

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS

UNION, AFL-CIO

and

NATIONAL ASSOCIATION OF

LETTER CARRIERS

Intervenor

and

NATIONAL POSTAL MAIL

HANDLERS UNION

Intervenor

and

NATIONAL RURAL LETTER

CARRIERS ASSOCIATION

Intervenor

USPS Case No.: 6X 21C-6X-C-3281423

NACI Background Check Separations

BEFORE: Margo R. Newman

Arbitrator

APPEARANCES:

For the U.S. Postal Service:

Lauren Heiman, Lori Markle &
Michelle Windmueller, Counsel

For the APWU:

Melinda Holmes & Adreanna
Sellers, Counsel

For the NALC:

Peter DeChiara, Counsel

For the NPMHU:

Matthew Clash-Drexler,
Counsel

For the NRLCA:

Jean-Marc Favreau, Michael
Gan & Mark Gisler, Counsel

Place of Hearing:	Videoconference hearing
Date of Hearing:	December 12, 2024
Briefs Received:	April 14, 2025
Date of Award:	June 30, 2025
Relevant Contract Provisions:	Articles 12.1, 15 & 16
Contract Year:	2021-2024 ¹
Type of Grievance:	Contract Interpretation

Award Summary:

1. A grievance protesting the separation/removal of a non-probationary employee based upon an unfavorable NACI report is substantively arbitrable under Article 15.

2. In such arbitration, the Postal Service must prove that it had just cause for the separation/removal under the principles of Article 16.

¹ This is the term of the applicable APWU contract. Since the other Unions are Intervenor in this case, but have the same relevant provisions in their National Agreements, the language quoted will be from the APWU Agreement. The relevant effective dates of the other Unions' National Agreements are: NALC (2019-2023); NMPHU (2022-2025); and NRLCA (2021-2024).

This case arises under the following language of the APWU National Agreement. The parties stipulated that the relevant language of Articles 12, 15 and 16 has remained substantially unchanged since 1973.

ARTICLE 3 MANAGEMENT RIGHTS

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

* * * * *

B. to hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees.

ARTICLE 12 PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.....²

B. The parties recognize that the failure of the Employer to discover a falsification by an employee in the employment application prior to the

² The NRLCA Agreement references Article 30.2.B with respect to the probationary period of a Rural Carrier. That provision states:

The probationary period for a rural carrier associate or assistant rural carrier shall be 90 days actually worked or one calendar year, whichever comes first. All other applicable provisions of Article 12.1 shall apply.

expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

C. When an employee completes the probationary period, seniority will be computed in accordance with this Agreement as of the initial day of full-time or part-time employment.

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or the Union which involves the interpretation, application of, or compliance with provisions of this Agreement or any Local Memorandum of Understanding not in conflict with this Agreement.

ARTICLE 16 DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-12, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance.....

A hearing was held by videoconference before the undersigned on December 12, 2024, where the parties had the opportunity to examine and cross-examine witnesses, present documentary evidence, and make arguments in support of their respective positions. The parties filed post-hearing briefs which were received by the arbitrator on April 14, 2025. There is no disagreement that the arbitrator has the jurisdiction to determine the interpretive issues in this dispute.

ISSUES:

At the hearing, the parties were unable to stipulate to the issues, but agreed that the arbitrator could frame the issues after hearing the evidence. In accord with their respective 15 day letters, the following proposed issues were presented at the hearing:

The APWU presents the following two issues:

1. Whether a non-probationary employee who is discharged by the Postal Service based on its assessment of the employee's NACI

background check can grieve and arbitrate the Postal Service's decision under Article 15, and

2. If said grievance is arbitrable, does the just cause standard of Article 16 apply?

The NPMHU agrees with the APWU's proposed issues. The NRLCA agrees with the first issue proposed by the APWU, but does not believe that the second issue needs to be reached or decided by the arbitrator. The NALC proposed the following issues:

1. Whether, when the Postal Service terminates an employee based on an unfavorable NACI report after the employee has completed probation, a grievance challenging the termination is arbitrable?

2. If such grievance is arbitrable, does the Postal Service have the burden of proof to establish cause in the arbitration?

The Postal Service presents the following two issues:

1. Whether challenges to administrative separations issued to employees who have completed a probationary period for failure to meet a condition of employment based on the Inspection Service's unfavorable adjudication of a NACI background check are substantively arbitrable?

2. Do non-disciplinary administrative separations of non-probationary employees for failure to meet a condition of employment based on the Inspection Service's unfavorable adjudication of NACI background checks violate Article 15 and/or 16 of the National Agreement?

After hearing all of the evidence and arguments of the parties, I adopt the following interpretive issues for resolution in this case:

1. Is a grievance protesting the separation or removal of a non-probationary employee based upon an unfavorable NACI report substantively arbitrable under Article 15 of the National Agreement?

2. If said grievance is arbitrable, does the just cause standard of Article 16 of the National Agreement apply?

RELEVANT FACTS/BACKGROUND:

At the outset, the Unions made clear that they are not challenging the right of the Postal Service to set eligibility criteria and determine suitability under its established standards. The testimony presented by the Unions deals mostly with the history of the issue of criminal background checks and how they have been dealt with by the parties over the last 30+ years. It appears that prior to 2020, the Postal Service never challenged the arbitrability of grievances arising from a problem with background checks, which mostly appeared in cases involving falsification of job applications. These cases were heard on the merits regionally, and ended in differing results depending on the individual circumstances.³

Handbook EL-312, Employment and Placement, contains Employment Eligibility and Suitability standards which include Assessing Criminal Conviction History (§514.3), and the process of obtaining criminal records checks by the National Agency Check with Inquiries (NACI) which is performed solely by the Postal Inspection Service (PIS). Joseph Bruce, Acting VP of Human Resources (HR) for the Postal Service, testified to the process involved in hiring new employees. He stated that the Postal Service plays no role in the NACI or PIS process involving background checks, and only receives the results from the PIS. Bruce noted that all forms involved in hiring, including job postings and applications, state clearly that employment is subject to meeting suitability requirements including background checks. He pointed out that all job offers indicate that they are

³ For background purposes, the APWU entered into the record 20 regional awards regarding the issue of falsification of the employment application concerning criminal background between 1975 and 2006. The NRLCA submitted 8 regional awards between 1980 and 2001 where the Union prevailed.

conditional upon meeting suitability requirements, and the record shows that they are labeled “conditional job offer.”⁴ They also advise the applicant not to resign from their current job at this time,⁵ and that their employment may begin before the reviews are completed, but that employment remains conditioned on successfully meeting the noted requirements. Job applications also state that having a criminal record is not automatically disqualifying, and that the Postal Service weighs a number of factors to see if such record impacts suitability.

Bruce stated that an applicant must receive a favorable interim NACI to be onboarded, but that if a final NACI is unfavorable, the employee and HR are notified by the PIS, and if the employee appeals, s/he is put on non-work status pending such appeal results. He indicated that if no appeal is filed by the employee or an unfavorable NACI is returned, the employee is issued a separation letter for not fulfilling the conditions of the original job offer, which is not disciplinary. Bruce pointed out that a separated employee can reapply for employment with the Postal Service, while a terminated employee cannot. He was unfamiliar with the process followed by the PIS in conducting background checks, making NACI findings, or the process of appeal and any employee rights or involvement in such process. Bruce testified that of the 140,000 employees hired by the Postal Service in 2024, about 500 of them had an unfavorable NACI returned, and of those, only 60 had passed their probationary period.

In 2020 the Unions became aware of some cases regionally where the Postal Service began challenging the arbitrability of these post-probation NACI separations.

⁴ Charlie Cash, APWU Director of Industrial Relations, pointed out that there is no reference in the National Agreement to either a “conditional employee” or an “administrative separation.”

⁵ David Heather, Retired NRLCA National Director of Labor Relations, explained that it was logistically impossible for someone to be hired as a Rural Carrier Associate (RCA) and not quit their other job, since they have no set schedule, and need to be available when called, with minimal notice.

Each of the Unions presented examples of specific regional cases within their crafts where this issue arose.⁶ In some of these cases, the employee was not placed on non-duty status pending an appeal, and received a Pre-Disciplinary Interview (PDI) prior to their separation. While previous cases had been resolved at the local level, it appeared that was no longer happening.⁷

When Charlie Cash, APWU Director of Industrial Relations, was advised by regional staff that the Postal Service was claiming that these cases were not arbitrable, he sent a case to Step 4 to deal with the issue. Cash testified that he met on this issue with Shannon Richardson, Postal Service Director of Contract Administration for the APWU, and believed that they had reached agreement that such grievances were arbitrable. He identified an email confirmation from Richardson of her understanding of such agreement, dated June 7, 2023, which states:

If I recall our conversation correctly, the question was whether we have a disagreement to allow individuals who have passed their evaluation or probationary period and are subsequently let go for an unfavorable NACI access to the grievance/arbitration procedure. Any employee should have access to the grievance/arbitration procedure once they have completed the evaluation/probationary period. While passing the NACI is considered a condition of employment, if the results of the NACI are not completed prior to the conclusion of the evaluation/probation period, then the employee would have access to the grievance/arbitration procedure to challenge the separation. The challenge would be based on local circumstances.

⁶ The APWU submitted 11 regional awards on this issue between 2021 and 2024, which included awards by arbitrators involving the other Unions. Manchester, New Hampshire Local President Dana Coletti testified about a case that was successful in arbitration in 2024, as well as two other cases that were resolved by the parties at Step 2. The NPMHU submitted one award from 2022, and documents related to two other grievances processed within the period from 2021-2024, along with the testimony of Tom Ruther from its Contract Administration Department explaining the cases. The NRLCA submitted two arbitration awards issued between 2021 and 2024. The USPS submitted 9 regional awards issued post 2020 on these issues, some of which are duplicative of the ones submitted by the Unions.

⁷ The APWU, NPMHU and NALC entered into the record the underlying grievances concerning the issues raised in this case, which had been referred to Step 4, and are encompassed within this dispute.

Cash testified that he sent a copy of this email, as well as his understanding of the agreement at the national level concerning the arbitrability of such issue, to all representatives in the field, as well as referred the initial grievance involved in the Step 4 dispute back to the region for adjudication. He explained that the Union's original intent in agreeing that the dispute was arbitrable, was to have these cases heard on the merits by an arbitrator at the regional level.

Richardson testified that her understanding of her agreement with Cash, as reflected in her email, was that a post-probationary employee has access to the grievance procedure, not that the underlying grievance was arbitrable, and that she never intended to limit any substantive arbitrability argument made by the Postal Service. She stated that these cases do not refer to disciplinary issues or removals, but to the failure to meet a condition of employment, and that there is no right to grieve an administrative separation since the Postal Service's suitability determinations are not open to discretion nor reviewable in arbitration. Richardson explained that she did not believe that such separations are challengeable or reviewable by either the Union or an arbitrator since the Postal Service's actions are outside the scope of the National Agreement, so there is no violation of the contract to be grieved. She opined that if suitability determinations were reviewable in arbitration, there would be two different rules applicable to unfavorable NACIs based on whether they are received during the probationary period or after, which is unfair. Richardson testified that the Postal Service cannot have different employment standards for its employees, acknowledging that there are different standards for removal or disciplinary actions within the National Agreement.

PARTIES' POSITIONS:

The APWU argues that a permanent employee's grievance over being removed for an unfavorable NACI rating is arbitrable, noting the Postal Service's admission in 2023

that such employee could file a grievance. It asserts that substantive arbitrability is a contract interpretation issue dealing with whether the parties intended to keep certain issues or employees out of their arbitration process. The APWU relies upon Case No. HOC-NAC-12 (Snow, 2000) (herein *the Snow 2000 award*) for his affirmation of the basic presumption of arbitrability “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,” as well as for his finding that the premise that Article 3(B)’s reference to “hire” gives management unreviewable discretion to remove permanent employees for not meeting a suitability requirement is “open to question.” All of the Unions point out that the broad arbitration provision and definition of a grievance encompasses disputes about separation or discharge which are clearly actions that affect “conditions of employment,” and that the test is whether the arbitration clause is susceptible to an interpretation that covers the dispute. They contend that there is no contract language that excludes permanent employees’ grievances over their removal for an unfavorable NACI rating or “conditional hires” from arbitration, and that the only explicit prohibition in the contract for access to the grievance procedure is Article 12.1(A) covering probationary status. The APWU asserts that access to the grievance procedure must, by its nature, include access to arbitration to address the merits of the dispute, relying on the USPS & NALC & APWU, D90N-4D-D 95003945 *et. al.* (Snow, 1996) (herein *the Snow 1996 award*).

The Unions maintain that Article 3 is not a limit on arbitration, and management rights must be exercised in compliance with other provisions of the National Agreement, including Articles 15 and 16, as well as Article 19, which incorporates provisions of handbooks, manuals and published regulations that directly relate to wages, hours, or working conditions of employees, including the ELM and EL-312. The APWU points out that the Postal Service’s exercise of its managerial discretion with respect to any of its listed Article 3 rights is reviewable in arbitration, relying on USPS & NALC & APWU,

A-1N-4A-D 05098663 (Das, 2007) (herein *the Das 2007 award*). The NRLCA states that the fact that all non-probationary employees are entitled to the protections of Articles 15 & 16 when their employment is ended does not strip the Postal Service of its right to establish and enforce hiring standards, citing USPS & NRLCA (Lehrkind), 4E 18R-4E-C 21167639 (Snider, 2021) (herein *the Lehrkind award*). The NALC asserts that the Postal Service's statutory right to set hiring standards in the Postal Reorganization Act (PRA) does not give it free reign to discharge employees who have completed probation, noting that the PRA requires the Postal Service to exercise its rights (including to hire and discharge employees) consistent with applicable laws, regulations and CBAs. It points out that even if the PRA gives the Postal Service the right to determine suitability requirements and hire whomever it chooses, once someone becomes an employee, the employment relationship is subject to the CBA and regulations, including ELM §365.311 (Involuntary Separations).

The Unions contend that past practice supports a finding of arbitrability, since the relevant contract language has not changed for 50 years and the Postal Service regularly arbitrated over separating permanent employees with regard to their criminal background checks. They note that the parties historically processed and resolved disputes concerning the removal of permanent employees for falsifying their applications with respect to their criminal records on their merits, and never claimed that the disputes were not arbitrable, until the Postal Service attempted to unilaterally change its policy. The Unions argue that the Postal Service cannot unilaterally deem job offers "conditional" to indefinitely subject employees to termination for failing to meet hiring criteria. They note that there is no reference to "conditional employment" in the National Agreement, and the language in the postings and job offers were not negotiated with them and cannot amend the interpretation of the National Agreement.

The NRLCA opines that a determination that an employee has not met the hiring criteria must be subject to neutral review with representational rights, noting that the PIS review process is unknown and insufficient. The NPMHU points out the the PIS NACI User Guide addresses steps management should take when getting an unfavorable NACI finding, which includes a process of supervisor discussion with HR, the employee and their representative, consideration of whether the criminal background was admitted on the application, and, ultimately, the exercise of managerial discretion regarding the employee's retention in employment, which is the type of decision-making generally reviewable in arbitration. The Unions also maintain that it is nonsensical for the Postal Service to tell applicants offered employment to keep their other jobs while working as a probationary employee (in whatever classification), which is impossible in many circumstances, as well as for an unlimited amount of time thereafter in case something is discovered on NACI, pointing out instances where it took 18 or 20 months for them to separate employees who voluntarily disclosed criminal background information on their applications. The NPMHU points out that the provisions of Article 12.1(C), giving retroactive seniority to employees who pass their probationary period, would make no sense if the Postal Service's position was accepted.

With respect to the application of the just cause standard to a grievance protesting a removal/separation for an unfavorable NACI rating, the NALC believes that *the Das 2007 award* is determinative of the issue raised in this case, and the NRLCA does not believe that it is necessary to reach the Article 16 issue herein. The Unions point out that *the Das 2007 award* held that the discharge of a non-probationary employee constitutes a removal since that is the only basis for an involuntary separation of an employee who has completed the probationary period, but whose appointment is subsequently determined not to have been in compliance with Postal Service procedures. They note that Das found that under ELM §365.311 the Postal Service must prove that such separation/removal

was “for cause” even if it is non-disciplinary, and regardless of the reason for the administrative separation due to an employee not having the right to be hired in the first place. The NALC asserts that neither the ELM nor the National Agreement recognize “conditional employment” status, and points out that ELM §365.311 recognizes only two exceptions - an employee who has not completed the probationary period and an employee serving under a temporary appointment. It maintains that *the Das 2007 award* also found that the Article 15.2 definition of a grievance is not limited to complaints related to compliance with the National Agreement, and that the matter is arbitrable even if the cause standard appears in the ELM. The NALC points out that none of the regional awards relied upon by the Postal Service considered *the Das 2007 award*.

The APWU argues that removing an employee because of their criminal history is disciplinary in nature, noting that *the Snow 1996 award* confirms that an action that involves misconduct that has been handled in the past as disciplinary in nature is covered by the protections of Article 16. It asserts that a criminal record is misconduct (not on the job) that the Postal Service believes is related to a person’s ability to do the job, and arbitrators treat these cases as disciplinary, not contractual in nature. The APWU maintains that a NACI removal has the possibility of being corrective (since an employee can reapply for employment), and thus falls within the parameters of Article 16. The NRLCA points out that the parties have applied Articles 15 and 16 to falsification of application cases for decades, and singled out these cases in the National Agreement to make sure the Postal Service can address application issues subject to Articles 15 and 16. It contends that the Postal Service never challenged the right of an employee to use the Article 16 process for these hiring-related issues before, and the Postal Service’s argument gives permanent employees more rights if they lie on their applications than if they tell the truth.

The Unions point to the discretionary nature of the NACI review and rating, and the fact that an unfavorable NACI is not *per se* cause for disqualification or removal. They note that the ELM requires individual review of at least 7 factors, and an exercise of judgment and discretion, and *the Das 2007 award* makes clear that the Postal Service must show that it took into account all relevant interests and facts in reaching its decision, which employees must be allowed to challenge under a standard of just cause review. The APWU points out that the JCIM requires the PIS to be bound by the National Agreement without interference with Article 15 and 16, and the fact that their process is secretive and the basis for their conclusions unknown, makes review under the just cause standard more appropriate and necessary.

Finally, the NALC contends that considerations of fairness support the Unions' position. It notes that completion of probation leads to an employee's expectation of continued employment assuming proper job performance, and the warning of "conditional employment" does not advise them that they are subject to summary termination after completing probation. The NALC asserts that whatever the PIS appeal process involves, it is not a substitute for the arbitration process which involves a hearing before a neutral with representation. It argues that an award favoring the Unions' position would have no adverse consequences, pointing out that the parties themselves negotiated and agreed to a "double standard" by the very terms of the probationary period. The NALC emphasizes that (1) a very small number of overall hires fall into this category, (2) no one would not be in this position if NACI background checks were processed more promptly, and (3) the Postal Service would still have the ability to enforce its suitability standards. It notes that the Unions' argument only guarantees employees the right to challenge the Postal Service's retention decision, not to remain employed.

The Postal Service raises a threshold issue that this dispute is not substantively arbitrable, since an arbitrator's jurisdiction is contractually derived, and her authority limited to interpreting or applying CBAs, citing *USPS & APWU*, H7T-3W-C 12454 (Mittenthal, 1992)(*the Mittenthal 1992 award*); *USPS & APWU*, H4C-4C 4753 (Collins, 1987); *the Steelworkers Trilogy*; *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981); *AT&T v. Communications Workers*, 475 U.S. 643 (1986). It asserts that the scope of the CBA arbitration clause determines an arbitrator's authority, and the Union must raise a claim that "on its face" is governed by the CBA, relying on *Safeway Stores v. UFCW Local 400*, 621 F. Supp. 1233 (D.D.C. 1985); *Graphic Communications Local 680 v. Nabisco Brands*, 649 F. Supp. 253 (N.D. Ill. 1986).

The Postal Service argues that its action protested here exists independently of the CBA, since it is a challenge to non-disciplinary administrative separations that are not governed by the National Agreement, and thus fall outside the scope of arbitration, citing *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir 2023). It contends that the PIS is best suited to adjudicate suitability determinations, as they have the expertise to make such assessments, and since the Postal Service relies upon such determinations in administratively separating employees, an arbitrator should not be in a position to second guess such findings, which involve conditions of employment.

The Postal Service asserts that its right to separate an employee for failure to meet a condition of employment is statutorily derived from the PRA, which gives it broad managerial powers consistent with applicable law and CBAs, including establishing procedures for appointing and relieving employees from duty. It maintains that the right to hire and retain employees is recognized by Article 3, has not been abrogated in the CBA and is consistent with it, and includes the right to separate or not retain employees who fail to meet suitability criteria which stems directly from the law, as noted by Das.

The Postal Service distinguishes the case presented to Das in 2007 as involving a Postal policy provision regarding cause not involved in this case, since here there was no error by the Postal Service in hiring, but rather, an employee's failure to pass the NACI background check and condition of employment. It contends that cause is not pertinent here, where what is presented is a binary choice to management - is the condition satisfied or not - and the Postal Service has the authority under the law to administratively separate an employee who fails to meet a condition of employment, as acknowledged by Das.

The Postal Service argues that the Unions failed to prove a contractual violation. It first posits that its statutory exclusive management right to set suitability criteria, and administratively separate employees who do not meet them, is not limited by any contractual provision. The Postal Service believes that Article 12 is irrelevant because, while it bars Unions from grieving separations of probationary employees, it does not bar the Postal Service from separating employees outside of this period. It contends that the just cause principles of Article 16 only apply to disciplinary separations, which is not the situation in these cases, noting that it is included in the National Agreement under the "Discipline Procedure" article. The Postal Service notes that the disciplinary process is intended to be corrective in nature, which is not the focus here.

The Postal Service states that Article 15 does not provide substantive rights, so there is no substantive provision of the Agreement to grieve. It notes that an arbitrator cannot interfere with the exercise of its retained and exclusive statutory rights to set conditions of employment. The Postal Service also maintains that Article 19 does not provide any avenue to a right enforceable through the grievance procedure, since it does not incorporate every provision of every handbook (including EL-312 hiring provisions), but only those directly related to wages, hours or conditions of employment, and not to

exclusive management functions, relying on *USPS & NALC*, Q11N-4Q-C 14032224 (Nolan, 2015); *USPS & APWU*, Q15-4Q-C 19267345 (Newman, 2021); *USPS & APWU*, Q10T-4Q-C 14171644 (Goldberg, 2017). It contends that administrative separations are not removals, as substantiated by the different NOA Codes on the Form 50. The Postal Service believes that ELM 365 does not apply to these separations, since it does not contain an exhaustive list of all types of separation actions, and Das was wrong to find that it did. It notes that, if you were to look at ELM 365, the question would be whether it prohibits the Postal Service from taking this action, not whether it authorizes it to do so. The Postal Service maintains that Article 19 follows the reserved rights concept in Article 3, which provides only that management's action must not be in conflict with the National Agreement.

The Postal Service goes on to argue that the Unions failed to prove that it acted in a manner that is arbitrary or capricious, citing *the Newman 2021 award*. It claims that such inquiry is a subjective test, where the Postal Service must show that it had a legitimate business reason for its actions in furtherance of business objectives, including efficient operations, and not a test of reasonableness. The Postal Service asserts that its actions took into account the safety of its employees, the security of the mail, and the integrity of the Postal Service brand, all of which show a valid exercise of its statutory and management rights.

Finally, the Postal Service argues that, if the arbitrator were to find the dispute to be arbitrable, she should hold that failure to obtain a favorable background check is *per se* cause for administrative separation. In that event, it contends that there would be nothing to arbitrate.

DISCUSSION AND FINDINGS:

A discussion of whether the instant dispute is substantively arbitrable must start with the analysis laid out in *the Snow 2000 award*, where he pointed to the strong presumption of arbitrability of labor-management disputes noted by the Supreme Court in *USWA v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), quoting the following passages:

“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage,” and that “only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.” *Id* at 583.

Arbitrator Snow went through the analysis used by courts regarding substantive arbitrability, considering (1) whether there is an arbitration clause in the contract; (2) whether the parties excluded from its coverage the subject matter of the dispute; and (3) what is the evidence of such an exclusion. In that case, in finding the dispute with respect to the meaning of Article 12.5.C.5(a)(2) (Reduction in the number of Employees in an Installation other than by Attrition) to be substantively arbitrable, he noted that there was no express exclusion of the subject matter present in the National Agreement.

Similarly, in this case, the only express prohibition to access to the grievance procedure in the National Agreement is Article 12.1(A), where the parties negotiated the right of the Postal Service to separate any probationary employee during the probationary period, and such employee “shall not be permitted access to the grievance procedure in relation thereto.” There is no similar provision anywhere in the National Agreement with respect to non-probationary employees. In Article 12.1(B) the parties recognized that the Postal Service may discover a falsification in an employment application after the

expiration of the probationary period, and agreed that such falsification can be used as a reason for “discharge.”⁸ However, they did not agree to any limitation on access to the grievance procedure in such situation. As noted by the parties, much of the arbitration precedent concerning criminal background history was the result of grievances filed protesting such terminations by non-probationary employees. In those cases, the Postal Service did not contest the substantive arbitrability of such grievances.

A review of the express language used by the parties in the National Agreement with respect to the Grievance-Arbitration Procedure, reveals a very broad definition of what constitutes a grievance - a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment - and some examples (although not comprehensive) such as a complaint of an employee which involves the interpretation, application of, or compliance with provisions of this Agreement or any Local MOU not in conflict with it. *Cf. the Mittenenthal 1992 award*. The parties acknowledge that Article 19 incorporates those parts of all Postal Service handbooks, manuals and published regulations that directly relate to wages, hours or working conditions as they apply to bargaining unit employees, and they agreed that such documents shall not contain anything that conflicts with the National Agreement.

Article 15 details a 4 step grievance procedure culminating in arbitration. Any properly initiated grievance, which is timely pursued through the steps of the grievance procedure, may be referred to arbitration by either party. Absent any clear prohibition against filing a grievance protesting a non-probationary employee’s separation/termination of employment for receiving an unfavorable NACI, such grievance would fit

⁸ I note that the term “separation” is not used here, or anywhere else in the National Agreement with respect to ending the employment of a non-probationary employee. Other than in Article 12.1(A), the term “separation” is only used in the National Agreement in Articles 12.1(D) with respect to the rehire of a separated employee; 6.C(1) in the definition of layoff and RIF; and 6.E(1) & (2) regarding Protective Benefits. The National Agreement itself does not use the phrase “administrative separation.”

the definition of a dispute related to conditions of employment which involves the application of, or compliance with, provisions of the Agreement. Thus, Article 15 is susceptible to an interpretation that covers this dispute.

The Postal Service argues that the Union's claim is not governed by the National Agreement on its face, and that the protested action exists independently of the Agreement but is statutorily derived from the PRA. It points out that its right to hire and retain employees is recognized by Article 3, but is not elsewhere abrogated. The Postal Service believes that separating non-probationary employees for receiving an unfavorable NACI is the exercise of a retained and exclusive statutory right to set conditions of employment, which is not subject to arbitral review. All of the Unions made clear that the Postal Service's setting of the conditions or standards of suitability for employment is not being questioned, and they acknowledge that right. They clarify that it is only the exercise of the right not to retain an employee past their probationary period that is the issue in this case.

The Postal Service asserts that its right to separate or not retain an employee who fails to meet its suitability criteria is a binary choice - the employee either meets the established criteria or he does not. Article 3 specifically states that management rights must be exercised not only consistently with the National Agreement, but also with applicable laws and regulations. The Postal Service's Rules and Regulations, and those of the PIS, list factors to be considered in determining action to take in response to an

unfavorable NACI finding.⁹ The Regulations make clear that an adverse criminal background check is not, *per se*, disqualifying from employment with the Postal Service. The on line job application (which mirrors EL-312, §514.31 Assessing Criminal Conviction History) informs prospective applicants that it is Postal Service policy to evaluate employability of each applicant with a criminal conviction record individually. Thus, the Postal Service is obligated by its Rules and Regulations to make an individual assessment concerning suitability and continued employability when it receives notice of an unfavorable NACI of a non-probationary employee.

I find that a complaint by a non-probationary employee with respect to the results of such determination is a dispute related to a condition of employment that clearly falls within the definition of a grievance in Article 15. I believe that Richardson acknowledged as much in her June 7, 2023 email confirming her understanding of the agreement she reached with Cash when dealing with the initial Step 4 on this issue, where at the regional level, the Postal Service took the position that the cases (grieving the separation of non-

⁹ EL-312 §514.37 Evaluating Employability of Applicants with Criminal Convictions states:

It is Postal Service policy to evaluate the employability of each applicant with a criminal conviction record individually. The fact that an applicant has a criminal conviction record is not sufficient to disqualify that applicant from postal employment. Instead, an applicant should be rejected on the basis of a history of criminal conviction only after a specific finding that the history is directly related to the applicant's present capacity to perform as a Postal Service employee. To the extent available, such factors as the following must be considered during such an evaluation:

- a. Applicant's age at the time of each offense.
- b. Nature and underlying circumstances of the offense.
- c. Length of time elapsed since the applicant's offense.
- d. Evidence of efforts towards rehabilitation, including job training or educational programs the applicant may have participated in during incarceration.
- e. Information supplied by penal authorities, parole and probation officers, social workers, or social agencies regarding the applicant's progress toward rehabilitation or employability.
- f. Applicant's employment record, including participation in a job training program.
- g. Dispensations that may have been granted by the authorities to evidence the applicant's rehabilitation such as certificates of relief from disabilities, certificates of good conduct, and certificates restoring civil rights.
- h. Nature and location of the position sought by the applicant.

EL-312 §514.38 lists three additional considerations: probation or parole, pending charges, and time since conviction.

probationary employees for receiving an unfavorable NACI) were not arbitrable. That email concludes by saying that

“While passing the NACI is considered a condition of employment, if the results of the NACI are not completed prior to the conclusion of the evaluation/probation period, then the employee would have access to the grievance/arbitration procedure to challenge the separation. The challenge would be based on local circumstances.”

In her testimony, Richardson attempted to draw a distinction between a post-probationary employee having access to the grievance procedure and the Postal Service’s argument that the underlying grievance is not substantively arbitrable since there is no violation of the contract to be grieved. Her opinion that permitting suitability determinations to be reviewable in arbitration would create unfairness since it would mean two different rules regarding unfavorable NACIs based on when that determination was made is not convincing since, admittedly, the parties themselves explicitly created different standards for removal/separations based on when the action takes place. They did not do so for challenges to separation actions based on an unfavorable NACI that takes place post-probation. Absent any clear language exhibiting an intention of the parties to exclude this type of dispute from the coverage of Article 15, I conclude that the matter is substantively arbitrable.

The second issue raised in this case is whether the just cause standard of Article 16 applies to grievances filed by non-probationary employees protesting their separations for receiving an unfavorable NACI. This is where *the Das 2007 award* is instructive. I first note that in that case the Postal Service did not raise a challenge to arbitrability, and that the affected non-probationary employees were given discharge letters of non-disciplinary administrative action and told that they had the right to grieve. In that case, the underlying cause for the separations was an administrative error, since the Postal Service

filled the positions using the wrong hiring roster. The primary rationale relied upon by the Postal Service in separating the employees was the necessity to protect the integrity of its hiring process. There was no question that the terminations were not disciplinary in nature. Das notes that disciplinary action will only be imposed as a result of, or in response to, some conduct by the employee, and relies on *the Mittenthal and Snow awards* for the proposition that Article 16 relates to discipline (wrongdoing or misconduct by the employee).

The main difference in this case is that there is an issue presented as to whether these separations are disciplinary in nature since, unlike *the 2007 Das award*, the basis for the action here is past misconduct by the employee, not a mistake by the Postal Service. This dispute is more akin to the situation that is presented in off-duty misconduct cases. The APWU argues that this case involves the removal of an employee due to their criminal history/record, which is disciplinary in nature since it involves misconduct that the Postal Service believes is related to a person's ability to do the job. Arbitrators treat these cases as disciplinary, not contractual, disputes. See, e.g. *the Lehrkind award*; *USPS & NRLCA*, Case No. 4E 21R-4E-A 23478315 (*Guevara*) (Gely, 2024). There is no question that if this is considered disciplinary in nature, the just cause provision of Article 16 applies.

Even if these separations are not, *per se*, disciplinary in nature, Arbitrator Das' analysis that an involuntary separation-disqualification after the probationary period is considered a removal under ELM 365.311, which must be for cause, provides the basis for a cause analysis of the Postal Service's removal/separation action. That provision notes that the only exceptions to such "removal" are employees who have not completed their probationary period and employees serving under a temporary appointment. In its attempt to distinguish *the Das 2007 award* on the basis that cause is not relevant here, the

Postal Service notes that there was no error by the Postal Service in hiring, but only an employee's failure to pass the NACI background check condition of employment, and relies on its assertion that cause is neither unclear nor pertinent where there is only a binary choice, as in this case. As pointed out above in footnote 9, the language of EL-312 §514.37 undermines this contention, specifying that a criminal background is not, *per se*, disqualifying, and that each case must be analyzed based on a number of factors. Such determination, as with other exercises of management rights contained in Article 3, are subject to independent review and scrutiny on the local level. The issue is what is the appropriate standard of such review.

The Postal Service's notice to applicants/employees that their appointments are "conditional" on them receiving a favorable NACI does not change this fact. The Postal Service is not able to unilaterally create a class of "conditional employees" to avoid the consequences of their becoming regular employees with full collective bargaining rights. As noted by the Unions, there is no reference to such class of employees in the National Agreement, nor any reference to "conditional employment." ELM 346 references Conditional Offers of Appointment and notes that offers of employment must, among other things, include instructions for required conditions that must be fulfilled after entrance on duty, including obtaining a security clearance. It does not exempt or further classify employees undergoing such conditions. I also acknowledge that the parties agreed in Article 12.1.C that, once an employee completes the probationary period, his/her seniority is computed from the initial day of employment, whether full or part-time. There is no exclusion for "conditional" employees or those awaiting NACI results. Thus, employees who receive an unfavorable NACI after they have completed their probationary period are seniority employees, with contractual seniority rights.

Additionally, the Postal Service's position that the Unions failed to prove a contractual violation does not address the issue raised in this proceeding. As noted by Das, an involuntary separation - disqualification of a non-probationary employee is a removal, which is encompassed within the ELM, and, as a condition of employment, is incorporated into the National Agreement by Article 19.¹⁰ Whether locally the Unions have chosen to cite Article 3 and/or Article 19 within their grievances protesting such separation, along with (or instead of) Article 16, there is ample contractual basis for a challenge to the action of removing a non-probationary employee from employment after receipt of an unfavorable NACI. While the standards of review may be different under each of those contractual provisions, there is still a valid basis for a substantive challenge to the Postal Service's action in such situation.

I am in agreement with the argument by the Unions that it would be anomalous for the Postal Service to have to establish just cause to terminate an employee who lied in the application process, but to have an unfettered right to remove an employee for conduct it alleges does not involve fault or dishonesty (i.e. is not disciplinary) by relying on their "conditional" employment status. This anomaly was noted in footnote 2 of *the Das 2007 award*. It is also difficult to imagine that the parties bargained for, and the Unions agreed to, the Postal Service's ability to keep an employee in limbo under "conditional" status (without access to Article 15 or 16 rights) for extensive, unlimited periods of time while the PIS completes its NACI process. The record contains examples of employees working for 18 or 20 months prior to their separations for criminal background issues.

After consideration of all of the relevant National Agreement provisions, along with incorporated or referenced rules, regulations and laws, I conclude that a post-probation separation for receipt of an unfavorable NACI can be considered disciplinary in

¹⁰ This fact, along with others, differentiates this case from the issue presented in my 2021 award.

nature so that the just cause standard of Article 16 applies. I note that the application of this standard of review in no way hampers the Postal Service's ability and authority to set and enforce suitability standards for employment. This finding only guarantees post-probationary employees the right to challenge the Postal Service's decision to separate them from employment, and does not grant them any entitlement to remain employed. If the Postal Service wishes to have an unfettered right to separate an employee due to an unfavorable NACI report, it must find a way to do so within the employee's probationary period.¹¹

I express no opinion about whether an unfavorable NACI due to the results of an employee's criminal background check would, or would not, constitute just cause for removal/separation. I reject the Postal Service's request that I decide that such a situation constitutes *per se* just cause for removal. As noted in the various referenced regulations, including the PIS NACI User Guide, the facts of each case must be considered and weighed individually, in line with specific criteria relevant to job performance, and a determination made by management concerning retention or separation.¹² While the PIS may have expertise in doing the background checks and determining the NACI results, the process by which it does so is not known by the parties, there is no provision for employee representation or participation in a hearing, and no independent review or oversight. Its results only determine whether a NACI is deemed favorable or unfavorable. The PIS makes no finding concerning the continuation of employment of the affected individual. The Postal Service is responsible for such decision. The parties have

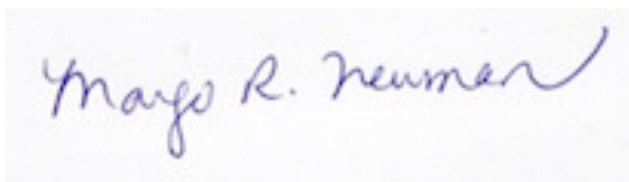
¹¹ See, e.g. *USPS & NALC*, Case No. 4J 19N-4J-C 22175752 (Kauffman) (Widgeon, 2022) and *USPS & NALC*, Case No. 4B 19N-4B-C 23303427 (Drucker, 2023) as examples of some of the regional cases dealing with this issue.

¹² It may well be that the Postal Service can establish just cause in each individual case by confirming the steps it took in deciding to separate the employee and its consideration of the relevant factors noted in its Handbooks, Manuals and the PIS NACI Users Guide.

bargained for a review of such determination through the grievance-arbitration procedure and, ultimately, by a neutral arbitrator. Such reviews should occur at the regional level in response to specific grievances protesting the separation/removal of a non-probationary employee due to receipt of an unfavorable NACI, and should be based on individual and local circumstances.

AWARD:

1. A grievance protesting the separation/removal of a non-probationary employee based upon an unfavorable NACI report is substantively arbitrable under Article 15.
2. In such arbitration, the Postal Service must prove that it had just cause for the separation/removal under the principles of Article 16.

A handwritten signature in blue ink that reads "Margo R. Newman". The signature is written in a cursive style with a large, sweeping flourish at the end.

Margo R. Newman, Arbitrator