American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

February 19, 2003

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

From: Greg Bell, Director
Industrial Relations

Re: Award on Use of "Kelly Girls"

Enclosed is a recent national level award by Arbitrator Das. The arbitrator ruled that Article 7.1.B does not prohibit the Postal Service from using "Kelly Girls" or other similar-type temporary agency employees as a supplemental work force, provided they are counted as casuals and are subject to the limits on employment of casuals set forth in Article 7.1.B. *(AIRS #38887 – USPS #Q90C-6E-C 94046800; 1/31/2003)*

The APWU's basic position was that temps are not casual employees and that Article 7 limits the composition of the supplemental work force to casuals. In addition, despite the previous settlements that were reached, the Postal Service has never, as a matter of established practice, counted any temps as casuals. In fact, there was no evidence that the Postal Service has ever counted or treated temps like casuals. Das rejected our contention that Article 7 prohibits the use of temps as a supplemental work force. However, this award is significant because his decision not only requires temps to be counted as casuals, if used, but also makes it clear that temps are subject to the limitation on employment of casuals pursuant to Article 7.1.B. This is important in light of Arbitrator Das's earlier "casuals in lieu of" decision. If temps are used, they can only be utilized as a limited term supplemental work force and not in lieu of (instead of, in place of, or in substitution of) career employees. Management has to give qualified and available part-time flexible employees working at the straight-time rate a priority in scheduling over temporary employees (if used) during the course of a service week and the employment of temps are limited to two (2) ninety (90) day terms of casual employment in a calendar year. The national is pursuing discussions with the Postal Service regarding the inclusion of "Kelly Girls" or other similar-type temporary agency employees in

the same or similar reporting procedures as casuals to ensure compliance with limitations provided for in Article 7.1.B.

BACKGROUND

This case arose when a Step 4 grievance was filed on May 18, 1994. The grievance indicated that the union interpreted the contract as prohibiting the use of employees of temporary agencies to perform bargaining unit work. The Postal Service thereafter denied the grievance, asserting in part that "'[p]revious agreements between the Postal Service and the APWU clearly indicate that the Postal Service may use temporary employees to perform short-term work as long as such employees are considered as casual employees pursuant to Article 7.1.B.'" Before this Step 4 grievance was filed, the parties had entered into two Step 4 agreements on the issue of Kelly Girls relating to specific circumstances. Each one of these settlements indicated that the "'use of temporary employees (i.e., Kelly Girls) in the circumstances described in this case shall be considered as casuals pursuant to Article 7.2.B of the National Agreement [currently Article 7.1.B of the National Agreement].'" In addition, there was correspondence at the national level between the APWU and Postal Service on several occasions relating to the use of non-career temporary employees. In 1992, the union inquired of the Postal Service whether non-career employees, such as "Kelly Girls" and other temporary service employees, who would operate the test Delivery Bar Code Sorters would be included within the 5% authorization for the supplemental work force. The Postal Service responded that when such employees are used, they are to be included in the 5% contractual limit on the supplemental work force. In 1973, the Postal Service wrote a letter to the APWU confirming an agreement regarding use of temporary clerical support to supplement the regular workforce of the Central Mark-Up System during conversion. The letter indicated that "'the temporary employees shall be considered as casuals in accordance with Article VII of the National Agreement and compensated at Level 5, Step 1 except that payment for their services shall be made directly to the organization supplying the employees.'" In 1993, the APWU made an inquiry regarding the staffing of Postal Service Business Centers; i.e., "'whether the employees of outside contractors assigned to these sites are being counted as casual employees, for purposes of Articles 1 and 7, as we believe they must be.'"

During arbitration proceedings, the union argued that temps are not casual employees and Article 7 limits the composition of the supplemental work force to casuals. We maintained that the term "casual" as used in the National Agreement means a postal employee who holds a limited-term postal appointment, is on the postal employment rolls, and is paid directly by the Postal Service. To further support this definition of casual, we cited Sections 419 and 432 of the Employee and Labor Relations Manual which describe casual employees as "'nonbargaining unit, noncareer employees with limited-term appointments.'" In addition, the union referred to national level arbitration decisions that have stated that the term "employed" in Article 7.1.B.1 means "hired." We then argued that the temps in this case are not given appointments, they are paid for by an employment agency and not

directly by the Postal Service, and they are not on the postal employment rolls. Also, the union cited testimony of a witness responsible for tracking the employment of casuals since 1984 that temps are not included in the casual count reports provided to the union by the Postal Service. Therefore, we contended that if temps are not casuals, they cannot be part of a supplemental work force that is defined in Article 7 as being made up of casual employees. Accordingly, the union maintained that Article 7 must be read to prohibit the Service from using temps to perform bargaining unit duties. Furthermore, the union asserted that prior settlements cannot be relied on to change the limits of Article 7 since such settlements were restricted to particular types of work or projects and particular locations. In addition, the union argued that correspondence on the issue of temps was limited to specific fact situations and proposed specific remedies related to counting casuals. We thus maintained that such evidence does not demonstrate an agreement by the union to permit an improper expansion of Article 7's limits. Finally, the union contended that the Postal Service should not be allowed to go outside negotiated limits on who can perform bargaining unit work.

The Postal Service countered that there is no contract language that prohibits the use of temps as part of the supplemental work force. While Article 7.1.A and 7.1.C define regular work force and transitional work force employees as persons who "shall be hired pursuant to such procedures as the Employer may establish," according to management, there is no language or requirement relating to how casual employees will be procured. Moreover, it asserted, the absence of a requirement that casuals be directly hired through the formal hiring process is consistent with the reason for a supplemental work force which is to satisfy an "immediate need by rapid availability." The Service further maintained that under Article 3, it has the right to employ nonbargaining unit personnel as deemed appropriate and nothing in Article 7 limits this right except a limit on the period of time they can perform the work. It also argued that the union's right to object to actions involving nonbargaining unit employees is very limited since it must establish that this conduct adversely affected wages, hours or working conditions of bargaining unit employees. In this case, the Service maintained that the union failed to rebut testimony of its witnesses that temps are counted against the casual cap when they are used. Moreover, it asserted that the union agreed in the past that temps could be used as casual employees as long as they are counted against the casual cap.

Arbitrator Das indicated first of all that "[t]he prior settlements and correspondence in this record . . . fall short of establishing that the parties have entered into an agreement on the interpretive issue raised by the Union in this case." "What the prior settlements and other correspondence do reflect," according to the arbitrator, "is that the Union has been insistent that in cases where temps have been used by the Postal Service they are to be counted and included in the casual cap, and the Postal Service has agreed to that."

He then observed that there is "no direct language" in Article 7 that shows that the Postal Service is prohibited from using temps to perform bargaining unit work as

part of a supplemental work force. "While Article 7.B [sic] uses the terms 'employee' and 'employment', it does not state that casual employees 'shall be hired' by the Postal Service, as Article 7.A [sic] and 7.C [sic] state with respect to the regular and transitional work forces that comprise the bargaining unit," according to the arbitrator. Moreover, Arbitrator Das indicated that he could not rely on prior national level arbitration awards that have stated the term "employed" in Article 7.1.B.1 means "hired," since "[n]one of these prior National Arbitrator cases dealt in any way with the issue of whether casuals had to be hired as appointees and be paid directly by the Postal Service." In addition, he determined that definitions of casual employees in Sections 419 and 432 of the ELM cannot be considered because they do not cover temps who are obtained through "procurement, rather than employment, procedures."

Finally, Arbitrator Das concluded that temps should not be treated any differently than casuals. He said that the APWU did not assert "that use of temps as part of a supplemental work force directly relates to wages, hours or working conditions of bargaining unit employees in any manner different from the use of casual employees that are hired directly by the Postal Service." Given evidence that the union's concern in the past has centered on the casual count, according to the arbitrator, "[t]he Union has not shown that assignment of bargaining unit work to temps, rather than to casuals hired directly by the Postal Service, has any additional adverse effect on the bargaining unit, provided, of course, that the temps are counted as casuals and are subject to the limits on employment of casuals set forth in Article 7.B [sic]."

GB/djf
OPEIU#2
AFL-CIO

National Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	
	)	
	)	
	)	Case No.
United States Postal Service	)	
	)	Q90C-6E-C 94046800
	)	
and	)	
	)	(Kelly Girls/Casuals)
	)	
American Postal Workers Union	)	

Before: Shyam Das

Appearances:

For the Postal Service:	Courtney B. Wheeler, Esquire
For the APWU:	Melinda K. Holmes, Esquire
Place of Hearing:	Washington, D.C.
Dates of Hearing:	March 26, 2002 May 15, 2002
Date of Final Award:	January 31, 2003
Relevant Contract Provision:	Article 7
Contract Year:	1990-1994
Type of Grievance:	Contract Interpretation

Award Summary

Article 7.B does not prohibit the Postal Service from using "Kelly Girls" or other similar-type temporary agency employees ("temps") as a supplemental work force, provided they are counted as casuals and are subject to the limits on employment of casuals set forth in Article 7.B.

Shyam Das, Arbitrator

BACKGROUND Q90C-6E-C 94 46800

This case involves a grievance filed in Step 4 on May 18, 1994 under the 1990-1994 National Agreement between the APWU (Union) and the Postal Service. The parties agree that the issue in this case is whether Article 7 of the National Agreement prohibits the Postal Service from using "Kelly Girls" or other similar-type temporary agency employees ("temps") as a supplemental work force.

In relevant part, Article 7.1 of the 1990-1994 National Agreement provides as follows:

ARTICLE 7
EMPLOYEE CLASSIFICATIONS

Section 1. Definition and Use

A. Regular Work Force. The regular work force shall be comprised of two categories of employees which are as follows:

1. Full-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules consisting of five (5) eight (8) hour days in a service week.

2. Part-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules of less than forty (40) hours in a service week, or shall be available to work flexible hours as assigned by the Employer during the course of a service week.

B. Supplemental Work Force.

1. The supplemental work force shall be comprised of casual employees. Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees.

2. During the course of a service week, the Employer will make every effort to insure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals.

3. The number of casuals who may be employed in any period, other than December, shall not exceed 5% of the total number of employees covered by this Agreement.

4. Casuals are limited to two (2) ninety (90) day terms of casual employment in a calendar year. In addition to such employment, casuals may be reemployed during the Christmas period for not more than twenty-one (21) days.

C. Transitional Work Force.

1. The transitional work force shall be comprised of noncareer, bargaining unit employees utilized to fill vacated assignments as follows:

* * *

2. Transitional employees shall be hired pursuant to such procedures as the Employer may establish. They will be hired for a term not to exceed 360 calendar days for each appointment....

On March 10, 1994, APWU Executive Vice President William Burrus sent the following letter to Postal Service Manager Anthony Vegliante:

> By exchange of previous correspondence between the parties, I had assumed that the issue of using employees from temporary agencies to perform bargaining unit work had been resolved. Recently, I received several reports that the problem has not abated.
>
> The union interprets the contract as prohibiting the use of employees of temporary agencies to perform bargaining unit work. The Supplemental Work Force agreed to by the parties is limited to Casuals and Transitional employees. This inquiry is not intended to address the subject of hiring temporary agency employees as TEs or Casuals as other issues would be involved, including rate of pay and hiring procedures etc.
>
> This is to request the employer's interpretation as to the use of "Kelly Girls" or other employees of temporary agencies to perform bargaining unit work.

On May 12, 1994, Manager William Downes responded to Burrus as follows:

> Pursuant to the enclosed June 28, 1989, step 4 settlement, temporary employees (i.e., Kelly Girls) may be used to perform short-term work and shall be considered as casual employees pursuant to Article 7.2.B of the National Agreement.

The referenced June 28, 1989 grievance settlement (Case No. H7C-NA-C 35), executed by Burrus and Postal Service representative Samuel Pulcrano, states as follows:

> The issue in this grievance is whether the use of "Kelly Girls" to perform the short term work during the acceptance test period of the Multi-Line Optical Character Reader (MLOCR) retro fit at the Suburban Maryland facility was a violation of the National Agreement.
>
> During our discussion, we mutually agreed that the use of temporary employees (ie., Kelly Girls) in the circumstances described in this case shall be considered as casuals pursuant to Article 7.2.B of the National Agreement. Accordingly, we agreed to settle this case.

On May 18, 1994, Burrus initiated the present grievance in a letter to Downes, in which he stated:

> The referenced 6-28-89 grievance was intended to resolve a specific fact situation and was not intended to interpret Article 7.2.B of the National Agreement. The settlement, by its specific terms, does not represent the position of the union on the use of "Temporary Agency" employees to perform bargaining unit work.
>
> The union interprets the contract as prohibiting the use of employees of temporary agencies to perform bargaining unit work. All bargaining unit work must be assigned to bargaining unit employees,

excluding the exceptions recognized by Article 1.6 and Article 32.

The Postal Service denied the grievance in a letter dated January 24, 1995, which states:

> The issue in this grievance is whether management is in violation of the National Agreement whenever "temporary agency employees" are used to perform bargaining unit work.
>
> The Union contends that the National Agreement prohibits the use of employees of temporary agencies to perform bargaining unit work.
>
> It is the position of the Postal Service that the use of such employees is permitted under the terms of Article 7. Previous agreements between the Postal Service and the APWU clearly indicate that the Postal Service may use temporary employees to perform short-term work as long as such employees are considered as casual employees pursuant to Article 7.1.B.
>
> In addition, the APWU has previously stated its position in correspondence to Sherry Cagnoli, Assistant Postmaster General, from William Burrus, Executive Vice President, APWU, dated May 27, 1992. That letter stated, in part:
>
> > I have been made aware of a number of occasions when the Postal Service has employed non-career employees, including "Kelly Girls" and other temporary service employees.

> The Union interprets Article 7 of the National Agreement as limiting the right of the Postal Service to employ non-career employees. All non-career employees (Transitional employees excepted) are governed by the terms of the supplemental work force, including the 5% total number that can be employed.
>
> The postal service agrees with the Union's position, as clearly stated in that letter, that temporary agency employees may be used on a short-term basis as long as they are considered as part of the supplemental work force.
>
> It is also the Postal Service's position that employees of temporary agencies may be utilized in accordance with the provisions of Article 32, and in such cases, they are not considered as casual employees pursuant to Article 7.1.B

The May 27, 1992 letter from Burrus to Cagnoli, the Union notes, is only partially quoted in the Postal Service's Step 4 decision. That letter also included the following paragraph:

> This is to inquire as to the USPS' interpretation of the National Agreement regarding the right to employ a supplemental work force. The union was recently notified of your intent to employ non-career employees to operate the test Delivery Bar Code Sorters (DBCS) at selected sites. I inquired of Mike Guzzo whether or not the Postal Service intended to include the employees utilized within the 5% authorization for the supplemental work

> force. To date, I have not received a response.

Cagnoli's July 14, 1992 response to this letter stated:

> It is the position of the Postal Service that when such employees are used to operate Delivery Bar Code Sorters during testing, those employees are to be included in the 5 percent contractual limit on the supplemental work force.

Several other pieces of correspondence between the parties relating to the Postal Service's use of temps were put into evidence in this case, including:

- A May 21, 1973 letter from Senior Assistant Postmaster General Darnel Brown to APWU President Francis Filbey, which states:

> This letter confirms the agreement between the American Postal Workers Union and the U. S. Postal Service regarding staffing of the Central Mark-up System during conversion. Management shall follow the provisions listed below regarding such staffing during the conversion phase of the system.
>
> 1. Determine if qualified employees can be detailed to the central mark-up function consistent with the terms and conditions of the national Agreement.
>
> 2. After such determination, management shall utilize such qualified employees and, if necessary, arrange for temporary clerical support to supplement the

regular work force during the conversion phase. Although such arrangements may be made with organizations such as Kelly Girls, Inc., or other similar organizations, the temporary employees shall be considered as casuals in accordance with Article VII of the National Agreement and compensated at Level 5, Step 1 except that payment for their services shall be made directly to the organization supplying the employees.

3. Post and fill permanent mark-up system positions as soon as possible after minimum staffing requirements have been determined.

- A December 5, 1990 agreement between Clerk Craft Assistant Director Cliff Guffey and Postal Service representative Joyce Ong remanding a grievance from Step 4 on the following basis:

> The issue in this grievance is whether management violated the National Agreement when temporary employees were hired to perform data input in the AIS office.
>
> After reviewing this matter, we mutually agreed that no national interpretive issue is fairly presented in this case. During our discussion, we mutually agreed that this case will be remanded to the local level for application of the settlement in Case No. H7C-NA-C 35 which states, in part:
>
> > During our discussion, we mutually agreed that the use of temporary employees (ie., Kelly Girls) in the circumstances described in this case shall be considered as casuals pursuant

to Article 7.2.B of the National Agreement.

Accordingly, we agreed to remand this case to the parties at Step 3 for further processing, including arbitration if necessary....

- A November 12, 1993 letter from APWU President Moe Biller to Postal Service Vice President Joseph Mahon, Jr., which states:

This is an inquiry and a statement of position by the American Postal Workers Union concerning the staffing of Postal Service Business Centers.... These sites are staffed by substantial numbers of employees employed by outside contractors, and by Postal Service employees assigned to EAS positions called "Customer Service Representative, Expedited Service Specialist," or "Mailpiece Design Analyst."

Our inquiry is whether the employees of outside contractors assigned to these sites are being counted as casual employees, for purposes of Articles 1 and 7, as we believe they must be. If they are being counted as casuals, please provide the Union with documentation or other evidence of that fact which will permit the Union to ensure continuing compliance with that requirement.

Our statement of position is that the employees in the three EAS positions listed above are performing duty assignments which should be assigned to the bargaining unit. Please state whether or not the Postal Service will assign this work to bargaining unit employees.

According to the Union, the situation described in this letter subsequently became the subject of a separate grievance.

UNION POSITION

The Union initially states that it is not challenging in this case how the Postal Service hires casuals or comes to employ any other category of workers. Its basic position is that temps are not casual employees and that Article 7 limits the composition of the supplemental work force to casuals.

The Union asserts that the term "casual" as used in the National Agreement means a postal employee who holds a limited-term postal appointment, is on postal employment rolls, and is paid directly by the Postal Service. This definition of who is a "casual" is the meaning the parties always have applied to that term in Article 7. It also is supported, the Union states, by Sections 419 and 432 of the ELM, which describe "casual employees" as "nonbargaining unit, noncareer employees with limited-term appointments". National Arbitration decisions also have recognized and used this definition, and have established that the term "employed" in Article 7.1.B.1 means "hired".

The Union points out that the temps at issue in this case do not enjoy any of the qualities that undisputedly define a casual. They do not have appointments, they are paid by an employment agency and not directly by the Postal Service, and they do not show up anywhere on postal employment rolls. As

testified to by Union witness Phil Tabbita, who has been tracking the employment of casuals since 1984, temps are not included in the casual count reports provided to the Union on a regular basis by the Postal Service.

The Union contends that if temps are not casuals, which undisputedly they are not, then they cannot be part of a supplemental work force defined in Article 7 as being made up of only casual employees. The Union further argues that Article 7 describes the only categories of workers who can work within the APWU bargaining unit -- the regular work force, the supplemental work force and the transitional work force. There is no issue here that temps fit into the regular or transitional work force, and the evidence demonstrates they do not fit into the supplemental work force. Therefore, the Union insists, Article 7 must be read to prohibit the Postal Service from using temps to perform bargaining unit duties.

The Union maintains that the Postal Service's argument that Article 7.1.B does not require that casuals be "hired" is a new argument. As such it should not be entertained by the Arbitrator under National Arbitration precedent. In any event, the Postal Service has presented no evidence to contradict the definition of casuals established by the Union which includes the fact that casuals are hired. This is clear, the Union says, from the ELM, the National Agreement and past arbitral decisions.

The Union also points out that although the Postal Service's Step 4 position makes brief mention of Article 32, the parties have not joined issue on the interpretation and application of Article 32 or Article 1 to the temps described in this case.

The Union argues that prior remedial settlements relied on by the Postal Service did not change the limits of Article 7. In the case of each of the three cited settlements -- Filbey/Brown (1973); Burrus/Pulcrano (1989); and Guffey/Ong (1990) -- the parties explicitly described a type of work or project and a particular location to which they worked out a remedy for the Postal Service's impermissible use of temps in the supplemental work force. Both the Burrus/Pulcrano and Guffey/Ong settlements resolved grievances over the use of temps which had already ended. By their very terms, the Union stresses, none of these settlements can be read to have modified Article 7.

The Union insists that the Postal Service has provided no substantiation for its claim that these settlements implicitly changed the rule of Article 7 to allow the Postal Service to use temps so long as it treats them like casuals. Moreover, the Postal Service has not actually treated temps like casuals. Despite the settlements that were reached, the Postal Service has never, as a matter of established practice, counted any temps as casuals.

The Union also maintains that the Burrus/Cagnoli (1992) and Biller/Mahon (1973) correspondence cited by the Postal Service were limited to specific fact situations. Like the 1989 Burrus/Pulcrano grievance settlement, these letters at most proposed, as a resolution to an obvious violation of Article 7, a remedy whereby the temps would be counted as casuals.

The Union asserts that its willingness to negotiate remedies to violations of Article 7 in the past does not obligate the APWU to similar future agreements or demonstrate an agreement to allow the Postal Service unfettered opportunity to use temps within the supplemental work force. Permitting an expansion of Article 7 contrary to its express terms, the Union argues, undermines the protections limiting the supplemental work force that the APWU has negotiated over many years.

Finally, the Union insists that it is not sufficient or permissible for the Arbitrator to rewrite the National Agreement to include temps in the definition of casuals or to require that they be treated like casuals, or both, in order to allay the Union's concerns. Not only has the Postal Service not complied in even limited circumstances with treating temps as casuals, but the overarching issue in this case is about negotiated limits on who can perform bargaining unit work other than the career employees represented by the Union.

EMPLOYER POSITION

The Postal Service asserts that in addition to hiring employees, it has used contract employees, including temps, since before the parties' first collective bargaining agreement. Temps have been used as part of a supplemental work force to perform both bargaining unit and nonbargaining unit work generally in situations when a specialized skill has been needed or if the Postal Service has difficulty recruiting appointees. Contract employees are obtained under the Procurement Manual, in contrast to those casual employees who are hired as appointees under the provisions of the ELM cited by the Union.

The Postal Service contends that there is no language in Article 7, or elsewhere, in the National Agreement which prohibits the use of temps as part of the supplemental work force. It points out that while Article 7.1.A and 7.1.C specifically define regular work force and transitional work force employees as persons who "shall be hired pursuant to such procedures as the Employer may establish", there is no such language or requirement in Article 7.1.B relating to a supplemental work force comprised of casual employees. Article 7 does not address how such employees will be procured nor does it even remotely imply that casual workers need be on postal rolls.

The Postal Service argues that the glaring absence of any requirement that casuals be persons directly hired by the Postal Service is both significant and consistent with the

reason a supplemental work force was negotiated by the parties. Implementing the formal hiring process defeats one of the basic purposes of a supplemental worker -- immediate need matched by rapid availability.

The Postal Service contends that the Union's claim that temps cannot be used as part of the supplemental work force because they were not hired under provisions of the ELM relating to the hiring of casual employees is not a substantively arbitral issue. As decided by Arbitrator Gamser in a 1980 National Arbitration decision (Cases No. AD-NAT-0121; ND-NAT-0121; MD-NAT-0121), the Union's right to object to Postal Service actions involving nonbargaining unit employees is severely limited. The Union first must establish that the Postal Service's actions adversely affected wages, hours or working conditions of bargaining unit employees.

The only adverse impact indicated by the Union in this case, the Postal Service maintains, is on the Union's ability to police the casual staffing limitations set out in Article 7.1.B. The Postal Service stresses, however, that there is no evidence that use of temps ever caused it to exceed those limits, and the likelihood of that is almost nonexistent because of the very small number of temps used by the Postal Service. If this was a true concern of the Union, the Postal Service adds, the Union would have required more extensive reporting procedures each time it settled a grievance concerning this issue on the basis that the temps would be counted against the casual cap. The Postal Service also claims that the Union failed to rebut

testimony of Postal Service witnesses that temps are counted against the casual cap whenever they are used. But, even assuming the Union's concern was genuine, it is easily dealt with by a more particularized reporting procedure.

The Postal Service contends that it has the right under Article 3 to fill nonbargaining unit positions as it deems appropriate. Specifically, Article 3 provides:

> The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
>
> * * *
>
> C. To maintain the efficiency of the operations entrusted to it;
>
> D. To determine the methods, means, and personnel by which such operations are to be conducted;

The Postal Service maintains that nothing in Article 7, or elsewhere in the National Agreement, limits its right to employ contract workers as members of the supplemental work force. The only limit is on the period of time they can perform such work.

The Postal Service also charges that the Union is attempting to repudiate its previous agreement that temps can work as members of the supplemental work force. The Postal Service argues that the record in this case clearly establishes that the Union agreed that temps could be used as casual

employees as long as they were counted against the casual cap. In particular this was the position taken by APWU President Biller in his 1993 correspondence with Postal Service Vice President Mahon. The Postal Service points to unrebutted evidence it presented that in the early 1990's Robert Tunstall, then Director of the Clerk Craft, kept the 1990 Guffey/Ong settlement letter in a "manual" he used to instruct Union representatives in the field on the Union's position on various issues.

FINDINGS

The Postal Service's position, as I understand it, is not that the prior settlements and correspondence it cites changed or modified Article 7, but rather that they reflect an agreement or understanding between the parties as to how Article 7 applies in situations where the Postal Service uses temporary agency employees.

In his March 10, 1994 letter of inquiry, then APWU Executive Vice President Burrus indicated that he assumed that previous correspondence between the parties had resolved the issue of using temps to perform bargaining unit work. The prior settlements and correspondence in this record, however, fall short of establishing that the parties have entered into an agreement on the interpretive issue raised by the Union in this case. What the prior settlements and other correspondence do reflect is that the Union has been insistent that in cases where temps have been used by the Postal Service they are to be

counted and included in the casual cap, and the Postal Service has agreed to that.

The Postal Service's rights under Article 3 are broad enough to encompass the use of temps subject to other provisions of the National Agreement and consistent with applicable laws and regulations. The issue raised in this case is whether Article 7 prohibits the Postal Service from using temps to perform bargaining unit work as part of a supplemental work force. Certainly, there is no direct language to that effect in Article 7. The Union, however, contends that Article 7.B limits the supplemental work force to casual employees and that temps are not casual employees.

The definition of "the supplemental work force" and of "casual employees" in Article 7.B.1 is somewhat circular:

> The supplemental work force shall be comprised of casual employees. Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees.

The Union asserts that the term "casual employee" as used in the National Agreement means a postal employee who holds a limited-term postal appointment, is on postal employment rolls and is paid directly by the Postal Service, but none of that is stated in the National Agreement. While Article 7.B uses the terms "employee", "employed" and "employment", it does not state that casual employees "shall be hired" by the Postal Service, as

Article 7.A and 7.C state with respect to the regular and transitional work forces that comprise the bargaining unit.[1] Nor does the record indicate that the Postal Service has agreed that the language of Article 7.B precludes occasional use of temps as part of the supplemental work force.

Prior National Arbitration decisions, which are discussed in my 2001 decision in Case Q98C-4Q-C 00100499, have ruled that the term "employed" in Article 7.B.1 means "hired" as opposed to "utilized". The thrust of those decisions, however, is that Article 7.B placed no restriction on the utilization of casuals. Similarly, Arbitrator Mittenthal concluded in his 1989 decision in Case Nos. H4C-NA-C 65 and H4C-NA-C 95 that the term "employed" in Article 7.B.3 had the same meaning as in Article 7.B.1. He determined that in applying the ceiling or cap on the number of casuals who could be "employed" all casuals on the employment rolls were to be counted, whether or not they were actually utilized during a particular accounting period. None of these prior National Arbitration cases dealt in any way with the issue of whether casuals had to be hired as appointees and be paid directly by the Postal Service.[2]

---

[1] The Postal Service's position from the outset has been that Article 7.B permits use of temps as part of a supplemental work force, provided they are considered as casual employees. By contrasting the language in Article 7.B to that in Article 7.A and 7.C, the Postal Service has not impermissibly raised a new issue at arbitration.

[2] Interestingly, the December 1990 Guffey/Ong grievance settlement refers to temps who were "hired" to perform certain work.

Burrus' May 27, 1992 letter to Assistant Postmaster General Cagnoli also shows that the verb "employ" and the noun "employee", as used in Article 7.B, need not be limited to direct hires. In that letter, the Union notably refers to the Postal Service's intent "to employ" temps to perform specific work and refers to those temps as "employees".

The provisions of Sections 419 and 432 of the ELM define "casual employees" as "nonbargaining unit, noncareer employees with limited-term appointments" who are "employed"/"used" as a "supplemental work force". These provisions do not cover use of temps, who are obtained under procurement, rather than employment, procedures. They do not address the issue of whether the Postal Service from time to time may obtain contract labor to be used as part of a supplemental work force under the direction and supervision of Postal Service management.

Moreover, the Union in this case has not asserted that use of temps as part of a supplemental work force directly relates to wages, hours or working conditions of bargaining unit employees in any manner different from the use of casual employees who are hired directly by the Postal Service. The settlements the Union has reached and the understandings it has proposed regarding past use of temps to perform bargaining unit work all have focused on those temps being included in the casual count, which clearly is a legitimate concern of the Union. The Union has not shown that assignment of bargaining

unit work to temps, rather than to casuals hired directly by the Postal Service, has any additional adverse effect on the bargaining unit, provided, of course, that the temps are counted as casuals and are subject to the limits on employment of casuals set forth in Article 7.B.[3]

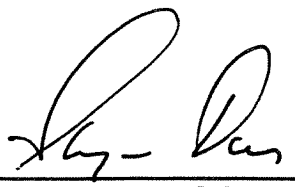
The agreed issue in this case is whether Article 7.B prohibits the Postal Service from using "Kelly Girls" or other similar-type temporary agency employees ("temps") as a supplemental work force. For the reasons set forth in this decision, I conclude that Article 7.B does not prohibit the use of temps, provided they are counted as casuals and are subject to the limits on employment of casuals set forth in Article 7.B.

---

[3] The Union has presented support for its claim that the Postal Service does not, in the ordinary course, include temps in the casual counts the Postal Service routinely provides to the Union. That may be an issue that needs to be addressed and remedied, but it is not part of this case.

AWARD

Article 7.B does not prohibit the Postal Service from using "Kelly Girls" or other similar-type temporary agency employees ("temps") as a supplemental work force, provided they are counted as casuals and are subject to the limits on employment of casuals set forth in Article 7.B.



Shyam Das, Arbitrator