American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

To: Local and State Presidents
National Business Agents
Regional Coordinators
Arbitration Advocates
Resident Officers

From: Greg Bell, Director
Industrial Relations

Date: December 3, 2008

Re: Das Award on Article 7.1.B.4, Working Casuals between 0500 and 1200

In a recent national-level award, Arbitrator Shyam Das ruled that "Article 7, Section 1.B.4 of the 2006-2010 National Agreement does not prohibit Tour 1 casual employees from normally continuing to work after 0500, provided they have not been scheduled in circumvention of the provision agreed to in paragraph 8 of the Memorandum of Understanding Re: Supplemental Work Force Conversion of Clerk Craft PTFs that is referenced at the end of 7.1.B and included in the CBA." *(USPS #Q06-4Q-C 07200239; 11/24/2008)*

This case arose after the Postal Service initiated a dispute on June 21, 2007 over whether there was a violation of the 2006 Agreement when mail processing casuals in 200-or-more-work-year offices work between the hours of 0500 and 1200 (noon**)**. It was the Postal Service position that the new provisions were not intended to "eliminate the longstanding practice of Tour 1 casual employees working past 5:00 a.m. to complete their assigned work. It was the APWU position that Article 7.1.B.4 prohibits the Postal Service from normally working causal employees in mail processing operations between the hours of 0500 and 1200. The Union did not dispute there may be mitigating circumstances, not recurring in nature, where there may be justification to work a casual in mail processing operations in restricted time frames. But the contract clearly does not permit casual employees to be regularly and routinely worked between the hours of 0500 and 1200.

During negotiations for the 2006 National Agreement, the APWU and the Postal Service agreed to a Memorandum of Understanding re: Supplemental Work Force, Conversion of Clerk Craft PTFs. Paragraph 8 of the MOU stated that "[i]n P&DC's that have 200 or more man years of employment in the regular work force, casuals will not have start times between the hours of 0500 and 1200 (noon) unless there are no career clerk craft employees currently with such starting times."

Subsequently, on January 25, 2007, the USPS Vice President of Labor Relations sent a letter to the APWU stating that "[a]s discussed, it was agreed in the Supplemental Work Force; Conversion of Clerk Craft PTFs Memorandum of Understanding that clerk casuals will not normally work between the hours of 0500 and 1200 in mail processing operations (as opposed to customer service operations) in 200 man year installations." It also stated that "[f]urther we agree that the intent of this language is not be circumvented locally by having casuals scheduled immediately before (0455) or after (1205) the restricted time frames." The Postal Service testified at the arbitration hearing that this letter was in response to concerns on the part of the union about the intent of the memo. The letter specified "mail processing operations" rather than P&DCs because 200 man-year installations weren't limited to P&DCs and there was no disagreement that the intent was to include all mail processing operations with 200 man-years of employment. The Postal Service testified that there was no significance that this letter didn't refer to "start times" as was used in paragraph 8 of the MOU and the intent was stated in the MOU "to not start casuals during [the 0500 and 1200 period of time]."

On March 2, 2007, the APWU and the USPS agreed to Questions and Answers on the "Supplemental Work Force; Conversion of Clerk Craft PTFs MOU." Question #29 asked whether a clerk casual in a 200-man-year installation may be assigned to work in a mail processing operation (as opposed to customer service operations) between the hours of 0500 and 1200. The response was that "Clerk casuals will not normally work between 0500 and 1200 in mail processing operations in 200-man-year installations. The intent of the MOU is not to be circumvented locally by having casuals scheduled immediately before (0455) or after (1205) the restricted time frames." Thereafter, in June 2007, the Joint Contract Interpretation Manual (JCIM) was agreed to and contained similar language as the Q & A relating to Article 7.1.B.4.

At the arbitration hearing, the union presented testimony that the MOU contained language charging the parties with negotiating the actual contract language that would be incorporated into the CBA to ensure that issues the union had achieved in negotiations were reflected in the Agreement. The Union stated that the MOU language wasn't final and we provided detailed documentation regarding proposed contract language changes exchanged between the APWU and the USPS before the final terms of the contract were agreed to. The Union presented testimony that several important changes were made with respect to paragraph 8 of the MOU before it was incorporated into Article 7.1.B.4 of the Agreement, including what is relevant to this case, that the restriction on casuals working between 0500 and 1200 no longer was limited to their starting times. The union also placed into evidence copies of emails between postal officials in the field, including a March 12, 2007 email from a manager of labor relations in the Postal Service's eastern area. This email, referring to a teleconference among USPS headquarters and field managers, stated that USPS management had clarified that this language means that casuals "will NOT work between the hours of 0500 to 1200."

The Postal Service presented rebuttal evidence by the USPS Manager of Contract Administration. He claimed that he wasn't engaged in collective bargaining with the union during the work on developing language changes to the Agreement, including those with regard to Article 7, and his role wasn't to "renegotiate the MOU." He testified that there wasn't any discussion regarding the merits of any contract provision, including the 0500 to 1200 issue, and

the parties agreed to placing a reference to the MOU at the end of Article 7.1.B. The USPS maintained that the MOU was not modified or changed by Article 7 language contained in the Agreement. He also claimed that the email from the eastern area manager was wrong and didn't include the correct understanding of Article 7.1.B.4 or what he told area personnel in the teleconference. The Manager of Processing Center Operations at USPS Headquarters stressed that processing of mail into delivery sequence is performed on Tour 1 and continues until approximately 7:00 AM; box mail is processed until 8:00 AM; and flats are sorted until 6:00 or 6:30 AM. He maintained that it was important to have the same employees who start these operations finish them.

The Postal Service argued that the plain meaning of contract language doesn't control since such language must be considered in its context. It asserted that bargaining history of Article 7.1.B.4 demonstrates that the MOU encompasses the parties' agreement concerning working clerk casuals beyond 5:00 AM. It maintained that the restriction was intended to apply to start times in order to give management more flexibility to use casual employees, and also to protect existing day shift career employees from being affected by this flexibility. Management argued specifically that the reference to the MOU in the USPS's January 25, 2007 letter to the Union indicated that the parties didn't intend to modify what was in paragraph 8 of the MOU. Moreover, it pointed to the parties' insertion of the MOU into the contract and in later joint documents as indications that paragraph 8 of the MOU remained in "full force." The Postal Service asserted further that the operational context and purpose of the language establishes that the parties didn't eliminate the practice of casuals working past 5:00 AM to complete their assigned work due to the need to finish processing letters in delivery sequence. In addition, management argued that in order to give meaning to all terms in the Agreement, both sentences in Article 7.1.B.4 have to be interpreted to refer to start times and to restrict casuals from starting work between 5:00 AM and noon. It asserted that the two sentences only make sense if the first sentence concerns start times. Management argued that the email from the eastern region labor relations manager introduced by the union is erroneous and therefore shouldn't be considered.

The union countered that, since the Postal Service initiated this dispute, it is the grieving party and has the burden of proving there was no violation of the Agreement. We maintained that the plain meaning of the contract should prevail where there is no ambiguity, and in this case Article 7.1.B.4 is clear and unambiguous in prohibiting the Postal Service from normally working casual employees in mail processing operations between 0500 and 1200. The union stressed that Article 7.1.B.4 uses the word "work" and not the words "start times" that are in the MOU. Moreover, we contended that even if there is an ambiguity in the contract language, such ambiguity must be construed against the drafter of the language. In addition, the union indicated that the second sentence of Article 7.1.B.4 isn't inconsistent with the prohibition of working casuals between the restricted hours. We maintained that the MOU clearly shows that further negotiations were necessary after the MOU was executed, and there is evidence that many substantive changes were made to the MOU prior to finalization of the contract. Moreover, the union asserted that the later-negotiated provision must take precedence over language in the MOU in order for the Agreement to be completely integrated. Also, we maintained that the email from the eastern area manager shows that the Postal Service interpreted Article 7.1.B.4 in the same way as the union.

Arbitrator Das indicated first of all that "[t]here is no denying that the language in the first sentence of Article 7.1.B.4 standing alone and giving words their ordinary and common meaning supports the Union's position that casuals may not normally be assigned to perform work in mail processing operations between 0500 and 1200." However, he found that the next sentence "throws considerable doubt on such an interpretation." " … I see no sensible way to read the second sentence of 7.1.B.4 as elucidating the intent of the first sentence, if the intent of that restriction was to prohibit casuals from normally performing any work between 0500 and 1200," according to Arbitrator Das. In reaching this conclusion, he said that if the parties wished to bar casuals from normally working between 0500 and 1200 as well as to bar them from working five minutes before or after 0500 and 1200, they "simply would have defined the period in which they 'will not normally work' accordingly." Though Das acknowledged that the parties have the ability to agree to make changes before finalizing a collective bargaining agreement, he found that the union's interpretation of Article 7.1.B.4 would constitute a significant change from what was previously agreed to in the MOU and such an agreement would go beyond the parties' agreement in the MOU "'to meet and develop the appropriate contract language and implementation guidelines and instructions.'" He then noted, however, that the issue in this case is whether the parties actually made a change in the restriction set out in paragraph 8 of the MOU. Citing the USPS's January 25, 2007 letter to the APWU, Das said that there is no evidence that the parties discussed prohibiting casuals scheduled on Tour 1 from normally working after 0500 and there is no evidence to contradict the Postal Service's testimony that in those discussions "the Union did not seek to change the restriction in paragraph 8 to bar casuals from normally performing any work in the period after 0500, but rather sought to better ensure that the intent of paragraph 8 was not circumvented."

Arbitrator Das thus concluded that in its letter the Postal Service focused on the concern the Union had raised and used the word 'work' in the first sentence as shorthand for scheduled to start work – which is what paragraph 8 of the MOU provided for and is the only interpretation that makes the first and second sentences of the letter fit together." Moreover, he found that there was no evidence of any subsequent discussion between the parties regarding the meaning of "will not normally work between the hours of 0500 and 1200" before the collective bargaining agreement was finalized. He cited the fact that the National Agreement, relevant Q & As, and the JCIM merely incorporate words used in the January 25, 2007 letter.

Even though the arbitrator ruled that Tour 1 casuals may continue to work after 0500 to complete Tour 1 operations, it is clear from this award that the December 2006 MOU and contract provisions of Article 7.1.B.4 are intended to protect Tour 2 day positions and employees. The parties' agreement that the restriction in the MOU was designed to protect existing day shift Tour 2 work for regular employees is memorialized in the Das award.

Enclosure

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National Arbitration Panel

In the Matter of Arbitration	)	
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	)	
between	)	
	)	
	)	Case No.
United States Postal Service	)	Q06C-4Q-C 07200239
	)	
and	)	
	)	
American Postal Workers Union	)	

Before: Shyam Das

Appearances:

For the Postal Service:	Peter J. Henry, Esq.
For the APWU:	Anton Hajjar, Esq.
Place of Hearing:	Washington, D.C.
Dates of Hearing:	March 12, 2008 March 13, 2008
Date of Award:	November 24, 2008
Relevant Contract Provision:	Article 7.1.B.4 and MOU Re: Supplemental Work Force; Conversion of Clerk Craft PTFs
Contract Year:	2006-2010
Type of Grievance:	Contract Interpretation

Award Summary

Article 7, Section 1.B.4 of the 2006-2010 National Agreement does not prohibit Tour 1 casual employees from normally continuing to work after 0500, provided they have not been scheduled in circumvention of the provision agreed to in paragraph 8 of the Memorandum of Understanding Re: Supplemental Work Force Conversion of Clerk Craft PTFs that is referenced at the end of 7.1.B and included in the CBA.

Shyam Das, Arbitrator

On June 21, 2007 the Postal Service initiated this interpretive dispute at Step 4.[1] It stated the issue as follows:

> Whether there is a violation of the 2006 USPS/APWU National Agreement when mail processing casuals in 200 or more work year offices work between the hours of 0500 and 1200 (noon).

On December 7, 2007 the Postal Service somewhat modified its statement of the issue in its written statement as follows:

> Whether there is an automatic violation of the 2006 USPS/APWU National Agreement when casuals in mail processing operations at 200 or more work year offices work between the hours of 0500 and 1200 (noon).

In its December 6, 2007 written statement, the Union stated the issue as follows:

> Whether there is a violation of Article 7, Section 1.B.4 of the National Agreement when the Postal Service normally (regularly) schedules casuals in mail processing operations to work between the hours of 0500 and 1200 (noon).

In its post-hearing brief, the Union states the issue as follows:

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[1] Earlier, the Central Missouri Area Local of the APWU filed a grievance claiming that: "Under the new contract management cannot work casual employees between the hours of 5 am and 12 noon."

Whether there is a violation of Article 7, Section 1.B.4 of the National Agreement when casual employees normally work between 0500 and 1200 (noon) in mail processing operations.

Article 7, *Section 1.B.4 of the current 2006-2010* Collective Bargaining Agreement provides:

> Casual employees will not normally work between 0500 and 1200 in mail processing operations. The intent of this provision is not to be circumvented locally by having casual employees scheduled immediately before (0455) or after (1205) the restricted time frames. This provision does not apply to Motor Vehicle Craft casuals.

During the 2006 contract negotiations the parties reached what both characterize as an historic agreement regarding the use of casual employees and the conversion of Clerk Craft Part-Time Flexibles (PTFs) to Full-Time Regular status. This agreement is set forth in a Memorandum of Understanding Re: Supplemental Work Force; Conversion of Clerk Craft PTFs (MOU) which was signed by the parties' chief negotiators on December 4, 2006. Following the text of Article 7.1.B (Supplemental Work Force) in the 2006-2010 CBA the parties inserted the following notation: "[See Memo, page 290]." The MOU is set forth on pages 290-2 of the CBA. In relevant part, the 2006 MOU states:

> The parties agree to the following general principles concerning Article 7 clerk craft work force structure in postal installations

which have 200 or more man years of employment in the regular work force:

* * *

8. In P&DC's that have 200 or more man years of employment in the regular work force, casuals will not have start times between the hours of 0500 and 1200 (noon) unless there are no career clerk craft employees currently with such starting times.

* * *

15. The parties will modify the appropriate provisions in the CBA, as a result of eliminating the part time flexible position in the clerk craft in 200 man year offices. In offices of less than 200 man years, the part-time flexible position will remain intact.

The parties agree to meet and develop the appropriate contract language and implementation guidelines and instructions.

The 2006-2010 CBA was signed by John E. Potter, the Postmaster General, and William Burrus, the President of the APWU, on March 29, 2007.

On March 2, 2007, Doug Tulino, USPS Vice President, Labor Relations, and Burrus signed a document entitled "Supplemental Work Force; Conversion of Clerk Craft PTFs MOU Q&A" (Q&A) designed to provide guidance to their respective representatives in the field. This document includes the following Q&As relating to paragraph 8 of the MOU:

29 May a clerk casual in a 200 man year installation be assigned to work in a mail processing operation (as opposed to customer service operations) between the hours of 0500 and 1200?

Response

- Clerk casuals will not normally work between 0500 and 1200 in mail processing operations in 200 man year installations. The intent of the MOU is not to be circumvented locally by having casuals scheduled immediately before (0455) or after (1205) the restricted time frames

* * *

46 Do paragraphs 7, 8, 9 and 13 of the MOU apply to the Maintenance and Motor Vehicle Crafts in installations which have 200 or more man years of employment?

Response

- Yes

47 Do the work hour restrictions found in paragraphs [sic] 8 of the MOU (0500 to 1200) apply to the Motor Vehicle Craft?

Response

- No

The Joint Contract Interpretation Manual (JCIM) agreed to by the parties in June 2007 includes the following paragraph relating to Article 7.1.B.4:

> Casual employees will not normally work between 0500 and 1200 in mail processing operations. This provision is not to be circumvented locally by scheduling casuals immediately before or after the restricted time frames and is not applicable to Motor Vehicle Craft casuals. (See Q&A 3/2/2007)

Doug Tulino testified that during the 2006 negotiations he and Tony Vegliante were co-chief negotiators for the Postal Service. Bill Burrus was their Union counterpart. The MOU was the result of both parties' wanting to figure out a better way to deal with the casual issue. Tulino said the key to the deal was that the Postal Service got to use casuals at 200 man-year installations without being restricted by the provision in Article 7.1.B.1 that casuals may not be employed "in lieu of" full or part-time employees, and all PTFs at those locations were converted to full-time employees. Tulino stated that the Union wanted some protection for Tour 2 (day shift) employees and this led to the agreement set forth in paragraph 8 of the MOU.

Tulino stated that sometime after the parties had signed off on the MOU, Burrus called him regarding a concern the Union had that some Postal Service operations people would "play around" with the provision in paragraph 8 and have casuals start five minutes before or five minutes after the start time block they had agreed to. Tulino said he and Burrus agreed this was not their intent, and Tulino asked Burrus what he wanted to do. According to Tulino, Burrus said he did not know. Tulino then suggested that he write a letter clarifying what they meant, which was agreeable to Burrus.

Tulino said he wrote a letter and discussed it on the phone with Burrus before sending it to him. Burrus said it was fine. Tulino's letter, dated January 25, 2007 and addressed to Burrus, states as follows:

> As discussed, it was agreed in the Supplemental Work Force; Conversion of Clerk Craft PTFs Memorandum of Understanding that clerk casuals will not normally work between the hours of 0500 and 1200 in mail processing operations (as opposed to customer service operations) in 200 man year installations. Further, we agree that that [sic] the intent of this language is not to be circumvented locally by having casuals scheduled immediately before (0455) or after (1205) the restricted time frames.

Tulino explained that his letter refers to "mail processing operations" in 200 man-year installations, rather than to "P&DCs" which are referenced in paragraph 8 of the MOU, because they realized they had 200 man-year installations that were something other than P&DCs, and there was no disagreement that their intent was to include all mail processing operations with 200 man-years of employment.[2]

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[2] The MOU starts out stating: "The parties agree to the following general principles concerning Article 7 Clerk Craft work force structure in postal installations which have 200 or more man years of employment in the regular work force...." Both paragraphs 8 and 9 start out by stating: "In P&DC's that have 200 or more man years of employment in the regular work force..." The essence of paragraph 9 was incorporated into Article 8.2.D of the CBA, which refers to "postal installations," rather than P&DCs.

When asked on direct examination whether there was any significance to the fact that his letter to Burrus does not use the term "start times" which is used in paragraph 8, Tulino responded as follows:

> No, there's no significance to it, I mean other than -- I mean, Bill called me with a specific problem. He was worried that we weren't going to apply the intent. The intent is obviously stated in the MOU. The intent was to not start casuals during -- during that period of time, and if you don't have starting times during that period of time, then I guess you're not working them during that period of time. That was the language that we used. That was the language that I used, and of course, the second sentence, you know, says it very clearly.
>
> Further, we agree that the intent of the language is not to be circumvented locally by having casuals scheduled immediately before or after, "scheduled" meaning that's when they start their tour of duty.
>
> So no, there was -- to me, there was not anything significant, and in doing that, we were trying to address a concern that the APWU brought to our attention, and that's what the intent of the letter is. It wasn't to change any provision that we had negotiated.

Tulino testified that after he sent his January 25, 2007 letter to Burrus, he had no further discussions with the Union on this matter. He noted that he was not involved in preparing the Q&A document, which he and Burrus signed off on as

final reviewers. Likewise, he testified, he was the final approver for the Postal Service of the CBA changes that were put together by members of his staff and their Union counterparts after the terms of the agreement were negotiated.

Greg Bell, the Union's Director of Industrial Relations, testified that during the 2006 negotiations, in the absence of President Burrus, he along with APWU Executive Vice President Cliff Guffey served as spokespersons for the Union at the main table. He stated that in negotiating the MOU, one of the Union's objectives was to preserve Tour 2 day work for career employees.

Bell testified that he had sole responsibility on the Union side for negotiating the actual contract language to ensure that those issues the APWU had bargained for and was successful in achieving in negotiations were incorporated into the CBA. This was what he characterized as the "final phase of the negotiation process." Bell stressed that the language in the MOU was not final, and that several aspects of the MOU changed during subsequent negotiations over the language changes to be made in the CBA.

Bell provided detailed testimony and documentation regarding proposed contract language changes that were exchanged between him and Postal Service representatives -- primarily Manager of Contract Administration John Dockins -- before the final terms of the CBA were agreed to. Those relevant to paragraph 8 of the MOU are discussed below.

On January 23, 2007 Bell emailed Dockins proposed language changes to Articles 7 and 8 relating to the MOU. In his email, Bell stated: "Please note that the changes that were made are based on further clarification and the outcome of the discussions between Bill Burrus and Tony Vegliante concerning the intent of the MOU." Bell testified that prior to sending this email he had received a draft of a letter addressed to Burrus regarding paragraph 8 of the MOU, which Burrus told him he had received from the Postal Service. The text of this draft was as follows:

> As discussed, it was agreed in the Supplemental Work Force; Conversion of Clerk Craft PTFs Memorandum of Understanding that Clerk casuals will not normally work between 0500 and 1200 in mail processing operations (as opposed to customer service operations) in 200 man year installations. Further, we agree that the intent of this language is not to be circumvented locally by having casuals scheduled immediately before (0455) or after (1205) the restricted time frames. However, this does not preclude management from assigning casuals to backfill for career employees in such mail processing operations.

The proposed changes to Article 7 in Bell's January 23 email included the following new language to be inserted as Article 7.1.B.4:

> Casual employees will not normally work between 0500 and 1200 in mail processing operations in postal installations which have 200 or more man years of employment. The intent of this provision is not to be

> circumvented locally by having casual employees scheduled immediately before (0455) or after (1205) the restricted time frames.

On January 29, Bell faxed a further revision of Article 7 to Dockins. This included the addition of the following sentence at the end of 7.1.B.4:

> This provision does not apply to Vehicle Maintenance Facility (VMF) clerk casual employees in the motor vehicle craft.

In a subsequent fax sent to Dockins on February 1 that sentence was again revised to read:

> This provision does not apply to casual employees in the motor vehicle craft.

On February 8, Bell sent a fax to Dockins that included further revisions to Article 7 and Article 8. He prefaced these changes with a message reading:

> I made the following changes after my discussion regarding the Qs & As that I have been informed was agreed to:
>
> I deleted the following from Article 8, Section 2.D (See Q&A #33 and #45):
>
> > "...in postal installations which have 200 or more man years of employment in the regular work force."
>
> I have rewritten Article 7.B.3 to reflect the quote in the MOU) to read as follows:

> Casual employees are prohibited from performing assignments requiring training and testing (reference Article 37.3.F.5 and Article 37.3.F.7 positions). This provision also applies to the Maintenance and Motor Vehicle Craft.

I have rewritten the last sentence in Article 7.B.4 (See Q&A #45) to read as follows:

> This provision does not apply to Motor Vehicle Craft VMF clerk casuals...

I deleted the following from Article 7.B.4 (See Q&A #29):

> "In postal installations which have 200 or more man years of employment".

Bell noted in his testimony that the Postal Service did not accept his deletion from Article 8.2.D (relating to scheduled days off), and stated that since it was clear the intent was to limit that provision to 200 man-year installations that limitation ultimately was incorporated into the CBA. Bell said he rewrote 7.1.B.3 to correspond to the language used in the MOU because the parties already had gotten into a dispute over the meaning of that language. Bell also explained that he deleted the reference to postal installations which have 200 or more man-years of employment from 7.1.B.4 because, subsequent to Q&A

#29, the parties had agreed to eliminate the reference to 200 man-year offices from this provision.[3]

On March 15, 2007 Bell and Dockins signed off on the language changes in Articles 7, 8 and 12 related to the MOU. Included was a final revision of the last sentence of 7.1.B.4, which states: "This provision does not apply to Motor Vehicle Craft casuals."

At arbitration, Bell also presented a document (Union Exhibit 14) he prepared to show the various changes between the language in the MOU and the finally agreed-to language in the CBA. Bell noted that the texts of Memorandums of Understanding agreed to in contract negotiations typically are included in and referenced in the CBA, as was done in this case. He pointed out, however, that historically they are subject to further negotiation in finalizing the language to be included in the CBA, and they may even be changed in subsequent CBAs. Although members of the bargaining unit ratified the new agreement in January 2007, Bell stated, the Union's position was that it would not sign the CBA until the parties negotiated the provisions of the MOU into the CBA.

Bell stressed that during the post-ratification negotiations over the language to be included in the CBA, several important changes were made with respect to the provision in paragraph 8 of the MOU. As incorporated into

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[3] While the parties apparently disagree as to whether 7.1.B.4 is limited to 200 man-year installations, that is not an issue presented in this case.

7.1.B.4 of the CBA, this provision is not limited to 200 man-year installations; the reference to "P&DCs" was changed to "mail processing operations;" and the provision is not limited to the clerk craft, but includes the maintenance craft while excluding the motor vehicle craft. Most relevant to this case, the restriction on casuals working between 0500 and 1200 no longer applies to their starting time. This was a very significant change, Bell stated. It was something the Union was seeking and was successful in achieving through negotiation.

When asked to explain the Union's position regarding the meaning of the language in the second sentence of 7.1.B.4 ("The intent of this provision is not to be circumvented locally by having casual employees scheduled immediately before (0455) or after (1205) the restricted time frames."), Bell testified:

> A First and foremost, the provision prohibit the Postal Service from normally scheduling casuals between the restricted hours of 0500 and 1200 noon. This reinforced the Postal Service's obligation not to normally schedule casual within that restricted hour. This is --
>
> Q Not to schedule or work them?
>
> A Oh, not to -- not to work them.
>
> This is -- this intent to -- intended to discourage local management from placing themselves in the situation where they're scheduling casuals in a way that circumvent the prohibition against working casuals within this time period.

For example, you know -- you know, our position is stay away from the restricted hours. If you schedule casual, let's say, 2:00 o'clock, it's obvious you're not going to let them -- you're not going to clock them out after two hours. If you schedule them 1:00 o'clock, it's obvious -- obvious that you're not going to end their tour after three hours.

So, you avoid circumventing the contract by not scheduling casuals immediately before or after. This is a restricted -- this is -- this is what we negotiated. This is a restricted time limit. Don't place yourself in a situation by scheduling casuals in such a way that it will result in you circumventing the contract by normally scheduling over the restricted hours.

Stay away from the restricted hours.

Q Normally scheduling them or normally working them?

A Working them.

MR. HENRY [USPS counsel]: Objection.

THE WITNESS: No, scheduling. Don't schedule them before that would result in you circumventing the contract by working them within the restricted hours.

MR. HAJJAR [APWU counsel]: Understood.

THE WITNESS: It reinforced their obligation not to schedule and avoid doing so, and there was no disagreement on that.

The Union also submitted into evidence copies of several emails between postal officials in the field that were forwarded by local union personnel to Greg Bell at APWU headquarters. The initial email in a string of emails is a March 12, 2007 message from the manager of labor relations in the Postal Service's eastern area stating:

> John Dockins clarified in our telecom this afternoon the intent of Doug Tulino's January 25, 2007, correspondence to Mr. Burrus regarding the utilization of casuals between the hours of 0500 to 1200. This clarification changes our interpretation regarding the previous start time issue and working into the 0500 to 1200 time period. Doug's language "will not normally work between the hours of 0500 and 1200 in mail processing operations (as opposed to customer service operations) in 200 man year installations" translates to they will NOT work between the hours of 0500 to 1200. So, for example, if you have casuals starting at 2200 hours, or midnight, or 0100 hours, etc. they CANNOT work after 0500 hours. We should attempt to settle any grievances already in the system on this issue with language that we will cease and desist. Please make certain you disseminate this change in position to all your plants.

On rebuttal, John Dockins, Manager of Contract Administration who oversees the daily administration of the APWU CBA, testified that following negotiation and ratification of the 2006 agreement he worked with several Union officials -- not including Bell -- on the Q&As and at the same time he worked with Union officials, led by Bell, in developing the necessary language changes in the CBA.

When asked on direct examination whether in his view he was engaged in collective bargaining with Bell, Dockins testified as follows:

> A Absolutely not. With all due respect -- and I do respect my union colleagues, and we do have a ongoing working relationship, so I don't want to be too harsh here, but I heard for the first time yesterday that I was engaging in collective bargaining after the contract had been signed, sealed, delivered, and ratified, and that just is not true. It's a complete and utter fairy tale with no basis in reality. I was not engaging in collective bargaining. That was never what happened here. It's just simply not the fact.
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> Q Did you and Mr. Bell discuss your roles as you were developing the language?
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> A Yes.
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> Q What conversations did you have in that regard?
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> A Our role was to get not only Article 7 but other language in the contract together, to print the contract.
>
> Our charter under the MOU was to develop appropriate contract language, appropriate meaning appropriate under the MOU, that reflected the MOU, and there had to be changes to Article 7, because the MOU changed the way the work force structure existed. It was a very significant change.
>
> So, Article 7 -- parts of it was obsolete and was incorrect. It had to be

> modified. And those modifications had to be appropriate with the MOU.
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> So, the task was to get that language in the -- in Article 7 that was appropriate as part of the larger printing-the-contract task. It was not to renegotiate the MOU.

Dockins also testified that Bell told him that Bell's role was to get the contract printed, and Bell expressed frustration several times that he was being blamed for holding up the printing of the contract, in part because the Q&A document had not been finalized.

Dockins stated that as he and Union officials addressed various issues in the Q&A discussions, some issues emerged where there was a dispute and at some point they ended those discussions. Dockins stressed, however, that in getting the CBA language together he and Bell did not intend to and did not get into disagreement. They just worked out the necessary CBA language to reflect the provisions of the MOU. He stated that there was never any discussion regarding the merits of any of the issues, including the 0500 to 1200 issue.

Dockins testified that when he and Bell signed off on the CBA language changes on March 15, he told Bell they needed to include a reference to the MOU because the practitioners in the field were going to be confused by their effort to capture the essence of a 15-point MOU and 47-point Q&A document in a relatively few paragraphs of revised language in the CBA. Bell had no objection to including a reference to the MOU, and that is now found at the end of Article 7.1.B.

Dockins asserted that the MOU, referred to in the CBA and included therein, and the Q&A document, referred to in the JCIM signed off by Tulino and Burrus in June 2007 still are in full force and effect and were not modified or changed by the Article 7 language included in the CBA.

Dockins insisted that inclusion of additional crafts, other than the motor vehicle craft, to the coverage of paragraph 8 of the MOU as set forth in Article 7.1.B.4 did not change the meaning of paragraph 8 at all.

Dockins also stated that the email from a labor relations area manager, who has since retired, that was submitted into evidence by the Union, simply was wrong. Dockins stated that the position ascribed to him in the email never was his understanding of 7.1.B.4, and that is not what he told the area personnel he spoke to in the phone conference referenced in the email. The Postal Service introduced an email Dockins sent to area managers and other labor relations personnel on March 21, 2007, which states:

> As we have discussed, we are engaged in ongoing discussions with the APWU at the national level regarding application of the Supplemental Work Force; Conversion of Clerk Craft PTF's MOU. Regarding application of paragraph 8 of the MOU and Q&A #29 (0500 to 1200 hr. casual restriction), it is the Postal Service's position that scheduling tour 1 mail processing casuals beyond 0500 hrs. to accomplish operational and/or

dispatch windows is not a violation of the MOU.

Chris Oronzio, Manager of Processing Center Operations at headquarters, testified that since the early 1990s the Postal Service has processed letters into delivery sequence on Tour 1. Referred to as "DPS," this process enables the Postal Service to provide mail carriers the majority of letter volume in the order of delivery. Tour 1 typically starts at 11:00 p.m. and continues until about 7:00 a.m., but may also begin between 10:00 a.m. and midnight. Oronzio said that in addition to letter mail, many large postal processing facilities have a post office box section. Night shift employees operate the processing equipment for mail addressed to these boxes until about 8:00 a.m. so that customers can retrieve it starting about 9:00 a.m. The Postal Service also sorts flats until 6:00 or 6:30 a.m. before dispatching that mail from the plant to the delivery unit. Oronzio stressed the importance of having the same employees who start the operation finish it because DPS is a methods-driven process.

Oronzio also noted that significantly fewer employees work on Tour 2, which typically begins between 6:00 and 8:00 a.m. Maintenance employees generally work on the letter sorting equipment between 7:30 and 11:00 a.m., because the DPS equipment is not in use. Plants finish processing and dispatch DPS mail at the end of Tour 1 and new mail is generally not brought in from the dock for processing until after the day shift.

EMPLOYER POSITION

The Postal Service maintains that the Union bears the burden of proving a contract violation, and has failed to do so. The Postal Service contends that the bargaining history, operations context, and a comprehensive reading of the contract language prove the restrictions in Article 7.1.B.4 concern casual start times.

The Postal Service stresses that the plain meaning of the text of a contract deserves great weight, but contract language must be understood in context, so it is not necessary to prove ambiguity before evaluating the totality of the circumstances leading to the language. In addition, the principal purpose of the language deserves great weight in the interpretive analysis.

The Postal Service argues that the parties agreed to limit casual start times when they signed off on the MOU in December 2006 and they never altered that deal. The parties intended the restriction at issue to apply to start times in order to give the Postal Service greater flexibility to use casual employees. At the same time, the parties intended to protect existing day shift career employee positions from this new flexibility. As the Postal Service witnesses testified, the Union never communicated a desire to negotiate what it seeks to obtain in this litigation.

The Postal Service asserts that the bargaining history reveals that the MOU embodies the parties' entire agreement

regarding clerk casuals working past 5:00 a.m. The incorporation of Tulino's January 25 letter to Burrus into Article 7.1.B.4 demonstrates the parties did not intend to modify the mutual promises contained in paragraph 8 of the MOU. They expressed a mutual intent to reiterate the MOU by opening the letter with the following clause: "As discussed, it was agreed in the Supplemental Work Force; Conversion of Clerk Craft PTFs Memorandum of Understanding that...." All of the parties' discussions focused on restricting casual start times only.

The Postal Service argues that insertion of the language from Tulino's January 25 letter into Article 7 reaffirms the understanding reached by Burrus and Tulino. Distorting the assurance of no gamesmanship into a new, harsh restriction on casual employee usage, as the Union seeks to do in this case, is the antithesis of good faith. Moreover, common experience teaches that neither Tulino nor Dockins would agree to a major limitation on using casual employees at crucial times in mail processing without any similar concession from the Union in return.

The Postal Service points out that Dockins and Bell mutually acknowledged they were responsible only for preparing the contract for printing, and not for altering the MOU.

The Postal Service stresses that the operational context and purpose of all relevant language confirms the parties did not eliminate the longstanding practice of casual employees working past 5:00 a.m. to complete their assigned work. Since the early 1990s, casuals have played an essential

role in processing letters into delivery sequence on the overnight shift, particularly in the period from 5:00 to 7:00 a.m. The last few hours of the night shift are the most critical because that is when the overnight shift completes the "second pass" of letter mail through DPS processing equipment. This second pass is the final stage of putting letters in delivery sequence. The Union's position also would disrupt long established box section and flat processing operations both of which end in the early morning hours. These night shift operations partially have overlapped with other operations on the day shift for many years before the parties negotiated the MOU. When the Postal Service starts a casual employee at 11:00 p.m., it expects the employee to complete the overnight shift assignment, often at about 7:00 a.m., in order to operate efficiently. The Postal Service argues this practice fully complies with the MOU, and takes nothing away from day shift employees.

The Postal Service argues that its interpretation gives meaning to all of the terms in the 2006-2010 CBA, but the APWU's interpretation does not. Initially, the Postal Service notes that interpreting the word "normally" in 7.1.B.4 is irrelevant, because the interpretive dispute concerns the nature of the rule not exceptions to it. The Postal Service argues that the second sentence of 7.1.B.4 is fully congruent with the first if it is interpreted as the Postal Service argues. Both sentences refer to start times and restrict the Postal Service from starting casuals between 5:00 a.m. and noon in large mail processing facilities.

The Postal Service asserts that the parties' decision to print the whole MOU, including paragraph 8, in the back of the contract militates in favor of the interpretation urged by the Postal Service. Including both the MOU and Article 7.1.B.4 in the CBA clarifies the parties' intent. The Postal Service also points out that the parties referred to the MOU in joint documents shortly before and months after they finalized the CBA language. These repeated references over several months confirm that the MOU, and paragraph 8 specifically, remained in full force. Q&As #29, #46 and #47 all refer to the MOU, the latter two referring specifically to paragraph 8. It would make no sense to refer to the MOU and paragraph 8 directly in the Q&A document completed a few weeks before the contract and indirectly in the JCIM completed months after the contract if they had been superseded.

The Postal Service argues that the Union's interpretation would render several terms of the CBA meaningless. First the reference at the end of 7.1.B to the MOU, and consequently paragraph 8, would be undermined. The Union's interpretation also negates the several references to paragraph 8 in the Q&As. As long as the Q&As refer to paragraph 8, the JCIM would also require revision, because it references the Q&As. Secondly, the Postal Service argues, the Union cannot reconcile the first and second sentences of Article 7.1.B.4. The Union cannot explain how scheduling a casual to work five minutes before or after the period between 5:00 a.m. and noon circumvents the intent of the proscription. These two sentences only make sense if the first sentence concerns start times.

The Postal Service argues that paragraph 15 and the last sentence of the MOU anticipate changes consistent with the MOU, not wholesale revisions to it. The MOU is the culmination of the parties' negotiations and not a springboard to more negotiations. The MOU provides the specific terms of the agreement, but is not written in the form of contract language, so paragraph 15 and the last sentence of the MOU instruct the parties to edit the contract to conform to the MOU and to develop guidance to implement the bargain.

Finally, the Postal Service contends that the email from the eastern area labor relations manager introduced by the Union erroneously describes the discussion that Dockins had with various area managers on March 12, 2007. Dockins made this clear in his March 21 email in which he explained that "it is the Postal Service's position that scheduling tour 1 mail processing casuals beyond 0500 hrs. to accomplish operational and/or dispatch windows is not a violation of the MOU."

UNION POSITION

Initially, the Union argues that as this dispute was initiated by the Postal Service, it is the grieving party and has the burden to prove that there is not a violation of the CBA in the circumstances set forth in its dispute.

The Union stresses that the first rule of contract interpretation is that where there is no ambiguity the plain words of the contract control. The Union contends that Article 7.1.B.4 is clear and unambiguous in that it prohibits the Postal

Service from normally working casual employees in mail processing operations between the hours of 0500 and 1200. The intent of this provision is that career employees should work between the hours of 0500 and 1200, rather than casual employees. The Union does not dispute there may be mitigating circumstances (exceptions to the rule), not recurring in nature, where there may be justification to work a casual in mail processing operations in restricted time frames. But the contract clearly does not permit casual employees to be regularly and routinely worked between the hours of 0500 and 1200. The Union stresses that Article 7.1.B.4 uses the word "*work*." *It does not say "start times" as did the MOU.* The Union maintains that the Postal Service's dispute is a transparent attempt to achieve in rights arbitration what it failed to achieve in collective bargaining negotiations.

The Union insists that the testimony of Doug Tulino to the effect that the language he drafted was meant to mean the same thing as the start time provision of the MOU is entirely beside the point. There is nothing ambiguous about the phrase "will not normally work." Moreover, if there was any ambiguity, the rule of contract interpretation is to construe ambiguous terms against the drafter. The Union further argues that the second sentence of 7.1.B.4 does not change the meaning of the first sentence. As explained by Union witness Bell, the second sentence is consistent with the prohibition against working casuals between the restricted hours set forth in the first sentence, and it supports the Union's interpretation of the first sentence, not the other way around.

The Union contends that the record shows that there were extended negotiations between the parties regarding the MOU which resulted in subsequent agreements departing from the MOU in several respects. It stresses that paragraph 15 and the final paragraph of the MOU make it clear that further negotiations were contemplated. The many substantive changes to the MOU negotiated between the Postal Service and the Union, detailed in the submission presented by Greg Bell, completely refute the Postal Service's contention that the MOU was intended to be continued intact in the CBA.

The Union argues that the testimony of Postal Service witness Dockins to the effect that the discussions leading to the CBA language changes did not constitute collective bargaining and that he had no authority to agree to contract changes cannot be credited. He was the chief spokesperson for the Postal Service in contract negotiations with the APWU. He is a very high ranking official in labor relations at the Postal Service, only one level below his immediate supervisor, Vice President Tulino. Bell was his counterpart in reaching agreement on final contract language. The Union insists Dockins certainly had authority to negotiate these changes, but at a minimum, he had apparent authority to negotiate with Bell.

The MOU deals with casuals having start times between 0500 and 1200. The Union points out that 7.1.B.4 clearly says that casuals will not work between those hours. Assuming without in any way conceding that the two provisions have to be reconciled if possible, the Union asserts, the simple fact is that it is not possible to do so. Therefore, the later

negotiated provision takes precedence. In this regard the Union stresses that the CBA is a completely integrated agreement and takes priority over the earlier MOU.

The Union rejects the Postal Service argument that the MOU is incorporated into the CBA and therefore has equal status with Article 7.1.B.4. Not only can the two contradictory provisions not be harmonized, Union witness Bell explained that MOUs are "incorporated" throughout the CBA in the sense of "associating it or making a reference in the appropriate article." As Bell also explained, historically, MOUs referenced in the CBA have been the subject of extended negotiations and changes.

The Union also asserts that the Postal Service's contemporaneous interpretation of Article 7.1.B.4 comported with that of the Union. It points to the evidence it presented showing that a manager in the eastern area reported on a March 12, 2007 briefing by Dockins in which he stated that the language drafted by Tulino, now found in 7.1.B.4, means casuals cannot work after 0500 hours, which the emails noted was "bad news" to managers. The Union points out that while Dockins argued that the eastern area manager got it wrong, he never testified about what he actually did tell managers in the March 12 briefing. Moreover, the email he subsequently sent on March 21, 2007 to all area managers of labor relations and some at headquarters clearly was self-serving and contemplated the current dispute.

FINDINGS

There is no denying that the language in the first sentence of Article 7.1.B.4 standing alone and giving words their ordinary or common meaning supports the Union's position that casuals may not normally be assigned to perform work in mail processing operations between 0500 and 1200. The next sentence, however, which relates to the "intent of this provision" -- that is, the intent of the first sentence -- throws considerable doubt on such an interpretation. Moreover, it is worth repeating the statement made by Arbitrator Snow, citing the Restatement (Second) of Contracts, in APWU v. USPS, Case No. H4C-3W-C 8590 (1993):

> It is not necessary to prove an ambiguity in the contractual language of the parties before evaluating the totality of circumstances that created the language. The language of the parties is understood only in context.

Notwithstanding the Union's valiant effort to do so, I see no sensible way to read the second sentence of 7.1.B.4 as elucidating the intent of the first sentence, if the intent of that restriction was to prohibit casuals from normally performing any work between 0500 and 1200. I can see no reason for the parties to be concerned with the intent of such a provision being circumvented locally by having casuals scheduled five minutes before or after 0500 and 1200, respectively. If the intent was not only to bar casuals normally performing any work between 0500 and 1200, but also to bar them working in those five-minute (or any other) preceding or following periods,

surely the parties simply would have defined the period in which they "will not normally work" accordingly.

The provision in 7.1.B.4 originated from paragraph 8 of the MOU that the parties agreed to in their 2006 negotiations. The parties have expressly directed attention to the MOU at the end of 7.1.B and have included it in the CBA. Paragraph 8 of the MOU addresses casual "start times." As the Union acknowledges, if its reading of 7.1.B.4 is correct this would constitute a very significant change from what was agreed to in paragraph 8. While the parties had the ability to agree to make such a change prior to finalizing the CBA, that would have gone considerably beyond the agreement they set forth at the end of the MOU "to meet and develop the appropriate contract language and implementation guidelines and instructions."

The Union has pointed to a number of other differences or changes that were agreed to in developing the contractual language after the MOU was signed and the 2006 settlement agreement was ratified by its members. (See Union Exhibit 14.) These changes, however, involved tweaking the language of the MOU, or clarifying it, or expanding its scope -- in terms of the casuals, the crafts and/or facilities that were covered.[4] In one instance the parties agreed to a more precise

[4] Some of these changes favored the Postal Service and others the Union.

statement of the requirement in the MOU, including a limited exception.[5]

As already noted, the parties had the ability to make the change in the restriction set forth in paragraph 8 of the MOU that the Union says they negotiated and to include that change in the CBA which was approved by the parties' top negotiators. The question is whether that is what they did. In determining that, it is appropriate to examine how the language at issue in 7.1.B.4 came into being following the signing of the MOU.

The evidence in the record shows that APWU President Burrus contacted USPS Vice President Tulino and expressed concern that local operations managers would attempt to erode or get around the restriction on casual start times that was agreed to in paragraph 8 of the MOU by scheduling casuals to start work just before or just after the 0500 to 1200 time block. The restriction in the MOU was designed to protect preferable day shift Tour 2 work for regular employees, and Tulino agreed that it was not the parties' intent to permit such a circumvention of the agreed-to restriction. Tulino said he asked Burrus what he wanted to do and Burrus said he did not know. Tulino proposed

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[5] Paragraph 11 stated that the full-time to part-time ratio in the Motor Vehicle craft "will continue at the same percentage on the date of this agreement." Article 7.1.3.A.2 states that the ratio shall by 90% at all installations -- not just those with 200 or more man years of employment -- but allows every installation to have at least 2 part-time employees.

that he (Tulino) write a letter addressing the matter and that was agreeable to Burrus.

Tulino apparently sent a draft of his letter to Burrus and some changes were made before Tulino signed it. The language now in issue -- "will not normally work between 0500 and 1200" -- evidently was there from the start, and there is no evidence of any further discussion regarding that language. Obviously, the Union would have had no incentive to reject or change that language. The record does not show, however, that Burrus and Tulino discussed prohibiting casuals scheduled on Tour 1 from normally working past 0500, as they typically did to complete Tour 1 operations at the covered facilities. The Union has not asserted that this endangered the number of Tour 2 positions available for regular employees. There is no evidence to contradict Tulino's testimony that in the discussions preceding the finalizing of his letter to Burrus, the Union did not seek to change the restriction in paragraph 8 to bar casuals from normally performing any work in the period after 0500, but rather sought to better ensure that the intent of paragraph 8 was not circumvented.[6]

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[6] In his January 23, 2007 email to Manager Dockins, in which he included his initial proposed CBA language changes based on paragraph 8 of the MOU, Director Bell indicated that they were made on the basis of "further clarification and the outcome of the discussions between Bill Burrus and Tony Vegliante concerning the intent of the MOU." (Emphasis added.) Parenthetically, there does not appear to be any dispute that with respect to discussion regarding paragraph 8 of the MOU the discussion was between Burrus and Tulino, not Vegliante. Bell had seen a draft of the letter regarding the intent of paragraph 8, but it did not indicate who in the Postal Service had written it. Tulino's signed letter to Burrus was dated January 25.

The text of Tulino's letter is informative. It begins by stating: "As discussed, it was agreed in the ... [MOU] that...." This shows that the words that immediately follow -- "clerk casuals will not normally work between the hours of 0500 and 1200" -- were intended to reflect what the parties already had "agreed" (past tense). This is confirmed in the second sentence, which states: "Further, we agree [present tense] that...the intent of this language [that is, what the parties had agreed to in the MOU which is restated in the first sentence] is not to be circumvented...." (Emphasis and bracketed language added.)

Under these circumstances, I am persuaded that in his letter Tulino focused on the concern Burrus had raised and used the word "work" in the first sentence as shorthand for scheduled to start work -- which is what paragraph 8 of the MOU provided for and is the only interpretation that makes the first and second sentences of the letter fit together. I also find on this record that the Union reasonably could not have concluded that Tulino, through this letter, intended to make a major revision of what the parties had agreed to in the MOU that would significantly hamstring Postal Service operations, on his own initiative and without any discussion of such a change.

There is no evidence of any subsequent discussion between the parties regarding the meaning of the words "will not normally work between the hours of 0500 and 1200" prior to the execution of the CBA. The CBA, the relevant portions of the Q&A -- and later the JCIM -- simply incorporate these words,

together with the words in Tulino's second sentence regarding circumvention of this restriction, without further amplification. Quite possibly, this was because that language was an expression of the understanding reached by the parties' top negotiators with respect to the intent of paragraph 8 of the MOU.[7]

For the reasons set forth above I find that Article 7, Section 1.B.4 of the 2006-2010 National Agreement does not prohibit Tour 1 casual employees from normally continuing to work after 0500, provided they have not been scheduled in circumvention of the provision agreed to in paragraph 8 of the Memorandum of Understanding Re: Supplemental Work Force Conversion of Clerk Craft PTFs that is referenced at the end of 7.1.B and included in the CBA.

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[7] As acknowledged at the outset, there is no question that the wording of the first sentence of Article 7.1.B.4 read in isolation supports the Union's position. It is not surprising that those words might be interpreted in that fashion even by a Postal Service representative. Dockins denies he told labor relations area managers what is attributed to him in the March 12, 2007 email put into evidence by the Union. Although the writer of that email presumably got that notion from somewhere, it has not been established that this ever was an official interpretation by the Postal Service.

AWARD

Article 7, Section 1.B.4 of the 2006-2010 National Agreement does not prohibit Tour 1 casual employees from normally continuing to work after 0500, provided they have not been scheduled in circumvention of the provision agreed to in paragraph 8 of the Memorandum of Understanding Re: Supplemental Work Force Conversion of Clerk Craft PTFs that is referenced at the end of 7.1.B and included in the CBA.

Shyam Das, Arbitrator