point in time, an employee was required to have an OF-346 driver's license with appropriate endorsement in order to drive a vehicle on the job. The Employer granted endorsements for specific vehicles on the basis of training, experience, and/or other licenses already held.

Since the Union filed the grievances, the Employer discontinued using the OF-346 driver's licenses. Management replaced it with a simpler certification process. Management also abolished enabling handbook regulations in EL-827 and replaced them with Handbook TD-087. The new handbook does not contain parallel language about surrendering one's driver's license or certificate. The arbitrator did not receive a copy of the replacement handbook.

The American Postal Workers Union filed the first of the five grievances on June 12, 1990 in Manchester, New Hampshire. (See Case No. H7V-1K-C 31669). In this case, the Manchester Area Local of the APWU filed a class action grievance contending that Mail Handlers held OF-346 licenses with endorsements to drive two-ton and five-ton trucks, despite the absence of driving duties in their Position Descriptions. Management had issued 17 Mail Handlers such licenses based on a call for volunteers. (See Tr. 133.) Although the facility in Manchester,

New Hampshire employed no motor vehicle operators, it did employ approximately 18 mechanics and support personnel within the Motor Vehicle Craft. (See Tr. 135.) The APWU requested that management require Mail Handlers to surrender OF-346 licenses or endorsements for individuals without driving duties on their bid assignments and that the Employer comply with Section 444 of the EL-827 Handbook in regard to driver selection, training, testing, and licensing. The Employer denied the grievance and argued that an absence of driving duties did not preclude management from issuing driving licenses to Mail Handlers.

The APWU filed the second grievance in July of 1990 with regard to a complaint in Hackensack, New Jersey. (See Case No. H7V-1N-C 33344.) The complaint was that Mail Handlers had been issued OF-346 licenses to drive five-ton or larger vehicles. Specifically mentioned in this particular grievance was the fact that Mail Handlers were assigned work (transporting mail) which allegedly should have been offered to Motor Vehicle Craft employees. (See APWU Exhibit No. 5, p. 7.) Management denied this grievance as well and relied on managerial discretion, an absence of contractual limitations on issuing driver's licenses, and on the fact that the Motor Vehicle Craft held no exclusive right to "driving" work. (See APWU's Exhibit No. 5, p. 2.)

The Union filed a third grievance on February 14, 1991 in Bangor, Maine. (See Case No. H7V-1K-C 37022.) As in the other cases, the issue remained whether the Employer had

authority to issue OF-346 licenses to Mail Handlers who have no driving duties. The Employer denied the grievance and asserted that management had complied with the parties' agreement as well as the fact that the grievance allegedly was untimely. The practice of having Mail Handlers shuttle mail to an annex had been in effect since 1985.

The Union filed the fourth grievance on March 13, 1991 in West Palm Beach, Florida. (See Case No. H7V-3S-C 40533.) The issue again was whether Mail Handlers had a right to hold OF-346 driver's licenses with endorsements to drive five-ton and seven-ton vehicles. Mail Handlers in this locale apparently drove seven-ton trucks on a reasonably regular basis. (See APWU's Exhibit No. 2, pp. 11 and 20.) The Employer denied the grievance.

The final grievance in the group consolidated for arbitration arose in Atlanta, Georgia on August 26, 1991. (See Case No. H0V-3E-C 3100.) The issue in this case focused on the operation of five-ton, seven-ton, and nine-ton vehicles by employees who had no driving duties in their job descriptions, including Clerks, Mail Handlers, and Letter Carriers. At Step 3 of the grievance procedure, the Union argued that "all MVS work should be assigned to MVS employees who are not being used to the maximum extent possible prior to such outside assignments." (See APWU's Exhibit No. 4, p. 11.) As with the four prior cases, the Employer denied the grievance; and the parties consolidated all five denials for consideration in arbitration at the national level.

The five grievances before the arbitrator all involve the right of the Employer to issue licenses and endorsements that allow Mail Handlers and Letter Carriers to drive five-ton trucks or larger. The respective employees held positions that did not include driving duties in either the Standard Position Descriptions or specific local bid assignments. Position Descriptions for Mail Handlers made no reference to driving duties, other than operating a fork lift; and job requirements did not include driving experience or licensing. (See APWU's Exhibit No. 11.) The Position Description for City Carrier includes delivering mail "on foot or by vehicle." (See APWU's Exhibit No. 12.) But a Carrier is required to have a valid driver's license and must pass the road test to be issued the appropriate driver's license.

Workers in the Motor Vehicle Service include two groups of employees, namely, Vehicle Maintenance workers and Postal Vehicle Service workers. Workers within Postal Vehicle Service include the positions of Motor Vehicle Operators and Tractor Trailer Operators. In contrast to the absence of driving duties for Mail Handlers, Position Descriptions for Motor Vehicle Operators and Tractor-Trailer Operators are specifically and predominantly concerned with operating a mail truck to transport mail in bulk. (See APWU's Exhibit No. 10.) Requirements for such positions include one year of experience driving five-ton vehicles, a valid and appropriate driver's license, and certain minimum physical abilities. In addition, employees must be able to pass a road test and,

otherwise, to qualify for the appropriate governmental driver's license.

Evidence submitted to the arbitrator showed that management often assigned driving duties involving five-ton vehicles and larger to employees outside of the motor vehicle craft. Situations in which this might occur include circumstances such as (1) a Letter Carrier needing to use a larger vehicle to deliver substantial quantities of mail to one facility, such as the official mail messenger service in Washington, D.C.; (2) an employee in a unit with no motor vehicle service employees regularly transporting mail or equipment to an airport for other facilities; and (3) a Mail Handler or other employee filling in for Motor Vehicle Service employees who are unavailable. (See Tr. 182, 192, 207.) Specific duties for a worker might range from a brief trip across a parking lot to an assignment of driving for a full eight-hour day on the road. (See Tr. 181.) These facts provided the context for the dispute which proceeded to arbitration when the parties failed to resolve their differences.

V. ANALYSIS

A. Boundaries of the Dispute

1. The American Postal Workers Union

The American Postal Workers Union asserts that the Employer violated the parties' agreement by extending driving privileges to employees who are not required to drive. Such conduct allegedly violated Articles 19 and 39 of the parties' National Agreement in addition to a number of manuals and handbooks.

It is the belief of the American Postal Workers Union that "the extension of driving privileges to a bargaining unit employee for a particular postal vehicle is controlled by the postion that the . . . employee holds." (See APWU's Post-hearing Brief, p. 15.) According to the APWU, a worker's "position" is defined by both the official Position Description as well as the local bid assignment posted for a specific position. The APWU argues that Article 19, which incorporates relevant handbooks and manuals, has been violated. Such administrative regulations allegedly deny management the right to issue a driver's license to people whose job assignment does not include driving. Moreover, the APWU argues that a violation of a handbook, manual, or published regulation "constitutes a violation of the National Agreement itself." (See APWU's Post-hearing Brief, p. 16.)

The APWU relied on its interpretation of numerous provisions in the Employee and Labor Relations Manual in support of its contention that the absence of driving duties in a Position Description prohibits the Employer from granting

driving privileges to an employee. The purpose of a Position Description is:

> To describe three components of a position: (a) the primary assignment or basic function; (b) the tasks and skills involved in carrying out the primary assignment, and (c) the organizational relationship. (See APWU's Exhibit No. 9.)

Accordingly, the Union reasons that a Position Description which fails to include either driving duties as a primary assignment or as a task or skill involved in carrying out the primary assignment means that management should not grant driving privileges to a person holding such a position.

The American Postal Workers Union argues that the positions of both Mail Handler as well as Letter Carrier include limited driving duties. The driving duties of Letter Carriers allegedly are limited to two-ton, long-life vehicles. Duties of Mail Handlers allegedly are limited to forklift trucks. The APWU contracted such duties with those of a Level 5 Motor Vehicle Operator whose primary function is transporting quantities of mail by truck and whose Qualification Standards include significant experience and training on five-ton trucks. (In testimony from Mr. LaFauci, National Business Agent for the Motor Vehicle Division in the northeast region, the APWU does not contest the authority of Letter Carriers to drive five-ton and larger vehicles for the purpose of delivering mail but, rather, object to their involvement in transporting mail in bulk. (See Tr. 126.)

It is the belief of the American Postal Workers Union that Manual EL-303 supports a conclusion that the Employer

violated the parties' agreement in this case. Manual EL-303 lists qualifications necessary for positions under discussion in this case, and the Manual also makes provision for local exceptions to national standards. Under Section 142 of EL-303, management may add typing or driving requirements when filling a vacant position, if such action is "reasonably related to the efficient performance of the duties of the job" and if such work is "expected to be performed on a regular basis." (See APWU's Exhibit No. 13.) The APWU contends that Section 142 of EL-303 is the only way for management to add driving requirements to a position, and the APWU believes that such additions are strictly limited by requirements of EL-303. In particular, Section 142.5 of EL-303 states that "local officials may not modify or delete . . . existing requirements contained in official Qualification Standards," and Section 151 of EL-303 states that "no additions, deletions, or modifications (to Qualification Standards) are permitted." (See APWU's Exhibit No. 13.)

It is the contention of the APWU that the Employer did not comply with these administrative regulations because (1) no vacancies were filled; (2) driving five-ton vehicles was not "reasonably related to the efficient performance" of the jobs at issue; and (3) the driving duties were not "expected to be performed on a regular basis." According to the APWU, the Employer did not add driving duties to positions at issue in this case, and management allegedly could not have done so under Sections 142.1, 142.5, and 151 of the EL-303 Handbook.

The APWU, therefore, concludes that it was not possible for the positions of employees who received the disputed OF-346 licenses for five-ton vehicles legitimately to have included driving duties.

The APWU maintains that, by requiring certain employees to "obtain OF-346 licenses to drive vehicles not required by either their Standard Position Descriptions or their bid positions, also violated Section 142.5 and 151 of the EL-303." (See APWU's Post-hearing Brief, p. 21.) As support for its conclusion, the APWU offers a case in which the Employer and the APWU agreed that adding a driving requirement to a position must comply with Section 142 of the EL-303 Handbook. (See Case No. H4T-4L-C 28093.) In addition, the APWU relies on another case in which the parties agreed that "there is no provision for the addition of an item by local management to an established Position Description." (See Case No. H1C-5B-C 6155.)

The APWU also finds support for its position in Chapter 7 of the Postal Operations Manual. Chapter 7 of the Postal Operations Manual is entitled "Fleet Management" and covers policies and procedures for postal vehicles. The APWU relies on the definition of motor vehicle service in Section 714 of the POM, the driver categories described in Section 721 of the POM, and licensing regulations in Section 22 (drivers must be licensed). The APWU uses these provisions to buttress its conclusion that employees in nondriving positions must not be granted driving privileges by management.

In support of its theory of the case, the APWU also

relies on the EL-827 Handbook. The APWU argues that provisions in Section 120 with regard to "incidental drivers" operating only personal or passenger vehicles, when added to the training requirements as well as the definition of an OF-346 license, all give support to a conclusion that authorization to drive five-ton trucks and larger may be given only to employees whose job duties include such driving. The APWU anchors its argument with Section 444 of the EL-827 Handbook, a provision calling for the surrender of OF-346 licensing. It is the contention of the American Postal Workers Union that Section 444 requires the Employer to revoke the OF-346 license of employees who do not hold driving positions. The regulation lists as an occasion for such a revocation circumstances such as a transfer to a different MSC, or separation, a change to a nondriving position, or expiration of the license. The APWU, accordingly, theorizes that, when the Employer issues an OF-346 license to an employee in a nondriving position, it violates the EL-827 Manual, as well as (a) the position description, (b) the EL-303 Handbook, (c) the POM, and (d) the collective bargaining agreement as an entire document.

It is the belief of the American Postal Workers Union that three recent regional arbitration awards covering the same general issue now being considered at the national level provide an important source of guidance in this proceeding. They are the Germano Award, the Marx Award, and the Franklin Award. (See Case Nos. N7V-1E-C 31646; N7V-1N-C 32924; and NOV-1W-C 1576).

With regard to claims made by the Employer as well as the Intervenors, the American Postal Workers Union takes a defensive position. In response to the suggestion that the APWU has no standing to challenge the Employer's action because the licenses in question were issued to employees represented by other unions, the APWU asserts that its bargaining unit members, indeed, do have a stake in the outcome of the issue. According to the APWU, craft identity of its members is a distinct and significant interest; and that interest allegedly is threatened by the Employer's action. The APWU maintains that, in fact, more than craft identity is at stake in these cases. Work itself allegedly is being lost. The APWU maintains that, "to the extent that postal management licenses a Mail Handler or Letter Carrier to drive five- and seven-ton trucks, and thereafter employs them to perform that work, that much less work . . . will be performed by Motor Vehicle Craft employees within the AWPU's bargaining unit." (See APWU's Post-hearing Brief, p. 27.) The APWU also relies on a Gamser Award in 1980 and a Collins Award in 1986 as providing support for its contention that a remedy need not be directed at members of a party's bargaining unit in order for that party to have standing to pursue a case at the national level.

A further defense by the American Postal Workers Union focuses on the status of the EL-827 Manual and the OF-346 license procedure. Despite the fact that the Employer appeared to discontinue the license and to replace the manual in 1984,

the APWU contends that both continue to exist, as evidenced by references to them in other documents issued after 1994. If, merely for the sake of argument, the APWU were to concede that the EL-827 Manual and OF-346 licenses are obsolete, the Union continues to maintain that the issue remains active by virtue of the similar policies in the replacement manual as well as the new certification procedure. In fact, the American Postal Workers Union asserts that its suggested remedy (of revoking the licenses of employees in nondriving positions) easily could be revised to include surrender of vehicle certification. Accordingly, the APWU concludes that the issue is far from moot and should be resolved in its favor.

2. The Employer

The Employer raises several procedural and substantive challenges to claims of the American Postal Workers Union. First, the Employer argues that the APWU does not have standing to challenge the Employer's actions with regard to members of other bargaining units. It is the Employer's contention that Article 19 rights undermine the standing of the APWU to pursue this case. As management sees it, Article 19 limits the incorporation of manuals and handbooks to "employees covered by this agreement;" and, accordingly, the APWU allegedly does not have standing to enforce such manuals and handbooks against

employees covered by agreement with other unions.

More specifically, the Employer maintains that its decision to grant driving privileges to Mail Handlers and other employees has no direct effect on members of the APWU bargaining unit and that the Employer's theory finds support in the APWU's insistence that the dispute before the arbitrator is not concerned with jurisdictional issues. A contention that the Employer's action has a direct effect on APWU bargaining unit members would undermine the position of the APWU as to the jurisdictional issue, in the view of the Employer. It is the belief of the Employer that the APWU is using a "back door attempt" to claim more driving work without mounting a jurisdictional challenge. (See Employer's Post-hearing Brief, p. 8.) If the APWU is claiming that the Employer's decision authorizing Mail Handlers and Letter Carriers to drive five-ton trucks takes away work from its members, this allegedly is a jurisdictional dispute and, as such, must be resolved at the bargaining table, according to the Employer. If, however, the APWU is not claiming any injury due to a loss of work, the APWU lacks standing to pursue the matter, according to the Employer.

A second defense of the Employer takes issue with the APWU's characterization of Position Descriptions as a source of control over an employee's work assignment. The Employer asserts that "Job Descriptions are not determinative of the work that employees may perform," and management finds support for this position in a 1975 decision by Arbitrator Garrett

involving a jurisdictional dispute between the Mail Handlers Union and the APWU. (See Case No. AW-NAT-5753.) Arbitrator Garrett described as "unrealistic" an assertion that Position Descriptions can be used to determine jurisdictional claims. (See p. 50.) The Employer finds confirmation of its view in a later decision by Arbitrator Dobranski which allegedly asserts that Position Descriptions are not intended to restrict duties that an employee can perform. (See Case No. H4C-1K-C 33597.) The Employer concludes that employees may not be denied driving duties merely because such duties are not specifically listed in a Position Description. Management believes that this error in the APWU's theory of the case fatally flaws the Union's entire argument.

Third, the Employer argues that the grievances are moot. They allegedly are moot because, on January 27, 1994, management abolished the EL-827 Handbook and the OF-346 license at issue in this case. The Employer discounts the APWU's argument that proof of the continuing viability of the El-827 Handbook is found in a reference to the handbook in Article 29 of the latest agreement between the parties. The reference to the EL-827 Handbook in Article 29 of the 1994-98 agreement allegedly is obsolete and is explained by the fact that the parties did not renegotiate Article 29 in the last round of negotiation. It allegedly would produce an absurd result to infer an intention to retain the EL-827 Handbook from this clerical irrelevancy.

Management finds proof that the EL-827 Handbook and the

OF-346 license have been abolished in testimony from Mr. Jones of the Office of Safety and Risk Management. He asserted that his office no longer administers the EL-827 Handbook or issues Of-346 licenses. The Employer contends that the parties already have discussed and settled the issue of replacing the EL-827 Handbook with the TD-087 Handbook. The Employer further contends that, even though the Handbook was in effect at the time the APWU filed its grievances, the fact that the remedy it seeks is prospective in application only undermines the Union's case and would serve no purpose.

Even if the APWU's challenge is not moot and the Union has standing to pursue the matter, the Employer still contends that its action did not violate the parties' agreement. The Employer asserts that the purpose of Section 444 in the EL-827 Handbook was not to compel management to revoke OF-346 licenses but, rather, to allow management to exercise its discretion as to whether an employee should be licensed. It is the Employer's contention that evidence of intent and practice are pivotal to a correct interpretation of Section 444, especially in view of the ambiguity of language in the provision. It is the conclusion of the Employer that Section 444 should be interpreted as granting flexibility to management rather than limiting its discretionary authority.

Fifth, the Employer argues that provisions of the EL-303 Handbook relied on by the APWU fail to support the Union's theory of the case and, in fact, damage it. According to the

Employer, provisions in Section 142 of the EL-303 Handbook (covering proper procedures for adding requirements to a position) support management's contention that the Employer retains the discretion to add driving duties to a position, as long as management meets the "reasonableness and efficiency" requirement. Moreover, the Employer contends that Section 142 deals only with job requirements and does not address permission to perform a particular function. Accordingly, the Employer believes the provision is not directly relevant to grievances before the arbitrator.

Finally, the Employer argues that the position of the American Postal Workers Union is contrary to a past practice of the parties as well as to "operational realities of the industry." (See Employer's Post-hearing Brief, p. 16.) Evidence submitted to the arbitrator allegedly proved the existence of a long-standing past practice according to which Mail Handlers, Letter Carriers, and others have operated five-ton and larger vehicles for over 30 years. The Employer contends that this type of practice is crucial to its operation, especially in facilities where PVS employees may not be available. It is the belief of the Employer that at least five arbitration decisions between 1970 and 1987 support its view that management may either permit or require Mail Handlers and Letter Carriers to drive large vehicles. Management concludes that not only does the evidence prove the existence of the past practice but also that its continuation is vital to the efficiency of the Postal Service.

3. The National Association of Letter Carriers

The National Association of Letter Carriers argues that the dispute is moot. The dispute allegedly is moot because abolition of OF-346 licenses renders meaningless the requested remedy of revoking the disputed licenses. The NALC sees a narrowly defined issue in the case (whether Letter Carriers and Mail Handlers were properly issued licenses), and the narrow issue requires an equally narrow consideration of the "mootness" issue, according to the NALC.

Even if the dispute is not moot, the NALC argues that the grievances should be denied on the merits. It is the belief of the NALC that reliance on Position Descriptions to limit work assignments is contrary to precedent established in this industry through prior arbitration decisions. According to the NALC, arbitral precedent has concluded that "work assignment disputes are to be determined on the basis of established local practice." (See NALC's Post-hearing Brief, p. 3.)

According to the NALC's theory of the case, conduct of parties is crucial in this dispute as evidence of contractual intent. It also allegedly provided important evidence for resolving disputes in arbitration cases on which the parties relied in this case. According to the NALC, no evidence received by the arbitrator undermined the vitality of the course of conduct followed by the parties for many years. In the view of the NALC, no evidence established an exclusive right of employees in the APWU bargaining unit to perform

such work. Accordingly, the NALC argues that the case should be dismissed as moot or denied on the merits.

4. National Postal Mail Handlers Union

The National Postal Mail Handlers Union argues that the dispute in this case should not be approached as merely a technical question about who gets to drive but, rather, that it really is a disguised jurisdictional dispute. It is the belief of the NPMHU that only workers who are not in the APWU bargaining unit will be affected by the outcome of the case. Hence, the APWU allegedly has no standing to pursue the dispute. Licensing Mail Handlers and Letter Carriers is not covered by the APWU's agreement with the Employer, and the APWU has no right to interfere, according to the National Postal Mail Handlers Union. The NPMHU contends that Article 19 in the parties' agreement incorporates handbooks and manuals into an agreement only as they apply to relevant employees and, thus, do not apply to nonmembers of a bargaining unit.

The NPMHU also asserts the "mootness" argument based on the theory that the EL-827 Handbook is no longer enforced and OF-346 licenses are no longer issued. It is the position of the NPMHU that the remedy sought by the American Postal Workers Union (revocation of licenses) would have "no practical significance" because management has implemented a new procedure. (See NPMHU's Post-hearing Brief, p. 6.)

On the merits the NPMHU argues that the EL-827 Handbook did not require management to list particular driving duties on a Position Description or job posting before the Employer could issue an OF-346 license. Rather than focus on the surrender of licenses in Section 444, the NPMHU argues that relevant provisions in Section 420 regarding the issuance of licenses should be scrutinized. It is the belief of the NPMHU that Section 420 does not include any requirement that an employee's Position Description list driving duties. Section 420 lists a number of prerequisites, but there allegedly is no requirement that an employee's position must include driving duties. (See NPMHU's Post-hearing Brief, p. 7.)

The NPMHU also argues that Section 444 of the EL-827 Handbook did not list a "change of duties" as a reason to revoke an OF-346 license. Using the "surrender" provision in the regulation to make an argument for a licensing requirement is logically convoluted, in the opinion of the NPMHU. "It is not reasonable to believe that such a significant limitation on the issuance of licenses would have been addressed in such a backhanded, and indeed obscure manner" by placing such a requirement in the "surrender" provision, according to the NPMHU. (See NPMHU's Post-hearing Brief, p. 10.)

It is the belief of the NPMHU that the American Postal Workers Union incorrectly defines the term "nondriving position" as it is used in Section 444. Rather than a "driving position" being one in which driving is required, the NPMHU asserts that a "driving position" is "any postal position in which an

employee is either required or allowed to drive." (See NPMHU's Post-hearing Brief, p. 11.) A nondriving position, then, would be one in which an employee is neither required nor allowed to drive, according to the NPMHU; and the fact that the "surrender" provision was dropped completely when the TD-087 Handbook replaced the EL-827 Handbook implies that no licensing requirements were included in it, according to the NPMHU.

As the NPMHU sees it, many of the arguments by the APWU based on materials other than the EL-827 Handbook have more to do with the right to drive than they do with the right to be licensed. As such, such arguments allegedly raise jurisdictional issues and are not applicable to the narrow issue presented in this case. Even if applicable, they allegedly lack merit.

The NPMHU argues that Position Descriptions do not limit tasks to which employees may be assigned. According to the NPMHU, the purpose of provisions in the EL-303 Handbook for adding driving requirements to a job is to insure that applicants will not be required to meet unnecessary qualification standards. The purpose is not to prevent the Employer from allowing an employee to drive or to prevent management from making necessary work assignments, according to the NPMHU. In conclusion, the NPMHU believes that, even if the arbitrator reaches the jurisdictional issue inherent in the dispute, the grievances should be denied on the merits of the case.

B. The Issue of Mootness

Each party argued about the impact of mootness in this case. A moot question is one in which no controversy continues to exist or one in which a question has ceased to be significant because of changed circumstances. The changed circumstance in this case is the fact that the EL-827 Handbook and OF-346 licenses are no longer valid. But this fact does not necessarily support a conclusion that the controversy is settled or a mere abstraction. The basic outline of the question before the arbitrator is still to be found in the documents that replace the supplanted procedures. The issue before the arbitrator is far from settled and more than a hypothetical question.

The suggestion, however, that the dispute remains viable as a consequence of a stray reference to an abolished document in the 1994-98 agreement failed to be persuasive. The EL-827 Handbook continues to be listed in only one collective bargaining agreement with the Employer. The reference is not to be found in the agreement with the National Association of Letter Carriers or the National Postal Mail Handlers Union. Even if one were to accept the argument of the American Postal Workers Union in this regard, it would apply only to workers covered by the agreement.

Arguments made by the Employer, the National Association of Letter Carriers, and the National Postal Mail Handlers Union fail to be convincing on the issue of mootness. The issue advanced by the American Postal Workers Union arises in

the context of a justiciable controversy, and the conduct challenged by the American Postal Workers Union has far more than theoretical impact. Although the arbitrator did not receive a copy of the TD-087 Manual, it is clear from the record of the case that there is more at issue than a mere difference of opinion and that the revocation of OF-346 licenses and the replacement of certificates has a considerable effect on the American Postal Workers Union.

The issue of standing is less easily unraveled. The Employer argued that the American Postal Workers Union is without standing to pursue the grievances in this case. "Standing" is not a concept customarily applied in arbitration proceedings, although the concept has been applied from time to time to deny strangers access to the grievance procedure. For example, arbitrators have denied interest groups that were not a party to a collective bargaining agreement any access to the contractual grievance procedure. (See, e.g., Hotel Employers Association of San Francisco, 47 LA 873 (1966).) Likewise, retirees have been denied access to the grievance procedure if they sought to compel arbitration of a dispute not involving their employment status which arose after their retirement. (See, e.g., Van Dyne-Crotty, Inc., 46 LA 338 (1966).) To have standing in an arbitration proceeding, it is necessary to show that (1) there is no special reason to deny standing to a party; (2) conduct challenged by a party, in fact, has caused injury to the party; and (3) the interest a party seeks to protect is within that party's penumbra of

duties as an exclusive representative of a group of employees.

No one advanced any special reason for denying standing to the American Postal Workers Union in this case. Whether the APWU has an injury in fact is enmeshed in unraveling whether the dispute is really a jurisdictional matter. A "jurisdictional dispute" is one in which there are two or more competing claims to particular work. If it is clear that "the only existing dispute is between the Employer . . . and the other unions, there is no jurisdictional dispute." (See Developing Labor Law 1374 (1992).)

The American Postal Workers Union walked a thin line with regard to the issue of standing. It asserted what it contended is enough of a stake in the dispute to have standing but not too much of a stake to result in a jurisdictional dispute with other unions involved in the proceeding. Doubts in such matters should be resolved in favor of a finding of standing, and the dispute in this case seems to fall within the APWU's penumbra of duties as an exclusive bargaining representative. The issue of licensing drivers has potentially damaging implications for members of the APWU bargaining unit. Hence, the American Postal Workers Union has standing to assert its interest in the dispute.

C. Narrowness of the Issue

On one hand, the American Postal Workers Union argued that the issue in the case is restricted to examining circumstances in which the Employer is permitted to issue an OF-346 license. On the other hand, arguments of the APWU generally focused on the Employer's ability to require certain employees to be licensed. Issuing a license is not synonymous with requiring an employee to drive. At most, issuing a license is permitting an employee to drive. Arguments based on qualification standards and on local options for driving in the EL-303 Handbook as well as the description of motor vehicle service in the Postal Operations Manual fall into this category and fail to provide much guidance. For example, the APWU argued that the Employer did not comply with "local option" provisions in the EL-303 Handbook for adding driving requirements. But whether duties so added by management met conditions in the handbook provision is material only to the Employer's decision to add requirements to a position and not to a decision to authorize a license without requiring it. Furthermore, credible evidence established that the EL-303 Handbook provisions were intended, not as a curb on the Employer's right to assign work, but as a limitation on the Employer's ability to burden applicants with unnecessary qualifications.

Evidence submitted by the American Postal Workers Union failed to establish whether Mail Handlers and Letter Carriers in the five grievances had been required to drive, despite the absence of driving duties in their Job Descriptions or

bid assignments. It is clear that in the "Manchester" grievance, licensing was solicited by the Employer and was voluntary on the part of Mail Handlers. (See APWU's Exhibit No. 1.) Whether the Employer could require the workers to qualify for a driver's license is not the issue before the arbitrator. The focus of the dispute is on whether the Employer had a right to issue licenses to such workers. The APWU argued eloquently against the requirement of such driving qualifications and duties, but the case it made was considerably less persuasive against the authorization of such licensing.

Arguments advanced by the American Postal Workers Union based on the EL-827 Handbook "surrender" provisions as well as the treatment in the Employee and Labor Relations Manual of Position Descriptions are more directly relevant to the issue of licensing. Verbiage in these documents is subject to more than one interpretation. Such ambiguity opens the door to examining extrinsic evidence in an effort to understand the meaning of the provision, and this conclusion implicates standard rules of contract interpretation.

The parties struck a bargain according to which they gave the Employer an exclusive right "to determine the method, means, and personnel by which [postal] operations are to be conducted." (See Joint Exhibit No. 1, p. 5.) Such a right must be exercised pursuant to any limitation in the parties' agreement and must be consistent with applicable laws and regulations. This contractual language may not be ignored or treated as though it is merely grandiloquence. It is an

assumption of the common law of the shop that no part of the parties' agreement is superfluous. (See Restatement (Second) of Contracts, §203, 92 (1981).)

Does Section 444 of the EL-827 Handbook, as incorporated by Article 19 of the parties' agreement, restrict the Employer's right to issue OF-346 licenses? Section 444 governs the surrender of Of-346 licenses. Its language is ambiguous as to the extent of the Employer's discretion in effecting such surrender. The provision appears on its face to grant local management the ability to control the licensing of transferring employees. Evidence in the parties' relationship allows a contract reader to move beyong reliance on mere appearances. The doctrine of past practice long has been used by arbitrators as an interpretive aid to resolve contractual ambiguity.

In his seminal research on past practice, Arbitrator Richard Mittenthal espoused the use of past practice as a source of meaning from which to draw the essence of a collective bargaining agreement. He implicitly recognized the imperfect nature of words and concluded that it is logical to use conduct of the parties regularly repeated in response to a given set of circumstances as a means of clarifying ambiguous contractual verbiage. (See Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," in Arbitration and Public Policy Proc., Fourteenth Annual Meeting, National Academy of Arbitrators 30 (1961).) Courts have given an approving nod to the Mittenthal analysis. (See SFIC Properties,

103 F.3d 926 (9th Cir. 1996).) The heart of the Mittenthal analysis has remained unchanged for over three and a half decades. (See Sylvester Garrett, "Contract Interpretation," in Arbitration 1985: Law and Practice, Proceedings of the Thirty-eighth Meeting of the National Academy of Arbitrators 1, 140 (1986).)

A review of the parties' past practice reveals that Section 444 of the EL-827 Handbook has not been used to limit the ability of the Employer to authorize Mail Handlers, Letter Carriers, and other non-MVS employees to drive large vehicles. Issuing licenses to such employees has been common practice in many, if not most, postal installations for many years. Mr. Eddy, Transportation Specialist at Postal Headquarters in the Logistic Department of Motor Operations, testified that ignoring the past practice of the parties would have a "disastrous effect" on the efficiency of the operation, either because licensed drivers would be unavailable for necessary duties or because it would be inordinately costly to change the practice. (See Tr. 184-85.) The well-established past practice makes clear that Section 444 of the EL-827 Handbook does not require management to revoke the licenses of "nondriving" employees.

The American Postal Workers Union failed to be persuasive in its contention that Position Descriptions and qualification standards limit a Mail Handler's or Letter Carrier's work authorization. The APWU's theory of the case suggested that merely because a worker's duty is not listed or because an

individual is not "required" to qualify to drive, an otherwise qualified person must be prevented from being allowed to drive at all. A balance must be struck in a case of this sort between extremes. On one hand, it is important not to overly circumscribe management's discretion in a way that negatively affects efficiency and the productive operation of the Postal Service. On the other hand, management must not be left with such unbridled discretion that it is able to threaten certain jobs by abuse of its discretion.

A significant difference between driving duties about which the APWU complained in the five grievances and such duties listed in the Position Description for a Motor Vehicle Operator is that one can best be described as a minor, irregular task, while the other constitutes the primary function of a position. It clearly makes sense to list major duties and to require employees to be qualified in order to perform such duties. At the same time, it would not be sensible to require every Mail Handler and Letter Carrier to qualify to perform a minor duty that might never be needed by most employees in the classification. Absent express contractual limitations, management possesses the discretion to dictate when such a duty might be needed and whether enough qualified employees are available, should such a contingency arise. Managerial discretion, however, is not unlimited. It is tempered by the contractual intent of the parties, as evidenced by their past practice. There are additional limitations on opportunistic behavior inherent in the doctrine of good faith.

D. Not a Jurisdictional Issue

The parties agreed on the narrow issue before the arbitrator that focused on the Employer's right to license certain employees. At the same time, all acknowledged either tacitly or openly that the dispute also may involve jurisdictional implications with regard to management's authority to extend driving privileges. The dispute at this point in time, however, is not ripe for consideration as a jurisdictional conflict. There are not competing claims to the work at this point. Neither the National Association of Letter Carriers nor the National Postal Mail Handlers Union advanced arguments in this proceeding with regard to the contractual right of employees they represent to drive five-ton or larger vehicles. Such jurisdictional issues do not need to be addressed in order to resolve the narrow issue with regard to the Employer's right to license and have not been the focus of this review.

It, however, seems clear that the possibility of such a dispute overshadows these five grievances. Resolution of such a dispute might well depend on the materiality and significance of driving assignments. These no doubt would vary from facility to facility. The arbitrator did not receive significant evidence on this issue. As a consequence, the result in this case is not intended to presage the appropriate determination in a jurisdictional challenge, should it proceed to arbitration at this level.

E. Conflicting Regional Decisions

The American Postal Workers Union advanced three regional arbitration decisions in support of its theory of the case. In the Germano Award, an arbitrator concluded that the ability of the Employer to license Mail Handlers to drive five-ton or seven-ton vehicles, even if not required to do so and even if the driving were limited to emergencies, was denied by Section 444 of the EL-827 Handbook. (See APWU's Exhibit No.6.) Only Section 444 stood in the way of the Employer's discretion according to Arbitrator Germano. Arbitrator Germano reasoned that, if the Employer were to add incidental driving duties to a position, only passenger vehicles could be authorized. He reasoned that the labor contract's overall lack of clarity with regard to this issue meant that clear and specific language in Section 444 of the EL-827 Handbook must be given priority. Accordingly, he sustained the grievance and ordered the licenses to be surrendered.

In the Marx Award, the grievance focused on the retention of an OF-346 driving license by employees in the classifications of Mail Handler, Electronics Technician, Tool and Parts Clerk, General Mechanics, and Custodians. (See APWU's Exhibit No. 7.) Arbitrator Marx concluded that employees in the Custodian classification would be permitted to retain their driving licenses but that Mail Handlers would be required to surrender theirs. He based his conclusion on a finding that driving is not required in a Mail Handlers job classification and is not essential to performance of the work.

In the Franklin Award, the issue focused specifically on the Employer's authority to issue a driving license to Mail Handlers. The grievance was based on instances in which a Mail Handler transported mail to a branch station in a two-ton vehicle under emergency circumstances. Arbitrator Franklin concluded that driving duties of Mail Handlers were limited by the Position Description to driving forklift trucks only. She also concluded that, because the disputed work was infrequent and unexpected, the Employer failed to meet criteria for "local options" that permitted management to add driving duties. The arbitrator reasoned that, if driving is required in a position, the Employer should add the requirement by using proper procedures to do so. If such work is not required, the arbitrator found that the Employer should not issue a driving license. She granted the grievance and ordered the Employer to limit Mail Handler licenses to forklift trucks or passenger vehicle endosements only. Curiously, the order did not require Mail Handlers to surrender licenses already granted by management.

Although all three arbitrators essentially agreed with the APWU's understanding of its rights in this matter, the three arbitration decisions were premised on different criteria. Arbitrators Marx and Franklin placed more emphasis on job requirements. For Arbitrator Germano, the issue turned solely on the language of the "surrender" provision in the EL-827 Handbook. There was no indication that Arbitrator Germano was presented with an alternative interpretation of

the provision and, accordingly, found the language to be clear and unambiguous. His assumption, however, that the provision could be interpreted only one way led to an erroneous conclusion.

Since the provision is no less ambiguous than the rest of the language covering this subject, it is appropriate to use past practice as an interpretive aid. Such an analysis leads to an opposite conclusion from that of Arbitrator Germano. Arbitrator Germano correctly distinguished between a license being required and a license being allowed. It is reasonable to believe that he would have allowed licensing for voluntary and energency situations had it not been for a misplaced reliance on the EL- 827 Handbook "surrender" provision.

The flaw in the result reached by Arbitrators Marx and Franklin results from a misplaced reliance on Position Descriptions. As discussed earlier in the analysis, Position Descriptions must not be relied on woodenly and rigidly to limit managerial discretion in terms of work assignments, unless such Position Descriptions have come into existence through a deliberative process of good faith bargaining. Arbitrators Max and Franklin erred in equating "required" with "allowed." Absent clear contractual guidance to the contrary, to restrict the Employer to assigning work only where it also has authority to require it constitutes an unreasonable burden on the efficient operation of the Postal Service and, hence, is inconsistent with Article 3 of the

parties' agreement. As a result, the three regional arbitration decisions on which the APWU relies failed to provide a persuasive source of guidance in this case.

F. Conclusion

The Employer is not required by the parties' collective bargaining agreement to revoke driving privileges of employees who are not required to drive solely on the basis of their position or job descriptions. Neither is management prevented by the parties' collective bargaining agreement from granting driving privileges to employees who, otherwise, are qualified to drive and meet internal requirements. The APWU failed to be persuasive in its theory to the contrary.

Past practice has been an important source of guidance in understanding the intent of ambiguous language in this case. It should also be useful in charting future action. Recognizing the potential for abusing the ability to license drivers and to assign driving duties, it is important to stress that this decision should not be construed as giving management unlimited discretion in this area. Where management can show a local past practice of licensing Mail Handlers, Letter Carriers, and others to drive five-ton and larger vehicles, such conduct continues to be permissible within the bounds of good faith.

If it can be shown that local management has not conducted its operation in such a manner, the Employer is limited

to its prior course of conduct, unless the parties negotiate a different approach or an appropriate arbitration decision produces a different configuration. For example, some evidence suggested that in the Marx Award in 1991, the Employer agreed that Mail Handlers should not be licensed. (See APWU's Exhibit No. 7, p. 3.) The point is that local past practice must control, unless the parties negotiate a different result.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the grievances are denied consistent with the analysis in this report. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 11-14-97