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NALC POSITION
DOUBLE JEOPARDY (P-00001)

Double Jeopardy

Management may not twice impose discipline for a single act of misconduct. Thus, to issue both a letter of warning and seven-day suspension for the same roll-away accident would be improper. It is not improperly subjecting a letter carrier to double jeopardy, however, when a removal is issued for the same misconduct for which an emergency suspension or an indefinite suspension has been issued (unless the employee was returned to work after the suspension).

NALC POSITION
Mitigating Circumstances (P-00002)

Allegations that, Because of Mitigating Circumstances, the Discipline Imposed is too Harsh, or No Discipline is Warranted. The final group of defenses may be called the "mitigation" defenses. With them, the NALC in effect says "even assuming that the grievant's behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive." "Mitigation" should not be confused with "leniency". The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn't. Leniency--simply asking for another change--is within the exclusive province of management, and will not be considered by any arbitrator. Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong"). A letter carrier should not be disciplined for violating a rule of which he or she was not aware. It should be noted, however, that employees are presumed to know the major rules of the shop. This defense, therefore, will not be useful where the grievant has assaulted a customer, or has intentionally discarded deliverable mail.

NALC POSITION
CAU POSITION ON CASUALS (P-00003)

Over the course of the past 15 years, NALC and APWU have taken at least six grievances concerning one aspect or another of casual employment to national level arbitration (see, e.g, C-00114, C-00403, C-00449, C-00675, C-00895, C-03246). All were denied.

Grievances appealed to Step 4 may be divided into two basic categories: first, claims that PTFS carriers must be worked across craft lines to perform straight time work before such work is given to casuals and, second, claims that PTFS carriers have an absolute right to perform carrier work at the straight time rate before any such work is given to casuals.

The Contract Administration Unit is in complete agreement with the position taken in the first category of cases, and there is, in addition, substantial external support for that position. Arbitrator Elliot Goldstein, in a regional level case (C-01215) sustained NALC's grievance where casuals were worked in the clerk craft while PTFS carriers were idle. Further, a 1976 Senior Assistant Postmaster General memorandum (M-00312) and the prearbitration decision M-00964 support our position on this issue.

The second category--claims that PTFS carriers must be given absolute priority in scheduling--is murkier. The same Senior Assistant Postmaster General memorandum that supports our position in the first category of cases contradicts our position on this issue. It states that priority need not be given to PTFS employees "where it is projected that the part-time flexible will otherwise be scheduled for 40 hours during the service week." That interpretation was not challenged by NALC when it was issued. A second strike against our position is found in the national level decision of Arbitrator Howard Gamser (C-00403). In that case, management worked PTFS clerks at the beginning of the service week, used casuals in the middle of the week, and returned to the PTFS clerks at the end of the week. APWU grieved, asserting that the PTFS clerks were entitled to work a full 40 hour week before any work was assigned to casuals. Denying APWU's grievance, Gamser ruled:

Nor does the language of Article 7, Section 1-B-2, which provides, in part "during the course of the service week, the Employer will make every effort to insure that qualified and available part-time flexible employees are utilized at the straight time rate prior to assigning such work to casuals" prevent the Service from making rational decisions regarding the scheduling of the casual work force to handle certain work for which its limited qualifications make its use more appropriate. It does not prevent consideration of the work load and composition of that work load during the entire service week rather than on a day by day basis.

Given this background, we have reluctantly concluded that a national level arbitrator would rule against us if we were to proceed to arbitration with the abstract issue whether in all circumstances a PTFS must be given absolute priority in scheduling on a daily basis. However, the line between what management may do and what management may not do in this area has not been so clearly drawn that NALC should permit management complete freedom to do as it wishes. If, for example, PTFS carriers were consistently worked on a six-day per week basis while casuals were making 40 hours in just five days, and if the work being performed by the PTFS carriers and by the casuals were substantially identical, and if this situation persisted over a considerable period, there might be a meritorious grievance.

NALC POSITION
Technical Defenses Unrelated to Merit (P-00004)

Technical Defenses Unrelated to the Merits of the Discipline.

Many arbitrators have found principles of procedural due process to be implied by the just cause standard. The examples of technical defenses in this section illustrate ways in which arbitrators have applied these principles in USPS cases. When technical defenses are used, NALC turns the tables and takes the initiative. Management, who started the whole business by making an accusation of misconduct, finds the finger pointed back at it. Because technical defenses are exhilarating, there is an unfortunate temptation to try to use them in every case, even where not quite justified. This temptation should be resisted, because overuse blunts their sharp effect, and erodes credibility. And in any event, other legitimate defenses may be found in almost every case.

NALC POSITION
DISCIPLINE WAS NOT TIMELY ISSUED. (P-00005)

DISCIPLINE WAS NOT TIMELY ISSUED.

When management discovers a letter carrier's misconduct, it must initiate discipline in a timely manner. If management does not do so, it waivers whatever rights it may have to impose discipline. It is not clear exactly where the line is drawn between timely and untimely discipline. A letter of warning for a one-minute extension of a break issued thirty years after the event would obviously be untimely. However, a removal two weeks after mail was discarded might be found timely, particularly where management spent the two-week period investigating to make certain that it had all the facts before it acted to impose discipline.

NALC POSITION
Discipline was ordered by higher management (P-00006)

Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.

The decision whether to impose discipline, and the decision as to the degree of discipline to be imposed, should be made by the letter carrier's immediate supervisor. While higher authority may advise, if asked, it is improper for officials above the immediate supervisor to initiate discipline or to override the immediate supervisor's recommendation as to extent of penalty.

NALC POSITION
MANAGEMENT'S REPRESENTATIVE LACKED AUTHORITY TO SETTLE (P-00007)

Management's grievance representative lacked authority to settle the grievance.

Article 15 specifically confers upon management's grievance representatives full authority to resolve any grievance. Where it can be demonstrated that management's representative lacked authority, discipline has sometimes been overturned. (This defense is closely related to the technical defense above. Where higher management has initiated discipline, it is presumed that subordinate supervisors lack authority to settle.)

NALC POSITION
HIGHER MANAGEMENT FAILED TO REVIEW AND CONCUR (P-00008)

HIGHER MANAGEMENT FAILED TO REVIEW AND CONCUR. Article 16: Section 8

While it is up to the immediate supervisor to initiate disciplinary action, before a suspension or removal is imposed it must be reviewed and concurred in by higher-level management.

NALC POSITION
INSUFFICIENT OR DEFECTIVE CHARGE (P-00009)

INSUFFICIENT OR DEFECTIVE CHARGE

Article 16 requires that management give a letter carrier a written notice of charges when imposing a suspension or a discharge. Implicit in this requirement is that the notice of charges describe and explain the basis for the discipline with sufficient specificity that the letter carrier may make a defense.

NALC POSITION
FAILURE TO RENDER A PROPER DECISION (P-00010)

MANAGEMENT FAILED TO RENDER A PROPER GRIEVANCE DECISION.

Article 15 requires that management state certain information in its Step 2 and Step 3 grievance decisions. Failure by management to state that information has sometimes resulted in the overturning of the contested discipline.

NALC POSITION
FAILURE TO PROPERLY INVESTIGATE (P-00011)

MANAGEMENT FAILED TO PROPERLY INVESTIGATE BEFORE IMPOSING DISCIPLINE

Before the decision to impose discipline is made, management must conduct a full, fair and impartial investigation, including giving the letter carrier an opportunity to respond to the charges.

NALC POSITION
IMPROPER CITATION OF "PAST ELEMENTS" (P-00012)

IMPROPER CITATION OF "PAST ELEMENTS" (Article 16: Section 2)

It is improper for management to cite discussions as past elements in support of another disciplinary charge. It is also improper to cite discipline which has been grieved but not finally settled or adjudicated as a past element. When these are cited, arbitrators sometimes order the present discipline rescinded or modified.

NALC POSITION
NO PROPER BASIS (P-00013)

DISPUTES WHETHER GRIEVANT'S CONDUCT, IF PROVEN, WOULD CONSTITUTE A proper basis for the imposition of discipline.

All letter carrier behavior may conceptually be divided into two categories: 1) behavior for which no discipline may be imposed, and 2) misconduct for which discipline may be imposed. Examples of behavior for which discipline may not be imposed include finishing one's route on time every day, or taking lunch at an authorized location. Examples of misconduct for which discipline may ordinarily be imposed include stealing from the mail, or assaulting a supervisor.

Sometimes management crosses the line between these categories, and issues discipline for behavior which may not properly characterized as misconduct, either because the behavior violates no rule, or because the rule which is violated is invalid. When this happens, the discipline should be disallowed.

While this is a dramatic defense, it is inapplicable to most disciplinary actions--decisions directly addressing this defense account for fewer than .01% of NALC's discipline arbitrations.

Although the opportunities to employ this defense are infrequent, it is the only proper defense in certain recurring situations. For example, management sometimes disciplines employees simply for failure to meet the "18 and 8" standard. Such a charge does not form a valid basis for the imposition of discipline, because NALC and USPS have jointly agreed that failure to meet that standard, by itself, is not disciplinable misconduct. In such situations, the NALC representative handling the grievance must look behind the charge and ask "what is the rule implied by the charge?"

Where the charge is failure to meet standard, the rule implied is that failure to meet standard, by itself, is disciplinable misconduct. But such failure is not misconduct, and this defense, therefore, should be employed. In other kinds of cases, a valid rule will be found to be implied. For example, in a discharge for fighting the rule implied by the charge is that fighting is disciplinable misconduct, a valid rule. And because a valid rule was found, this defense could not appropriately be used.

NALC POSITION
Correctness or Completeness of the Facts (P-00014)

Disputes about the Correctness or Completeness of the Facts used to Justify the Discipline.

1. FAILURE TO PROVE GRIEVANT ACTED AS CHARGED
2. GRIEVANT MAY HAVE ACTED AS CHARGED, BUT WAS PROVOKED BY ANOTHER.

This defense may be divided into two major categories.

The first category--management failed to prove that grievant acted as charged--is a defense that is available in every discipline case. This is so because whenever management issues discipline, it assumes the burden of proving that the grievant acted in such a way as to provide cause for discipline. To meet this burden, management must come forward with probative evidence sufficient to convince the arbitrator that the misconduct with which the grievant has been charged actually occurred. The union does not bear a corresponding burden--it does not have to prove that the grievant did not act as charged. Instead, the union's job is to poke holes in the proofs offered by management.

This is not to say that the union should waive its opportunity to present its side of the case. If the union can prove through its own presentation of evidence that the grievant did not act as charged, so much the better.

The second category--grievant may have acted as charged, but was provoked by another--is an affirmative defense. If the union employs this defense, it bears the burden of proving that provocation occurred. Thus, for example, if a letter carrier punches a supervisor, the union must prove that the supervisor first attacked the letter carrier, and that the letter carrier was merely defending him or herself.

FAILURE TO PROVE GRIEVANT ACTED AS CHARGED.

Before any discipline will be allowed, management must prove that the letter carrier actually engaged in the misconduct with which charged. Management's proof must be in the form of evidence. Arguments, assumptions, guesses, conjectures, allegations or speculations are not evidence. Testimony of a witness who has personal and direct knowledge is evidence, as may be photographs or fingerprints.

The arbitrator's primary function in a typical discipline case is to weigh the evidence, to determine whether the evidence is sufficient to conclude that management has met its burden of proof. In performing this function, the arbitrator must decide the weight, if any, to be given hearsay or circumstantial evidence; and if witnesses have given testimony which is contradictory, the arbitrator must decide whose testimony is to be credited, and whose discounted. The decisions listed under 'Supporting Cases,' below, illustrate the ways in which arbitrators deal with these kinds of problems.

When you are preparing to make this defense in a case, you should also look at other discipline cases having the same charge. By doing so, you'll be able to identify the kind of evidentiary problems that may be specific to a certain charge. For example, the fact patterns

found in falsification of employment application cases are quite similar to each other, but are quite different from the fact patterns found in cases in which discarding deliverable mail is charged--and the methods used by arbitrators to resolve disputes of fact in the two kinds of cases is also quite different.

GRIEVANT MAY HAVE ACTED AS CHARGED, BUT WAS PROVOKED BY ANOTHER.

This is one of the only possible defenses to some forms of misconduct, including assaults on supervisors, customers, or other employees.

NALC POSITION
LACK OF, OR IMPROPER, TRAINING (P-00015)

Allegations that, Because of Mitigating Circumstances, the Discipline Imposed is too Harsh, or No Discipline is Warranted.

The final group of defenses may be called the "mitigation" defenses. With them, the NALC in effect says "even assuming that the grievant's behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive."

"Mitigation" should not be confused with "leniency". The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn't. Leniency--simply asking for another change--is within the exclusive province of management, and will not be considered by any arbitrator.

GRIEVANT MAY HAVE ACTED IMPROPERLY, BUT DID SO AS A RESULT OF LACK OF, or improper, training (including claims that the grievant "didn't know it was wrong").

A letter carrier should not be disciplined for violating a rule of which he or she was not aware. It should be noted, however, that employees are presumed to know the major rules of the shop. This defense, therefore, will not be useful where the grievant has assaulted a customer, or has intentionally discarded deliverable mail.

NALC POSITION
LONG PRIOR SERVICE, GOOD PRIOR RECORD (P-00016)

Allegations that, Because of Mitigating Circumstances, the Discipline Imposed is too Harsh, or No Discipline is Warranted.

The final group of defenses may be called the "mitigation" defenses. With them, the NALC in effect says "even assuming that the grievant's behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive."

"Mitigation" should not be confused with "leniency". The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn't. Leniency--simply asking for another change--is within the exclusive province of management, and will not be considered by any arbitrator.

GRIEVANT HAD LONG PRIOR SERVICE, GOOD PRIOR RECORD, OR BOTH.

As a letter carrier works the job year after year, he or she establishes ever greater "property rights" to the job, and a letter carrier with substantial time on the job deserves a more moderate response to a transgression than does a new-hire. This defense is most effective when the years of service have been relatively discipline-free.

NALC POSITION
GRIEVANTS MISCONDUCT WAS NOT INTENTIONAL (P-00017)

Allegations that, Because of Mitigating Circumstances, the Discipline Imposed is too Harsh, or No Discipline is Warranted.

The final group of defenses may be called the "mitigation" defenses. With them, the NALC in effect says "even assuming that the grievant's behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive."

"Mitigation" should not be confused with "leniency". The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn't. Leniency--simply asking for another chance--is within the exclusive province of management, and will not be considered by any arbitrator.

GRIEVANT'S MISCONDUCT WAS NOT INTENTIONAL.

Unintentional misconduct (e.g., "negligence") is generally viewed as being less serious than intentional misconduct. Intent is an essential element of almost all charges of misconduct, and it is clear that it is management's burden to prove that the grievant's acts were intentional.

NALC POSITION
GRIEVANT WAS EMOTIONALLY IMPAIRED. (P-00018)

GRIEVANT WAS EMOTIONALLY IMPAIRED.

This is a sub-category of the mitigation defense that the grievant's conduct was not intentional. Here it is argued that grievant was emotionally impaired, and because of that impairment grievant's misconduct should be viewed as unintentional.

NALC POSITION
GRIEVANT IMPAIRED BY DRUGS OR ALCOHOL (P-00019)

GRIEVANT WAS IMPAIRED BY DRUGS OR ALCOHOL (INCLUDING CLAIMS THAT "ALCOHOLISM" was the cause of grievant's misconduct).

This is a sub-category of the defense above (emotionally impaired). Here it is argued that grievant was impaired by drugs or alcohol, and because of that impairment grievant's misconduct should be viewed as unintentional.

This defense is used more frequently than any other; only rarely, however, is it presented with the thoroughness of preparation required for a satisfactory result. If you determine that this defense may fit a case which you are preparing, carefully study the cases listed below, and make certain that you can match the elements essential for a win. If you can't, you may be better off concentrating your efforts on other defenses. (one arbitrator of NALC/USPS discipline cases was recently heard to ask, "What have you got when you sober up a drunken mail thief?" His answer: "A sober mail thief.")

NALC POSITION
GRIEVANT WAS DISPARATELY TREATED. (P-00020)

GRIEVANT WAS DISPARATELY TREATED.

Letter carriers who are similarly situated should receive the same discipline for the same misconduct. For example, if two letter carriers with no prior discipline extend their lunches by an hour, management might be able to justify giving each letter of warning; in the same situation, management could not justify giving one a letter of warning, and firing the other.

NALC POSITION
RULE GRIEVANT BROKE WAS OTHERWISE UNENFORCED (P-00021)

RULE GRIEVANT BROKE WAS OTHERWISE UNENFORCED.

If management routinely permits letter carriers to violate a rule, or routinely to follow a certain behavior, it may not suddenly impose discipline for violations without first announcing its intention to begin enforcing the rule, or to stop tolerating the behavior.

NALC POSITION
NOT PROGRESSIVE DISCIPLINE (P-00022)

MANAGEMENT FAILED TO FOLLOW PRINCIPLES OF PROGRESSIVE DISCIPLINE.

While management may dispense with minor forms of discipline for certain offenses which are normally dischargeable by themselves (e.g., theft of mail), for most types of misconduct, management must follow a corrective (and all arbitrators have read this to mean "progressive") pattern of disciplinary actions. This means that discharge must normally be preceded by one or more large suspensions, and that a large suspension must be preceded by one or more small suspensions, and so forth. When management fails to follow the progressive path, discipline will usually be disallowed or modified.

NALC POSITION
DRIVING PRIVILEGES-Revocation/Suspension (P-00023)

I. INTRODUCTION

The rest of this section was originally published as a CAU paper discussing issues related to the revocation or suspension of letter carriers operator identification cards (OF-346, previously SF-46). Their use has been discontinued. However, many earlier cases concerning the revocation or suspension of OF-346s are applicable to the revocation or suspension of dirivng privileges. This section summarizes arbitration awards, discusses how arbitrators have handled the issues which frequently arise, and outlines the criteria used by arbitrators in making their decisions.

II. CLASSIFYING AN EMPLOYEE AS AN UNSAFE DRIVER

Before a letter carrier's driving privilege may be suspended or revoked, Article 29 requires that management first conclude that the carrier's "on-duty record shows that the employee is an unsafe driver."

A. Burden and quantum of proof

Arbitrators often place the burden of proof on the Postal Service and will not allow mere conjecture or speculation to sustain the revocation or suspension of an employee's driving privileges. According to the arbitrator in C-07487, "the employer has the obligation of showing that based on the grievant's on-duty record, the grievant is an unsafe driver, and that he failed to observe critical safety rules and regulations set by the employer to such an extent that his on-duty record shows him to be a hazard to himself and to others, and that he would likely have injured himself or others, or damaged the Employer's property had he not been suspended. If it makes such proof the suspension and the revocation are to be sustained." (But see C-07787, C-08747)

In C-03791, the grievant hit a parked car in order to avoid an oncoming car that swerved into his lane. There were no witnesses. The arbitrator stated, "The Service must produce more than mere rejection [of the grievant's account of the accident]." The arbitrator gave the grievant the benefit of the doubt for what he said he did, stating that the grievant does not have to prove what he didn't do.

In C-07013, the arbitrator held that even the designation of an accident as an at-fault one does not by itself automatically prove that safety rules and regulations have been violated. In short, the Employer must prove that the grievant "failed to observe or disregarded" Postal Service safety rules and regulations and "the Employer must cite which practices the grievant engaged in that constituted such a failure and/or the regulations which were violated in the process." In this case, the arbitrator held that where the grievant's accident may have been an at-fault one, he did not violate any Postal Service regulations and therefore, the revocation could not be sustained.

Arbitrators will hold a suspension or revocation improper where they find that management acted unreasonably in its determination. Management must have some basis for its

conclusion that the employee can be classified as "unsafe." In C-05200, the grievant had been involved in five accidents, three of which were determined to be preventable. On the day of the accident which prompted the revocation, the road conditions were "slick" and "icy." The arbitrator held that the Postal Service must make its determination "reasonably," and "the mere conclusion, without more, that the grievant was 'at fault,' was not reasonable under the circumstances." (See also C-04877, management did not meet its burden of demonstrating reasonableness and rationality; and C-05296, where the presentation of the Union was sufficient to cast doubt on the fault of the grievant, and the benefit of the doubt must go to the grievant.)

In C-07660, the employee had his license revoked after he damaged a Postal truck by driving it under a low ramp. The arbitrator held that the revocation was improper. The employee was a "floater" and not familiar with his route for that day. Even though the employee's supervisor instructed him not to drive under that ramp, the arbitrator stated that the employee was not insubordinate, but merely "inattentive." Therefore, "an irrevocable lifting of the grievant's license does sufficient violence to the test for reasonableness to warrant some modification." The employee's license was thus reinstated. (See also C-06283)

B. The arbitrator will consider the grievant's overall driving record

Arbitrators place significant weight on a grievant's overall driving record in determining whether the grievant is an "unsafe driver." In C-07787, the grievant had two preventable accidents. In the first accident, the grievant nicked a dumpster while parking his vehicle. In the second accident, the grievant parked the vehicle, it rolled out of parking gear, into the side of a parked car, and caused over $1000 damage. The grievant had received ten safe driving awards over eleven years. The arbitrator stated: "The magnitude of this accident must be evaluated in terms of the total driving record, including the substantial number of driving awards the grievant earned during his employment." Where the sum total of the evidence failed to establish that management had a reasonable basis for classifying the grievant as an "unsafe driver," the arbitrator found the revocation to be improper. (See also C-08747, where grievant had one severe preventable accident in 21 years revocation was ruled improper.)

However, when an employee is involved in an egregious violation of basic traffic safety rules, arbitrators will look to their prior record in support of a revocation. In C-03682, the grievant was hit by a car while crossing six lanes of traffic in an unsafe manner. The other car had the right of way. The grievant had had one previous preventable accident 17 months earlier for which his license was revoked. The arbitrator ruled that these circumstances, particularly the grievant's record of a prior revocation and previous preventable accidents provided the Postal Service with reasonable cause to believe he was an unsafe driver and upheld the revocation.

III. SPECIAL DEFENSES TO REVOCATION OR SUSPENSION

In addition to the general defenses that "management didn't meet the burden" and "management's decision was unreasonable," as described above, there are three special defenses to revocation or suspension, as follows:

A. Disparate treatment

The Postal Service must use the same criteria for each employee in assessing whether or not s/he is an unsafe driver. Where an employee is able to show disparate treatment, arbitrators most often hold the suspension or revocation to be improper. According to the arbitrator in C-03016, in order to substantiate a charge of disparate treatment, the letter carrier must establish that the basis for comparison is sufficiently similar to affirm such a claim.

In C-03259, the grievant had only one clear "at fault" and one "preventable" accident. The Postal Service permanently revoked his SF-46. The arbitrator held the revocation to be unwarranted where several employees had much the same or worse driving records than the grievant but none had their SF-46's permanently revoked. However, where management is able to develop an acceptable and credible rationale for its differentiation, some arbitrators have ruled that proof of disparate treatment alone is not sufficient to overturn a revocation. (See C-7013)

B. Driver improvement training

Section 311.c of the EL-827 provides: "Current driving employees who demonstrate a need for improvement in their driving (based either on accident involvement or observed driving practices) are afforded the opportunity to improve a specific deficiency through improvement driver training." And Section 463.4 of the EL-827 lists as one of the "decision criteria" to be used by management when considering whether to revoke an OF-346: "...the quality or absence of prior training in a particular driving activity."

Management, thus, has a duty to provide remedial training when driving difficulties appear. Where management has failed to provide such training, arbitrators have sometimes ruled that revocation or suspension is improper. (See C-01316, where revocation was ruled improper because the grievant demonstrated no driving deficiencies after receiving training; and C-07621, where grievant had two accidents but was not provided with training after either. See also C-01435, C-03682, C-04774, C-05039 where the arbitrators conditionally set aside revocations until the grievants were given training specific to demonstrated deficiencies, because the arbitrators ruled that the evidence did not support a finding that the letter carriers would not respond to such training).

Arbitrators, however, sometimes rule that where there is a clearly demonstrated pattern of unsafe driving activity, the failure to give remedial driving training will not always operate to defeat the revocation of his SF-46. But as the arbitrator in C-06789 stated, "Management should be forewarned that whenever there is a question as to the charges leading to revocation, the procedural violation of failing to give remedial training will result in overturning the revocation."

The Postal Service has an obligation to enroll an employee in a remedial training program which specifically addresses the employee's safety problems. The Postal Service does not meet its burden if it only enrolls the employee in a routine training program which does not address the specific driving problems of the employee. (See C-00010)

C. Automatic suspension

The Postal Service cannot implement a rule which calls for automatic suspension of an employee's license. Such a rule is contrary to the Memorandum of Understanding to Article

29 which states, "the mere fact that an employee was involved in a vehicle accident is not sufficient to warrant suspension of driving privileges nor the imposition of a suspension or other discipline." In C-06800, the arbitrator ruled that the Postal Service could not automatically suspend employees involved in an accident for a period of thirty to sixty days. (See also C-03151, which held that a post office can implement local policies but they may not be more stringent than the requirements set forth in the national agreement.)

The Memorandum of Understanding also states: "When an employee's SF-46 is temporarily suspended as a result of a vehicle accident, a full review of the accident will be made as soon as possible, but not later than 14 days, and the employee's SF-46 and driving privileges must either be reinstated, suspended, or revoked as warranted." This does not mean that the Postal Service can automatically suspend for 14 days the OF-346 of an employee who has been in an accident. The arbitrator in C-06800 stated, "the 14 day time limit for the review is a maximum time for the review and is not equated with a suspension period in any manner. In certain vehicle accidents a 14 day period would be needed in order to investigate the facts of a case but in other cases the investigation could conclude in a few days. This arbitrator is not saying that an automatic suspension is always wrong, but only that the need for a 14 day investigative period must be shown." In this case, the Postal Service was ruled to have violated the agreement by automatically suspending the grievant for 14 days, even though the investigation of the accident was completed in two days.

V. THE POSTAL SERVICE MUST MAKE "EVERY REASONABLE EFFORT TO REASSIGN"

Even if a revocation or suspension is proper, Article 29 provides that, "every reasonable effort will be made to reassign the employee in non-driving duties in the employee's craft or other crafts."

In C-1374, the arbitrator ruled: "The language of [Article 29] requires the Postal Service to reassign an employee who cannot drive a vehicle. An offer to reassign does not constitute a reassignment. Management's functions and its obligations belong to Management exclusively. The Postal Service had the authority to reassign Grievant, irrespective of her lack of consent. Not only did Management have that right, but pursuant to Article 29, it had that obligation." (Emphasis in original.) (See also C-6343.)

Management's effort to reassign must begin in the letter carrier craft. In C-5139, the arbitrator observed, "The Service is obligated to make 'every [reasonable] effort. . .to reassign the employee to non-driving duties in his craft. . . .'" He concluded, "The Service's action in assigning Grievant to wash trucks when foot carrier work was clearly available did not represent a reasonable effort within the meaning of Article 29." In C-7621, the arbitrator ruled, "[W]hile management is authorized to extend its search to other crafts, the 'employee's craft' is expressly included in its 'every reasonable effort' commitment. By all logic, then, this is where the search should begin."

In C-06225, the grievant had had his SF-46 revoked and had been temporarily assigned to the mail handler craft. During the time of his temporary reassignment, the grievant failed to bid on two walking routes which were given to those with less seniority, and failed to take the mail handler's exam, although he had expressed a desire to do so. Once the station was able to hire additional mail handlers the grievant lost his temporary assignment. The arbitrator held that Management had fulfilled its obligation to reassign.

However, in C-06064A, the arbitrator held that while the Employer's decision to revoke the grievant's SF-46 was proper, the decision to remove the grievant without reassigning him to a clerk craft position was not proper. The arbitrator held that the Employer was obligated to assign the grievant clerk craft work, and directed the Employer to pay the grievant at the applicable rate of pay for that period as if he had been employed, less any alternate earnings.

NALC POSITION
EMPLOYEE CLAIMS (P-00024)

Article 27 of the 1987 Agreement, regarding Employee Claims reads, in part:

Subject to a $10 minimum, an employee may file a claim within fourteen (14) days of the date of the loss or damage and be reimbursed for loss or damage to his/her personal property, except for motor vehicles and the contents thereof, taking into consideration depreciation where the loss or damage was suffered in connection with or incident to the employee's employment while on duty or on the postal premises. The possession of the property must be reasonable, or proper under the circumstances and the damage or loss must not have been caused in whole or in part by the negligent or wrongful act of the employee. Loss or damage will not be compensated when it resulted from normal wear-and-tear associated with day-to-day living and working conditions.

Claims should be documented, if possible, and submitted with recommendations by the Union steward to the employer at the local level. The employer will submit the claim, with the employer's and the steward's recommendation, within 15 days to the regional office for determination. The claim will be adjudicated within thirty (30) days after receipt at the regional office. An adverse determination on the claim may be appealed pursuant to the procedures for appealing an adverse decision in Step 3 of the grievance-arbitration procedure.

The above procedure does not apply to privately owned motor vehicles and the contents thereof. For such claims, employees may utilize the procedures of the Federal Tort Claims Act in accordance with Part 250 of the Administrative Support Manual.

Simply stated, Article 27 sets forth the following principles:

1. The claim must be filed within 14 days of the date of the loss.

2. The property claimed must be "personal property" in order to be eligible for reimbursement.

3. The loss or damage must be connected with or "incident to the employee's employment while on duty or while on Postal premises."

4. Possession of the property must have been reasonable or proper under the circumstances.

5. The damage or loss must not have been caused, in whole or in part, by the negligence of the employee.

6. The amount of the loss must reflect the depreciation value of the property.

7. The loss or damage will not be compensated when it resulted from normal wear and tear associated with day-to-day living and working conditions.

PROCEDURAL REQUIREMENTS

Section 645.2 of the Employee and Labor Relations Manual (ELM) provides that Form 2146, Employee Claim for Personal Property, must be filed to document a claim. However, this section also provides, "any written document received within the period allowed is treated as a proper claim if it provides substantiating information." Claims should be supported with evidence such as (a) date of purchase, and (b) sales receipt or statement from seller showing price and date of purchase. (See C-02940).

Article 27 requires an employee to file a timely claim within 14 days after the loss or damage occurred. Generally, the employee is expected to know the proper procedures to file, including the time limits. In C-05754, the arbitrator ruled that the employee's unfamiliarity with the contractual 14-day limitation did not excuse him from it, particularly where management had no role in his lack of knowledge. However, in C-01452, where neither the employee nor the steward knew of the proper procedures and the employee made a good faith attempt to file within the time limit, the arbitrator ruled that the delay was unavoidable and would not act to bar the claim.

It is uniformly accepted that the claim must be in writing. In C-05562, the employee missed the 14-day time limit and asserted his claim as timely due to oral communication with his supervisor following the accident. The arbitrator ruled, "Verbal relating of the fact of the accident and loss of employee to his supervisor can't be regarded as the filing of a written claim within 14 days of the date of the loss or damage. Even though the language of the agreement does not refer to a written clause, uniform past practices show that the claim should be in writing."

The arbitrator will not necessarily hold the actual claim form to be binding, if it turns out to be incorrect. In C-01389, the employee incorrectly described his claim, yet the arbitrator allowed oral evidence at the hearing to control. The arbitrator stated, "The resolution of the claim does not depend solely on the claim submitted. Where the language is incomplete or ambiguous, the Postal Service should ask for clarification or additional information."

WHAT CONSTITUTES "PERSONAL PROPERTY"?

"Personal property" includes cash, jewelry, clothing and uniforms as well as other items that are worn or otherwise brought to work. Personal property does not include automobiles (see "The automobile exclusion," below).

On some occasions management has argued that uniforms should not be considered personal property, at least to the extent that they were acquired with Postal Service funds through the uniform program. Arbitrators, however, have universally rejected that argument. In C-03004, the arbitrator ruled that, "Article 27 does not draw a distinction between uniforms purchased with personal funds and those secured through the allowance program. Nor does the obvious intent of that provision permit such a conclusion. Reimbursement is anticipated so long as compliance with the eligibility standards set forth therein is present. To deny reimbursement for damaged or lost uniform items subject to the annual uniform allowance would be to deny almost every such claim. A result of that magnitude may be supported only by an express exclusion and no such exclusion appears in the National Agreement." (See also C-04462, C-02686).

THE AUTOMOBILE EXCLUSION

Article 27 excludes privately owned motor vehicles and their contents. (See C-00124, C-01182, C-04053). Note, however, that if a letter carrier's automobile is damaged by "the negligent or wrongful act" of the Postal Service, the letter carrier may seek recovery under the Federal Tort Claims Act. To initiate a Tort Claim, a Form 95 should be completed and submitted.

Note also that the standard for establishing liability under the Tort Claims Act is different than the standard for reimbursement under Article 27, because they treat fault differently. To make a claim under Article 27 it is merely necessary to show that the loss or damage was "not caused in whole or in part by the negligent or wrongful act of the employee" -- whether or not there was also negligence on the part of the Postal Service. However, to recover under the Tort Claims procedure, it is not enough to demonstrate that the damage was not the fault of the employee -- the employee must establish that the damage was the fault of the Postal Service.

DOES THE AUTOMOBILE EXCLUSION APPLY TO BICYCLES?

It is the position of the NALC that bicycles are not "motor vehicles". Instead, they are personal property for which reimbursement may be sought. However, arbitrators have differed on this point.

The arbitrator in C-05484 held that a bicycle is not a motor vehicle for purposes of Article 27 because the contract "specifically mentions motor vehicle - not method of transportation." In C-02885, the arbitrator ruled that "an employee's bicycle would be considered property, the loss or damage to which would be subject to a claim against the Postal Service." However, he also held that the property must be located on postal premises. The arbitrator stated, "If an employee brings a bicycle with the consent and permission of the Postmaster or officer in charge, stores that bicycle by lock at a point on the postal premises, and said bicycle is lost or damaged by some third person, then the Postal Service is liable for that loss or damage." According to this arbitrator, in order to avoid exposure under Article 27, the Postmaster of a particular facility must prohibit employees from storing or locating their bicycles on postal premises.

Other arbitrators have disagreed. In C-01373, the arbitrator held that the Article 27 exclusion should be interpreted as "including alternate means of employee personal transportation unless such loss was connected with, or incident to an employee's employment." The arbitrator stated, "For the Arbitrator to conclude that all employees who adopted some form of alternate personal transportation between their homes and the Post Office shifted the responsibility for the loss thereof from themselves to the Postal Service would be to place on the Postal Service a financial obligation which the parties did not mutually agree upon." Another arbitrator, in C-05753, ruled that the exclusion of "motor vehicles" must be construed as embracing all means of transportation.

WHAT CONSTITUTES REASONABLE OR PROPER POSSESSION INCIDENT TO EMPLOYMENT?

In determining "reasonable, or proper" possession arbitrators generally evaluate: 1) whether it was necessary for the employee to have the lost or damaged item in his or her possession

at work, and 2) whether the value of the item was too great to justify taking the risk of damage or loss at work.

The Postal Service has no duty to inform postal workers what jewelry or articles of adornment are not required for the performance of their employment duties if a claim is to be denied. The Postal Service may issue reasonable regulations and orders to control the appearance and garb of its employees; however, according to the arbitrator in C-01930 it has "no power to instruct and direct an employee how much money he might have in his wallet while delivering mail nor what items of jewelry or personal adornment he chooses to wear." That notwithstanding, the arbitrator further ruled that in order to successfully recover under Article 27, "the personal property for the loss of which reimbursement is sought, must be an item which the arbitrator can find, as a fact, was reasonably necessary for the postal worker to have on his person (or in his locker or at his work station)."

Generally, an employee's personal money and items such as a license or watch have been found to be incident to employment and possession deemed reasonable under the circumstances. (See C-07760, C-03968, C-04235, C-05223, C-06481). In C-05276, possession of a radio was also declared reasonable, where the Service allowed the carriers to use their radio headsets at their cases, signifying an affirmation that the use of radios was incidental to their work. (See also C-03408).

However, often where reimbursement for lost or stolen cash is requested, the Service has adopted a practice of setting a $20 maximum on reimbursement, an amount that management deems would be reasonable for an employee to have on his person on any given working day. Arbitrators have differed in their treatment of this practice. In C-05543, the arbitrator held the $20 maximum reimbursement sum set by the Postal Service, although not supported by any specific contractual language, to be "reasonable and reflective of a past consistent and fair practice." However, in C-09154, the arbitrator ruled that the $20 guideline was "too arbitrary and would preclude fair consideration of the circumstances of a given loss." In C-04501, the arbitrator held that where cash is held for personal reasons only, such as to pay a bill or purchase groceries after work, possession was not reasonable.

The reasonableness of a claim generally turns on the value of the item. Where the item being claimed is of unreasonable or excessive value, arbitrators generally rule in favor of the employer. In C-05223, the arbitrator held that where the employee damaged his expensive watch while delivering mail, the employee exercised poor judgment, and should have known the risk of damaging such an expensive piece of property. Therefore, the wearing of the watch was unreasonable.

Most arbitrators have ruled that expensive jewelry items such as personal rings or necklaces are not reasonably or properly connected with an employee's job duties as a letter carrier so as to justify responsibility in the employer (See C-08188). In C-06224, the arbitrator stated, "Whether or not a carrier wears a ring while at work is purely a personal decision. Such item is not required by the carrier's job. The employee is furnished a locker in which to keep personal belongings which he does not wish to take with him on his route." Generally, however, in cases involving wedding or engagement rings, arbitrators have ruled possession to be reasonable. In C-02145, the arbitrator ruled that although the wearing of expensive jewelry may create unreasonable risks, "it cannot be said that the wearing of a wedding ring

or engagement ring while performing duty in the workplace is unreasonable or improper under the circumstances." (But see, C-04235).

WHAT CONSTITUTES NEGLIGENCE?

Under Article 27 of the Agreement, the Postal Service has no obligation to an employee who suffers loss if the loss is caused in whole or part by the negligent act of the employee. Negligence implies an absence of care; it involves the failure to act in a manner in which a reasonable person would have acted under the same circumstances.

In order to successfully deny a claim, the employer bears the burden of proving that the employee was negligent or failed to exercise reasonable care. Generally, a positive showing that the employee was not exercising reasonable care is required to establish negligence or a wrongful act. (See C-06482). Where there is a common practice among employees, of which management acquiesces, the employee usually will not be found negligent in following this practice. (See C-02686).

In some cases, however, arbitrators have required the employee to show that there was no negligence involved. (See C-05531, C-04088). In C-02145, the arbitrator ruled in favor of the employer where management found no support for the employee's claim that heavy machinery had damaged her ring, and the employee failed to establish that the damage was not caused by her own negligence.

THE EMPLOYEE MUST TAKE REASONABLE MEASURES TO SAFEGUARD.

In most cases employees are expected to take reasonable measures to safeguard their personal property. Therefore, when an employee fails to attach a lock, chain or cable to secure his bicycle, he will likely be held negligent if his bicycle is stolen, and his claim will be barred. (See C-01589, C-06356). In C-01589, the arbitrator held that it was not reasonable for the employee to rely on the presence of a mail handler in the area as adequate protection against theft. In addition, the arbitrator ruled that a reasonable person should not need to be told to secure an expensive bicycle, therefore, the Postal Service has no obligation to give such notice.

In cases involving theft out of postal vehicles, it is generally required that the employee show that the vehicle was locked and adequately secured, and all reasonable measures were taken to protect the employee's property. (See C-03408; See also C-05542).

Arbitrators generally agree that possession of a purse in a postal vehicle by a female worker is a reasonable and common practice and does not constitute negligence or unreasonable possession for purposes of Article 27. (See C-03968 and C-06481). Where an employee leaves her purse unattended, in an open area, however, the employee will most likely be found negligent. (See C-07382).

DAMAGE OR LOSS DUE TO AN ACCIDENT

Where damage or loss is sustained due to an accident which is beyond the control of the employee, arbitrators are generally reluctant to find the employee negligent. In C-00132, the arbitrator ruled, "An accident is simply an unexpected incident which results in damage to

property or person. It is not normal, it is unexpected and when the incident results in the loss of property, it is provided for by Article 27."

When an employee sustains a loss due to slipping or falling while performing his job duties, the claim is generally upheld. In C-01453, the grievant slipped on an icy sidewalk while making his rounds. According to the arbitrator, "Special training in walking on ice and snow indicates a degree of risk. There is always the possibility of an accident." Since there was no evidence of negligence on the part of the employee, the arbitrator upheld the claim.

EYEGLASSES

There have been a significant number of employee claims pertaining to loss or damage done to an employee's eyeglasses. Arbitrators generally require the employee to maintain well-adjusted glasses in order to receive recovery. In C-01389, the arbitrator stated, "If the evidence established that the glasses merely slipped off during the course of his work because they were not fastened or adjusted properly, the Postal Service should not be responsible for that damage under Article 27." Where glasses are knocked off during the course of a normal job performance, the employee will generally recover. (See C-00132, C-01452).

When the employee has taken affirmative steps to safeguard his/her property, arbitrators generally find this to be reasonable behavior. In C-00795, the employee lost his glasses while shoveling heavy snow, after placing his glasses in a case and affixing them to his clothing by a clip. The arbitrator found the employee "took those steps to safeguard his property which are usually taken by a reasonable person," and upheld the claim. Similarly, where an employee took reasonable precautions and left her glasses in a locked vehicle which was later broken into by a third person, the arbitrator found this to be reasonable behavior, and upheld the claim. (See C-01488, C-03814).

Arbitrators will look carefully at the judgment of the employee in the particular situation. Where the employee appears to have exercised poor judgment or acted carelessly, arbitrators usually rule that the claim cannot be justified. (See C-00194, C-01588). In C-01252, the employee left her glasses out on her work space temporarily, and they were crushed by a falling newspaper roll. The arbitrator stated, "While anyone knows that glasses are easily broken, the average reasonably prudent person does take off his or her glasses occasionally and for short periods and places them either on the desk or other work place with the expectation that the glasses, after the short interval, will be picked up and worn. What the average reasonably prudent person does is not negligence or want of due care. On the other hand, to place glasses on a desk or other work place indefinitely, and unprotected, is a breach of due care."

WHAT CONSTITUTES NORMAL WEAR AND TEAR?

According to Article 27, "Loss or damage will not be compensated when it resulted from normal wear and tear associated with day-to-day living and working conditions." Normal wear and tear constitutes that damage that occurs during the normal course of working and day-to-day living. In C-02111, the arbitrator concluded that damage done to an employee's shirt by a customer's package was not ordinary wear and tear. In C-04462, where 5 pairs of trousers were damaged due to the employee's vehicle seat, the arbitrator ruled that this

damage, all occurring in the same area, could not constitute ordinary wear and tear and upheld the claim.

PROOF OF VALUE

The employee and the Union bear the burden of proving the value of the personal property lost or damaged. The best evidence of value is a purchase receipt. If a receipt is unavailable, the claimant's own unsupported valuation of the lost or damaged property may not always satisfy the demands of proof. In C-07600, the arbitrator denied the claim where the evidence of value was only the testimony of the employee herself.

Although documentation is ordinarily the easiest way of proving the value of the damaged items, arbitrators may use their discretion in allowing recovery. In C-05773, the arbitrator concluded, "The fact that there was no documentation for the lost goods is not fatal to the grievant's claim. Article 27 does not state that all claims must be documented in order to be allowed.

REMEDY

Once an arbitrator concludes that management violated Article 27 in denying the employee's claim, a remedy is due. Article 27 establishes that the employer's obligation to provide reimbursement includes "taking into consideration depreciation." In C-00795, the arbitrator ruled, "The amount of the loss to which the employee is entitled is the depreciation value of the property loss, not the new or replacement value." Generally, in the absence of evidence showing the depreciation value, arbitrators have tended to award the employee 50% of the amount of replacement rather than conduct a new hearing to present evidence of depreciation value. (See C-00795, See also, C-01488).

If the property lost or damaged has a value clearly in excess of the reasonable value of personal property claimed to be needed for the performance of employment duties, the employee will have no assurance that he will be reimbursed for the full value of the property. In C-03408, the arbitrator determined that although possession of a radio was reasonable, the value claimed by the employee was excessive and reduced the claim. Similarly, in C-07600, the arbitrator found a claim for an expensive watch excessive and reduced it to a reasonable amount. See M-00969.

NALC POSITION
HOLIDAY SCHEDULING - Change to Tuesday (P-00025)

HOLIDAY SCHEDULING

Beginning with the 1987 National Agreement, Article 11 was changed to require posting of the holiday schedule as of Tuesday preceding the week in which the holiday falls. Earlier decisions, although referring to Wednesday, may be understood to mean Tuesday.

NALC POSITION
LEAVE, FAMILY AND MEDICAL (P-00026)

The Postal Service regulations implementing the provisions of the Family and Medical Leave Act (FMLA) are found in ELM Section 515. For a complete description of letter carriers' rights under the act see the 1995 NALC publication entitled "NALC Guide to the Family and Medical Leave Act."

NALC POSITION
ADMINISTRATIVE LEAVE for "Acts of God" (P-00027)

Section 519 of the ELM allows management to grant administrative leave to employees due to "Acts of God". It reads, in part: 519.1 Administrative leave is absence from duty, authorized by appropriate postal officials, without charge to annual or sick leave and without loss of pay. 519.211 "Acts of God" involve community disasters such as fire, flood, or storms. The disaster situation must be general rather than personal in scope or impact. It must prevent groups of employees from working or reporting to work. 519.213 Postmasters and other appropriate postal officials determine whether absences from duty allegedly due to "Acts of God" were, in fact, due to such cause or whether the employee or employees in question could, with reasonable diligence, have reported to duty. 519.214(c) Part-Time Flexible Employees are entitled to credit for hours worked plus enough administrative leave to complete their scheduled tour. The combination of straight time worked and administrative leave may not exceed 8 hours in a service day. If there is a question as to the scheduled work hours, the part-time flexible employee is entitled to the greater of the following: (1) The number of hours the part-time flexible worked on the same service day in the previous service week; or (2) The number of hours the part-time flexible was scheduled to work; or, (3) The guaranteed hours as provided in the applicable national agreement. THE THREE CRITERIA ELM Section 519.211, specifies three criteria which must be met before administrative leave may be granted for "Acts of God". First, the "Act of God" must create a community disaster. Second, the disaster must be general, rather than personal, in scope and impact. Third, it must prevent groups of employees from working or reporting to work. The majority of arbitrators agree that all three of these criteria must be met before a request for administrative leave is upheld (See C-04883, C-00074, C-00235). It is up the Postmaster to determine whether absences from duty, allegedly due to "Acts of God" were, in fact, due to such cause, or whether the employee or employees in question could have, with reasonable diligence, reported for duty. However, the Postmaster's decision is not beyond question, and is subject to review by an arbitrator (See C-00359). WHAT IS AN "ACT OF GOD"? A definition commonly used by arbitrators in determining whether an "Act of God" has occurred which is sufficient to justify the granting of administrative leave, is: "A natural occurrence of extraordinary and unprecedented impact whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight." (See C-04205, C-09057). Snowstorms are most often the reason for granting administrative leave. To qualify as an "Act of God", the storm must be of such severity to disrupt normal community functions. Generally, arbitrators consider factors such as the amount of snow, the length of time it fell, wind strength and temperature in determining the severity of the storm (See C-00411). Not every snowstorm or rainstorm can be classified as an "Act of God" merely because of its unusual or above average intensity. The general rule is that an "Act of God" must create "disaster conditions" to justify granting administrative leave See, C-04205). 1. The "Act of God" must involve a community disaster. According to the arbitrator in C-03964, "use of the term 'disaster' means, insofar as the community is concerned, a complete shutdown of all of the services of a community except for emergency services such as fire, police and hospitals." In this case, the arbitrator believed there was no doubt that the severe snowstorm which had occurred was an "Act of God". However, the arbitrator looked to the fact that even though there were no mail deliveries, over 5000 employees in a nearby military base, both civilian and military, reported for work. Thus, the impact on the community was not great enough to constitute a disaster, and administrative leave was denied. Other factors

arbitrators will consider include: whether a state of emergency has been declared, evidence of massive road closings, and whether the state police or local authorities have advised persons to stay home (See C-04964, C-04205, C-05432). In C-00411, the arbitrator granted administrative leave where there was a three-day snowstorm and the National Guard was called out to rescue people stranded in their cars, while other stranded travellers were forced to sleep in schools (See also, C-00402, C-00074). According to the arbitrator in C-03491, "Bad conditions, poor weather, difficult conditions and the like, are insufficient to constitute a disaster. A disaster must be an extreme situation." In this case, where the storm did not block main roads and during which many businesses were able to operate normally, the arbitrator denied administrative leave. (See also, C-06622). WHEN IS A DISASTER GENERAL IN SCOPE AND IMPACT? According to the arbitrator in C-00542, the "scope and impact" of the storm is indicated by the amount of absenteeism among employees scheduled to work that tour. Many arbitrators will consider the number of absences on a given day, but most look to the pattern of absenteeism to make a determination of scope and impact. Where it can be shown that employees from a large general area were prevented from reporting to work by a storm, administrative leave will usually be upheld (See, C-09024). Maps are useful in demonstrating areas where employees live and whether the storm prevented employees from specific areas or general areas from reporting to work (See C-00359, C-00410). Most arbitrators will consider a particular employee's difficulties in reporting to work. However, if other employees living in the same area were able to report, arbitrators usually find the disaster to have been personal in scope and impact, unless the employee can demonstrate otherwise. (See C-03489, C-04964, C-08197). In C-09025, the arbitrator found that the severe thunder and wind storm which hit the area was a community disaster which was general in its scope and impact. However, the arbitrator denied administrative leave where he found that the conditions which prevented the grievants from reporting to work were not generally encountered by other employees. Occasionally, arbitrators determine the scope and impact based upon whether the Postal Service has suspended operations or curtailed mail delivery. In C-01176, the arbitrator denied administrative leave where there was little impact on Postal operations, and held that, since there was no curtailment of mail, it was "impossible to conclude that there was a disaster situation which was general in nature." (See also, C-09033, C-04483). However, most arbitrators agree that the ELM does not require the Post Office to close its doors before administrative leave is granted (See C-00402). In C-00713, the arbitrator stated, "the determination of an entitlement to administrative leave does not depend upon whether the Post Office was closed or not. Section 519.211 imposes no requirement that the office be closed or operations curtailed before employees may receive such leave." (See also, C-00447, C-03433, C-04542). WHAT CONSTITUTES "GROUPS OF EMPLOYEES"? Arbitrators most often deny administrative leave to employees because "groups of employees" were not prevented from reporting to work. Arbitrators are divided on their interpretation of what constitutes a "group". In C-04205, the arbitrator stated, "As a rule of thumb, it has been held that 50% of the employees in the group, must be unable to come to work because of disaster conditions. The rationale of the 50% rule is that if half or more of the employees in the group, exercising reasonable diligence are unable to get to work, it is persuasive evidence that the conditions were most abnormal. If less than 50% of the employees in the group are unable to get to work, the inference may be drawn that with the exercise of reasonable diligence, employees could get to work." (See also, C-00235, C-03964, C-04483, C-09025, C-09033, C-09068). Other arbitrators reject that rule. The arbitrator in C-00447 held, "it is not determinative that a significant number of employees were able to report to work. The manual only requires that groups of employees must be prevented from working." The 14% of the workforce unable to report because of the

snowstorm were granted administrative leave (See also, C-00452, C-00713). Other arbitrators fall somewhere in the middle of this spectrum, and will allow administrative leave if it can be demonstrated that the group is "substantial". According to the arbitrator in C-01357, "The requirement is not that all employees be unable to report to work but that the groups of employees who were unable to do so be general, substantial and that each employee has used reasonable diligence to get to work." The Postal Service's method of grouping employees can alter the percentages dramatically. In C-00448, the Postal Service grouped employees over a 24 hour period, and using these numbers was able to demonstrate that more than 50% of the employees reported to work. The arbitrator held that this was improper, since weather conditions had changed over the 24 hour period. The arbitrator ruled that the Postal Service should group them by tour of duty instead. III. The postmaster has the discretion to grant administrative leave. Most arbitrators will not substitute their judgment for the judgment of the Postmaster unless it was arbitrary or capricious. The ELM gives the Postmasters the discretionary authority to grant administrative leave. It does not require that administrative leave be granted. (See C-09033). According to the arbitrator in C-03205, "The only time an arbitrator might consider overturning the Postmaster's decision in such cases would be a situation where the requirements spelled out in the manual were met, and the Postmaster's decision appeared to be arbitrary or capricious." (See also C-02340, C-03368). In C-00680, administrative leave was granted to those employees who arrived late to work during a severe snowstorm, but denied to those employees who failed to report to work. The arbitrator held that by granting administrative leave in this limited fashion, management recognized that conditions existed which justified administrative leave. In this case, the Postmaster testified that he had never previously granted administrative leave to those employees who failed to come to work, because he believed that employees would have less incentive to make an effort to get to work in the future. The arbitrator held that the Postmaster was arbitrary in his decision and that there was not a valid reason for denying administrative leave. Most arbitrators agree that Section 519.211 is applicable to a "scheduled tour" on any day, including a day outside an employee's regular schedule. However this does not change the provisions of ELM Section 433.1 which mandates that an employee cannot be given more than 40 hours of straight time pay in a service week. In C-06365, where the granting of administrative leave would have given the employees more than 40 hours of straight time pay, the arbitrator held Section 433.1 to be an overriding limitation on the scope of administrative leave, and denied the employees' request, even though they had met the other three criteria (See also, C-09228). PROOF OF "REASONABLE DILIGENCE" To justify a request for administrative leave, most arbitrators require the employee to have exercised reasonable diligence in attempting to report to work. Some arbitrators will make this determination based upon the general conditions of the area, and do not require specific proof. Other arbitrators require the employee to present specific proof that they have exercised reasonable diligence and still were unable to report to work. In C-00616, the arbitrator held that where the Postmaster concluded that some employees did not exercise reasonable diligence because their neighbors were able to report to work, this established a prima facie case which the Union had to refute by submitting proof that the absent employees did, in fact, exercise reasonable diligence. In C-03433 the arbitrator denied requests for administrative leave where the Postal Service did not suspend operations and the arbitrator was given no evidence of the diligence of the employees. In C-00581, where the storm was of sufficient severity to force a halt to community activity and had an equally severe effect on the Service, the arbitrator granted administrative leave to the two grievants who testified. However, the arbitrator denied administrative leave to the other employees who failed to produce affidavits or other evidence that they had exercised reasonable diligence in their

efforts to report to work. According to the arbitrator in C-00411, "Proof of such effort will involve the various means available to the employee to get to work and the feasibility of those means. Such means can be a personal automobile, or various specialized automotive vehicles such as 4-wheel drive vehicles, snowmobiles, trucks and the like." The arbitrator held that an employee must show that alternate means were unavailable or the effort would have been futile, before administrative leave is granted (See also, C-09024). According to the arbitrator in C-05290, in determining reasonable diligence, one must look to the general norm or a reasonable range of expected behavior. In this case, even though half of the employees were able to report to work, the arbitrator held that the storm was severe enough to be a legitimate basis for the judgment of many that reporting in would be futile, unsafe, and imprudent (See also, C-00402). CONVERTING OTHER LEAVE TO ADMINISTRATIVE LEAVE Generally, where employees report to work, and management has work available, administrative leave will not be warranted if the employee elects to leave early. In C-00614, management gave employees who reported to work and worked most of their shift the option of leaving early, or performing additional work that was available. In this situation, the arbitrator held that administrative leave was not justified for those employees who elected to leave early (See also, C-01590, C-01850). When an employee has been granted annual leave or leave without pay to cover an absence due to an "Act of God", most arbitrators hold that this will not prevent the employee from receiving administrative leave, if it is later determined to be warranted. In addition, when management grants administrative leave to excuse those who arrived late or left early during a disaster, most arbitrators consider this to be a recognition by management that the three criteria were met. In these circumstances those who were unable to report to work often are granted administrative leave as well. In C-00680, management granted administrative leave to those employees who arrived late to work, but denied it to those who were unable to report to work. The arbitrator held that by granting administrative leave to late employees, management recognized that the conditions justifying administrative leave were present. Therefore, the arbitrator found that management acted unreasonably, and that administrative leave was warranted for those employees who were unable to report to work on that day See also C-00411, C-00614. See M-00970 for reprint.

NALC POSITION
Marriage Mail, Third Bundles (P-00028)

The procedures to be followed in the delivery of third bundles differs depending upon whether the mail involved is "pre-sequenced" or "simplified address".

I. Simplified address mail (e.g. "Postal Patron") is mail without a specific address affixed. The proper procedure for the handling of such material is specified in the April 17, 1980 Settlement Agreement (M-00159) which provides that in all instances carriers may be required to deliver the mailing as a third bundle. Except on mounted curbside delivery routes, the Postal Service's response to the October 29-30 National Joint City Committee meeting, Item E (M-00603) provides the further restriction that, "Normally, only one such mailing should be carried at one time". It is NALC's position that management has the burden of proof whenever they assert that circumstances are not "normal". See also M-01097

II. Pre-sequenced mail is letter or flat sized mail with a specific address affixed that arrives pre-sequenced in the order of delivery. The proper procedure for the handling of such material is specified in M-39, Section 121.33. Carriers on curb-line (mounted) routes normally handle such mail as a third bundle. Such mail should not be delivered as a third bundle on a park and loop route. However, on dismount deliveries only, Letter Carriers on park and loop routes may be required to deliver pre-sequenced mail as a third bundle (C-03003) Garrett, September 29, 1978.

III. Detatched label mailings: The procedure for the delivery detached label mailings on park and loop routes is governed by the April 17, 1980 Settlement agreement (M-00159). Carriers should case the address cards and carry the unaddressed pieces as a third bundle. See also M-00723. The proper procedures when two detached address label card mailing are identically addressed and to be delivered on the same days are described in M-00750 and M-00608.

IV. There are no contract or manual provisions limiting the number of bundles that may be required on a mounted route.

NALC POSITION
Medical Certification (P-00029)

INTRODUCTION

Section 513.361 of the Employee and Labor Relations Manual (ELM) reads:

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.36) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

Stated simply, ELM 513.361 establishes three rules:

1) For absences of more than three days, an employee must submit "medical documentation or other acceptable evidence" in support of an application for sick leave, and

2) For absences of three days or less a supervisor may accept an employee's application for sick leave without requiring verification of the employee's illness (unless the employee has been placed in restricted sick leave status, in which case verification is required for every absence related to illness regardless of the number of days involved), however

3) For absences of three days or less a supervisor may require an employee to submit documentation of the employee's illness "when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

This handbook provision, which is incorporated into the National Agreement by reference in Article 19, has been the subject of a larger number of regional level contract arbitrations than any other contract term. Virtually all of the arbitrations have concerned situations in which a supervisor required an employee not in restricted sick leave status to submit medical documentation for an absence of three days or less. The purpose of this paper is to summarize the awards issued as a result of those arbitrations, and to summarize Step 4 settlements concerned with ELM 513.361 (Section V of this paper deals with issues concerning submission and acceptance of certification).

WHAT CONSTITUTES "THREE DAYS"?

In Case M-00489, NALC and USPS agreed that "an absence is counted only when the employee was scheduled for work and failed to show." Therefore, non-scheduled days are not counted in determining length of absence unless the employee had been scheduled to come in on overtime on the non-scheduled day.

BURDEN OF PROOF

When a supervisor has required an employee to submit medical certification, the burden is upon the NALC to show that the Postal Service arbitrarily, capriciously or unreasonably required the employee to obtain medical documentation. According to the arbitrator in C-00418, the "burden is heavy." The NALC "must prove that the supervisor was arbitrary and unjustified in his request."

WHAT CIRCUMSTANCES JUSTIFY REQUESTS FOR MEDICAL CERTIFICATION FOR AN ABSENCE OF THREE DAYS OR LESS, WHEN THE EMPLOYEE IS NOT IN RESTRICTED SICK LEAVE STATUS?

The hundreds of arbitration cases in which medical certification is contested may be divided into two groups: 1) Those in which the supervisor's request for certification was found justified, and 2) Those in which the supervisor's request was found not justified. Examination of these cases discloses certain patterns, as may be seen below:

1) Circumstances in which a request for certification was found justified.

In C-05348, the arbitrator ruled that certification was properly required when a heated discussion between the supervisor and the employee concerning the employee's duties was followed by a request for sick leave by the employee. "The Service's interest would be threatened if all employees who are upset, even if some justification exists for their feeling, can leave the work floor for the balance of the day and still receive compensation." The same conclusion has been drawn in other cases where an employee outwardly shows that s/he is unhappy with her or his assigned duty and then asks for sick leave. In C-03347 the arbitrator stated, "Given the appearance of the grievant's good health just prior to the undesirable assignment, there was sufficient grounds for suspicion that the sudden inability to work coinciding with the notice of an undesirable route assignment was too coincidental, thereby placing the burden on the grievant to establish his illness by medical documentation." (See also C-01597, C-04714, C-05101 and C-06565)

The request for medical documentation has usually been found proper when the employee asked for sick leave after his or her request for auxiliary assistance has been denied. In C-04627, the supervisor had denied the employee's request for assistance delivering mail and the employee then had asked for sick leave. The arbitrator concluded that the supervisor's actions were proper under the circumstances. The fact that the employee had not asked for sick leave until he was denied assistance delivering mail, coupled with his leaving work the previous day because of illness, made it reasonable for the supervisor to consider the possibility that the grievant was not truly ill. The same situation arose in C-06123 in which the arbitrator stated, "Considering the fact that the direction to the grievant to obtain medical documentation came after he had come to work and worked for two and a half hours without complaint, and had asked for auxiliary help and been denied it, and been told he would have to complete his route, even though it might entail overtime, it would appear that it was reasonable of the supervisor to insist upon documentation." (See also C-04086, C-04782 and C-04909)

Arbitrators have concluded that medical documentation was properly requested by a supervisor when the employee called in for sick leave for a day for which the employee had previously requested annual leave. (See C-01160, C-04897, C-06747 and C-06751)

Arbitrators have not always ruled in favor of certification required of an employee who requested sick leave for a day preceding or following a day off or a holiday. Under such circumstances, however, arbitrators have been generally sympathetic to supervisors' concerns and have required only minimal further support of supervisory decisions to require certification. In C-03057 the arbitrator stated that, "Concern by the supervisor of the grievant's pattern of taking sick leave and annual leave on Saturday unless overtime was involved, as well as the fact that he had only eight hours of sick leave to his credit were legitimate reasons for requesting medical documentation." (See also C-04209, C-04117, C-04967 and C-06167)

2) Circumstances in which a request for certification was found not justified.

While a supervisor has discretion to request medical certification, such discretion must be exercised on a case-by-case basis rather than requiring that all employees submit certification for absence on a certain day. In national level settlement M-00662, NALC and USPS agreed that local management's requirement that substantiation for illness must be submitted by any and all carriers absent on the day following a holiday was "contrary to national policy".

Where the supervisor does not have a factual basis for requiring certification and instead relies on a mere feeling that certification should be provided, arbitrators generally find certification to have been unreasonably required. In C-00008 the medical documentation request was ruled to have been unjustified because there was "no pattern that could raise suspicion and indicate that an employee's undocumented request should not be accepted." The Arbitrator found that three absences in a thirty-four week period were insufficient to deem the employee's sick leave request "suspicious."

Where an employee appeared sick at the time leave was requested, arbitrators usually rule that certification should not have been required. In C-01224, the request for medical documentation was not reasonable when the employee actually appeared ill to the supervisor at the time she requested sick leave. The arbitrator pointed out that "an employee can have a lousy record of attendance but still can become ill at work which would justify excusing him from work." In C-04033 the arbitrator stated, "The single, isolated incident of the grievant leaving work due to illness on a prior occasion, with no indication otherwise in the grievant's work record that he was a malingerer likely to abuse sick leave, is not sufficient to produce a substantial doubt in the mind of a reasonable person that the grievant left his route on the day in question simply because he did not want to complete the overtime assignment." In this case the supervisor had conceded that the grievant had the outward appearance of being sick by the hoarseness in his voice.

Further, it is unreasonable for a supervisor to require medical documentation of an employee requesting sick leave without an inquiry into the employee's illness. In C-03860 the supervisor's request for medical documentation was found improper because the supervisor had not questioned the employee about his illness before asking for medical documentation. The Arbitrator stated, "To conclude that the grievant was not ill because [the supervisor] perceived no outward manifestation was not enough." (See also C-03819, C-04002 and C-05015)

Many arbitrators have ruled that the workload at the facility at the time the sick leave request is made is a factor which the supervisor should consider when deciding whether to require medical documentation of an employee. However, heavy mail volume alone is usually ruled to be an insufficient reason for requesting medical documentation. In C-00276 the employee had no history of sick leave abuse and had not tried to leave earlier on in the day for personal reasons. The arbitrator ruled that management's request for medical documentation based only on heavy mail volume was unreasonable. Similarly, in C-06723 the arbitrator concluded, "The mere fact that management would be inconvenienced by an employee's absence, or that other employees may have been previously required to provide medical documentation in similar situations, or that productivity and/or efficiency may be negatively impacted by an employee's unscheduled absence, are insufficient reasons--in and of themselves--to justify the requiring of an employee to provide medical documentation to verify an unscheduled absence."

Finally, although the Postal Service often argues that medical documentation is properly required where the employee calls in sick on a day preceding or following a day off, that reason alone is insufficient to require medical documentation. The arbitrator in C-03744 stated, "The station's need for more carriers to tideover a holiday is, in itself, not a sufficient reason for requiring medical certification." The arbitrator concluded that the possibility that the grievant was seeking to lengthen a holiday was not demonstrated by any statement or action. (See also C-00418, C-00451, C-01641 and C-02886)

WHAT CONSTITUTES PROPER DOCUMENTATION?

Section 513.364 of the Employee and Labor Relations Manual reads as follows:

When employees are required to submit medical documentation pursuant to these regulations, such documentation should be furnished by the employee's attending physician or other attending practitioner. Such documentation should provide an explanation of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept proof other than medical documentation if they believe it supports approval of the sick leave application.

Until such time as acceptable evidence substantiating an employee's illness is presented, management may refuse to approve the requested sick leave. (See M-00132) However, pursuant to national level settlement M-00001, a physician's certification of illness need not appear on a form 3971: "appropriate medical statements written on a doctor's office memoranda or stationary which are signed by the doctor are considered to be an acceptable medical certification." Indeed, provided the requirements of the ELM are satisfied, such certification may be presented on preprinted forms. (See M-00079 and M-00779)

Statements from lay persons are not acceptable as medical documentation. (See C-00102; grievant returned with a note from her husband and this was deemed unacceptable by the supervisor.) In M-00803, however, the parties agreed that less traditional medical practitioners, naturopaths, were "attending practitioner[s]," within the meaning of ELM 513.364.

In M-00703 it was agreed that management is not precluded from contacting an employee's physician in order to clarify matters pertinent to the medical certification. (See also M-00557, noting that such a management practice is "prudent" when an employee's certification lacks "specificity")

REMEDIES

Once it has been concluded by the arbitrator that the supervisor has violated Part 513.361 of the Employee and Labor Relations Manual by arbitrarily, capriciously or unreasonably requiring medical documentation of an employee who requested sick leave, a remedy is due.

1) Reimbursement for medical documentation

The remedy most frequently granted to the employee who was improperly required to obtain medical documentation is reimbursement for the cost of the medical documentation. As the arbitrator in C-01624 pointed out, "where a gross error is made by the supervisor and the effects of the error falls upon an employee who is not on Restricted Sick Leave and who has not 'taken advantage' of a very substantial sick bank, since his sick leave payments have been negligible, the Employer ought to bear the responsibility of paying the cost of a medical documentation which the grievant has been directed to procure." (See also C-00452, C-00508, C-01224, C-01624, C-01641, C-03744, C-04129, C-04195, C-04436, C-04636, C-04974, C-05015 and 6723)

An exception to the generally accepted remedy of reimbursement for the cost of the documentation is found where the employee was reimbursed by the employee's medical insurance. (See C-00417 and C-00479) In C-00417 the arbitrator reasoned, "the Arbitrator does have power and jurisdiction to fashion an appropriate remedy, which is in this type of case, reimbursement. However, it is elementary that there cannot and should not be double recovery. No employee should be able to seek payment by the Employer after having already received payment through an insurance carrier. The aim and purpose of the remedy is to make the employee whole, not to enrich the employee or penalize the employer."

2) Reimbursement for medical treatment

The pre-arbitration decision M-00989 established that an arbitrator has the authority to grant relief in the form of the Postal Service paying for doctor's bill when it is found that supervisory personnel did not have reasonable and sufficient grounds to require medical verification from an employee for absences of 3 days or less.

Upon finding that an employee was improperly required to obtain certification, most arbitrators have ruled that the employee is entitled to be reimbursed for the cost of the medical examination. However, arbitrators have consistently ruled against reimbursement for medical treatment. In C-00008 the grievant was denied reimbursement for the cost of a tetanus shot he received. The arbitrator concluded that the grievant would have gone to a doctor to receive a tetanus shot regardless of the medical documentation requirement. Requests for reimbursement for the cost of a prescription were denied in C-03032 ("Proof of filling the prescription was not required to meet the Employer's medical verification and therefore the Grievant elected to fulfill is this prescription and take the medication at his own risk") and C-04033 ("the purchase was a personal choice and benefit which grievant may not charge to the Postal Service"). In C-03860 the grievant was compensated for the cost of a "brief office visit" yet denied reimbursement for an electrocardiogram, urinalysis, accusan, and chest x-ray. The arbitrator pointed out, "all the supervisor required was certification of incapacity to work, not a series of expensive testing procedures."

3) Reimbursement for time spent traveling to and from the doctor's office and reimbursement for transportation costs.

In addition to being reimbursed for the cost of the medical documentation, some arbitrators have ruled that the employee is entitled to reimbursement for the time it took to travel to and from the doctor's office (see C-00067 and C-00418), and transportation costs related to the doctor's visit. (See C-02886, (See C-02886, C-03819 and C-04744) However, reimbursement for travel expenses and time spent traveling to and from the doctor's office was denied in C-00243A and C-00451. In C 00243A the arbitrator ruled: "The testimony indicates that the doctor's office was located approximately two miles from the Grievant's home and that it was not particularly off the course of travel between the Post Office and the Grievant's home. Therefore, the Grievant is not entitled to any compensation for mileage or time spent in connection with the visit to the doctor's office." The arbitrator in C-00451 stated, "The claim for $10, for the one hours time that the grievant spent in the doctor's office, is denied. So is the request for $.40 mileage charge for use of the grievant's car going to and from the doctor's office. Both of these items would have been utilized by the grievant if he had gone to work instead of remaining home on December 23, 1982. His savings in not going to work recompensed him for these requested charges so he suffered no loss and required no reimbursement."

NALC POSITION
OPTING (P-00030)

I. INTRODUCTION

The National Agreement provides a special procedure for exercising seniority in filling temporary vacancies in full-time duty assignments. This procedure, called "opting," allows carriers to "hold down" vacant routes of regular carriers who are on leave or otherwise unavailable to work for five or more days. The terms "opt" and "hold-down" refer to the same procedure and may be used interchangeably. This section will review the opting procedures and policies as established by the National Agreement, arbitration awards, and national level settlements.

II. CONTRACT PROVISIONS

The opting procedures stem directly from Article 41, Section 2.B of the National Agreement, which states in part:

3. Full-time reserve letter carriers, and any unassigned full-time letter carriers whose duty assignment has been eliminated in the particular delivery unit, may exercise their preference by use of their seniority for available craft duty assignments of anticipated duration of five (5) days or more in the delivery unit within their bid assignment areas, except where local practice provides for a shorter period.

4. Part-time flexible letter carriers may exercise their preference by use of their seniority for available full-time craft duty assignments of anticipated duration of five (5) days or more in the delivery unit to which they are assigned.

5. A letter carrier who, pursuant to subsections 3 and 4 above, has selected a craft duty assignment by exercise of seniority shall work that duty assignment for its duration.

Questions arising from these provisions fall into several categories. These areas include eligibility for opting, rules for posting of vacancies, the meaning of "duration" in Section 2.B.5, pay status of employees on hold-downs, applicable schedules, and remedies for improper denials of opting opportunities. Each area is addressed separately below.

III. ELIGIBILITY

A. Employees eligible for opting

Full-time reserves, flexible-schedule regulars, unassigned full-time carriers, and part-time flexible carriers may all opt for hold-down assignments. Although Article 12, Section 3 of the National Agreement provides that "an employee may be designated a successful bidder no more than five (5) times" during the contract period, a national settlement (M-0513) establishes that these restrictions do not apply to the process of opting for vacant assignments. Moreover, opting is not "restricted to employees with the same schedule as the vacant position" (M-0843). Rather, an employee who opts for a hold-down assignment

assumes the scheduled hours of the regular carrier whose absence is filled by the hold-down (See "Schedule Status," below).

Eligible employees may not be denied opting opportunities. National Arbitrator Bernstein held (C-6461) that an employee may not be denied a hold-down assignment by virtue of his or her potential qualification for overtime pay. For example, an employee who works 40 hours Saturday through Thursday is eligible for a hold-down which begins on Friday even though he or she will earn overtime pay for work in excess of 40 hours during the service week. Furthermore, an otherwise-qualified employee on light duty may not be denied hold-down assignments as long as the assignment is within his or her physical limitations (C-10181). Finally, according to the National Agreement, employees may opt for temporary vacancies only in their delivery units. In clarifying this limitation on eligibility, a Step 4 settlement (M-0828) established that when employees are temporarily reassigned to other units, they may still exercise their seniority to obtain hold-down positions in their home units.

Some employees are not permitted to opt. Probationary employees may never opt (M-0594, M-0510), because while probationary they have no seniority to exercise (Article 12, Section 1(c)). Carriers acting in 204(B) supervisory positions may not opt for hold-down positions in their installations as long as they are in a supervisory status (M-0552). A national pre-arbitration settlement (M-0891) established that an employee's supervisory status is determined by Form 1723, which shows the times and dates of an employee's 204(B) duties.

B. Duty assignments eligible for opting

Not all anticipated temporary vacancies create opting opportunities. Vacancies in full-time level 5 regular and reserve assignments are open for opting. T-6 positions are not subject to opting because they are higher level assignments which are filled under Article 25 of the National Agreement (M-0276). The failure of management to award a temporarily vacant higher level position to the senior, eligible, qualified employee should be grieved under Article 25, not Article 41.2.B. Auxiliary routes need not be made available as hold-downs because such assignments are not full-time (M-0625).

Vacancies lasting less than five days need not be filled as hold-downs. Clarifying the meaning of this five-day requirement, National Arbitrator Kerr held (C-5865) that opting is required when vacancies are expected to include five or more work days, rather than vacancies that span a period of five calendar days but may have fewer than five days of scheduled work. However, these anticipated five days may include a holiday (M-0237). According to the National Agreement, local practice may allow full-time carriers to opt for vacancies of fewer than five days (Article 41, Section 2.B.3).

In any case, an employee does not become entitled to a hold-down assignment until the "anticipated" vacancy actually occurs (C-8883). Thus, an employee who successfully opts for an expected vacancy that fails to materialize is not guaranteed the assignment and has no remedy.

IV. POSTING

The National Agreement does not set forth specific procedures for posting and opting for hold-downs. However, the posting of vacancies and procedures for opting for hold-down

assignments may be governed by Local Memorandums of Understanding (M-0446, C-6339). In sustaining a local policy of posting notices of temporary vacancies for only one day, a regional arbitrator correctly noted that "Article 30 allows the local parties to negotiate provisions covering 22 specific items, including the subject of posting" (C-6395).

In the absence of an LMU provision or mutually agreed-upon local policy, the bare provisions of Article 41, Section 2.B apply. In that case, there is no requirement that management post a vacancy, and carriers who wish to opt must learn of available assignments by word of mouth or by reviewing scheduling documents. There is also no requirement concerning the form by which an employee must notify management that he or she wishes to opt-- any means of notification is acceptable.

V. DURATION

The National Agreement says that once an available hold-down position is awarded, the opting employee "shall work that duty assignment for its duration" (Article 41, Section 2.B.5). Within this category are questions involving hold-down carriers who voluntarily leave or are involuntarily removed from their hold-down assignments before the duration of the vacancy has run.

A. Defining "duration"

One important issue is the meaning of "duration" as used in Section 2.B.5. Generally, "duration for remaining on an instation bid will be as long as the position remains unfilled unless the instation bid itself places a definite time limit" (C-7489). Thus, a hold-down typically ends upon the return of the incumbent carrier. If no end date is specified and a vacancy lasts longer than anticipated, the opting employee retains his or her right to work the assignment (See C-7001). An opt is not necessarily ended by the end of a service week (C-9539).

B. Voluntary leave and reassignment

There are situations in which carriers temporarily vacate hold-down positions for which they have opted. Such an employee may reclaim and continue a hold-down upon returning to duty (M-0748). If the opting employee's absence is expected to include at least five days of work, then the vacancy qualifies as a new hold-down within the original hold-down. Such openings are filled as regular hold-downs, such that the first opting carrier resumes his or her hold-down upon returning to duty-- until the regular carrier returns.

An opting employee may also bid for and obtain a new, permanent full-time assignment during a hold-down. A national settlement (M-0669) established that such an employee must be reassigned to the new assignment. If there are five or more days of work remaining in the hold-down, then the remainder of the hold-down becomes available to be filled by another opting carrier. Detail to a temporary supervisory position is considered a voluntary reassignment that ends an employee's rights to a hold-down. For example, suppose an employee opts for a position which he or she voluntarily vacates to assume supervisory 204(B) responsibilities. Once the vacancy is awarded as a hold-down to another employee, the original hold-down cannot be reclaimed by the 204(B) upon returning to craft duties (C-9187).

C. Involuntary reassignment

The duration provision in the National Agreement generally prevents the involuntary removal of employees occupying continuing hold-down positions.

National Arbitrator Bernstein (C-6461) held that an employee may not be involuntarily removed from (or denied) a hold-down assignment in order to prevent his or her accrual of overtime pay (See "Eligibility," above). For example, suppose an employee who worked eight hours on a Saturday then began a 40-hour Monday-through-Friday hold-down assignment. Such an employee may not be removed from the hold-down even though he or she would receive overtime pay for the service week.

Opting employees are also protected against permanent reassignment. Article 41, Section 1.A.7 of the National Agreement states that unassigned full-time regular carriers may be assigned to vacant full-time duty assignments for which there are no bidders. However, National Arbitrator Mittenthal ruled that an unassigned regular may not be involuntary removed from a hold-down to fill a full-time vacancy (C-4484). Thus, the right to remain on a hold-down "for its duration" is "unconditional." Of course, management may decide to reassign an employee to a new permanent assignment pursuant to Article 41, Section 1.A.7 at any time, but the employee may not be required to work the new assignment until the hold-down ends.

Mittenthal's reasoning was later adopted by a regional arbitrator to prevent the early removal of part-time flexibles. "To involuntarily reassign an employee while on hold-down would, in effect, nullify the intent of Article 41, Section 2.B.5. . . . Involuntary assignments of PTFs obviously can be made by the Postal Service, but such assignments must be made by using PTFs who are not on hold-down positions" (C-10264).

There is an exception to this rule against involuntarily removing opting employees from their hold-downs. Part-time employees may be "bumped" from their hold-downs to provide sufficient work for full-time employees. Full-time employees are guaranteed 40 hours of work per service week (M-0531). Thus, they may be assigned work on routes held down by part-time employees if management demonstrates that no other sufficient work is available for them on a particular day (M-0097). Bumping is still a last resort, as reflected in a Step 4 settlement (M-0293), which provides that:

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

VI. PTF PAY STATUS

Although a part-time flexible employee who obtains a hold-down must be allowed to work an assignment for the duration of the vacancy, he or she does not assume the pay status of the regular carrier being replaced. That is, a part-time flexible carrier who assumes the duties of

a full-time regular by opting is still paid as a part-time flexible during the hold-down (C-4871, C-5399).

PTFs do not receive holiday pay for holidays which fall within the hold-down period. Instead of being eligible for holiday pay, PTFs are paid at a slightly higher hourly rate than full-time employees.

The pay status of PTFs is most important in the area of overtime pay. Part-time flexibles can receive overtime only for working in excess of eight hours in a day or 40 hours in a week (C-10710). PTFs do not receive "out-of-schedule overtime" pay (C-4871).

VII. SCHEDULE STATUS

Employees on hold-downs are entitled to work the regularly scheduled days and hours of the assignment. These scheduling rights assumed by all hold-down carriers, whether full-time or part-time, create some of the most perplexing problems in the opting process. In the area of schedule status, two key distinctions must be considered. First, there is a difference between a guarantee to work and a right to days off. Second, when an opting employee is denied work within the regular hours of a hold-down, "out-of-schedule overtime" may not be the appropriate remedy.

A. Scheduled days

The distinction between the guarantee to work certain scheduled days and the right to specific days off is an important one. An employee who successfully bids for a hold-down assignment is said to be guaranteed the right to work the hours of duty and scheduled days of the regular carrier. Some settlements and arbitration awards state that hold-down carriers "assume" the scheduled work days and days off of the incumbent carrier (E.g. M-0091, M-0404). It must be noted, however, that days off are "assumed" only in the sense that a hold-down carrier will not work on those days unless otherwise scheduled. In other words, a hold-down carrier is not guaranteed the right to work on non-scheduled days (See C-5911). This, of course, is the same rule that applies to the assignment's regular carrier, who may be required to work on a non-scheduled day.

For example, suppose there is a vacant route with Thursday as the scheduled day off. The carrier who opts for such a route is guaranteed the right to work on the scheduled work days, but is not guaranteed work on Thursday. This does not necessarily imply that Thursday is a guaranteed day off; the hold-down may be scheduled to work that day as well, either on or off the opted-for assignment. However, management may not swap scheduled work days with days off in order to shift hours into another service week to avoid overtime or for any other reason. To do so would violate the guarantee to work all of the scheduled days of the hold-down.

B. Scheduled hours

If management requires a regular or a PTF to work hours outside of an assignment's regular hours and fails to pay the carrier for all hours that he or she should have worked, a grievance should be filed (See C-1412). For example, suppose a Monday-through-Friday route is regularly scheduled from 7:00 am to 3:30 pm, but management instructs an opting carrier to

work from 8:00 am to 4:30 pm instead. The carrier should be paid for the time from 7:00 am to 8:00 am by virtue of the opt. The rate of pay demanded as a remedy should be whatever rate the letter carrier would have earned during the scheduled hours plus the additional hours actually worked. Thus, in this example, the carrier should be paid for a nine-hour day (7:00 am to 4:30 pm, with 30 minutes for lunch), receiving eight hours of straight pay and one hour of regular overtime. Such a grievance should not request "out-of-schedule overtime" as a remedy, because PTFs are never entitled to such pay.

VIII. REMEDIES

Employees are entitled to remedies if their rights to opt are violated. Remedies to employees are usually money awards, intended to make the aggrieved employee whole by compensating him or her for wages lost due to the violation. If no money award is appropriate, the disputed practices may be prohibited in the future, but employees rarely receive punitive damages in excess of their demonstrated losses. Such punitive damages are awarded in extreme situations where "the terms and intent of a collective bargaining agreement are blatantly, arrogantly, or repetitively violated placing the offended party in a position of having to sue for damages or incurring undue expenses at arbitration" (C-7001).

Where a monetary award is the appropriate remedy, the usual measure of damages "is not whether grievant was compensated for the hours he worked, . . . but rather whether he was improperly deprived of . . . work that day" (C-5821). The remedy for unfair denial of scheduled work to a successful hold-down bidder is the employee's regular wage for the hours that he or she should have worked, less the hours that he or she actually worked (C-6142).

The following regional arbitration awards are among those which held that monetary awards were appropriate remedies for violations of employees' rights to opt: C-04739 Leventhal, March 28, 1985 C-05821 Rotenberg, March 24, 1986 C-06142 Britton, May 9, 1986 C-06339 Dennis, June 19, 1986 C-06395 Stephens, August 8, 1986 C-06904 Jacobowski, March 6, 1987 C-07001 Scearce, April 8, 1987 C-10181 Sobel, July 23, 1990 C-10264 Parkinson, Sept. 4, 1990 C-10710 Taylor, March 15, 1991

NALC POSITION
OUT-OF-SCHEDULE PAY (P-00031)

Out-of-schedule pay is an additional fifty percent premium paid for those hours worked outside of, and instead of, a full-time regular employee's regularly scheduled workday or workweek. The regulations controlling out-of-schedule pay are contained in ELM Section 434.6.

All full-time regular letter carriers, including reserve and unassigned regulars, have schedules with fixed reporting times and regularly scheduled days off. Management may temporarily change the schedules of full-time regular employees. However, whenever this is done, the employees whose schedules have been temporarily changed are entitled to additional pay.

If notice of a temporary change is given to an employee by Wednesday of the preceding service week, the employee's time can be limited to the hours of the revised schedule. However, "out-of-schedule" premium is paid for those hours worked outside of, and instead of, the employee's regularly scheduled workday or workweek.

If notice of a temporary schedule change is not given to an employee by Wednesday of the preceding service week, the employee is entitled to be paid for the hours of his regular schedule, whether or not they are actually worked. Therefore any hours worked in addition to the employee's regular schedule are not worked "instead of" his regular schedule. Such hours are not considered as "Out-of-schedule" premium hours. Instead they are paid as regular overtime for work in excess of eight hours per service day or 40 hours per service week.

For example, an employee whose regular schedule of 7 a.m. to 3:30 p.m. was temporarily changed to 6 a.m. to 2:30 p.m. would be paid differently depending upon whether or not prior Wednesday notice was given.

If an employee did receive notification he would be paid an "out-of-schedule premium" for the hour 6 a.m. to 7 a.m. and seven hours straight time pay for the hours 8:00 a.m. to 2:30 p.m.

If the employee did not receive the proper advance notification, he would be paid for nine hours on days the revised schedule was worked. The time between 6 a.m. and 7 a.m. would be paid at the overtime rate and the time between 7 a.m. and 3:30 p.m. - the regular schedule - at the straight time. If the employee was sent home at 2:30 p.m. he would be paid the hour between 6 a.m. and 7 a.m. at the overtime rate; receive straight time pay for the period 7 a.m. to 2:30 p.m., plus one hour administrative leave at the straight time rate for the period 2:30 p.m. to 3:30 p.m.

Bargaining unit employees do not receive "out-of-schedule premium" pay when they request a schedule change for personal reasons. Employees may request such a schedule change by preparing and signing form 3189, Request for Temporary Schedule Change for Personal Convenience. The form must also be signed by both the Union steward and the supervisor before it will be honored.

NALC POSITION
WORK ASSIGNMENT OVERTIME & T-6 CARRIERS
(P-00032)

Note: It is NALC's position that:

1. A T-6 or utility carrier who has signed for work assignment overtime has both a right and an obligation to work any overtime that occurs on any of the five component routes on a regularly scheduled day. However, management is not required to work the T-6 or utility carrier at the penalty overtime rate if there is a carrier from the regular overtime list available to perform the work at the regular overtime rate.

2.a. When overtime is required on the regularly scheduled day of the route of a carrier who is on the OTDL and whose T-6 or utility carrier is on the work assignment list, the T-6 or utility carrier is entitled to work the overtime.

2.b. When overtime is required on the regularly scheduled day of the route of a carrier who is on the work assignment list and whose T-6 or utility carrier is also on the work assignment list, the regular carrier on the route is entitled to work the overtime.

Postal management at the national level agrees with 1 and 2a above. They have not as yet taken a position as to 2b, above. If you get a grievance presenting the 2b issue, please send it to Step 4.

NALC POSITION
EMPLOYEE CLAIMS - BICYCLES (P-00033)

DOES THE AUTOMOBILE EXCLUSION APPLY TO BICYCLES?

It is the position of the NALC that bicycles are not "motor vehicles". Instead, they are personal property for which reimbursement may be sought. However, arbitrators have differed on this point.

The arbitrator in C-05484 held that a bicycle is not a motor vehicle for purposes of Article 27 because the contract "specifically mentions motor vehicle - not method of transportation." In C-02885, the arbitrator ruled that "an employee's bicycle would be considered property, the loss or damage to which would be subject to a claim against the Postal Service." However, he also held that the property must be located on postal premises. The arbitrator stated, "If an employee brings a bicycle with the consent and permission of the Postmaster or officer in charge, stores that bicycle by lock at a point on the postal premises, and said bicycle is lost or damaged by some third person, then the Postal Service is liable for that loss or damage." According to this arbitrator, in order to avoid exposure under Article 27, the Postmaster of a particular facility must prohibit employees from storing or locating their bicycles on postal premises.

Other arbitrators have disagreed. In C-01373, the arbitrator held that the Article 27 exclusion should be interpreted as "including alternate means of employee personal transportation unless such loss was connected with, or incident to an employee's employment." The arbitrator stated, "For the Arbitrator to conclude that all employees who adopted some form of alternate personal transportation between their homes and the Post Office shifted the responsibility for the loss thereof from themselves to the Postal Service would be to place on the Postal Service a financial obligation which the parties did not mutually agree upon." Another arbitrator, in C-05753, ruled that the exclusion of "motor vehicles" must be construed as embracing all means of transportation.

NALC POSITION
EMPLOYEE CLAIMS: EYEGLASSES (P-00034)

There have been a significant number of employee claims pertaining to loss or damage done to an employee's eyeglasses. Arbitrators generally require the employee to maintain well-adjusted glasses in order to receive recovery. In C-01389, the arbitrator stated, "If the evidence established that the glasses merely slipped off during the course of his work because they were not fastened or adjusted properly, the Postal Service should not be responsible for that damage under Article 27." Where glasses are knocked off during the course of a normal job performance, the employee will generally recover. (See C-00132, C-01452).

When the employee has taken affirmative steps to safeguard his/her property, arbitrators generally find this to be reasonable behavior. In C-00795, the employee lost his glasses while shoveling heavy snow, after placing his glasses in a case and affixing them to his clothing by a clip. The arbitrator found the employee "took those steps to safeguard his property which are usually taken by a reasonable person," and upheld the claim. Similarly, where an employee took reasonable precautions and left her glasses in a locked vehicle which was later broken into by a third person, the arbitrator found this to be reasonable behavior, and upheld the claim. (See C-01488, C-03814).

Arbitrators will look carefully at the judgment of the employee in the particular situation. Where the employee appears to have exercised poor judgment or acted carelessly, arbitrators usually rule that the claim cannot be justified. (See C-00194, C-01588). In C-01252, the employee left her glasses out on her work space temporarily, and they were crushed by a falling newspaper roll. The arbitrator stated, "While anyone knows that glasses are easily broken, the average reasonably prudent person does take off his or her glasses occasionally and for short periods and places them either on the desk or other work place with the expectation that the glasses, after the short interval, will be picked up and worn. What the average reasonably prudent person does is not negligence or want of due care. On the other hand, to place glasses on a desk or other work place indefinitely, and unprotected, is a breach of due care."

NALC POSITION
EMPLOYEE CLAIMS: THE AUTOMOBILE EXCLUSION (P-00035)

Article 27 excludes privately owned motor vehicles and their contents. (See C-00124, C-01182, C-04053). Note, however, that if a letter carrier's automobile is damaged by "the negligent or wrongful act" of the Postal Service, the letter carrier may seek recovery under the Federal Tort Claims Act. To initiate a Tort Claim, a Form 95 should be completed and submitted.

Note also that the standard for establishing liability under the Tort Claims Act is different than the standard for reimbursement under Article 27, because they treat fault differently. To make a claim under Article 27 it is merely necessary to show that the loss or damage was "not caused in whole or in part by the negligent or wrongful act of the employee" -- whether or not there was also negligence on the part of the Postal Service. However, to recover under the Tort Claims procedure, it is not enough to demonstrate that the damage was not the fault of the employee -- the employee must establish that the damage was the fault of the Postal Service.

NALC POSITION
TIME OFF AS A REMEDY (P-00036)

TIME OFF AS A REMEDY Some arbitrators have refused to grant Administrative Leave as a remedy because of the argument that Administrative Leave can only be granted under the conditions enumerated in ELM Section 519, and that Article 15, Section 4.A.6 prohibits them from altering, amending, or modifying the terms and provisions of the Contract. See for example, C-04413, Britton. Notwithstanding this argument, many other regional arbitrators have granted Administrative Leave as a remedy; See Epstein C-01637, Foster C-03542, Levak C-05393, Stephens C-06750, Rentfro C-08316, Render C-08614, Lange C-08792, and Eaton C-08893.

The Contract Administration Unit takes the position that the safest remedy request is simply "time off with pay." The arbitration cases listed below may also be cited in support of this remedy. In most cases, however, a monetary remedy is preferable.

(Citation removed)