FROM THE DESK OF

CLIFF "C. J". GUFFEY
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TO: **APWU State and Local Presidents**	DATE: **June 9, 2005**

[XX] Your information	[ ] Acknowledge and reply
[ ] Take action	[ ] Comment
[ ] Your files	[ ] Revise
[ ] Approve	[ ] Call me
[ ] What is status?	[ ] As per your request
[ ] Please advise	[ ] Investigate and recommend
[ ] Please return	[ ] Sign
[ ] Do you have files	[ ] Other

RE: Unit Clarification – Enforcement of "AMS Specialist" Award and Enforcement of Personnel Work Award

Please look for this type of work in these two documents and ask that the craft be paid hour for hour for all hours worked for these EAS Employees and that the work be moved to appropriate craft.

CJG: meb/Opeiu#2. AFL-CIO

W/Attachment(s)

ENFORCEMENT OF "AMS SPECIALIST" AWARD
(Case Q94C-4Q-C 98117564)

ACTION PLAN

Grievances should be filed wherever management is not in compliance with the rule that all non-supervisory and non-managerial EAS duties of all EAS positions in customer services and mail processing facilities should be assigned to the clerk craft.

If EAS employees are performing duties in customer service and mail processing facilities that are not supervisory or managerial, management's failure to assign those duty assignments to the bargaining unit violates Articles 1.2 and 1.3. Authority for this rule can be found in national case Q94C-4Q-C 98117564. The duties may be both those things listed in EAS position descriptions or work that you observe EAS employees performing. A grievance should be filed even if the Postal Service raises a question as to which bargaining unit the work should be assigned to. Case Q94C-4Q-C 98117564 can be cited for the holding that such work should be assigned to the clerk craft. It is also possible that the situations that should be grieved may have been going on for some time and management may argue that the grievances are untimely. If so, Locals should assert that the violations are ongoing Acontinuing violations. Further guidance on the continuing violations theory may be obtained by contacting Patricia "Pat" Williams, Clerk Division Assistant Director (A).

The National is designating particular advocates to handle these cases at Step 3 and beyond. If you need assistance with the initial grievance, however, please contact Pat Williams.

BACKGROUND

The APWU filed a unit clarification (UC) petition with the National Labor Relations Board claiming that a number of EAS positions belonged in the clerk craft bargaining unit. On August 27, 1998, the APWU initiated a number of National Level grievances claiming both (1) that EAS **positions** belonged in the unit and (2) that many of the **duties** EAS personnel were performing in those positions constituted bargaining unit work. The parties settled the UC case on December 13, 1999 with an agreement to submit the EAS disputes to arbitration (see attached settlement). The agreement states in part (emphasis added):

> In initiating the several August 27, 1998 grievances, the APWU intended to broadly encompass disputes over whether the positions belonged in the bargaining unit **or whether the positions contained duties which should be assigned to the bargaining unit**. The parties shall apply national level arbitration awards which are issued as a result of this settlement agreement **as broadly as possible** in an effort to resolve other pending EAS grievances raising the same or similar issues or arguments.

Under the agreement, the Postal Service selected Case H4C-4H-C 25455 out of Wichita, Kansas as the first case to go to arbitration. In a much earlier case, Arbitrator Snow had held that a similar position, the Personnel Assistant B position, was not a bargaining unit position (Case H4C-4C-C 23981). The Wichita Personnel Assistant A case raised an issue not decided by Arbitrator Snow in the earlier case about whether the personnel assistant work should be assigned to the bargaining unit. In accordance with the APWU's intent to have the National Level grievances broadly encompass the disputes over both the position and the work as well as the parties' express intention to apply the resulting awards broadly to resolve EAS disputes, the agreement also provided for withdrawal of all other pending grievances involving the related EAS positions of Human Resource Associate, Human Resource Specialist or Personnel Assistant **which claim that these**

positions belong in the bargaining unit, because, applied broadly, the unit placement issue was resolved in the earlier award.

On June 22, 2001, Arbitrator Snow issued an award denying the Postal Service's motion to dismiss the grievance as not arbitrable in light of the prior Personnel Assistant A award and sustaining the APWU's grievance claiming that the position contained **duties** which were bargaining unit duties. This award highlights the distinction between unit placement issues and work jurisdiction issues.

The second case arbitrated under the settlement agreement was the Address Management System (AMS) Specialist case. The APWU argued that, because none of the duties listed in the AMS Specialist position description fell within the exclusions of Article 1.2 (Exclusions - managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards, postal inspection service employees, casuals, and employees already represented by other unions, e.g., city letter carriers and mail handlers) and Article 1.3 (Facilities Exclusions - customer services and mail processing facilities), the EAS **position** belonged in the clerk craft and/or the **duties** listed in the AMS Specialist position description were clerk craft duties. The Postal Service stressed that the position (and its predecessor positions) had been historically excluded and that the APWU was seeking an accretion to the clerk craft, contrary to the law developed by the NLRB in representation proceedings. The NALC intervened.

On April 29, 2003, Arbitrator Snow issued an award sustaining the grievance. Applying the rule of "the expression of one thing is the exclusion of another" (AMS Award at page 20); he found that both the AMS Specialist position and duties belonged to the clerk craft, stating that "it is

reasonable to conclude that the parties intended the **work and the position** to be in the bargaining unit." (AMS Award at page 22 (emphasis added).

The arbitrator also found that nothing in the NLRB's rulings in representation cases precluded his award to the clerk craft, particularly in light in the APWU's ongoing challenges to the assignment of bargaining unit duties to EAS employees. Although he surveyed the law, Arbitrator Snow said: "While NLRB guidelines and judicial decisions are instructive, the parties' collective bargaining agreement ultimately is dispositive." (AMS Award at page 33).

At the close of the hearing, the arbitrator allowed the NALC 14 days to notify the parties about whether it intended to call rebuttal witnesses. Believing that at least some of the work belonged to the city letter carrier craft, the NALC suggested that the arbitrator issue an award and remand any work jurisdiction disputes between it and the APWU to the parties to resolve. To avoid delays, the APWU was willing to bifurcate the case so that Arbitrator Snow would decide whether the position and work was not EAS, leaving to later the resolution of which craft the work and positions belonged to. The Postal Service responded to Arbitrator Snow that "there is nothing in either [union's] correspondence that prevents you from issuing a full and final decision in this matter." Arbitrator Snow closed the hearing on October 31, 2002.

After the award was issued giving the position and work to the APWU, the NALC wrote to the Arbitrator arguing that he should not have issued an award which resolved the inter-craft issues. The APWU responded that the Postal Service specifically objected to the NALC's suggestion of a bifurcated award, so that procedure was never adopted by the parties and thus the award was final and binding. The Postal Service then filed a UC petition of its own with the NLRB to clarify the APWU unit as excluding **all EAS positions**. The Postal Service wrote to the Arbitrator informing

him of this filing and, changing its earlier position, argued that the NALC should have been given an opportunity to submit rebuttal evidence. Arbitrator Snow did not respond and his 90 day retention of jurisdiction expired. Since then, the Postal Service has balked at scheduling the next case and the APWU has filed suit to compel it to do so.

The APWU has argued to the NLRB that the Postal Service waived the right to seek review of the Snow Award by entering into a settlement providing for final and binding arbitration of **all** issues regarding EAS positions and work and the withdrawal of the APWU's UC petition. The Postal Service's UC petition is still pending before the NLRB.

Whatever may be said about the NLRB's right to review the Snow Award as it applies to unit placement of AMS EAS positions, the AMS Award is final and binding on its holding that the **duties** of the AMS Specialist position belong to the clerk craft because the NLRB has no jurisdiction over work assignment issues. Moreover, given the UC settlement agreement's provision that awards be applied broadly, **the AMS Award is authority that all non-supervisory and non-managerial EAS duties of all EAS positions in customer services and mail processing facilities is bargaining unit work.**

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Case No. Q94C-4Q-C 98117564
	)	
and	)	
	)	
AMERICAN POSTAL WORKERS UNION	)	
	)	
with	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS, Intervenor	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Mr. Howard J. Kaufman

For the APWU: Ms. Melinda K. Holmes

For the NALC: Mr. Gary H. Mullins
Mr. Allen J. Apfelbaum

PLACE OF HEARING: Washington, D.C.

DATES OF HEARINGS: February 22, 2002
July 23, 2002

POST-HEARING BRIEFS: February 10, 2003

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the "Address Management System Specialist" position is a part of the APWU bargaining unit and that it is a violation of Article 1.2 of the National Agreement to exclude the position and the disputed work from the bargaining unit. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date April 29, 2003

NATIONAL ARBITRATION PANEL

IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	
	)	
UNITED STATES POSTAL SERVICE	)	ANALYSIS AND AWARD
	)	
	)	Carlton J. Snow
AND	)	Arbitrator
	)	
AMERICAN POSTAL WORKERS UNION	)	
	)	
WITH	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
(Case No. Q94C-4Q-C 98117564)	)	

I. INTRODUCTION

This matter initially arose under the 1990 collective bargaining agreement but was processed under the 1994-98 agreement between the Employer and the American Postal Workers Union. Pursuant to Article 15.5.A, the National Association of Letter Carriers intervened in the matter. Hearings occurred on February 22, 2002 and July 23, 2002. The parties briefed the matter in February of 2003. Mr. Howard J. Kaufman, Senior Counsel, represented the United States Postal Service. Ms. Melinda K. Holmes of O'Donnell, Schwartz & Anderson, represented the American

Postal Workers Union. Messrs. Gary H. Mullins, Vice-president, and Alan J. Apfelbaum, Contract Administration Unit, represented the National Association of Letter Carriers.

The hearings proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. A reporter for Diversified Reporting Services, Inc. reported the proceeding for the parties and submitted a transcript of 436 pages in two volumes.

There were no challenges to the substantive or procedural arbitrability of the dispute, although the American Postal Workers Union objected to allowing the Employer's affirmative defenses on the theory that management failed to respond with those defenses when the parties processed the grievance. Otherwise, the parties stipulated that the matter properly is before the arbitrator and authorized the arbitrator to resolve all jurisdictional issues in the dispute. They granted the arbitrator authority to retain jurisdiction in the matter for 90 days following the issuance of a decision. All parties received an opportunity to submit a post-hearing brief, but the National Association of Letter Carriers chose not to do so. The arbitrator

officially closed the hearing on February 10, 2003 after receipt of the final post-hearing brief in the matter.

II. STATEMENT OF THE ISSUES

The issues before the arbitrator are as follows:

1. Does the arbitrator have authority to consider the Employer's affirmative defenses?

2. Shall the "Address Management System Specialist" position be included in the APWU bargaining unit? Alternatively, does this position contain duties belonging in the APWU bargaining unit? If so, what is an appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 UNION RECOGNITION

Section 1. Union

The Employer recognizes the Union designated below as the exclusive bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the national level:

American Postal Workers Union, AFL-CIO--Maintenance Employees
American Postal Workers Union, AFL-CIO--Special Delivery Messengers
American Postal Workers Union, AFL-CIO--Motor Vehicle Employees
American Postal Workers Union, AFL-CIO--Postal Clerks

American Postal Workers Union, AFL-CIO--Mail Equipment Shops Employees
American Postal Workers Union, AFL-CIO--Material Distribution Centers Employees

Section 2. Exclusions

The employee groups set forth in Section 1 above do not include, and this Agreement does not apply to:

1. Managerial and supervisory personnel;
2. Professional employees;
3. Employees engaged in personnel work in other than a purely non-confidential clerical capacity;
4. Security guards as defined in Public Law 91-375, 1201(2);
5. All Postal Inspection Service employees;
6. Employees in the supplemental work force as defined in Art. 7;
7. Rural letter carriers; or
8. Mail handlers; or
9. Letter carriers.

Section 3. Facility Exclusions

This Agreement does not apply to employees who work in other employer facilities which are not engaged in customer services and mail processing, previously understood and expressed by the parties to mean mail processing and delivery, including but not limited to Headquarters, Area Offices, Information Services Centers, Postal Service Training and Development Institute, Oklahoma Postal Training Operations, Postal Academies, Postal Academy Training Institute, Stamped Envelope Agency or Mail Transport Equipment Centers.

Section 5. New Positions

A. Each newly created position shall be assigned by the Employer to the national craft unit most appropriate for such position within thirty (30) days after its creation. Before such assignment of each new position the Employer shall consult with the Union signatory to this Agreement for the purpose of assigning the new position to the national craft unit most appropriate for such position. The following criteria shall be used in making this determination.

1. existing work assignment practices;
2. manpower costs;
3. avoidance of duplication of effort and "make work" assignments;

4. effective utilization of manpower, including the Postal Service's need to assign employees across craft lines on a temporary basis;
5. the integral nature of all duties which comprise a normal duty assignment;
6. the contractual and legal obligations and requirements of the parties.

B. The Union party to this Agreement shall be notified promptly by the Employer regarding assignments made under this provision. Should the Union dispute the assignment of the new position within thirty (30) days from the date the Union has received notification of the assignment of the position, the dispute shall be subject to the provisions of the grievance and arbitration procedure provided for herein.

IV. STATEMENT OF FACTS

In this case, the American Postal Workers Union challenged the Employer's placement of an employment position outside the APWU bargaining unit. At the heart of the dispute is the Address Management System. AMS is a computer data-base used to manage address information of postal customers. Bargaining unit employees in the Clerk Craft have performed work using the AMS, according to the APWU. The Employer responded that bargaining unit employees performed "key what you see" data entry for the AMS during a limited amount of time as the system was being merged with another program. In 1990-92, the Employer underwent a significant reorganization; and the "AMS Specialist" position came into

existence. In the Employer's view, this is not a new position. It allegedly was the previously existing "AMS Analyst" position simply with a new title. The Employer maintains that the disputed position has existed since 1982 when management created the "AMS Analyst" position, and the Employer asserts that the disputed position has existed outside of the bargaining unit since its creation. It is an "executive and administrative schedule" position and, as such, appropriately is not part of the bargaining unit, according to the Employer.

The APWU contends that it earlier wanted to vindicate its contractual rights to the disputed position but was barred from doing so because of an arbitration decision by Arbitrator Gamser. (*See* Case No. A-C-N 6922 (1990).) The Union contends that, during the 1986-90 time period and before, APWU bargaining unit members filed grievances over the fact that nonbargaining unit employees doing the disputed work were performing bargaining unit work. (*See* Tr. 76.) None of the grievances, however, proceeded to arbitration. (*See* Tr. 61.)

In October of 1997, the American Postal Workers Union filed a unit clarification petition with the National Labor Relations Board. Th APWU sought to have the Board clarify its bargaining unit to include the disputed job classification. Before the Board issued a unit clarification

decision, the APWU filed a national level grievance in 1998 to determine whether the "AMS Specialist" position should be included in the APWU bargaining unit or, alternatively, whether duties of the position more properly belong to workers in the bargaining unit. The Employer and the APWU later signed a settlement agreement in which the Union agreed to withdraw the unit clarification position with an understanding that the matter would be resolved in arbitration. With this as its factual background, the dispute came to the arbitrator for resolution.

V. POSITION OF THE PARTIES

A. The American Postal Workers Union

As a threshold matter, the APWU contends that the Employer's affirmative defenses should not be considered by the arbitrator because the Employer allegedly failed to argue its current defenses when the parties processed the grievance. The Union contends that a Step 4 grievance, the step preceding arbitration, requires a meeting and decision from the Employer in response to the complaint. The Union also relies on arbitral precedent in the parties' system stating that a party cannot present evidence or arguments

in arbitration that were not presented at earlier phases of the grievance process. (*See* Case No. NC-E 11359, p. 3 (1984).) Even if this arbitrator should reach the merits of the Employer's case, the Union maintains that management's defenses fail to support its position.

The Union contends that external law should not be a focal point in deciding this dispute because it is a case of contract interpretation. According to the Union, standard rules of contract interpretation provide a sufficient basis for resolving the dispute; and resort to external law is unnecessary. Hence, the Union urges the arbitrator to focus narrowly on the language of the parties' agreement.

On the merits, the Union contends that workers assigned to the "AMS Specialist" position perform duties that are a part of the Clerk Craft. In the opinion of the APWU, none of the duties is excluded from the bargaining unit. Accordingly, the APWU argues that the disputed position should be adjudged to be a part of the APWU bargaining unit. Moreover, the Union believes that the "AMS Specialist" position should have been included in the bargaining unit from the moment it first was created. According to the Union's view, even if management had a right to allow supervisors to perform minimal duties belonging to the bargaining unit, those duties must be assigned to the bargaining unit once they become a significant portion of a supervisor's

workload. It is the conclusion of the APWU that none of the duties of the "AMS Specialist" position is excluded from the bargaining unit and, therefore, that the entire position is more appropriately placed within the APWU bargaining unit. It is the belief of the Union that the Employer, in effect, created a Clerk Craft position outside of the APWU bargaining unit and did so in violation of the parties' National Agreement. Even if the position should not be in the bargaining unit, the APWU contends that work performed by AMS Specialists belongs within the bargaining unit.

B. The Employer

First, the Employer contends that it has every right to present its affirmative defenses in this case to the arbitrator. Relying on Article 15 of the parties' National Agreement, the Employer points out that any failure by management to render a decision during steps of the grievance procedure merely moves the dispute to the next step; and the next step in this case is arbitration. Moreover, the Employer maintains that the Union is not surprised and has not been prejudiced by any arguments brought forth by management in arbitration because the Employer's position clearly was made known

during extensive negotiation that led to the APWU's decision to withdraw the unit clarification petition and to move the matter to arbitration. Accordingly, the Employer concludes that there is no basis in contract or equity for excluding the Employer's affirmative defenses.

On the merits, the Employer contends that, if the "AMS Specialist" position should become a part of the APWU bargaining unit, it should occur only because AMS Specialists collectively decide to join the bargaining unit. Any such change should be the result of an election. The Employer contends that it is inappropriate to use an administrative procedure such as arbitration to force AMS Specialists into the APWU bargaining unit when their position historically has been excluded from it. It is the view of the Employer that the "AMS Specialist" position has been in existence for over 20 years and that it merely underwent a name change after 1992. The position has not changed significantly, according to management.

The Employer also contends that, even though APWU bargaining unit members might have performed peripheral duties, they have not been responsible for core functions of the "AMS Specialist" position. When management merged the AMS program with a different one, the Employer used some bargaining unit members to enter the large amount of data necessary to combine the programs. The Employer argues that data

entered by AMS Specialists has to be reviewed and analyzed; and bargaining unit employees merely entered data without engaging in any sort of analysis. Management contends that bargaining unit members used a "key what you see" method of data entry but that AMS Specialist engaged in far more complicated work. As a consequence, the Employer concludes that the APWU is incorrect in its belief that management removed work from bargaining unit members.

Nor, in the opinion of the Employer, is it adequate for the Union to rely on a Position Description to conclude that AMS Specialists belong in the APWU bargaining unit. Furthermore, the Employer rejects the Union's contention that AMS Specialists perform exclusively bargaining unit duties. At issue, in the opinion of the Employer, is whether certain overlapping duties traditionally and historically performed by AMS Specialists constitute mail processing activity to which only APWU bargaining unit members may lay claim. In the Employer's view, duties of AMS Specialists are not exclusive to the APWU because the duties are not traditional mail processing duties.

The Employer stresses the fact that no evidence shows current AMS Specialists desire to be included in the APWU bargaining unit. To force them into the bargaining unit would be to ignore the fundamental principle of free choice, according to the Employer. The Employer argues

that, for the Union to prevail, it needs the majority consent of those currently holding "AMS Specialist" positions. Whether interpreting the collective bargaining agreement or relying on external law, the Employer maintains that it must prevail in this matter.

VI. ANALYSIS

A. The Employer's Affirmative Defenses

The Union argues that the arbitrator is without contractual authority to consider the Employer's affirmative defenses. As Professor Ted St. Antoine made clear many years ago, an arbitrator is the parties' officially designated "contract reader," and the primary source of guidance in the dispute is the parties' National Agreement. (*See* 30 NAA, 29, 30 (1977).) Article 15 of the National Agreement describes the parties' grievance-arbitration procedure, and Article 15.4.C of the collective bargaining agreement is instructive with regard to the APWU's contention that the arbitrator is without authority to consider the Employer's affirmative defenses. Article 15.4.C states:

> Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure. (*See* Joint Exhibit No. 1, p. 100, emphasis added.)

The parties' agreement is clear and unambiguous in its application to the facts of the case. Management's failure to set forth its affirmative defenses moved the grievance to the Step beyond Step 4, namely, arbitration at the national level. The Employer sustained a penalty as a result of its approach, but not

the one the Union seeks to impose. The penalty for not disclosing affirmative defenses is that they now must be heard and resolved by an arbitrator, instead of being used as the building blocks of a negotiated settlement in Step 4 of the grievance procedure.

Interpretations of a labor contract with a different union and the Employer might require a more rigid process at the national level. For example, the relevant language of the APWU and NALC national agreements is not precisely the same. Decisions interpreting similar contractual provisions in the agreement between the Employer and the National Association of Letter Carriers might constrict an arbitrator's authority to consider claims not advanced in Step 4. Arbitrator Aaron in 1984 interpreted the NALC-USPS agreement and concluded that:

> Parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and (it is now well settled) that this principle must be strictly observed. The reason for the rule is obvious: neither party should have *to deal with* evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it had no time to prepare rebuttal evidence and argument. (*See* USPS and NALC Case No. NC-E-11359, pp. 3-4 (1984), emphasis added.)

The language in the "grievance procedure-arbitration" article of both parties' agreement has changed since 1984.

Another case interpreting language in the NALC-USPS National Agreement concluded that the parties expressly intended to restrict attempts to present new evidence for the first time in arbitration. (*See* Case No. N8-W-0406, p. 9 (1981).) Although the APWU-USPS agreement at the time contained provisions similar to those in the NALC-USPS agreement, the language and culture of the two agreements are different. Article 15.2 (Step 3(b) of the USPS-APWU agreement makes clear that each party's advocate is charged with "making certain that all relevant facts and contentions have been developed and considered." (*See* Joint Exhibit No. 1, p. 95.) The Employer also agreed in the APWU agreement that its Step 3 decision must include "the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2." (*See* Joint Exhibit No. 1, p. 95.) But in Step 4 of Article 15.2, the parties to the USPS-APWU agreement may return to Step 3 a dispute where "all relevant facts" have not been adequately developed. At Step 3, the parties may return to Step 2 disputes where not only relevant facts but also "contentions" were not adequately developed.

Did the parties in the USPS-APWU agreement intend more flexibility at Step 4 than might be the case for other steps in the procedure or under other contracts, or is it an inadvertent gap in their agreement? The

parties also decided in the USPS-APWU agreement that a decision at Step 4 "shall include an adequate explanation of the reasons therefor." (*See* Joint Exhibit No. 1, p. 98.) The parties chose not to track the language of Step 3 and did not require that a Step 4 decision "state the reasons for the decision in detail and ... include a statement of any additional facts and contentions" not previously set forth in the record. (*See* Joint Exhibit No. 1, p. 95.)

The point of this litany is to show that earlier decisions are not dispositive of the issue submitted to the arbitrator in the current dispute. Moreover, it previously has been found that, at least under the NALC-USPS agreement, an arbitrator should be permitted to hear some arguments advanced for the first time in arbitration. (*See* Case No. B90N-4B-C 94027390, pp. 8 and 12 (1996).) Such flexibility at the national level recognizes that many lawyers and most labor/management representatives are not expert in drafting formalistic pleadings and that national labor policy favors arbitration, especially in cases of doubtful contract coverage. Such flexibility also avoids inefficient rigidity in the arbitration process once a dispute reaches the national level. The point is that no "bright-line test" exists with regard to the first issue raised by the APWU. A decision needs to be made on a case-by-case basis as to whether or not the bargain of the parties is being evaded and whether or not considering a particular argument will

encourage arbitration by ambush. The Union's contention that the arbitrator is without authority to consider the Employer's affirmative defense must be decided based on the specific facts of this case and cannot be resolved merely on the basis of general arbitral precedent, especially when the precedent did not construe this particular agreement.

As Arbitrator Aaron made clear almost two decades ago, the underlying policy objective of rejecting new evidence and arguments at the last step is to encourage early information sharing so that a party may come to arbitration prepared to join issue with evidence and argument submitted by the other side. The APWU failed to be persuasive in its contention that it was unduly surprised by the Employer's affirmative defenses in this case and that it was unprepared to join issue with them. The arbitrator received conflicting evidence with respect to whether management made the Union aware of its affirmative defenses, but the Employer offered the most persuasive evidence. Moreover, the arbitrator was amenable to giving the Union additional time to prepare a defense, if it was needed.

The Employer contended that the Union learned of management's affirmative defenses during settlement talks about the APWU's withdrawing its unit clarification petition. Mr. Guffey, Executive Vice-president, testified he knew about the Employer's defense that, if the

AMS Specialists were to be included in the APWU bargaining unit, they should be the subject of an election campaign. (*See* Tr., vol. 2, p. 62.) The evidence failed to be dispositive with respect to a contention that the Union's ability to prepare an adequate response in this case has been or would be substantially prejudiced by the arbitrator's considering the Employer's affirmative defenses. They, accordingly, will be considered by the arbitrator in evaluating the merits of the case, and the affirmative defense of the Employer based on the "historical exclusion" principle of the NLRB will be considered as an aspect of contract interpretation, a topic to be examined later in the report.

B. Construing the Intent of the Parties

The Employer rejects the propriety of accreting members to the APWU bargaining unit in this case. In Article 1.1 of the USPS-APWU collective bargaining agreement, the Employer recognized the American Postal Workers Union as the exclusive bargaining representative of those in the appropriate bargaining unit. In Article 1.2, the parties agreed that the APWU bargaining unit does not include:

1. Managerial and supervisory personnel;
2. Professional employees;
3. Relevant personnel employees;
4. Security guards;
5. Postal inspectors;
6. Supplemental workers;
7. Rural letter carriers;
8. Mail handlers; or
9. Letter carriers. (*See* Joint Exhibit No. 1, p. 2.)

As the Union sees it, the "AMS Specialist" position is not a part of any excluded category of employees. It logically follows, according to the APWU, that the disputed position is a part of the bargaining unit. It is the position of the APWU that the Employer violated the parties' agreement by treating employees in the "AMS Specialist" position as nonmembers of the APWU bargaining unit.

Collective bargaining agreements contain gaps, as do all contracts. Parties to a collective bargaining agreement are presumed to understand that, unless a negotiated agreement sets forth contrary instructions, gaps in a labor contract will be filled by drawing on established arbitral jurisprudence and the common law of the shop. Parties are presumed to be familiar with this body of arbitral principles and to understand that an arbitrator will draw on it for guidance in construing a collective bargaining agreement. As the late David Feller, past-president of the National Academy of Arbitrators, observed, "There is a whole set of implicit relationships, not

spelled out in the agreement, and not confined to any particular employer, which an arbitrator assumes to exist." (*See* 2 Industrial Relations Law Journal 97, 104 (1977).) Parties to collective bargaining agreements understand that arbitrators draw on this deep wellspring of implicit relationships to interpret a labor contract.

Arbitrators have incorporated into their jurisprudence standard common law principles of contract interpretation. As Professor Dennis Nolan observed, "The arbitrator's interpretive tools in resolving a grievance are not limited to the words of the collective bargaining agreement." (*See ADR in the Workplace,* 323 (2000).) Courts share Professor Nolan's conclusion. As stated by the Second Circuit, "Merely because an arbitral decision is not based on the express terms of a collective bargaining agreement does not mean that it is not properly derived from the agreement. An arbitrator is entitled to take cognizance of contract principles of contract interpretation and draw on them for guidance in construing an agreement." (*See Harry Hoffman Printing, Inc.*, 950 F.2d 95, 98-99 (2d Cir. 1991).)

One standard of contract interpretation enjoying wide acceptance among arbitrators is the notion that "the expression of one thing is the exclusion of another." As one scholar observed, "Arbitrators follow an interpretive assumption that if parties specifically enumerated a list of items

from a class to which a contractual provision is applicable, they meant to cover only the specific items listed and to exclude other items of that class from coverage." (*See* St. Antoine, *The Common Law of the Workplace,* 71 (1998).) Courts use the same standard. Almost four decades ago, the eminent contract scholar, Professor Edwin Patterson, stated that, "If one or more specific items are listed, without any general or inclusive terms, other items although similar in kind are excluded." (*See* 64 Columbia Law Review, 833, 853 (1964); *see* also *Central Hous. Inv. Corp.*, 248 P.2d 866 (1952).)

Without evidence from the parties on which to base a conclusion, it is not an arbitrator's role to speculate about the bargain they struck but, rather, to read the contract and implement their intent based on the objective manifestation of their understanding, as construed within the context of accepted principles of contract interpretation. It is logical for an arbitrator to conclude that parties consciously have chosen not to dispose of a gap in their agreement or not to resolve a controversy in their relationship by incorporating specific language to eliminate the dispute because they are satisfied with general rules of contract interpretation that govern the gap or controversy, and they have no desire to bargain around established jurisprudence in order to change the rules. The dispute before the arbitrator is not one which the parties could not have foreseen or did not foresee at the

time they entered into the relevant agreement, and their conscious decision not to confront the issue supports a conclusion that they were satisfied with the impact of rules of contract law on the problem if the matter came to arbitration or to a court of law.

The impact of the relevant rule of interpretation in this case is clear. Article 1.2 of the USPS-APWU labor contract lists types of positions to be excluded from the bargaining unit. The standard rule of contract interpretation teaches that any position devoted to performing duties not listed within the exclusions is a part of the bargaining unit. The "AMS Specialist" position does not call for workers to perform duties within the exclusions set forth in the contract. Accordingly, it is reasonable to conclude that the parties intended the work and the position to be in the bargaining unit.

C. Teaching of the Law

While an arbitrator's allegiance is to the parties' contract, the law is not to be ignored. A standard rule of contract interpretation is that a lawful interpretation is preferred to an interpretation which ignores the law. (*See* § 203(a) of *Restatement (Second) of Contracts,* 93 (1981).) Most

arbitrators interpret labor contracts within the shadow of the law. To argue that the law is not relevant because the Employer made its assignment of work while focused only on contract interpretation and not on the law misses the point that a standard rule of contract interpretation is to prefer an interpretation consistent with the law. The parties to the USPS-APWU collective bargaining agreement themselves recognized that they implement their agreement within the shadow of the law. For example, the Employer agreed to exercise its managerial rights in a manner "consistent with applicable laws and regulations." (*See* Joint exhibit No. 1, p. 6.) Likewise, the Employer agreed in Article 5 of the parties' agreement to be instructed by the National Labor Relations Act and not to act in a way "inconsistent with its obligations under law." (*See* Joint Exhibit No. 1, p. 8.) The parties themselves recognized the law as a contractual backdrop and saw the importance of using the law as an interpretive guideline to better understand their labor contract.

The relationship between the American Postal Workers Union and the Employer is covered by the National Labor Relations Act. The Act is administered by the National Labor Relations Board, the General Counsel, and regional offices of the Board. The Act requires that an employer bargain collectively with an exclusive bargaining representative selected by a

majority of workers in an appropriate bargaining unit. Since a collective bargaining agreement covers a certain group of workers, the Board has spent considerable time studying appropriate boundaries of bargaining units. It has developed a number of helpful guidelines to test the propriety of a particular bargaining unit, and this body of administrative decisions provides a useful source of guidance in interpreting contractual provisions in the USPS-APWU labor contract. Factors used by the Board in its analysis include:

(1) Similarity in the scale and manner of determining earnings;
(2) Similarity in employment benefits, hours or work and other terms and conditions of employment;
(3) Similarity in the kind of work performed;
(4) Similarity in the qualifications, skills and training of employees;
(5) Frequency of contact or interchange between employees;
(6) Geographic proximity;
(7) Continuity or integration of production processes;
(8) Common supervision and determination of labor-relations policies;
(9) Relationship to the administrative organization of the employer;
(10) History of collective bargaining;
(11) Desires of affected employees; and
(12) Extent of union organization.

Not all factors are used in every case, and generally no single factor is dispositive.

Since 1971 and passage of the Postal Reorganization Act, the National Labor Relations Act has covered employees of the United States Postal Service. It was the intent of Congress that "the judgment as to what will be the appropriate units for collective bargaining in the Postal Service [will be made] on the basis of the same criteria applied by the National Labor Relations Board in determining appropriate bargaining units in the private sector." (*See* Conf. Rep. No. 91-1363, Second Session 81-82 (1970).) Use of NLRB criteria, of course, includes all the uncertainty inherent in using a wide variety of factors. The parties agreed in their National Agreement that management would not affect conditions of employment in a manner inconsistent with guidelines set forth in the Act. Accordingly, it is reasonable to construe the current dispute between the parties in light of relevant guidelines developed by the National Labor Relations Board. Although the arbitration decision is rooted in the parties' contract, it is appropriate to consider relevant interpretive guidance in administrative decisions under the National Labor Relations Act.

An overarching concern of the NLRB is whether employees in an appropriate bargaining unit share a community of interests. Defining an appropriate unit, however, does not mean finding a perfect community of interests. The search is not for the most appropriate unit but only a unit in

which employees share a reasonable community of interests and a unit that assures employees reasonable freedom to exercise their collective bargaining rights. (*See, e.g., Morand Brothers Beverage Co.*, 91 N.L.R.B. 409 (1950).) The National Labor Relations Board even has gone as far as concluding that, if a union can establish the propriety of an appropriate bargaining unit, it is unnecessary to evaluate an allegedly better configuration offered by an employer. (*See, e.g., Dick Contracting*, 209 N.L.R.B. 150 (1988).)

A relevant test in determining the appropriateness of a bargaining unit is to consider the similarity of the kind of work performed by those who would be accreted to the unit in comparison with those already in the unit. Such a comparison in this case supports a conclusion that workers in the "AMS Specialist" position perform reasonably similar duties to those in the Clerk Craft. This conclusion is based on comparing position descriptions of the "Data Collection Technician" and "General Clerk" position with that of the "AMS Specialist" position.

Duties of the AMS Specialist include (1) collecting and maintaining address information; (2) checking such information for accuracy; (3) resolving data discrepancies; (4) transferring data to a database; (5) maintaining route delivery information; (6) coordinating procedures for address changes; and (7) providing technical support for the system.

(*See* APWU's Exhibit No. 11.) A Data Collection Technician in the Clerk Craft performs some similar duties, such as collecting data and analyzing information for accuracy as well as for compliance with national programs. (*See* APWU's Exhibit No. 13.) A General Clerk in the Clerk Craft performs duties such as correcting and maintaining mailing lists, a duty requiring a thorough knowledge of a primary scheme. (*See* APWU's Exhibit No.14.) While position descriptions provide a useful source of guidance with regard to basic mail handling and processing functions, they clearly are not dispositive. (*See* Case No. B90N-4B-C 94027390 (1996); and Case No. A-C-N-6922 (1990).)

It should also be noted that a USPS case in 1990 examined whether or not position descriptions should be dispositive in defining jurisdictional boundaries between supervisors and bargaining unit members. The present dispute involves no such consideration. Moreover, although position descriptions in this case provide useful information to help define whether the disputed positions involve bargaining unit work, it is primarily the parties' contract that is being used to understand the appropriate configuration of the bargaining unit. The relevant position descriptions merely confirm a conclusion that disputed work is similar to that performed

within the bargaining unit and has not been excluded by contract from the appropriate unit.

Evidence submitted to the arbitrator established that AMS Specialists share a community of interests with the APWU bargaining unit in their skills and qualifications. Mr. Titus, an AMA Specialist in Minnesota, testified that his work requires a knowledge of coding guidelines and that he reviews guidelines so that he knows what to look for when analyzing data. (*See* Tr. vol. 1; p. 303.) An individual is not required to have prior experience with the U. S. Postal Service in order to apply for the position. (*See* Tr., vol. 1, pp. 207-208.) Evidence established that skills of the disputed position are not significantly different from the Data Collection Technician. Both obtain essentially the same sort of training. (*See* APWU's Exhibit No. 14.) A comparison of the two positions suggests that analytical skills based on a knowledge of coding and reviewing relevant guidelines are substantially similar and that, in this regard, both positions share a community of interests.

Bargaining history is also highly significant to the NLRB in defining an appropriate unit of employees. Duties of AMS Specialists historically have been performed by nonbargaining unit employees. But bargaining history is not dispositive where the history is checkered. AMS

Specialist Titus testified that he believed no bargaining unit employee ever performed the work of an AMS Specialist. (*See* Tr., vol. 1, p. 305.) Ms. Hawes, from the Office of Address Management, testified that bargaining unit employees performed data entries and conceded that sometimes AMS Specialists performed the same work as well. She maintained, however, that the type of data entry done by bargaining unit members no longer exists and also that work performed by an AMS Specialist is more analytical than the sort of work performed by bargaining unit members. (*See* Tr., vol. 1, pp. 262, 267-268.)

When there is a long, unspotted history of work performed by particular employees either pursuant to a negotiated agreement or by certification of an administrative agency, the work organization should be disturbed by an arbitrator with great reluctance. For example, if there existed a long-standing history that was counterbalanced by other indicia of a community of interests, the long organizational history might be dispositive unless the history were spotty or, perhaps, had not included a successful method of organizing the work. (*See, e.g.,* Case No. A-C-N-6922 (1990); and *Teamsters National UPS Negotiating Committee v. NLRB,* 12 F.3rd 1518 (D.C. Cir. 1994).)

Evidence submitted to the arbitrator established that in the past the work of AMS Specialists has been performed by both bargaining unit and nonbargaining unit employees. Mr. Garner, Customer Service Support Specialist, testified that the "AMS Specialist" position has existed since 1982. (*See* Tr., vol. 1, p. 153.) The initial title of the position was "Address Information Systems Analyst." While management created it as a nonbargaining unit position, clear and convincing evidence established that some of the work of the position occasionally had been performed by bargaining unit employees. Work of the AIS Analyst or the AMS Specialist has been performed by nonbargaining unit employees, but it is clear that the history is checkered and not unbroken. Moreover, the parties' bargaining history with regard to the disputed work has not been predicated on the certification of an appropriate unit by the National Labor Relations Board. As such, bargaining history in this case is not dispositive. (*See, e.g., NLRB v. Porter County Farm Bureau Corp. Association,* 314 F.2nd 133 (C.A. 7, 1963).)

Bargaining history is highly significant in defining a work unit because of an often unstated assumption that it reflects the desires of the employees. In other words, a long, unspotty history of excluding certain employees from a bargaining unit is highly significant based on a theory that

disputed employees at some point would have voted to join the bargaining unit if it had been their desire to do so. A checkered history of the work, however, complicates that assumption. Although a checkered bargaining history calls into question the dispositive nature of this particular factor, it is still important to be sensitive to the desires of employees in the disputed positions. If an analysis of an appropriate bargaining unit suggests that it is in homeostasis, it might be simple to use the "desires of the employees" factor as a crucial tie breaker. (*See, e.g., Globe Machine and Stamping Co.*,3 N.L.R.B. 294 (1937).) But no tie breaker exists in this case.

The *Globe* Doctrine is not dispositive in this particular dispute because of the Union's unrebutted evidence that, when management created the "AMS Specialist" position and assigned the work outside the bargaining unit, the American Postal Workers Union received no adequate opportunity to object to the Employer's organizational design. Mr. Guffey, Executive Vice-president of the APWU, testified without rebuttal that management never informed the Union of its placement of the disputed work outside the bargaining unit when the Employer created the position. (*See* Tr., vol. 2, p. 67.) Moreover, Mr. Almirall, Customer Requirements Analyst, testified that it is not a standard practice of management to inform the Union when a

position is assigned outside the bargaining unit. (*See* Tr., vol. 2, p. 25.) Yet, the parties agreed in Article 1.5.A that:

> Each newly created position shall be assigned by the Employer to the national craft unit most appropriate for such position within thirty (30) days after its creation. Before such assignment of each new position the Employer shall consult with the Union signatory to this Agreement for the purpose of assigning the new position to the national craft unit most appropriate for such position. (*See* Joint Exhibit No. 1, p. 3, emphasis added.)

Moreover, the Employer promised to notify the Union promptly "regarding assignments made under this provision." (*See* Joint Exhibit No. 1, p. 3.) Without notice from the Employer, the APWU has no way of protecting its contractual rights if it is not made aware that management has made an assignment outside the bargaining unit.

On learning of management's decision to assign the work outside the bargaining unit, the Union not only did not acquiesce but objected to the placement and filed grievances to challenge the Employer's decision. The complaints became snarled in the parties' grievance system, and the Union in 1992 filed an Unfair Labor Practice charge that challenged the assignment of allegedly bargaining unit work to nonbargaining employees. (*See* Tr., vol. 2, pp. 60, 61 and 76). Moreover, Mr. Guffey, Executive Vice-president, testified that the Union could not file a national level grievance until a 1990 arbitration decision opened the system to such a grievance. (*See*

Case No. A-C-N-6922 (1990).) The Union, however, did not immediately file a national level grievance in this matter. The Employer also points out that the Union failed to object at the bargaining table to management's decision with regard to the disputed position. Such evidence diluted the Union's assertion that it had no opportunity to challenge management's decision with regard to the "AMS Specialist" position. At the same time, the evidence established that the APWU clearly did not acquiesce with the Employer's decision to assign the work of AMS Specialists outside the bargaining unit. Moreover, the evidence is compelling that the APWU did not initially challenge the decision because management did not inform APWU officials of the disputed placement.

While NLRB guidelines and judicial decisions are instructive, the parties' collective bargaining agreement ultimately is dispositive. Article 1 of the agreement between the Employer and the APWU recognizes the APWU as the exclusive bargaining agent "of all employees in the bargaining unit for which each has been recognized and certified at the national level." (*See* Joint Exhibit No. 1, p. 1.) Rather than defining an appropriate bargaining unit or determining the jurisdiction of a bargaining representative, this contractual provision acknowledges that the APWU has been recognized by management as the bargaining agent for those in the appropriate unit.

(*See* Case No. H4C-4C-C 23981 (1985).) The Employer argues that, because the "AMS Specialist" position did not exist in 1971, it clearly was not part of the bargaining unit the APWU is certified to represent, and management believes it would inappropriately expand the Union to add the position at this late date. Such an analysis, however, gives short shrift to Article 1.2 of the parties' negotiated agreement.

Article 1.2 of the National Agreement sets forth exclusions. It enumerates nine categories of employees who are excluded from the APWU bargaining unit. The parties are sophisticated negotiators with a long collective bargaining history, and they knew or are presumed to have known that, by listing exclusions from the bargaining unit, they were announcing that anything not excluded was to be included. To argue that, because the disputed position did not exist, it could not been covered by the contract provision on exclusions is to ignore the totality of the parties' agreement As the parties well understand, an agreement is interpreted as a whole document. Article 1.5 of the Employer's agreement with the APWU makes clear that new positions must be assigned to the most appropriate craft. In view of the fact that the disputed work is not excluded under exceptions listed in Article 1.2 of the APWU-USPS agreement, the Employer bound itself to assign the work to the most appropriate craft, namely, the Clerk Craft.

The Employer argued that, even though some of the data entry work had been performed by bargaining unit members in the past, AMS Specialists constitute a separate unit of workers. In the view of the Employer, interests of AMS Specialists are not submerged within those of existing bargaining unit members. The Employer argues that, only if AMS Specialists have an opportunity to resolve the representation issue for themselves, should they be included in the APWU bargaining unit.

To accept the Employer's theory of the case, however, requires a decisionmaker to ignore the bargain struck by the parties in their collective bargaining agreement. In other words, the Employer's theory would authorize management to create any position that does not narrowly fit into exclusions set forth in Article 1.2 of the parties' agreement and to assign the work outside the bargaining unit. If the Employer continued its practice of not informing the APWU of the work assignments, the Union would not be in a position to object until by happenstance it learned of management's acts. At that point, the Employer again would be in the position of wanting to argue that a disputed position historically had been excluded from the bargaining unit. In this case, however, management failed to prove that AMS Specialists enjoy an identity as a self-contained, homogenous group of employees, separate and distinct from the APWU bargaining unit employees. Evidence

submitted to the arbitrator showing a sufficient community of interests with the APWU unit failed to justify a smaller unit of only AMS Specialists. As the Ninth Circuit pointed out long ago, these are decisions that must be made on a case-by-case basis and must take into account "the entire congeries of facts in each case." (*See NLRB v. Food Employer Council, Inc.*, 69 LRRM 2077, 2080 (9th Cir. 1968).) The totality of the record in this case favors including the disputed positions in the APWU work unit.

It is recognized that in Article 3(B) of the USPS-APWU National Agreement, management retained the right to assign work, but it is not an unfettered right. The Employer agreed to assign work subject to the provisions of the parties' negotiated contract. In Article 1.2 of the parties' agreement, the Employer recognized the APWU as the exclusive representative for employees unless the employee group fell into one of the excluded categories. The Employer limited its managerial right to assign work to whatever group of employees it prefers. Flexibility is important in this area of the parties' relationship, and the congeries of facts in this particular case favor an appropriate bargaining unit that includes AMS Specialists.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the "Address Management System Specialist" position is a part of the APWU bargaining unit and that it is a violation of Article 1.2 of the National Agreement to exclude the position and the disputed work from the bargaining unit. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date April 29, 2003

ENFORCEMENT OF PERSONNEL WORK AWARD

ACTION PLAN

Grievances should be filed wherever management is not in compliance with the rule that all personnel duties that do not involve labor relations or dealing with labor relations materials should be assigned to the clerk craft.

If EAS employees are performing personnel duties that do not involve labor relations and are not supervisory or managerial, management's failure to assign those duty assignments to the bargaining unit violates Articles 1.2 and 1.3. Authority for this rule can be found in the personnel work award in national-level case H4C-4H-C 25455 regarding EAS employees performing personnel-related work that the Postal Service should have assigned to the bargaining unit. The duties may be both those things listed in EAS position descriptions or work that you observe EAS employees performing, including those duties on the attached list. The situations being grieved may have been going on for some time and management may argue that grievances are untimely. If so, Locals should assert that the violations are ongoing continuing violations. Further guidance on the continuing violations theory may be obtained by contacting Patricia "Pat" Williams, Clerk Division Assistant Director (A).

The National is designating particular advocates to handle these cases at Step 3 and beyond. If you need assistance with the initial grievance, however, please contact Pat Williams.

BACKGROUND

The APWU filed a unit clarification (UC) petition with the National Labor Relations Board claiming that a number of EAS positions belonged in the clerk craft bargaining unit. On August 27, 1998, the APWU initiated several National Level grievances claiming both (1) that EAS **positions** belonged in the unit and (2) that many of the **duties** EAS personnel were performing in those positions constituted bargaining unit work. The parties settled the UC case on December 13, 1999, with an agreement to submit the EAS grievances to arbitration (see attached settlement). The agreement states in part (emphasis added):

> In initiating the several August 27, 1998 grievances, the APWU intended to broadly encompass disputes over whether the positions belonged in the bargaining unit **or whether the positions contained duties which should be assigned to the bargaining unit**. The parties shall apply national level arbitration awards which are issued as a result of this settlement agreement **as broadly as possible** in an effort to resolve other pending EAS grievances raising the same or similar issues or arguments.

Under the agreement, the Postal Service selected Case H4C-4H-C 25455 out of Wichita, Kansas as the first case to go to arbitration. In an earlier grievance pre-dating the UC petition, Arbitrator Snow had held that a similar position, the Personnel Assistant B position, was not a bargaining unit position (Case H4C-4C-C 23981). The Wichita Personnel Assistant A case raised an issue not decided by Arbitrator Snow in the earlier case about whether the personnel assistant **work** should be assigned to the bargaining unit. In accordance with the APWU's intent to have the National Level grievances broadly encompass the disputes over both the position and the work as well as the parties' express intention to apply the resulting awards broadly to resolve EAS disputes, the agreement also provided for withdrawal of all other pending grievances involving the related EAS positions of Human Resource Associate, Human Resource Specialist or Personnel Assistant

which claim that these positions belong in the bargaining unit, because, applied broadly, the unit placement issue was resolved in the earlier award.

On June 22, 2001, Arbitrator Snow issued an award denying the Postal Service's motion to dismiss the grievance as not arbitrable in light of the prior Personnel Assistant B award and sustaining the APWU's grievance claiming that the Personnel Assistant A position contained **duties** which were bargaining unit duties. He noted that in his earlier award he focused on the fact that employees who are engaged in personnel work **in other than a purely clerical capacity** are excluded from the unit. Arbitrator Snow cited Article 1.2(3), which excludes employees engaged in personnel work in other than a purely non-confidential clerical capacity from the bargaining unit. The phrase "purely clerical capacity" means work that is not confidential, and Arbitrator Snow concluded that the exclusion was therefore limited to **"individuals involved in labor relations and dealing with labor relations materials."** (PAA Award at page 25 (emphasis added)). He also found, however, "that work being done in the Personnel Department in the Wichita Division is nonconfidential and purely clerical" and that "the lion's share of duties assigned to the four posted Personnel Assistant positions in the Wichita, Kansas Division must be assigned to bargaining unit members because duties of the positions are nonconfidential and appear to be purely clerical." (PAA Award at page 28).

The duties in Wichita included typical clerical work such as typing, answering phones, photocopying, and maintaining personnel records. These duties were akin to the duties performed by the Personnel Clerk bargaining unit position. Applied broadly, as the parties intended by their settlement agreement, the PAA award entitles the clerk craft not only to these particular duties, but to **all personnel work** assigned to EAS employees that **does not involve labor relations or dealing**

with labor relations materials.

PERSONNEL DUTIES LIST

The following are the types of duties which should be assigned to the clerk craft:

- Log, prepare, maintain, and distribute records, forms reports, correspondence, charts, and files.*
- Review and process reports and transactions, checking for completeness, accuracy and conformance to program guidelines.*
- Collect, track, and compile reporting data and statistics; maintain statistical reports and charts.*
- Research, respond to, and resolve questions, inquiries, requests for information, and complaints.*
- Perform scheduling, notification, and coordination activities related to the operation of assigned programs.*
- Requisition, maintain, and distribute program, informational, and promotional materials.*
- Provide technical guidance and information regarding the administration of assigned programs.*
- Receive a register of qualified applicants, apply screening techniques including police checks and interviews, and present applicant credentials for management decision.#
- Prepare and maintain employment forms and answer employee questions.#
- Prepare bid of job vacancies; assist in determining senior qualified bidder.#
- Assist, by the preparation of forms, correspondence, and statistics, in the maintenance of personnel programs and services such as incentive awards, retirement, OWC, health and life insurance, and EEO.#
- Conduct or assist with employee participation drives for various approved organizations.#
- Assist in administering the health benefits program, life insurance program, and retirement and leave programs.#
- Examine, document, and otherwise process official personnel actions.+
- Induct new employees by taking their fingerprints, providing them with, and instructing them in filing out forms, administering oaths, and performing related operations.+

- Examine applications for leave by employees when the type or durations of leave desired fall within the categories required to be acted on centrally.+

- Maintain personnel records.+

- Furnish information to employees and applicants about personnel regulations and practices.+

- Examine for completeness or compose reports of personnel injuries sustained by employees in the performance of their duties and claims for compensation due to time lost from work because of such injuries.+

- **And all personnel work assigned to EAS employees that does not involve labor relations or dealing with labor relations materials.**

* Human Resource Associate (EAS 11)
# Personnel Assistant (A)
+ Personnel Clerk (PS-05)

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Work Jurisdiction Grievance Case No. H4C-4H-C 25455
	)	
AND	)	
	)	
AMERICAN POSTAL WORKERS UNION	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Mr. David Stanton

For the Union: Ms. Melinda Holmes

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: June 22, 2000

POST-HEARING BRIEFS: May 29, 2001

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the dispute before the arbitrator is procedurally arbitrable and that the arbitrator has jurisdiction to proceed to the merits of the case. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 6-22-01

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement by assigning bargaining unit work to nonbargaining unit personnel employees in the Wichita, Kansas Division. The grievance is sustained, and the parties shall have 90 days from the date of this report to fashion an appropriate remedy. Should they fail to succeed, either party may activate the arbitrator's jurisdiction to determine an appropriate remedy, at which time an evidentiary hearing may be necessary. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 6-22-01

NATIONAL ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND AMERICAN POSTAL WORKERS UNION (Work Jurisdiction Grievance) (Case No. H4C-4H-C 25455)	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a settlement agreement entered into by the parties on December 13, 1999. A hearing occurred on June 22, 2000 in a conference room of United States Postal Service headquarters located in Washington, D.C. Mr. David Stanton, Chief Counsel in Labor Relations, represented the United States Postal Service. Ms. Melinda Holmes of the O'Donnell, Schwartz and Anderson law firm located in Washington, D.C. represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Ms. Amy Lapiere of Diversified Services, Inc., reported the proceeding for the parties and submitted a transcript of 176 pages. The advocates fully and fairly represented their respective parties.

The Employer challenged the procedural arbitrability of the dispute asserting that the matter was precluded from arbitration by the doctrines of claim and issue preclusion. The parties authorized the arbitrator to retain jurisdiction in the matter for 60 days following the issuance of an award. The arbitrator officially closed the hearing on May 29, 2001 after receipt of the final post-hearing brief in the matter.

III. STATEMENT OF ISSUES

The issues before the arbitrator are as follows:

(1) Is the grievance procedurally arbitrable? If so, what is the appropriate remedy?

(2) Did the Employer violate the parties' collective bargaining agreement by assigning certain work to nonbargaining unit personnel in Wichita, Kansas? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE I - UNION RECOGNITION

Section 2. Exclusions

The employee groups set forth in Section I above do not include, and this Agreement does not apply to:

3. Employees engaged in personnel work in other than a purely non-confidential clerical capacity.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer to post four "Personnel Assistant A" positions in the Executive and Administrative Service branch of the Wichita, Kansas Division. None of the positions is within the Union's bargaining unit. The Union, however contends that employees hired for the position are required to perform bargaining unit work. For this reason, the Union challenged the Employer's decision. The issue in the dispute is relatively straightforward, and the facts are largely uncontested. Circumstances, however, with respect to how the dispute came to arbitration are unique.

In approximately October of 1997 after over ten years of conflict about the matter, the Union filed a unit clarification petition with the National Labor Relations Board. The petition asked the Board to make clear that the bargaining unit represented by the Union includes a job classification which the Employer assigned outside the bargaining unit and as a part of the Executive and Administrative Service classification.

The EAS unit consists of managerial and supervisory positions not represented by this bargaining unit or covered by this collective bargaining agreement. The "Personnel Assistant A" positions in Wichita, Kansas were among those contested in the NLRB petition. On December

13, 1999, the parties entered into a settlement agreement which resolved all matters pending before the National Labor Relations Board. Pursuant to their agreement, the Union withdrew its petition from the Board; and the parties agreed to submit certain disputes to arbitration. They further agreed that all arbitration hearings with regard to the matter would be heard by the present arbitrator. The parties stipulated that the first case to be heard would involve the position of Personnel Assistant A. Accordingly, this matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

It is the position of the Union that the Employer violated the parties' collective bargaining agreement by posting four EAS "Personnel Assistant A" positions in the Wichita, Kansas Division. The posting allegedly constituted a contractual violation because it placed work assignments belonging to the bargaining unit outside of the bargaining unit and failed to subsume them under the coverage of the parties' negotiated agreement.

It is the belief of the Union that the Employer actively attempted to circumvent the parties' collective bargaining agreement. According to the Union, all personnel work which is nonconfidential and purely clerical is work which belongs within the bargaining unit represented by the Union, and the Union contends that the four disputed "Personnel Assistant A" positions require performance of duties which are nonconfidential and purely clerical. It is the conclusion of the Union that such duties should be assigned to bargaining unit members.

The Union also contends that it is not precluded from arbitrating the merits of this case by the doctrines of issue and claim preclusion. The Union maintains that, in previous arbitration hearings

involving other Personnel Assistant positions, the parties addressed different issues and received decisions that never addressed issues and arguments now being raised in this proceeding. It is the contention of the Union that, since the "work jurisdiction" issue argued in this proceeding has not been previously addressed, the doctrines of claim and issue preclusion do not prevent it being arbitrated at this time.

B. The Employer

The Employer argues just as eloquently that management did not violate the parties' collective bargaining agreement in this case by posting the "Personnel Assistant A" positions in the EAS unit of Wichita, Kansas. According to the Employer, the arbitrator is precluded from reaching the merits of the dispute by the doctrines of claim and issue preclusion. Even if the arbitrator should reach the merits of the case, the Employer contends that the outcome of the dispute already has been determined by precedent-setting, national level awards which previously decided the issue before the arbitrator. The Employer believes that previous

arbitral decisions addressed both the issue of work jurisdiction and unit placement with regard to Personnel Assistants.

The Employer believes cases on which management relies held that bargaining unit personnel work is limited to work of a nonconfidential, purely clerical nature. Management argues that, while it may be true some of the duty assignments performed by EAS Personnel Assistants could be performed by members of the bargaining unit, such duties do not belong exclusively to the bargaining unit. The Employer reasons that there is no contractual obligation which reqires management to cluster or combine bargaining unit work when duty assignments overlap with nonbargaining unit work. It is the Employer's position that the standard to be applied in such "overlap" situations is whether the division of bargaining and non-bargaining unit work is the result of a sound business judgment and is based on good faith reasons of operational efficiency. The Employer concludes that the grievance must be denied because duty assignments for the four Wichita, Kansas "Personnel Assistant A" positions were placed outside the bargaining unit in good faith and for reasons of operational efficiency.

VI. ANALYSIS

A. The Matter of Procedural Arbitrability

The Employer argued that the dispute before the arbitrator is not procedurally arbitrable based on doctrines of issue and claim preclusion (also known as collateral estoppel and res judicata). It is the belief of the Employer that these common law doctines prevent the arbitrator from reaching the merits of the case. While the doctrines of issue and claim preclusion are regularly confronted by law students in a civil procedure course or by parties in a commercial arbitration proceeding, their application in labor arbitration is less developed. Their use in labor arbitration, however, is an emerging trend. (*See Vestal and Hills,* 35 Okla L.R. 281 (1982).)

Whether in court or an arbitration forum, the principle of decisional finality is important; and rules have been developed in both arenas to "relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." (*See Allen v. McCurry*, 449 U.S. 90, 94 (1980).) Rules fostering finality are described as preclusion rules. Preclusion rules limiting an arbitrator's review of claims and issues are important in an arbitration system both because of their impact on the

settlement of disputes as well as on relieving parties from the expense of repeated arbitration. While parties debate the persuasive value of prior arbitration decisions as a tool to interpret their collective bargaining agreements, the tradition in this particular industry is to apply the doctrine of stare decisis to national level arbitration decisions. (*See* St. Antoine, The Common Law of the Workplace, 48 (1998).) This tradition increases the importance of res judicata rules because the parties have made a commitment to constrain the right to rearbitrate claims that already have been adjudicated. Hence, rules of preclusion become more relevant than they might be in an industry where precedential value is not assigned to arbitration awards.

Res judicata rules generally are divided into claim preclusion and issue preclusion. Claim preclusion generally prevents a party from rearbitrating in a later proceeding a matter that was a part of the same claim arbitrated in an earlier dispute. As the eminent Whitley McCoy stated many years ago, "Where the prior decision involves the interpretation of the identical contract provision between the same company and union, every principle of common sense, policy, and labor relations demands that it [a prior arbitration decision] stand until the parties annul it by a newly worded contract provision." (*See* 9 LA 731, 732 (1948).) Rules of claim

preclusion teach that any part of a claim which might have been litigated, even though it was not, should be precluded from later arbitration.

Some courts and scholars do not group issue preclusion under the topic of res judicata rules and, instead, describe issue preclusion under the doctrine of collateral estoppel. (*See, e.g., McCoy v. Cooke*, 419 N.W.2d 44 (1988).) While such variegated terminology can be a source of confusion, issue preclusion rules generally limit any further arbitration of issues "actually" arbitrated in an earlier proceeding. Restatement (Second) of Judgments includes both claim preclusion and issue preclusion as a part of res judicata rules. (*See* Ch. 3, 131 (1982).)

Rules of claim preclusion prevent a party from pursuing a later action on the original claim, and a final decision in favor of a party bars the other party from obtaining a second decision on the same claim. It means that a party may not split a claim into a number of disputes, and this fact makes the scope of the original claim highly important. In understanding the scope of the original claim, Restatement (Second) of Judgments teaches that weight is to be given "to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (*See* Section 24(1)

(1982).) Section 26 of Restatement (Second) of Judgments sets forth six exceptions to the rule against splitting a claim, and the exceptions include permitting a new claim when "it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." (*See* Section 26 (1982).)

While claim preclusion rules focus on what a party "ought" to have arbitrated in the first proceeding, issue preclusion rules focus on what was "actually" arbitrated and decided in the earlier award. Rules of issue preclusion require that the issue arbitrated in the first and second proceedings must be the same. To test the sameness of an issue, it should be asked, for example, whether the evidence in both proceedings is essentially the same; do both proceedings involve the same arbitral standards; did preparation for the second arbitration proceeding involve essentially the same matter presented in the first arbitration proceeding; and is there a close substantive relationship between claims being asserted in the two proceedings?

Additionally, not only must the issue be the same in both proceedings but also issue preclusion rules require that the issue actually must have been arbitrated and determined in the first award. Finally, the issue the arbitrator decided in the first proceeding must, in fact, support the

award of the arbitrator before that issue will be precluded from being revisited in a later proceeding. In other words, even if an arbitrator acutally decided a matter in an earlier decision but it was not essential to the ultimate award of the arbitrator, a party is not precluded from later pursuing the issue on the theory that the first arbitration decision merely provided dicta with regard to the challenged issue. Likewise, if an arbitrator based an award on alternative theories, either of which would justify the determination, rules of issue preclusion would permit the matter to be pursued in a later proceeding. *(See* Restatement (Second) of Judgments, Section 27 (1982).)

Just as with claim preclusion, there also are numerous exceptions to issue preclusion rules. For example, was the earlier decision premised on "ultimate facts" or on "mediate data"; is there a difference in the burden of proof in the two proceedings; are the procedures followed in the two proceedings essentially the same; and was there an adequate opportunity to obtain a full and fair decision in the first proceeding? The Employer argued that such rules of preclusion caused the dispute to be described as procedurally not arbitrable in this case.

B. Application of the Rules

Neither claim preclusion nor issue preclusion rules should be applied in this dispute because of the unique way in which the matter came to arbitration. The quality of proceedings are highly relevant in testing their preclusive effect. Typically, matters come to arbitration from these particular parties pursuant to a detailed and carefully negotiated grievance procedure set forth in the parties' collective bargaining agreement. Disputes between the parties regularly flow through a highly structured grievance procedure and, if necessary, are ultimately the subject in arbitration of direct and cross-examination from four or five lawyers before a national level arbitrator who monitors due process protections. Such was not the route followed by the dispute in this case.

This matter came for arbitration as the direct result of a negotiated settlement agreement in an effort to forestall other litigation. The parties reached an agreement according to which the Union promised to forego pending claims before the National Labor Relations Board in exchange for the Employer's agreeing to arbitrate the matter before the present arbitrator. Mr. Cliff Guffey, Director of the Clerk Division, testified about his participation in the settlement negotiation and explained his

understanding of the parties' intent to present the dispute to this arbitrator so that it could be resolved on its merits.

No evidence contradicted his description of the parties' negotiated intent. The arbitrator received no testimony suggesting that Mr. Guffey incorrectly described the intent of the negotiated settlement. If the Employer had a right to require the application of rules of claim or issue preclusion, it would call into question the arbitrator's authority to consider the merits of the case. It is reasonable to conclude that, based on the nature of the settlement agreement, management is barred from raising a challenge to the procedural arbitrability of the case. To conclude otherwise would deprive the parties of the intended benefit of the bargain for which they negotiated. It would not be sensible to apply the previously described rules of preclusion to this negotiated settlement of the parties.

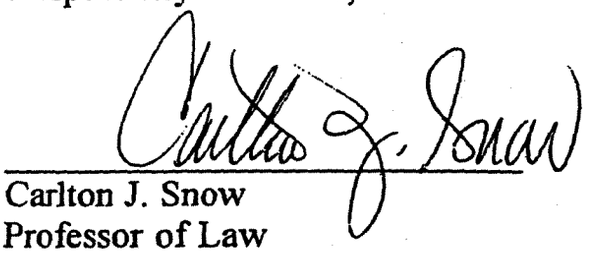
This conclusion is not intended to undermine the precedential impact of national level arbitration awards. The parties for years have followed a tradition of giving such decisions precedential effect at the national and area levels. Absent extraordinary circumstances that provide some defense, the parties will continue to be bound by such national awards

in the future. If prior national level awards have already determined issues raised by this grievance, the outcome shall be dictated by those earlier decisions.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the dispute before the arbitrator is procedurally arbitrable and that the arbitrator has jurisdiction to proceed to the merits of the case. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date: 6-22-01

C. Merits of the Case

In the view of the Union, the issue before the arbitrator on the merits of the case involves a question of work jurisdiction. The Union has not couched the issue in terms of management's placement of a bargaining unit position outside of the bargaining unit. On the other hand, the Employer viewed the issue in just the opposite way and claimed that the dispute involves merely a matter of the appropriate placement of a position. Both parties recognized that the issue of the placement of "Personnel Assistant" positions previously had been addressed by this arbitrator in a 1995 national level decision. (*See* Case No. H4C-4C-C 23981; *see* Joint Exhibit No. 3.)

In the 1995 arbitration proceeding, the Union raised an argument about a loss of work, asserting that duties performed by other workers belonged in the bargaining unit. The arbitrator gave little attention to this argument at the time because it seemed inconsistent with the Union's chief theory of the case that the positions themselves belonged in the bargaining unit. In the earlier decision, the arbitrator stated:

> It is, of course, inconsistent to challenge the removal of work from the bargaining unit while claiming at the same time, that the positions involved are themselves in the bargaining unit. (*See* Joint Exhibit No. 3, p. 34.)

As was clear in the earlier decision, the "loss of bargaining unit work" theory received little attention; and the arbitrator resolved the dispute believing it was unnecessary to explore this aspect of the case in the report. But this issue now has been placed squarely in contention and must be addressed in order to decide the present dispute.

The essence of the earlier decision provides useful guidelines in this case. The earlier decision stated:

> Viewing the totality of the record, it must be concluded that employees like Personnel Assistants who are engaged in personnel work in other than a purely clerical capacity are excluded from the Union and coverage of the parties' agreement by the operation of Article I(2)(3) of the collective bargaining agreement. (*See* Joint Exhibit No. 3, p. 39, emphasis added.)

Such guidance makes clear that the four "Personnel Assistant" positions at the Wichita, Kansas Division do not belong in the bargaining unit if they require employees to perform personnel work in other than a purely clerical capacity. Regrettably, however, such guidance failed completely to resolve the current dispute because the Union in this case is alleging that the Wichita, Kansas Personnel Assistants are performing purely clerical, nonconfidential duties.

In order to resolve the present dispute, it is helpful to review boundaries of personnel work that previously had been established. The 1995 decision stated:

> Language used by the parties modified the "purely clerical capacity" language in such a way as to exclude from the bargaining unit those personnel employees with purely clerical duties who, otherwise, would be considered bargaining unit members. That limitation did not necessarily or logically destroy the existing historic exclusion from the bargaining unit of employees engaged in personnel work in other than a purely clerical capacity. Without assuming the intent to change completely the meaning of the exclusion, addition of the word "non-confidential" to the historic, broad exclusion of personnel workers would serve to create three groups of employees engaged in personnel work. First, there would be workers in a purely nonconfidential capacity who would be bargaining unit members. Second, there would be workers in a confidential clerical capacity who would be excluded. Third, there would be workers who did not work in a clerical capacity. (*See* Joint Exhibit No. 3, p. 36.)

The current dispute before the arbitrator deals with duty assignments to be given the first group of workers, that is, bargaining unit members of a purely clerical, nonconfidential capacity.

Another arbitration decision must be examined for its guidance in this matter. It is the decision involving Article I.6 decided in 1989. (*See* Case No. A-C-N-6922, Employer's Exhibit No. 17.) The "Article 1.6" dispute dealt with a claim that supervisory employees not belonging to the bargaining unit were impermissibly performing bargaining unit work in

violation of the parties' agreement. The present dispute is similar in that the Union alleged the Employer violated the parties' agreement by assigning EAS employees who do not belong to the bargaining unit to perform bargaining unit work. In both cases, the Union maintained that job descriptions setting forth basic functions, duties, and responsibilities of the respective work positions assigned to bargaining unit members presumptively demonstrated that the work described is bargaining unit work and, consequently, that it must be assigned exclusively to members of the bargaining unit. (*See* Employer's Exhibit No. 17, p. 11.)

In the "Article 1.6" grievance, the arbitrator reasoned the evidence failed to support a conclusion that "bargaining unit work" referred to absolutely any task delineated in a Position Description. (*See* Employer's Exhibit 17, p. 34.) The 1989 decision also stated:

> The arbitration decisions have not shown that the Position Descriptions conserve the purpose urged for them in this proceeding, namely, that of defining what job duties belong solely to bargaining unit members. (*See* Employer's Exhibit No. 17, p. 44.)

The Employer asserted in this current dispute that the Union once again is relying on Position Descriptions to prove a "loss of work" theory of the case. While it is correct that the Union in the present case submitted Position Descriptions as evidence that this particular work

belongs in the bargaining unit, it is incorrect to assert that the Union relied primarily on such evidence. This is an important fact and distinguishes the current dispute before the arbitrator from the case presented in the "Article 1.6" grievance.

The arbitrator received clear and convincing evidence in the current grievance that the disputed duties existed and were placed within the bargaining unit represented by this Union as early as the 1960s. For instance, the "Personnel Assistant" position of 1968 was the predecessor to the "Personnel Assistant" position in dispute before the arbitrator. "Personnel Assistant" positions of the 1960s were part of the bargaining unit represented by this Union. Nor is there any dispute about the fact that workers in those "Personnel Assistant" positions continue today to perform purely clerical duties. For example, this is demonstrated by the fact that, despite a 1962 Executive Order excluding personnel employees performing other than "purely clerical" duties from the bargaining unit, some "Personnel Assistant" as well as "Personnel Clerk" positions remained within this bargaining unit and performed a wide range of duties. Consequently, it is reasonable to conclude that management viewed duties performed by Personnel Assistants and Personnel Clerks in the Union after

1962 to be clerical in nature. Otherwise, the positions would have been removed at that time.

It was not until 1972 that the "Personnel Assistant" position was removed from the bargaining unit, and it, then, appeared the removal was based on language of the law which excluded "confidential" employees from the bargaining unit. At that time, the Employer took the position that, if work was confidential, it needed to be separated from the bargaining unit but that, if it was not confidential, then it could remain in the bargaining unit. Workers in the "Personnel Clerk" position, however, continued to perform purely nonconfidential clerical personnel duty assignments, and they remained a part of the bargaining unit. Even to this date, the bargaining unit continues to include a "Personnel Clerk" position.

In 1986 when the Wichita, Kansas personnel office expanded, the Employer posted and filled four Personnel Assistant (A), EAS-11 assignments. When the Union inquired of management regarding why none of the positions was part of the bargaining unit, Ms. Jodine Elwick, Head of Personnel, allegedly stated, "There is never going to be a bargaining unit job posted in Personnel." Mr. Darryl Tate, Clerk Craft Director in Wichita, Kansas, testified that, prior to 1986, a PS-Level 4 Clerk Typist regularly

worked in the Personnel Office, but she was not replaced with a bargaining unit member when she retired.

After 1986, the Employer asserted that all duties performed in the personnel office were confidential and, therefore, could not be assigned to bargaining unit members. The Union maintains that many of the duties assigned to the personnel position, in fact, were not confidential and should be performed by bargaining unit employees. In those disagreements, this grievance was born and made its way to this point in the life of the organization. The parties' history makes clear that nonconfidential clerical duties can be performed by bargaining unit members and that traditionally bargaining unit members, in fact, performed such duties. In order better to understand what constitutes "nonconfidential work," it is useful to turn to Article 1.2(3) of the parties' negotiated agreement.

In Article 1.2(3), the parties set forth categories of workers not covered by the agreement. It states:

> The employee groups set forth in Section 1 above do not include, and this agreement does not apply to:
>
> (3) employees engaged in personnel work in other than a purely non-confidential clerical capacity. (*See* Joint Exhibit No. 1, p. 1.)

In the 1995 "Personnel Assistant B" grievance, the arbitrator discussed the definition of "confidential employees" for purposes of interpreting Article

1.2(3). The conclusion was that the "confidential employee" verbiage in Article 1.2(3) of the parties' agreement follows federal law. The arbitrator stated:

> The U.S. Supreme Court has been clear about the fact that confidential employees are excluded from the bargaining unit if they 'assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations.' (*See B.F. Goodrich Company,* 115 N.L.R.B. 722 (1966); and *NLRB v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170 (1981).) (*See* Joint Exhibit No. 3, p. 21.)

The earlier arbitration decision concluded that the "confidential employee" exclusion was intended to apply to individuals involved in labor relations and dealings with labor relations material.

Evidence submitted to the arbitrator in this case failed to undermine a conclusion that the disputed personnel in the Wichita Division of the Personnel Department do not perform "labor relations" work as such. Testimony at the arbitration hearing established that EAS employees in the Wichita Personnel Department do not specialize in particular areas. Moreover, management occasionally details employees from the bargaining unit temporarily to work in the Personnel Department. Additionally, there is one bargaining unit employee who was placed in Personnel as a rehabilitation assignment. Such facts strongly suggest that the work being performed in the Personnel Department of the Wichita Division is not

confidential. It is not work which placed the disputed employees in a special relation to management. (*See NLRB v. Rish Equipment Company*, 687 F.2d 36 (CA4, 1982); *Swank, Inc.*, 231 N.L.R.B. 96 (1977); and Mukamal, "The Exclusion of Confidential and Managerial Employees," 22 Duq. L. Rev. 1 (1983).)

Absent evidence to the contrary, it is reasonable to believe that the parties intended their contractual exclusion reasonably to parallel the statutory categories, and the statutory category of "confidential employees" is a narrow one. Merely handling personnel records does not necessarily qualify an employee for the "confidential" exclusion. (*See, e.g., Union Oil Company of California*, 607 F.2d 852 (CA 9, 1979).) Nor, for example, does opening mail for an individual who effectuates labor policy mean that an employee should be described as "confidential." (*See, e.g., Air Express International Corp.*, 245 N.L.R.B. 478 (1979), 659 F.2d 610 (CA5, 1981), *cert. denied* 459 U.S. 835 (1982).) Evidence submitted to the arbitrator failed to show that the disputed positions cover workers "who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations." (*See B.F. Goodrich Company*, 115 N.L.R.B. 722 (1966).) The evidence established that, over the years, personnel work gradually has been assigned to

nonbargaining unit members and that the work of bargaining unit personnel has decreased. From 1990 to 2000, the bargaining unit lost approximately 1565 personnel assignments. Although technology changes over the years may have modified duties in the industry, such changes of themselves failed to account for the loss of bargaining unit personnel positions.

The Employer also argued that, even if EAS employees in the Wichita Division may be performing work that could be performed by bargaining unit members, such work does not belong to the bargaining unit exclusively. As management sees it, there is no contractual requirement to combine work when bargaining and nonbargaining unit assignments overlap. The "Article 1.6" arbitration decision provided guidance with regard to this topic in its discussion of differences between exclusive and non-exclusive work and appropriate approaches in areas of overlap, that is, in the gray areas.

The "Article 1.6" decision reasoned that in the gray areas nonbargaining unit employees "must be able to perform [disputed functions] if there are good faith reasons of operational efficiency behind the performance of such duties." (*See* Employer's Exhibit No. 17, p. 66.) The arbitrator, however, examined no persuasive evidence that there are exclusive overlapping duties in this case or that management distributed

assignments in this case based on fundamental concerns about operational efficiency with regard to labor relations. In fact, contradicting any assertion of exclusive overlapping duties is the fact that bargaining unit members are able to perform duties in the unit, are assigned to such duties, and that everyone in the unit covers for each other because all perform generalized duties.

It is reasonable to conclude that work being done in the Personnel Department in the Wichita Division is nonconfidential and purely clerical. Absent persuasive evidence to the contrary, it is reasonable to conclude that the disputed duties assigned to EAS employees which are nonconfidential and purely clerical belong within the bargaining unit. Evidence submitted to the arbitrator established that the lion's share of duties assigned to the four posted "Personnel Assistant" positions in the Wichita, Kansas Division must be assigned to bargaining unit members because duties of the position are nonconfidential and appear to be purely clerical.

USPS SETTLEMENT AGREEMENT
NLRB Case No. 5-UC-353

This settlement agreement represents an understanding between the parties to fully and completely resolve any and all issues, and all currently pending grievances regarding the above-captioned Unit Clarification petition.

- APWU will withdraw NLRB Case No. 5-UC-353.

- Disputes regarding the proper assignment of **EAS Secretaries** in Mail Processing and Customer Service facilities will be resolved on the basis of the parties' December 13, 1999 settlement agreement. (Copy attached).

- Effective with the signing of this agreement, the Postal Service will change the **Bulk Mail Dock Clerk** (Occ. Code 2315-99xx; SP 2615) position from a best qualified to a senior qualified position.

- APWU will withdraw the 8/27/98 **Postmaster** national level grievance, and any other grievances in existence as of the signing of this settlement agreement which claim that **Postmaster** positions are clerk craft positions. This settlement agreement does not resolve any pending grievances over issues related to **Postmaster Relief** or **Post Office Administrator** positions.

- APWU will withdraw the 8/27/98 national level grievance, and any other grievances in existence as of the signing of this settlement agreement which claim that **Human Resource Associate, Human Resource Specialist** or **Personnel Assistant** positions are clerk craft positions.

- Unless resolved before arbitration, the parties will arbitrate as an individual case the **Address Management System Specialist** grievance dated 8/27/98. Any other grievances in existence as of the signing of this settlement agreement which claim that **Address Management System Specialist** positions are clerk craft positions will be withdrawn.

- Unless resolved before arbitration, the parties will arbitrate as an individual case the **Mail Flow Controller** grievance dated 8/27/98. Any other grievances in existence as of the signing of this settlement agreement which claim that **Mail Flow Controller** positions are clerk craft positions will be withdrawn.

- Unless resolved before arbitration, the parties will arbitrate as an individual case the **Business Center** grievance dated 8/27/98. Any other grievances in

existence as of the signing of this settlement agreement which claim that **Business Center** positions are clerk craft positions will be withdrawn.

- Unless resolved before arbitration, the parties will arbitrate as an individual grievance the **Business Mail Entry Analyst** grievance dated 8/27/98. Any other grievances in existence as of the signing of this settlement agreement which claim that **Business Mail Analyst** positions are clerk craft positions will be withdrawn.

- Unless resolved before arbitration, the parties will arbitrate as an individual grievance the **Operations Quality Improvement Analyst** grievance dated 8/27/98. Any other grievances in existence as of the signing of this settlement agreement which claim that **Operations Quality Improvement Analyst** positions are clerk craft positions will be withdrawn.

- APWU withdraws its claim to the **Arbitration Scheduling Coordinator** position based on the Postal Service's representation that these individuals work in Area offices. Any grievances in existence as of the signing of this settlement agreement which claim that **Arbitration Scheduling Coordinator** positions are clerk craft positions will be withdrawn.

- Arbitration hearings held pursuant to this settlement agreement shall be heard before Arbitrator Carlton Snow. The first case to be heard will be Case No. H4C-4H-C 25455, Wichita, KS. The APWU will select the second case, and the Postal Service will select the third case, and so forth, with each party alternating selections. Upon issuance of the Award in the first case, the next case shall be promptly scheduled and heard.

- In initiating the several August 27, 1998 grievances, the APWU intended to broadly encompass disputes over whether the positions belong in the bargaining unit or whether the positions contain duties which should be assigned to the bargaining unit. The parties shall apply the national level arbitration awards which are issued as a result of this settlement agreement as broadly as possible in an effort to resolve other pending EAS grievances raising the same or similar issues or arguments.

Anthony J. Vegliante
Vice President
Labor Relations

Dated: 12/13/99

Moe Biller
President
American Postal Workers
Union, AFL-CIO

Dated: 12/13/99

Mr. Moe Biller
President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Re: EAS Secretary, Field

This settlement agreement represents an understanding between the parties to fully and completely resolve any and all issues and all currently pending grievances regarding the proper assignment of EAS secretaries in Mail Processing and Customer Service facilities.

1. The Postal Service agrees to limit the use of EAS secretaries in the current organizational structure to the following managers and/or their successor positions in any subsequent organizational structure:

   a) The District Manager, Customer Service
   b) Manager, Human Resources (District)
   c) Managers, Processing and Distribution Center/Facility or similar facility (e.g. Bulk Mail Center), or Manager, Remote Encoding Center - Level 23 and above
   d) Postmasters. EAS 26 and above

2. The Postal Service agrees to create a new Clerk Craft position entitled "Secretary, PS-6." The Secretary, PS-6, position is developed for use at District offices for management officials who directly report to the District Manager (except Manager Human Resources), or their successor positions in any subsequent organizational structure and Postmasters, EAS-24. Candidates for the newly created position shall be selected on a "best qualified" basis.

3. The initial staffing of the Secretary, PS-6, positions shall occur in the following fashion:

   a. Within 60 days after the first full pay period in January, incumbent EAS secretaries who are impacted by the provisions of the MOU will be given the option of immediately becoming a full-time Clerk Craft employee assigned to the newly created Secretary, PS-6, position.

Salary and seniority for those choosing to accept the new assignment shall be treated in accordance with the National Agreement and the Employee & Labor Relations Manual (ELM). Seniority shall be established in accordance with the National Agreement in effect at the time that the employee left the bargaining unit or, if never in the craft as of the date of the reassignment. In no event, however, shall an EAS secretary's position be abolished as a result of this settlement agreement. When an EAS secretary's position, not covered by Sections 1.a through d. above, becomes vacant for any reason, such vacancy, if filled, shall be posted as a bargaining unit position in accordance with the terms of this agreement.

b. In the event the provisions of a. above fail to produce a sufficient number of best qualified employees, the duty assignment will be posted for application by full-time Clerk Craft employees in the installation.

4. Future vacant Secretary, PS-6, duty assignments occurring after the initial staffing shall be filled in accordance with the applicable National Agreement provisions.

5. This settlement agreement does not apply to facilities excluded under the provisions of Article 1, Section 3.

6. This settlement agreement defines the proper use of bargaining and non-bargaining unit secretaries for specified managerial employees. This agreement shall not be used to establish mandatory staffing complement levels.

7. The parties have identified the following grievances as specifically being resolved by this settlement agreement:

H0C-NA-C 52; Q90C-4Q-C 93046872; Q90C-4Q-C 95058808; H4C-4C-C 24116; H4C-4A-C 23474; H4C-4C-C 24121; H90C-1H-C 93017080; H90C-1H-C 93017081; D90C-1D-C 93020593; D90C-4D-C 94001226; E90C-1E-C 93045290; I90C-1L-C 94054139

If any additional grievances are discovered, which exist as of the date of this settlement agreement, the parties shall meet in good faith and resolve such grievances in accordance with the principles established in this settlement agreement.

8. This settlement agreement shall be without precedent as to any other dispute now pending or to arise in the future between and among these parties or involving any one or more of these parties, and shall not be cited or relied upon by any party in any current or future dispute, except any which may arise concerning enforcement of this settlement agreement.

In particular, and without limiting the reach of the foregoing sentence, the APWU and the Postal Service expressly agree that nothing in this MOU may be cited or used in any way to affect the resolution of any national level grievance.

Anthony J. Vegliante
Vice President
Labor Relations

Dated: 12/13/99

Moe Biller
President
American Postal Workers
Union, AFL-CIO

Dated: 12/13/99

Mr. Moe Biller
President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

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   b) Manager, Human Resources (District)
   c) Managers, Processing and Distribution Center/Facility or similar facility (e.g. Bulk Mail Center), or Manager, Remote Encoding Center - Level 23 and above
   d) Postmasters, EAS 26 and above

2. The Postal Service agrees to create a new Clerk Craft position entitled "Secretary, PS-6." The Secretary, PS-6, position is developed for use at District offices for management officials who directly report to the District Manager (except Manager Human Resources), or their successor positions in any subsequent organizational structure and Postmasters, EAS-24. Candidates for the newly created position shall be selected on a "best qualified" basis.

3. The initial staffing of the Secretary, PS-6, positions shall occur in the following fashion:

   a. Within 60 days after the first full pay period in January, incumbent EAS secretaries who are impacted by the provisions of the MOU will be given the option of immediately becoming a full-time Clerk Craft employee assigned to the newly created Secretary, PS-6, position.

Salary and seniority for those choosing to accept the new assignment shall be treated in accordance with the National Agreement and the Employee & Labor Relations Manual (ELM). Seniority shall be established in accordance with the National Agreement in effect at the time that the employee left the bargaining unit or, if never in the craft as of the date of the reassignment. In no event, however, shall an EAS secretary's position be abolished as a result of this settlement agreement. When an EAS secretary's position, not covered by Sections 1.a through d. above, becomes vacant for any reason, such vacancy, if filled, shall be posted as a bargaining unit position in accordance with the terms of this agreement.

b. In the event the provisions of a. above fail to produce a sufficient number of best qualified employees, the duty assignment will be posted for application by full-time Clerk Craft employees in the installation.

4. Future vacant Secretary, PS-6, duty assignments occurring after the initial staffing shall be filled in accordance with the applicable National Agreement provisions.

5. This settlement agreement does not apply to facilities excluded under the provisions of Article 1, Section 3.

6. This settlement agreement defines the proper use of bargaining and non-bargaining unit secretaries for specified managerial employees. This agreement shall not be used to establish mandatory staffing complement levels.

7. The parties have identified the following grievances as specifically being resolved by this settlement agreement:

H0C-NA-C 52; Q90C-4Q-C 93046872; Q90C-4Q-C 95058808; H4C-4C-C 24116; H4C-4A-C 23474; H4C-4C-C 24121; H90C-1H-C 93017080; H90C-1H-C 93017081; D90C-1D-C 93020593; D90C-4D-C 94001226; E90C-1E-C 93045290; I90C-1L-C 94054139

If any additional grievances are discovered, which exist as of the date of this settlement agreement, the parties shall meet in good faith and resolve such grievances in accordance with the principles established in this settlement agreement.

8. This settlement agreement shall be without precedent as to any other dispute now pending or to arise in the future between and among these parties or involving any one or more of these parties, and shall not be cited or relied upon by any party in any current or future dispute, except any which may arise concerning enforcement of this settlement agreement.

In particular, and without limiting the reach of the foregoing sentence, the APWU and the Postal Service expressly agree that nothing in this MOU may be cited or used in any way to affect the resolution of any national level grievance.

Anthony J. Vegliante
Vice President
Labor Relations

Dated: 12/13/99

Moe Biller
President
American Postal Workers
Union, AFL-CIO

Dated: 12/13/99