American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

September 5, 2001

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

Fr: Greg Bell, Director
Industrial Relations

Re: Das Award on "Casuals in Lieu of"

Enclosed you will find a copy of a recent arbitration award by Arbitrator Shyam Das sustaining the APWU's grievance over the Postal Service's improper use of casuals in lieu of career employees. *(AIRS # 36175 - USPS #Q98C-4Q-C 00100499: 8/29/01).* This is a major win for the APWU. The National Association of Letter Carriers (NALC) and the National Postal Mail Handlers Union (NPMHU) are also affected by this award, having intervened in this arbitration in support of the APWU position.

The arbitrator ruled that Article 7.1.B.1 of the National Agreement establishes a separate restriction on the employment of casual employees, in addition to the other restrictions set forth in other paragraphs of Article 7.1.B. He also ruled that the Postal Service may only employ (hire) casual employees to 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. In addition, the arbitrator ruled that a memo by the Postal Service's former Director of Contract Administration, which the parties cited in numerous Step 4 settlements, amounts to a "jointly endorsed understanding" regarding the circumstances under which it is appropriate to employ (hire) casual employees to be utilized as a limited term supplemental work force consistent with Article 7.1.B.1. Citing this memo, he ruled:

> *"Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate."*

This grievance was filed last year under new Article 15 provisions that were negotiated into the 1998-2000 National Agreement. The changes to Article 15 were designed to improve the process and have grievances adjudicated in a more timely fashion. In addition, one of our objectives in addressing the backlog of pending cases has been to identify and to arbitrate those cases that have the most direct impact on local unions and the membership, especially where local grievances are pending the outcome of a national dispute. This is one of several cases that the APWU has successfully expedited to national-level arbitration.

The APWU argued that three binding National Decisions by Arbitrator *Gamser* clearly forecloses the Postal Service's position that Article 7.1.B.1 does not impose a separate limitation on casuals. We also argued that the Postal Service had entered into binding agreements with the Unions after Arbitrator's *Zumas* 'award (Case# H1C-4K-C 27344/45) that clearly precludes its position in this case. The Union cited a nationwide instruction issued by William Downes (Downes Memorandum) which included the following paragraph:

> *"Additionally, questions have arisen regarding the proper utilization of casuals as a supplemental workforce. Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate."*

The Unions stressed that the Downes memorandum was mutually agreed to in a series of Step 4 agreements at the National Level.

The APWU also argued that in Case # H7C-NA-C 36, Arbitrator Mittenthal correctly understood that Article 7.1.B.1 provides a separate and distinct limitation on casuals, and can be violated at the local level and remedied at the local level even when the percentage limitations of Article 7.1.B.3 have not been violated.

The Unions also argued that the regional *Zumas* award, which the Postal Service contended confirms its reading of the 1985 national level award, was misplaced. We contended that arbitrator *Zumas* had no authority to modify his earlier award in any way, nor did he have any more authority to interpret it than does any other regional arbitrator.

The Postal Service contended that the Unions failed to meet their burden of proof. It insisted that the 1985 *Zumas* award, together with Arbitrator *Zumas* 1999 regional arbitration award in Case # K94C-4K-C 96086293, are controlling. The Postal Service argued that Arbitrator Zumas clearly interpreted Article 7.1.B.1 when he stated: "It is clear, as the Service contends, that the provision that casual employees 'may not be employed in lieu of full or part-time employee' relates to the number of casual employees that may be hired and the limited duration of their employment." The Postal Service, relying on the *Zumas* award, argued that Article 7.1.B.1 does not restrict the Postal Service from employing and using casual employees for whatever function it chooses, provided the casual cap limitations and the two 90-day plus

Christmas period term restrictions are not exceeded. The Postal Service also maintained that the Union's reliance on the Downes memorandum is not appropriate. It contended that document was not signed by any union, nor is there any proof that it was a bargained-for agreement with any union. The Postal Service also contended that the *Gamser* decisions dealt with specific and narrow fact situations that predated *Zumas* and that *Zumas* rejected the outcomes.

The Postal Service also argued that the way to read Article 7.1.B was not to make it "complex and obtuse to understand and administer." It contended that the simplest way to determine whether the "in-lieu-of" language in Article 7.1.B has been complied with is to look to see if the Postal Service is in compliance with the casual cap and individual term limitations. It argues that trying to determine whether or not a particular hour worked by a casual was worked "in lieu of" is nearly impossible.

The Postal Service maintained that if *Zumas* is not adopted then the record supports only one alternative:

> That alternative would recognize that the Postal Service may employ and use casuals, consistent with cap and term requirements, whenever it has an operational need which it reasonably believes cannot be filled with career employees, whether that need is of a long or short term duration, or is for routine or complex work. Such employment would not be "in lieu of" employment of regular workforce employees; such use would be "supplemental." The Unions, as always, would have the burden of proof in any such contract interpretation arbitration.

The Arbitrator did not agree with the Postal Service's contention that the *Zumas* decision was controlling in this case. He found that there were only two holdings in Zumas which in his opinion could be considered as precedent. "First, is the holding that Article 7.1.B.1 does not restrict the utilization of casuals, who have been properly employed, to perform overtime assignments, or, more broadly, any particular category of assignments, provided the Postal Service complies with the requirement of Article 7.1.B.2 regarding the utilization of part-time flexibles. Second, is the holding that the term "employed" in Article 7.1.B.1 means "hired".... Both of these holdings have been acknowledged and followed in subsequent national decisions," the arbitrator wrote.

Arbitrator Das directly addressed the *Zumas* opinion regarding the proper interpretation of Article 7.1.B.1 and found that the "issue of what restrictions, if any, Article 7.1.B.1 imposes on the employment or hiring of casuals was not an issue raised in the grievance in *Zumas* and was not joined by the Union. His stated opinion on that issue was not necessary or even germane to his decision denying the grievance." He found "that it is also contrary to the existing National Arbitration precedent established in *Gamser I* and *Gamser II*." Thus, Arbitrator Das found that "Zumas hardly can be considered precedent on the issue presented in this case or as overruling or negating the precedent established by *Gamser I* and *Gamser II.*" He further found that "the record establishes that after *Zumas* was decided in 1985 the Postal Service and two of the Unions, the NPMHU and the APWU, entered into a series of at least six binding Step 4 agreements between October 1986 and June 1990 in which they remanded grievances alleging

violations of Article 7.1.B.1 to Step 3 for resolution in accordance with the Downes memorandum." He found that "whether or not the Downes memorandum on its own would bind the Postal Service, this series of agreements at the National Level is highly significant" and amounted to a "jointly endorsed understanding."

Arbitrator Das found that "adoption of the Postal Service's position in this case that Article 7.1.B.1, in essence, is merely, introductory, and that a violation of the 'employing in lieu of' provision can only occur when either the allowable percentages cap or the limited appointment duration periods are exceeded, certainly would simplify application of that provision. It would also read out of the National Agreement a separate restriction on casuals, which as arbitrator Mittenthal points out, imposes an essentially local obligation, separate and apart from the National casual ceiling in Article 7.1.B.3." The arbitrator concluded that "under the Postal Service's position, to take an extreme example, the Postal Service could staff an entire facility with a succession of casual employees on an indefinite basis, provided that it did not exceed the National casual ceiling, which hardly seems consistent with the language in Article 7.1.B.1."

In response to the Postal Service claims that there are myriad circumstances in which, as a practical matter, it may need to employ casuals for lengthy periods of time, Arbitrator Das concluded that the present decision is not the place to address any particular set of circumstances. He found that if the Postal Service has a genuine need at a particular time at a particular location for a limited term supplemental work force, rather than career employees, consistent with the jointly endorsed Downes memorandum, there is no violation of Article 7.1.B.1. Moreover, as the Postal Service observes, the Union has the burden of proving a violation of Article 7.1.B.1.

Finally the arbitrator rejected the Postal Service's position that this interpretation should be prospective only. He found "this decision serves to clarify, on a National Arbitration basis, the proper interpretation of Article 7.1.B.1. It does not create 'new law' or depart form the 'old law'. To the extent that the Postal Service has chosen to rely on its own interpretation of *Zumas*, it has done so knowing full well it might not be successful."

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National Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	
	)	
	)	
United States Postal Service	)	
	)	
and	)	
	)	Case No.
American Postal Workers Union	)	
	)	Q98C-4Q-C 00100499
and	)	
	)	
National Association of Letter Carriers - Intervenor	)	
	)	
and	)	
	)	
National Postal Mail Handlers Union - Intervenor	)	

Before: Shyam Das

Appearances:

For the Postal Service:	Lynn D. Poole, Esquire
For the APWU:	Darryl J. Anderson, Esquire
For the NALC:	Keith E. Secular, Esquire
For the NPMHU:	Bruce R. Lerner, Esquire Robert Alexander, Esquire

Place of Hearing: Washington, D.C.

Dates of Hearing:	June 27-28, 2000 October 5-6, 2000 January 23, 2001
Date of Award:	August 29, 2001
Relevant Contract Provision:	Article 7.1.B
Contract Year:	1998-2000
Type of Grievance:	Contract Interpretation

Award Summary

1. Article 7.1.B.1 of the APWU National Agreement (and the corresponding provision in the NALC and NPMHU National Agreements) establishes a separate restriction on the employment of casual employees, in addition to the other restrictions set forth in other paragraphs of Article 7.1.B.

2. The Postal Service may only employ (hire) casual employees to 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.

3. The following formulation in the May 29, 1986 Downes Memorandum sets forth a jointly endorsed understanding as to the circumstances under which it is appropriate to employ (hire) casual employees to be utilized as a limited term supplemental work force consistent with Article 7.1.B.1:

> Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate.

Shyam Das, Arbitrator

Issue

This case arises under the 1998-2000 National Agreement between the American Postal Workers Union (APWU) and the Postal Service. The National Association of Letter Carriers (NALC) and the National Postal Mail Handlers Union (NPMHU) have intervened in support of the position taken by the APWU.

The issue as stated in the APWU's Step 4 grievance is:

> Whether Article 7, Section 1.B requires that the Postal Service utilize casual employees as a limited term supplemental work force in circumstances such as a heavy workload or leave periods; to accommodate temporary or intermittent service conditions; and in other circumstances where supplemental workload needs occur; and requires that they not be employed in lieu of full or part-time employees.

As set forth in the Postal Service's response to the grievance:

> The Postal Service's position has been that the Article 7 provision dealing with employing casuals in lieu of full- or part-time employees relates solely to the number of casual employees that may be hired and to the limited duration of their employment. Thus, a violation of the National Agreement with respect to the "employing in lieu of" provision can occur only when either the allowable percentage or the limited duration is exceeded.

The NPMHU has offered the following alternative statement of the issue:

> Whether the contractual language that appears in Article 7.1B1 of the National Agreement between the APWU and the Postal Service (or the identical language contained in the second sentence of Article 7.1B of the National Agreement between the NPMHU and the Postal Service) - i.e., that casuals "may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees" - establishes a separate restriction or obligation on the Postal Service, beyond the percentage cap and the limited duration of employment for casual employees that are set out in other portions of Article 7.1B.

Both the Unions and the Postal Service rely on prior National Decisions in support of their respective positions. At the outset of the hearing, the Postal Service requested that the case be bifurcated so as to first obtain a ruling on its contention that the 1985 National Decision by Arbitrator Zumas in Case No. H1C-4K-C 27344/45 (*Zumas*) was controlling. That request was denied without prejudice to the Postal Service's right to continue to press its position that *Zumas* is controlling.

Contract Language

Article 7.1.B of the 1998 APWU National Agreement, which is entitled "Supplemental Work Force", provides as follows:

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. Beginning January 16, 1999, the number of casuals who may be employed within a District in any accounting period, other than accounting periods 3 and 4, shall not exceed 15% of the total number of career employees within a District covered by this Agreement, and also shall not exceed on average 5.9% of the total number of career employees covered by this Agreement during a fiscal year, exclusive of accounting periods 3 and 4. Disputes concerning violations of the casual cap will be addressed by the parties at the national level.

   a. Any District exceeding the 15% casual cap in any accounting period, other than accounting periods 3 and 4, shall reduce their casual workforce by the total number of

casuals exceeding the 15% cap within 2 accounting periods from when the violation took place, except that such reductions will not occur in accounting periods 3 and 4. The casual reduction associated with a violation occurring in accounting period 12 or 13 will occur within the next 2 accounting periods.

b. Any District exceeding the 15% casual cap in more than one accounting period during a fiscal year, other than accounting periods 3 and 4, will be required to settle the violation through a monetary resolution that shall be calculated by utilizing the Level 5, Step A, straight time rate.

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.

(Emphasis added.)

The NALC and NPMHU National Agreements contain similar provisions.[1] In particular, both the NALC and the NPMHU Agreements include identical language to that contained in Article 7.1.B.1 of the APWU Agreement. The sentence directly in issue in this case -- "Casual employees are those who may be utilized as a limited term supplemental work force, but may not

[1] There are some differences, for example, in the applicable "casual caps", but they are not relevant to the issue in this case.

be employed in lieu of full or part-time employees." -- has been included in the National Agreements of these three Unions since the outset of collective bargaining in 1971.[2]

Prior National Decisions

As previously noted, the Postal Service asserts that the issue in this case already has been decided in *Zumas*, and it insists that *Zumas* is controlling here. Needless to say, the Unions disagree. As part of their case, the Unions contend that three earlier National Decisions by Arbitrator Gamser, two issued in 1973 and one in 1980, as well as a later 1994 National Decision by Arbitrator Mittenthal establish the correctness of their position in this case. Several other National Decisions were cited by one or more of the parties. A brief description of the significant National Decisions follows.

Arbitrator Gamser issued a National Decision on June 28, 1973 in Case No. A-NA7-3444 between the APWU and the Postal Service (*Gamser I*). At issue was the hiring of clerk casuals by the New York City Post Office during January 1973. In his opinion, Arbitrator Gamser stated:

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[2] Until 1981, the APWU, the NALC and the NPMHU were all parties to the same National Agreement with the Postal Service. The NPMHU has had a separate National Agreement since 1981. The NALC and the APWU have had separate National Agreements since 1994. All further references to the "National Agreement" or "Agreement", unless otherwise indicated, are to the APWU National Agreement.

The Union contended that the hiring of casuals, under the circumstances existing in the New York City Post Office during January of 1973, was for the purpose of having such casuals employed "in lieu of full or part-time employees". Obviously, in the face of the clear restriction on the use of casuals for this purpose contained in the Agreement, as quoted above, for the Postal Service to engage in the hiring of casuals in New York City during the period under review in stead of, in place of, or in substitution of full or part-time employees would not be permissible under the Agreement. Casuals could only be hired in the numbers stated and the period of time provided in the Agreement for some other purpose. The Agreement also sets forth just what that purpose is, "Casual employees are those who may be utilized as a limited term supplemental work force,..."

Whether the casuals hired in New York City during January were employed "in lieu of" regular employees or to supplement the efforts of the regular force for a limited term is the determinative question in this case.

* * *

...The Union offered no evidence to refute the Postal Service's contention, supported by testimony from witnesses, that during January the Service experienced a "surge" of mail in the Outgoing Sections because of the failure of out-of-town post offices to properly implement the Managed Mail Program which was designed to divert certain types of mail from New York and the delay in receiving new scanning equipment that was

> designed to eliminate the need for many clerk jobs.
>
> (Emphasis added.)

Arbitrator Gamser concluded that:

> ...[I]t must be found that the Postal Service did not hire casuals during the month of January of 1973 "in lieu of" providing work opportunities to career employees but rather these casuals were hired as a supplement to the regular work force for a limited period of time. Such hiring is permitted under the provisions of Article VII, and this grievance must be denied.
>
> (Emphasis added.)

Arbitrator Gamser issued another National Decision on July 1, 1973 in Case No. N-N-73-1 between the NALC and the Postal Service (*Gamser II*). The NALC argued that Article 7 of the 1971 National Agreement and the parties' past practice required that the Postal Service maximize overtime and cancel regular days off before employing casuals during the Christmas season. In his opinion, Arbitrator Gamser stated:

> Both parties acknowledged that the language of Article VII was of utmost importance in determining the issue presented in this case.
>
> As regard [sic] Christmas casuals that language contemplates their utilization "as a limited term supplemental work force, but (they) may not be employed in lieu of full or part-time employees." This language does not refer in any way to the use of regulars

on overtime before casuals may be employed, but the Union contended that to employ casuals before regulars had been given maximum overtime opportunities would be to employ such a classification of employees "in lieu of" the regular employees.... [Footnote omitted.]

* * *

An examination again of the language of Article VII reveals that casuals can be utilized "as a limited term supplemental work force". There is no dispute that the casuals who were employed during 1972 Christmas season were employed in that capacity.

* * *

...[A]ssuming for the sake of argument that regulars could have handled the Christmas rush by working on the sixth day and by remaining for up to 3½ hours of overtime on their regular work days if the Service re-arranged the work flow and schedules and possibly delayed the processing of some mail, the Union is seeking to require that the Service handle the assignment of personnel and the distribution of overtime in this manner. The Agreement on the subject of assignment of the work force, in Article III, leaves discretion in this area to management. As to overtime, the Agreement in Article VIII, likewise vests discretion as to when, where and how it is to be utilized in management.

* * *

The language of Article VII, concerning the employment of casuals, as written by these parties at the onset of their new

> relationship in 1971, contains these specific restrictions upon the utilization of casuals. The numbers of such casuals who may be employed, the duration of their employment, and that they may not be used "in lieu of" regular employees. The record made in this case cannot sustain a finding that the casuals employed in the New York Region in 1972 were so employed in derrogation of any of these requirements. For this reason, this grievance must be and hereby is denied.
>
> (Emphasis added.)

Arbitrator Gamser also issued a National Decision on June 25, 1980 in Case Nos. AD-NAT-01211 et al. between the three Unions and the Postal Service (*Gamser III*). As set forth in that decision:

> The substantive question raised in this proceeding is whether the unilateral change in the hourly wage paid to casuals, announced by the USPS after the completion of the 1978 negotiations, violated any term or condition of that collective bargaining agreement covering the status or conditions of employment of those covered by that Agreement.

Arbitrator Gamser concluded that the protested action by the Postal Service did not violate any provisions of the National Agreement.

In *Gamser III*, Arbitrator Gamser reviewed the parties' bargaining history with respect to casuals. He pointed out that:

...The Unions have attempted to secure the total abolition of the use of casuals, but they have not been successful thus far in this effort. The Unions have succeeded in negotiating several restrictions on the use of casuals into the National Agreement.

Article VII of the 1971 Agreement provided that casuals were only to be used as a supplemental workforce and were not to be employed in lieu of full or part-time employees. Christmas casuals were limited to a single 21 day term of employment during December, and all other casuals were limited to a single annual term not to exceed 90 continuous days. Section 2-D of Article VII prohibited the Service from employing casuals in any period in excess of 8% of the total number of employees covered by the Agreement.

The restrictions on the use of casuals in the 1971 Agreement were carried over verbatim to the 1973 Agreement except that the 8% aggregate limit was decreased to 7%.

...Included in Article VII of the 1975 National Agreement was a new requirement that during the course of a service week the USPS would make every effort to insure that qualified and available part-time flexible employees would be used at the straight time rate prior to assigning such work to casuals. Further, the percentage limitation on the number of casuals the Service could employ was again lowered this time to 5% of the regular workforce. At the Service's insistence, the length of time for which a casual could be employed was extended to two 90 day terms per calendar year plus a Christmas period not to exceed 21 days.

(Emphasis added.)

The 1985 *Zumas* National Decision involved a case between the APWU and the Postal Service. The issue in that case was stipulated to be:

> ...[W]hether the Service violated the National Agreement when it utilized casual employees on overtime on the days in question instead of scheduling Full-Time Regular employees who are on the Overtime Desired List (ODL).

As described by Arbitrator Zumas, the essential contractual positions of the parties were as follows:

> The Union argues that local management's utilization of casual employees for overtime duty on the dates in question instead of calling Grievants was prohibited by that portion of Article 7, Section 1-B-1 stating:
>
> > "Casual employees . . . may not be employed in lieu of full or part-time employees."
>
> The Union contends that this section mandates that if an assignment (such as overtime) is available, full and part-time employees must receive priority over casual employees.
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> The Union also contends that the parties, by agreeing to Article 8, Section 5, provided an overtime work benefit to full-time regular employees, giving a first preference to those full-time employees who are on the ODL, and secondly to those full-time employees who are not. Since casual employees are not covered by the National Agreement, they are not entitled to any of

> the benefits, including overtime, as provided in Article 8, Section 5.
>
> * * *
>
> The Service first argues that Article 8, Section 5 in no way requires it to use full-time regular employees before using casual [sic] for overtime work....
>
> The Service next contends that the Union's reliance upon Article 7 does not support its position. The Service argues that the term "employed" means hired, not assigned or utilized. The Service asserts that this section, when looked at in its entirety and along with other provisions, makes it clear that had the parties intended "employed" to mean assigned, the term "utilized" and not "employed" would have been used. Moreover, the Service contends, since 1971 the term "employed" has referred to the number of casual employees that may be hired and the duration of their employment. [Footnote omitted; emphasis in original.]

In his opinion denying the grievance, Arbitrator Zumas stated, in relevant part:

> There has been no showing by the Union that the utilization of casuals on January 17 and 18, 1984, when the mail volume was unusually heavy due to the annual arrival of "contest" mail, rather than scheduling full-time regular MPLSM Operators to work overtime on their non-schedule days violated any provision of the National Agreement.
>
> Casual employees are non-career employees who, as part of the Supplemental Work Force, perform duties assigned to bargaining unit

positions on a limited term basis. They are not restricted to straight time worked, and may perform overtime. And as provided in Article 7, Section 1, these casual employees "may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees."

There is no restriction as to how such casual employees may be "utilized" (assigned), except that the Service is required to "make every effort to insure [sic] that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals." It is also clear, as the Service contends, that the provision that casual employees "may not be employed in lieu of full or part-time employees" relates to the number of casual employees that may be hired and to the limited duration of their employment. The term "employed" means hired [emphasis on "hired" in original] and not, as the Union contends, the manner in which they are assigned ("utilized") to perform work. The correctness of this interpretation becomes even more obvious when the parties referred to "utilized" and "employed", in different contexts, in the same sentence.

The Union's reliance on the contention that these Grievants were "passed over" in violation of Article 8, Section 5 is equally misplaced.

(Emphasis added; except as noted.)

Following *Zumas*, three other National Decisions dealt with APWU challenges to the assignment of casuals.

In Case No. H1C-3T-C 32308, decided on April 4, 1986, Arbitrator Collins held that assignment of casuals to key "live" mail on the MPLSM did not violate Article 7.1.B.1. He stated that: "there is neither evidence nor allegations that the hiring of casuals was in violation of the Agreement". He held that the *Zumas* interpretation was controlling with respect to "whether or not the Agreement prohibits utilizing casuals in any manner that would impact adversely on work opportunities of the regular workforce".

In Case No. H4T-3T-C 20524, decided on April 19, 1988, Arbitrator Bloch held that the Postal Service did not violate the Agreement by failing to offer "higher level work" first to bargaining unit employees before casuals. Citing *Zumas* and Arbitrator Collins' decision, Bloch stated that: "Indeed, prior cases establish that there is no contractual restriction as to the type of work that casual employees may perform."

In Case No. H4C-1K-C 33597, decided on August 9, 1989, Arbitrator Dobranski held that the Postal Service did not violate the Agreement by utilizing casuals to perform certain payroll functions. He cited *Zumas* and the decisions of Arbitrators Collins and Bloch for the proposition that "there is no contractual restriction on the utilization of casuals".

In a National Decision issued on October 28, 1989 in Case Nos. H4C-NA-C 65 and H4C-NA-C 95 (*Mittenthal I*), Arbitrator Mittenthal held that the Postal Service had exceeded the 5 percent ceiling on the number of casuals who may be "employed"

contained in Article 7.1.B.3 of the APWU/NALC National Agreement then in effect. Arbitrator Mittenthal concluded that the word "employed" as used in Article 7.1.B.3 included all casuals on the employment rolls whether or not they were actually utilized during a particular accounting period. He noted that *Zumas* had similarly concluded that the word "employed" in Article 7.1.B.1 meant "hired" and not "assigned" or "utilized", and stated:

> There is no sound basis for construing the word "employed" any differently in Section 1B3. There is no sound basis for overruling the Zumas award.

In a subsequent January 29, 1994 decision in Case Nos. H7C-NA-C 36 et al. (*Mittenthal II*), Arbitrator Mittenthal dealt with the question of whether a monetary remedy was appropriate for acknowledged violations of the 5 percent ceiling in Article 7.1.B.3 of the APWU/NALC National Agreement. Arbitrator Mittenthal's recitation of the Postal Service's position in that case included the following:

> The Postal Service also observes that Article 7, Section 1B1 prohibits Management from employing casuals "in lieu of full or part-time employees". It maintains that the Unions carefully monitor Section 1B1 at the local level and that a widespread failure by Management to honor this provision would have prompted many local grievances. It claims that the apparent absence of such grievance activity reveals there was no problem at the local level. It says Section 1B1 should thus serve as a "litmus test" regarding casual usage in relation to full or part-time employees....

In his Discussion and Findings, Arbitrator Mittenthal discussed this matter as follows:

Other Casual Limitations

> The Postal Service refers to the casual limitation in Article 7, Section 1B1 ("Casual employees...may not be employed in lieu of full or part-time employees"). It states in effect that any damage attributable to excess casual usage under Section 1B3, the 5 percent ceiling, should be remedied at the local level under Section 1B1. It asserts that local unions have successfully grieved under 1B1 and that the apparent absence of such grievance activity during the period in question suggests there was no problem at the local level.
>
> This argument is not persuasive. The Section 1B1 restriction can be invoked when Management hires casual employees "in lieu of..." career employees. That is a matter to be determined by conditions existing at a particular time at a particular postal facility. A violation of 1B1 can occur at the local level even in an accounting period in which the national casual ceiling of 5 percent has been honored. For the casual ceiling is a Postal Service obligation beyond the essentially local obligation found in 1B1. There is no remedy at the local level for a violation of the national casual ceiling. Hence, the presence of the 1B1 restriction in no way precludes the Unions from pursuing a national remedy in this case.
>
> (Emphasis added.)

UNION POSITION[3]

The Unions contend that Article 7.1.B.1 expressly states a limitation on casuals. The Postal Service may only utilize casual employees as a "limited-term supplemental workforce"; and casuals may not be "employed in lieu of" career employees. The logical and natural, or plain, meaning of this provision is that casuals are not to be used instead of or in place of career employees; that is, to fill duty assignments that are long-term, ongoing assignments needed by the Postal Service to do its regular work. This is a separate standard or limitation to those contained in Paragraphs 2, 3 and 4 of Article 7.1.B.

Three binding National Decisions by Arbitrator Gamser, the Unions assert, clearly foreclose the Postal Service's position that Article 7.1.B.1 does not impose a separate limitation on casuals.

In *Gamser I*, decided in 1973, the case turned on the question of whether the Postal Service had complied with the standards in Article 7.1.B.1. There was no claim by the Postal Service that it could use casuals as other than a "limited-term supplemental work force" that was not being "employed in lieu

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[3] The APWU and NALC filed a joint brief. The NPMHU filed a separate brief. The essence of the arguments in both briefs is mostly the same. This recitation of the Union Position basically follows the APWU/NALC brief. In some instances I refer to specific additional arguments made by the NPMHU.

of" career employees. The Postal Service prevailed in that case by persuading Arbitrator Gamser that it did meet those standards on the facts of that case, because of the temporary and emergent nature of the work being done by the casuals. The NPMHU further points out that the Postal Service's argument that Article 7 contained only "two restrictions upon the employment of casuals", namely, a ceiling on the total number of casuals and a limit on the duration of their employment, was specifically rejected in *Gamser I*.

Gamser II, also decided in 1973, clearly spelled out that in addition to restricting the total number of casuals who may be employed and the duration of their employment, Article 7 provides that casuals may not be used "in lieu of" regular employees. In this case, as well as in *Gamser I*, there was no dispute that casuals were being used in response to a temporary surge of work. Arbitrator Gamser held that the casuals in question had not been employed in lieu of the career workforce. In doing so, however, he rejected the argument in the Postal Service's brief in that case that the "in lieu of" language in Article 7.1.B.1 is merely introductory to the specific limitations on the total number of casuals who may be employed and the duration of their employment.

In *Gamser III*, decided in 1980, Arbitrator Gamser specifically listed the four restrictions on the use of casuals, including the limitation that they were "only to be used as a supplemental workforce". Notably, the Postal Service also acknowledged in its brief in that case:

> With respect to casuals, Article VII set forth four specific limitations: 1) that casuals could not be employed in lieu of full-time or part-time employees; 2) that during the service week, the Postal Service would make every effort to utilize available and qualified part-time employees at straight time prior to using casuals; 3) that, with the exception of December, casuals would not be hired in numbers greater than 5% of the regular workforce; and 4) that an individual could be appointed to two 90 day terms as a casual in any calendar year, plus a 21-day appointment during December....

Thus, the Unions argue, it was well established by 1973, and expressly accepted by the Postal Service by 1980, that the separately stated limitations on casuals in Article 7 are "four specific limitations", contrary to the Postal Service's present position that the "in lieu of" clause in Article 7.1.B.1 does not impose a separate limitation.

The Unions insist that, properly considered, the 1985 *Zumas* decision does not support the Postal Service's position in this case.[4] *Zumas* best can be understood as the first of a series of four National Decisions holding that Article 7.1.B.1

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[4] The NPMHU further stresses that *Zumas*, whatever its proper interpretation, is neither binding on, nor even applicable to the contractual relationship between the NPMHU and the Postal Service. The NPMHU was not a party to the 1981 APWU/NALC National Agreement at issue in *Zumas* and did not intervene in that case. Moreover the NPMHU has separate contractual agreements regarding the priority to be afforded career employees in assigning overtime.

does not impose a categorical limitation on the type of work that may be performed by casuals. Arbitrator Zumas plainly understood that casuals are a "limited term supplemental workforce". His additional observation that the "in lieu of" language in Article 7.1.B.1 only "relates to the number of casual employees that may be hired and to the limited duration of their employment" was merely a gratuitous observation on his part. Moreover, narrowly read, it relates only to the "in lieu of" passage in Article 7.1.B.1 and does not mean that the sentence read as a whole has no further meaning beyond the other provisions of Article 7.1.B, as the Postal Service asserts. In particular, the Unions assert, the statement in *Zumas* that the "in lieu of" clause "relates to the number of casuals that may be hired" is wholly consistent with the Unions' position. A grievance claiming a particular installation has "hired" casuals "in lieu of" career employees plainly "relates to the number of casuals that may be hired" by that installation.

In any event, the Unions argue, the Postal Service entered into binding agreements with the Unions after *Zumas* that clearly preclude its position in this case.

On May 29, 1986, the Postal Service Director of the Office of Contract Administration, William Downes, issued a nationwide instruction ("Downes Memorandum") which included the following paragraph:

> Additionally, questions have arisen regarding the proper utilization of casuals as a supplemental workforce. Generally,

> casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate.

The Unions presented evidence that shortly before issuance of this memorandum, the NPMHU (then the NPOMH) had urged the Postal Service to issue clear operating instructions to its field officers outlining the proper usage of casuals and that Management agreed to issue such instructions and to review them with the NPMHU beforehand. The Unions argue that this authoritative instruction, issued at the highest levels of Postal Service labor relations six months after *Zumas* was decided, alone is sufficient to discredit the Postal Service's present position and its purported reliance on *Zumas*.

Moreover, the Unions stress, the Downes Memorandum was mutually agreed to by the parties in the following series of Step 4 agreements resolving cases that had been pending at the national level:

- In October 28, 1986, the Mail Handlers and Postal Service considered a grievance "whether casuals are being improperly utilized continually at the Des Moines BMC." They mutually agreed that no national interpretive issue was presented and remanded the case to Step 3 for further processing, using precisely the

language employed by Mr. Downes in his memorandum of instructions to the field.

- On December 30, 1986, the APWU and the Postal Service remanded a Step 4 grievance concerning "whether casuals are being improperly used to perform Maintenance Craft duties," to be resolved at Step 3 on the basis of the Downes memorandum language.

- On December 30, 1986 the APWU and the Postal Service remanded a grievance, whether casuals are being improperly used to perform Maintenance Craft duties, to Step 3 for resolution in accordance with the Downes memorandum language.

- On May 19, 1988 the Mail Handlers Union and the Postal Service represented by Ms. Joyce Ong of the Grievance Arbitration Division, agreed to remand a grievance from Step 4 to Step 3 for a resolution in accordance with the Downes memorandum language.

- The APWU and Postal Service agreed after a January 6, 1989 Step 4 meeting to remand a case which "involves the use of casual employees" to Step 3 for further processing in accordance with the language of the Downes memorandum.

- On June 29, 1990, the Mail Handlers and Postal Service remanded a grievance concerning "whether management violated the National Agreement when it assigned casuals to the Small Parcel Bundle Sorter Machine," to Step 3 for resolution with a statement that "[w]e further agree that this case is a fact circumstance best suited for regional determination and

application of the Downes letter of May 29, 1986 (attached), and a staffing letter on small parcel bundle sorter."

This series of Step 4 agreements entered into over a period of more than four years following initial distribution of the Downes Memorandum, the Unions urge, clearly evince the parties' mutual understanding of Article 7.1.B.1 and should be dispositive of the question in the instant case.

The Unions contend that *Mittenthal II*, decided in 1994, also precludes the Postal Service's argument in this case. The key point endorsed by Arbitrator Mittenthal is that the Article 7.1.B.1 restrictions and the Article 7.1.B.3 restrictions are conceptually different. The percentage limitations of Article 7.1.B.3 are nationwide (at least in the APWU/NALC National Agreement at that time), and can be enforced only at that level. Arbitrator Mittenthal correctly understood that Article 7.1.B.1 provides a separate and distinct limitation on casuals, and can be violated at the local level and remedied at the local level even when the percentage limitations of Article 7.1.B.3 have not been violated. His analysis of these provisions, which is consistent with that of Arbitrator Gamser and with the Downes Memorandum, was a part of his holding and is binding on the Postal Service and the Unions that were parties to that case.

The NPMHU further points out that not only did various Postal Service labor relations representatives continue throughout the 1990's to expressly acknowledge that casual

employees should not be hired "in lieu of" career employees, but in the 1998 negotiations with the NPMHU the Postal Service specifically proposed to delete the "in lieu of" language from Article 7 of the NPMHU National Agreement. This is strong evidence of the parties' mutual understanding that the clause has an independent, substantive meaning.

The Unions insist that the Postal Service's reliance on an October 29, 1999 regional arbitration award by Arbitrator Zumas, which the Postal Service contends confirms its reading of the 1985 national level *Zumas* Award, is misplaced. Arbitrator Zumas had no authority to modify his earlier Award in any way, nor did he have any more authority to interpret it than does any other regional arbitrator. Moreover, regional awards are entitled to weight only to the extent that their analysis and reasoning are persuasive. The record before Arbitrator Zumas in the 1999 regional arbitration case was limited and his regional decision lacks any meaningful analysis.

Finally, the Unions submitted copies of all the regional arbitration awards they have identified as bearing on the issues in this case. While recognizing that, as regional awards, they should not play a significant role in the decision in this case, the Unions point out that a large majority of these regional decisions support the Unions' interpretation of Article 7.1.B.1. The Unions identified a number of these decisions whose reasoning they believe is particularly persuasive.

EMPLOYER POSITION

The Postal Service contends that the Unions have failed to meet their burden of proof. It insists that the 1985 *Zumas* decision together with Arbitrator Zumas' 1999 regional decision in Case No. K94C-4K-C 96086293 are controlling.

The Postal Service asserts that *Zumas* holds that Article 7.1.B.1 does not restrict the Postal Service from employing and using casual employees for whatever function it chooses for as long as it chooses, provided the casual cap limitations and the two 90-day plus Christmas period term restrictions are not exceeded. Arbitrator Zumas held that the entire "in lieu of" phrase in Article 7.1.B.1 relates solely to the hiring of casuals and that the only restrictions on hiring are the casual cap in Article 7.1.B.3 and the duration of appointment limitations in Article 7.1.B.4. Arbitrator Zumas also held that the only restrictions on the utilization of casuals is the requirement for finding qualified and available part-time flexible employees in Article 7.1.B.2.

The Postal Service stresses that the precise issue in this case was before Arbitrator Zumas in 1985 and that the Postal Service urged him to make the very findings that are controlling in this case. Moreover, the record shows that Arbitrator Zumas was fully aware of the three prior decisions by Arbitrator Gamser which the Unions make so much of in this case.

Arbitrator Zumas' 1999 regional arbitration decision simply reinforces the fact that he completely understood the issues in 1985. The issue before Arbitrator Zumas in 1999 was squarely posed by the APWU as being that the Postal Service had been working casuals "on a regular and consistent basis...to move the mail and service customers almost every day for over the last two years". The Union also presented Arbitrator Zumas with the Downes Memorandum and a regional arbitration award that was very critical of the reasoning in *Zumas*. In the face of all this, Arbitrator Zumas unqualifiedly reaffirmed his 1985 views, as understood by the Postal Service, as being the proper interpretation of Article 7.1.B.1.

The Postal Service insists that neither Postal Service positions nor other arbitration decisions have modified or limited *Zumas*, as shown by Arbitrator Zumas' reaffirmation of that decision in 1999. In particular, the Unions are wrong when they argue that the Postal Service conceded in 1994 in *Mittenthal II* that there were criteria other than cap limits and term limit restrictions on the use of casuals. As shown by the evidence presented in this case, including the forceful testimony of Mr. Edward Ward who was the Postal Service's chief advocate in *Mittenthal II*, the entire thrust of the Postal Service's position in that remedy case was to blunt the Unions' call for a sweeping remedy for violation of the casual cap based on the novel theory of "unjust enrichment". The Postal Service showed in that case that the Union had been successful at the local level in securing a remedy for alleged violations of Article 7.1.B.1. Hence, it argued, there was no real evidence

of harm and granting an additional remedy would result in a double recovery. The Postal Service did not pass any judgment on whether the Union's success at the local level was a correct interpretation of the contract, only that it had occurred. The Postal Service's position was not intended to, nor did it, concede that there was any contractual limit on casuals in Article 7.1.B.1 beyond the limitations in Article 7.1.B.3 and Article 7.1.B.4. It did not dilute *Zumas*, which was not an issue in *Mittenthal II* in any way.

The Postal Service also maintains that the Unions' reliance on the Downes Memorandum is misplaced. That document was not signed by any Union, nor is there proof that it was a bargained-for agreement with the NPMHU. The very language of the statement shows that it did not attempt to create absolute criteria. It very carefully begins with "generally" and ends with the all-encompassing "and other circumstances where supplemental workforce needs occur".

It is true that from 1986 until the latter part of 1990 the Postal Service agreed to settle or dispose of certain grievances or remand them to Step 3 by use of the general formula suggested in the Downes Memorandum. In cases which were litigated at the National or regional level, however, the Postal Service continued to press its contention that *Zumas* gave it the right to use casuals in any position once they were properly hired. Moreover, to clear up any misunderstanding about the Postal Service's position, an October 1990 Step 4 decision by Labor Relations Specialist Joyce Ong stated that: "The only

explicit limitations placed on employing casuals in the context of Article 7 is the 5% ceiling and the limited term appointments for individuals [sic] casual employees."

The Postal Service insists that even if it has altered its view of Article 7.1.B.1, which it does not concede, it was entitled to do so. It could take a less restrictive view of *Zumas* at one point in time and later change its mind. It cites a 1998 National Decision by Arbitrator Nolan, to which the NALC was a party, in support of this position. USPS and NALC and NRLCA, Case Nos. W4N-5H-C-40995 and SIN-3P-C-41285.

The Postal Service maintains that the Unions' reliance on the three *Gamser* decisions is also misplaced. They predate *Zumas*, were provided to Arbitrator Zumas and, if really contrary to *Zumas*, obviously were rejected by him. Moreover, a close reading of the *Gamser* decisions show they deal with specific and narrow fact situations, and, in each instance, the Unions lost their claim that casual usage was improper.

Even if the analysis of Article 7.1.B.1 in *Zumas* does not automatically dictate dismissal of these grievances, the Postal Service urges, that analysis nonetheless should be adopted in this case. The second sentence of Article 7.1.B.1 at issue in this case reasonably can be read as part of the explanation of Article 7.1.B as a whole, consistent with the *Zumas* formulation. As set forth in its brief the Postal Service reads Article 7.1.B.1, in context, as follows:

The first part of this second sentence begins by stating that casual employees may (not must) be (1) utilized as a (2) limited term (3) supplemental work force. How casuals are "utilized" pursuant to Article 7.1.B. is explained in 7.1.B.2. ("...the Employer will make every effort to insure that qualified and available part time flexible employees are utilized..." (emphasis supplied)). The "limited term" of casuals clearly refers to Section 7.1.B.4 which spells out how those "terms" are to be calculated ("Casuals are limited to two (2) ninety day terms...in a calendar year...[and]...during the Christmas period..." (emphasis supplied)). As explained in the Postal Bulletins, the nature of casual "terms" derives from the limited length of formal appointment in a calendar year, not, as the Unions contend, the nature of the work.... The words "supplemental work force" are simply a restatement of the heading of Article 7.1.B.1.

The second part of the second sentence in 7.1.B.1 says that casuals "may not be employed in lieu of full or part time employees." Arbitrator Zumas determined, and no party questions, that "employed" means "hired". Article 7 1.B.3 and 4 use the word "employed" and "employment" and establish the cap and term limits. Hence...the Postal Service does not contend that the term "in lieu of" means nothing. It means that casuals cannot be employed except under the strictures of sections 3 and 4 of 7.1.B. Thus, the Postal Service, as did Arbitrator Zumas, interprets and incorporates the "in lieu of" language as part of the overall sense and thrust of Article 7.1.B as a whole, not just as a

separate clause to be viewed apart from the rest of the Article.

Adopting this approach to Article 7.1.B, the Postal Service stresses, is not only logical, but practical. It is fair to assume that the parties who drafted this language intended that it be reasonably easy and logical to apply, rather than complex and obtuse to understand and administer, and that it was designed to solve problems rather than to create controversy and generate litigation. As testified to by a Postal Service witness, with all the variables that affect the operations of the Postal Service, the simplest way to determine if the "in lieu of" language in Article 7.1.B.1 has been complied with is to look to see if the postal Service is in compliance with the casual cap and individual term limitations. Conversely, trying to determine whether or not a particular hour worked by a casual was worked "in lieu of" is well nigh impossible. As the scores of regional arbitration decisions attest, trying to ascribe some separate meaning to "utilized" or "in lieu of" simply drags the parties into factual quicksand.

The Postal Service maintains that the evidence it presented at the hearing demonstrates that operationally there are multiple circumstances under which casuals need to be and are utilized. Such circumstances could be continuous and could stretch over considerable periods of time. Within the last decade, competitive pressures, demands of customers, employee attitudes and desires and rapid changes in technology and equipment all have increased the Postal Service's need for flexibility. While the availability of part-time flexibles may

help, there is an absolute need for casuals in all areas, and a necessity to be able to shift casuals around to "plug up operational holes" as needs arise. Generally casuals are assigned to routine and noncomplex duties, while regular employees are moved to more demanding assignments. The need for casuals on any specific project or projects could be for lengthy periods of time, perhaps as long as two years. In light of these operational realities, it is absurd to conclude that the Postal Service, in Article 7.1.B.1, agreed to only a sporadic, restricted role for casuals, as the Unions assert.

The Postal Service rejects the Unions' attempt to have their formulation of the language of the Downes Memorandum used as the appropriate standard in applying Article 7.1.B.1. It points out that the Unions' formulation leaves out the very important caveat placed on that language by Mr. Downes that it was to apply "generally". The Downes Memorandum also is not comprehensive because it deals only with the use (utilization) of casuals, not their hiring (employment). Moreover, contrary to the Unions' assertion, the parties have not agreed to such an interpretation of Article 7.1.B.1.

The Postal Service maintains that if the *Zumas* interpretation of Article 7.1.B.1 is not adopted, either as binding precedent or as the most sensible interpretation of that provision, then the record as a whole supports only one possible alternative:

> That alternative would recognize that the Postal Service may employ and use casuals, consistent with cap and term requirements, whenever it has an operational need which it reasonably believes cannot be filled with career employees, whether that need is of a long or short term duration, or is for routine or complex work. Such employment would not be "in lieu of" employment of regular work force employees; such use would be "supplemental". The Unions, as always, would have the burden of proof in any such contract interpretation arbitration.

This formulation would recognize the legitimate and practical needs of the Postal Service, and is consistent with the Postal Service's right under Article 3 to "direct employees", "maintain the efficiency of operations" and "determine the methods, means and personnel" by which to conduct its operations.

Finally, the Postal Service urges that if the *Zumas* analysis is not adopted that any other interpretation of Article 7.1.B.1 be prospective only. The Postal Service argues that it should not be penalized by its adoption of an interpretation of Article 7.1.B that has the support of many distinguished and thoughtful neutrals, including National Arbitrators.

FINDINGS

> 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.

These few words have bedeviled the parties off and on for the past thirty years. It would appear that whole forests have been felled just to supply the paper for the grievances, grievance records, transcripts, briefs, arbitration decisions and multiple copies thereof that have been devoted to the interpretation and application of this provision in Article 7.1.B.1 of the National Agreement. In this case, the parties have done an extraordinarily thorough job of presenting a full history of the parties' dealings on this issue and the substance of their present interpretive disagreement. The record, in short, seems to be as complete and developed as possible.

The fundamental issue in this case is whether Article 7.1.B.1 imposes a limitation on casuals other than the limitations in Paragraphs 2, 3 and 4 of Article 7.1.B. Established arbitral precedent that does not appear to be any longer in dispute has considerably narrowed this issue. A series of National Decisions, including *Zumas*, have held that Article 7.1.B.1 does not limit the type of work that casuals who have been properly employed may be assigned to perform on any given occasion or require that priority be afforded to career employees in the assignment of work, except as specifically provided in Article 7.1.B.1. *Zumas* and other National Decisions

have established that the word "employed" in Article 7.1.B.1 means "hired", in contrast to "utilized" or "assigned". It is worth stressing, however, that both before and after *Zumas* the words "utilized" and "employed", as well as "used" (which does not appear in Article 7.1.B.1), sometimes have been used (or employed or utilized) interchangeably both by representatives of the parties and by arbitrators.

The Postal Service maintains that *Zumas* also constitutes a controlling National precedent that supports its position that the "may not be employed in lieu of" language in Article 7.1.B.1 means only that casuals cannot be employed or hired except under the strictures of Paragraphs 3 and 4, which establish the percentage caps on total casual employment and the limited terms during which an individual casual may be employed. I must disagree. That was not an issue properly before Arbitrator Zumas. His stated opinion on that issue was not necessary or even germane to his decision denying the grievance before him, which challenged only the assignment of casuals, not their hiring. His stated opinion on that issue also was contrary to existing National Arbitration precedent, which he did not cite, let alone attempt to distinguish. He offered no convincing analysis for his stated opinion on that issue. And, as the Unions have stressed, the parties entered into a series of Step 4 agreements after *Zumas* that adopt a different interpretation of Article 7.1.B.1; one that is consistent with the National Arbitration precedent that preceded *Zumas*.

The provision in dispute has remained unchanged since the parties' first negotiated a National Agreement in 1971. Very soon thereafter, in *Gamser I*, decided in 1973, the APWU challenged the hiring of certain casual employees. The Postal Service appears to have made very much the same argument in *Gamser I* that it made in *Zumas* and makes in this case. It argued that the only restrictions on the hiring of casuals in Article 7.1.B are the percentage cap and duration of appointment limitations, although it also referred to its "traditional reliance upon casual help to meet short term surges in the work load". Arbitrator Gamser dealt directly and convincingly with this interpretive issue:

> Obviously, in the face of the clear restriction on the use of casuals for this purpose contained in the Agreement, ... for the Postal Service to engage in the hiring of casuals in New York City during the period under review in stead of, in place of, or in substitution of full or part-time employees would not be permissible under the Agreement. Casuals could only be hired in the numbers stated and the period of time provided in the Agreement for some other purpose. The Agreement also sets forth just what that purpose is, "Casual employees are those who may be utilized as a limited term supplemental work force,..."

He then went on to state:

> Whether the casuals hired in New York City during January were employed "in lieu of" regular employees or to supplement the

> efforts of the regular force for a limited term is the determinative question in this case.

Ultimately, Arbitrator Gamser denied the grievance because he found the casuals in question "were hired as a supplement to the regular work force for a limited period of time" as the result of a "surge" of mail.

Thus, *Gamser I* held that what is now Article 7.1.B.1 imposes a restriction or requirement on the purpose for which casuals are hired that goes beyond percentage cap and duration of appointment limitations. This holding was reaffirmed in *Gamser II*, also decided in 1973, where the Postal Service again, in effect, argued that the Article 7.1.B.1 language did not impose any additional limitation on the employment of casuals. *Gamser II*, in describing the language in Section 7.1.B that concerns the employment of casuals, refers to restrictions upon the "utilization" of casuals and the manner in which they may be "used". It is evident, however, from the overall decision, which includes a specific finding that the casuals in question "were employed" in the capacity of a "limited term supplemental work force", that Arbitrator Gamser was interpreting and applying the "in lieu of" language as he had in *Gamser I*.

Gamser III was decided in 1980. Its actual holding is not particularly germane to the present case. In reviewing the parties' bargaining history with respect to casuals, however, Arbitrator Gamser listed the specific restrictions on the use of casuals that the Unions had succeeded in negotiating into the

National Agreement. The first of these was "that casuals were only to be used as a supplemental work force and were not to be employed in lieu of full or part-time employees". This, of course, was consistent with his earlier decisions in *Gamser I* and *Gamser II*. The Postal Service's brief in that case also indicates that it viewed the "in lieu of" provision in Article 7.1.B.1 as setting forth a separate specific restriction beyond the percentage cap and term duration limits.

These three *Gamser* decisions preceded *Zumas*, which was decided in 1985.

In *Zumas* the APWU did not dispute the hiring of the casuals in question. The record in that case shows that they were employed as a limited term supplemental work force. The Union protested the assignment of overtime work to these casuals without first offering that work to career employees on the ODL. The Union based its position on both the "in lieu of" provision in Article 7.1.B.1 and the overtime provisions in Article 8.5. Its entire argument regarding Article 7.1.B.1 was as follows:

> The laymens [sic] interpretation of the "in lieu of" language means "instead of". This is exactly what happened in the instant case, management used casuals on overtime "instead of" Full-Time Regulars on the Over Time Desired List.

The Postal Service's response to the Union's reliance on Article 7.1.B.1 was accurately paraphrased by Arbitrator Zumas as follows:

> The Service next contends that the Union's reliance upon Article 7 does not support its position. The Service argues that the term "employed" means hired, not assigned or utilized. The Service asserts that this section, when looked at in its entirety and along with other provisions, makes it clear that had the parties intended "employed" to mean assigned, the term "utilized" and not "employed" would have been used. Moreover, the Service contends, since 1971 the term "employed" has referred to the number of casual employees that may be hired and the duration of their employment. [Footnote omitted; emphasis in original.][5]

In its brief in *Zumas*, the Postal Service, citing *Gamser I* and *Gamser II* (which were provided, as was *Gamser III*, to the arbitrator), stated:

> Arbitrator Gamser found no prohibition in the 1971 or 1973 contract language which precludes casuals from working overtime instead of full-time employees. Thus, the union has raised this same argument concerning casuals as early as 1973 to no avail.

The Union in *Zumas* made no reference to the *Gamser* decisions, nor did it address the meaning or application of Article 7.1.B.1 other than in the two sentences of its brief previously quoted.

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[5] Elsewhere in its brief, the Postal Service also stated: "In accordance with Article 7, casuals may be employed as a supplemental work force for short periods of time as needed."

After quoting the operative language in Article 7.1.B.1, Arbitrator Zumas' opinion stated:

> There is no restriction as to how such casual employees may be "utilized" (assigned), except that the Service is required to "make every effort to insure [sic] that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals." It is also clear, as the Service contends, that the provision that casual employees "may not be employed in lieu of full or part-time employees" relates to the number of casual employees that may be hired and to the limited duration of their employment. The term "employed" means hired and not, as the Union contends, the manner in which they are assigned ("utilized") to perform work. The correctness of this interpretation becomes even more obvious when the parties referred to "utilized" and "employed", in different contexts, in the same sentence. [Emphasis in original.]

There are two holdings in *Zumas* which, in my opinion, properly can be considered precedent. First, is the holding that Article 7.1.B.1 does not restrict the utilization of casuals, who have been properly employed, to perform overtime assignments, or, more broadly, any particular category of assignments, provided the Postal Service complies with the requirement of Article 7.1.B.2 regarding the utilization of part-time flexibles. Second, is the holding that the term "employed" in Article 7.1.B.1 means "hired". Both of these holdings were a necessary part of Arbitrator Zumas' decision

that the grievance before him was without merit. Both of these holdings have been acknowledged and followed in subsequent National Decisions.

The same cannot be said for Arbitrator Zumas' stated opinion that:

> It is also clear, as the Service contends, that the provision that casual employees "may not be employed in lieu of full or part-time employees" relates to the number of casual employees that may be hired and to the limited duration of their employment.

It is true that the Postal Service made this argument, but the issue of what restrictions, if any, Article 7.1.B.1 imposes on the employment or hiring of casuals was not an issue raised in the grievance in *Zumas* and was not an issue joined by the Union. His stated opinion on that issue was not necessary or even germane to his decision denying the grievance. It also is contrary to the existing National Arbitration precedent established in *Gamser I* and *Gamser II*.[6] The Postal Service did present those *Gamser* decisions to Arbitrator Zumas, but only in support of its position that Article 7.1.B.1 does not preclude casuals from working overtime instead of full-time employees. There is no reason to conclude that Arbitrator Zumas considered

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[6] The Unions argue in this case that Zumas need not be read as contradictory to *Gamser I* and *Gamser II* in this regard. For purposes of this decision, however, I assume that the Postal Service is correct in asserting that Arbitrator Zumas intended to state that the only limits on the employment of casuals are the percentage cap and duration of appointment limitations.

those decisions for any other purpose. The Unions had no reason to cite them, and did not cite them, for their holdings regarding the restrictions Article 7.1.B.1 imposes on the employment or hiring of casuals. That was not an issue in *Zumas*.

Arbitrator Zumas' failure to cite, let alone attempt to distinguish, *Gamser I* and *Gamser II*, suggests that he was not aware that his stated opinion on the "in lieu of" provision in Article 7.1.B.1 was contrary to those precedents. Moreover, Arbitrator Zumas offered no convincing analysis to support his stated opinion on this issue. The only analysis he provided, other than his conclusory statement that "[i]t is also clear, as the Service contends, ...", was his determination that the term "employed" means "hired and not, as the Union contends, the manner in which ... [casuals] are assigned ('utilized') to perform work". No matter how correct, that interpretation of the term "employed" provides no reason for concluding that the "in lieu of" language imposes no restriction on the employment of casuals beyond the restrictions in Article 7.1.B.3 and 7.1.B.4.

For all of these reasons, *Zumas* hardly can be considered precedent on the issue presented in this case or as overruling or negating the precedent established by *Gamser I* and *Gamser II*. Moreover, the record establishes that after *Zumas* was decided in 1985 the Postal Service and two of the Unions, the NPMHU and the APWU, entered into a series of at least six binding Step 4 agreements between October 1986 and June 1990 in

which they remanded grievances alleging violations of Article 7.1.B.1 to Step 3 for resolution in accordance with the language of the May 29, 1986 Downes Memorandum. Whether or not the Downes Memorandum on its own would bind the Postal Service, this series of agreements at the National level is highly significant. As Arbitrator Collins stated in his April 4, 1986 decision in Case No. H1C-3T-C 32308:

> The settlement of a contract grievance at the national level, without any disclaimer of precedential effect, would in the normal course seem to constitute important evidence of the parties mutual interpretation of their Agreement, at least insofar as the expressed terms of the settlement provided interpretive guidance.

The Downes Memorandum includes the following paragraph:

> Additionally, questions have arisen regarding the proper utilization of casuals as a supplemental workforce. Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate.

Although couched in terms of "utilization" of casuals, it is apparent that this paragraph is not directed at the specific assignments given to casuals on a day-to-day basis, but to the

employment, that is, hiring, of casuals. As the last sentence states: "Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate." This is entirely consistent with the National precedent in *Gamser I* that Article 7.1.B.1 restricts the Postal Service from hiring casuals "in stead of, in place of, or in substitution of" career employees, and provides that casuals can only be hired for the purpose of being "utilized as a limited term supplemental work force". The Downes Memorandum puts some flesh on the bones of Article 7.1.B.1, which the parties then adopted as the basis on which to remand the six cited grievances to Step 3 for further processing.[7]

In context, I do not read the word "[g]enerally" at the beginning of the formulation in the Downes Memorandum as

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[7] In August 1992, the Postal Service and the NALC entered into a Step 4 agreement (NALC Exhibit 5) in which they agreed to remand to Step 3 a grievance asserting a violation of Article 7.1.B.1 on the basis of the following agreed-to principles:

1. That in accordance with Article 7.1.B.1 casual employees may not be employed in lieu of full or part-time employees.
2. That in accordance with Arbitrator Zumas' award in Cases H1C-4K-C 27344/45 the term "employed" means hired and not the manner in which the casuals are assigned (utilized).

It is difficult to square this agreement with the Postal Service's assertion that its position at that time was that *Zumas* also established that the "in lieu of provision" had no separate significance apart from the other paragraphs in Article 7.1.B.

some sort of limitation or caveat on what follows, particularly in light of the catchall "or in other circumstances where supplemental workforce needs occur" included in that formulation. A more straightforward reading is that it signifies that the formulation that follows is a general statement of the proper application of Article 7.1.B.1, which then is to be applied in the field -- or on remand of a grievance -- to the particular facts and circumstances at a given local installation.

The Postal Service stresses that in cases litigated at the National or regional level it continued to press its contention that Zumas gave it the right to use casuals in any position once they were properly hired, even during the period in which it agreed to settle or dispose of certain grievances on the basis of the general formulation in the Downes Memorandum. The National level cases it cites (Arbitrator Bloch's 1988 decision and Arbitrator Dobranski's 1989 decision) did not, however, involve an issue as to the employment or hiring of casuals, but whether they could be assigned to perform "higher level work" or certain payroll functions. The positions taken by the Postal Service in the three regional cases it cites were not taken at the National level. Moreover, the earliest of these cited regional cases was heard in April 1990, which was close to the time when the Postal Service apparently ceased agreeing to remand cases on the basis of the Downes Memorandum formulation.

In an October 1990 Step 4 decision denying a grievance involving the employment of casual employees allegedly in violation of Article 7.1.B.1, the Postal Service did state that: "The only explicit limitations placed on employing casuals in the context of Article 7 is the 5% ceiling and the limited term appointments for individuals [sic] casual employees." This unilateral assertion of this position, however, could not undo the effect of the Step 4 National agreements that were entered into between 1986 and 1990, or the still valid National Arbitration precedent in *Gamser I* and *Gamser II*.

Since 1990 the parties have arbitrated hundreds of grievances at the local level involving issues relating to the employment of casuals. Evidently, the majority of those decisions adopted the Union's position regarding the proper interpretation of Article 7.1.B.1, whether or not the Union was able to establish an actual violation of that provision. But there have been thoughtful decisions going both ways. In light of its track record at the regional level, the Postal Service has issued various internal directives aimed at avoiding situations where it might be found to have violated Article 7.1.B.1. I do not view these actions as in any way prejudicing the Postal Service's right to espouse the position it has taken in this case.

I also do not place any weight on the positions taken by the parties in *Mittenthal II*, which was heard in 1993. Their respective interests in that case led the Postal Service to stress the Unions' ability to successfully grieve violations of

Section 7.1.B.1 at the local level and the Unions to intimate that *Zumas* foreclosed any local remedy for violations of that provision. For purposes of this case, I also accept the Postal Service's assertion that Arbitrator Mittenthal misunderstood its position on this matter. Nonetheless, the following statement in *Mittenthal II* is a thoughtful and, in my view, persuasive reading of Article 7.1.B.1 that is consistent with both the National Arbitration precedent in *Gamser I* and *Gamser II* and the formulation of Article 7.1.B.1 in the Downes Memorandum:

> The Section 1B1 restriction can be invoked when Management hires casual employees "in lieu of..." career employees. That is a matter to be determined by conditions existing at a particular time at a particular postal facility. A violation of 1B1 can occur at the local level even in an accounting period in which the national casual ceiling of 5 percent has been honored. For the casual ceiling is a Postal Service obligation beyond the essentially local obligation found in 1B1. There is no remedy at the local level for a violation of the national casual ceiling.

Adoption of the Postal Service's position in this case that Article 7.1.B.1, in essence, is merely introductory, and that a violation of the "employing in lieu of" provision can occur only when either the allowable percentage cap or the limited appointment duration periods are exceeded, certainly would simplify application of that provision. It also would read out of the National Agreement a separate restriction on casuals, which, as Arbitrator Mittenthal points out, imposes an essentially local obligation, separate and apart from the

National casual ceiling in Article 7.1.B.3. Under the Postal Service's position, to take an extreme example, the Postal Service could staff an entire facility with a succession of casual employees on an indefinite basis, provided it did not exceed the National casual ceiling, which hardly seems consistent with the language in Article 7.1.B.1. In any event, as already discussed, the Postal Service's position is contrary to both National Arbitration precedent and the parties' joint adoption at the National level of the formulation of Article 7.1.B.1 set forth in the Downes Memorandum.

The Postal Service's assertion that trying to determine whether or not a particular hour worked by a casual was worked "in lieu of" is well nigh impossible raises a false issue. Article 7.1.B.1 is a limitation on the employment or hiring of casuals, not on any particular assignment. As Arbitrator Mittenthal noted, a claim that casuals have been "employed in lieu of" career employees is "a matter to be determined by conditions existing at a particular time at a particular postal facility". To paraphrase *Gamser I*, the question is whether they were employed or hired for the purpose of being utilized as a limited term supplemental work force or instead of, in place of, or in substitution of career employees.

The Postal Service claims that there are myriad circumstances in which, as a practical matter, it needs to employ casual employees, and that this need could be for lengthy periods of time. The present decision obviously is not the place to address any particular set of circumstances. If,

however, the Postal Service has a genuine need at a particular time at a particular location for a limited term supplemental work force, rather than career employees, then there is no violation of Article 7.1.B.1. The formulation of this provision in the jointly endorsed Downes Memorandum specifically encompasses, without limitation, "other circumstances where supplemental work force needs occur". And, as the Postal Service observes, the Union has the burden of proving a violation of Article 7.1.B.1.

Finally, I am not persuaded that it would be appropriate to designate the interpretation of Article 7.1.B.1 in this decision as being prospective only. This decision serves to clarify, on a National Arbitration basis, the proper interpretation of Article 7.1.B.1. It does not create "new law" or depart from the "old law". To the extent the Postal Service has chosen to rely on its interpretation of *Zumas*, it has done so knowing full well that it might not be successful. Indeed, at the regional level where this issue has been continuously batted about for over a decade, the Unions have succeeded in numerous cases in obtaining an award finding a violation of Article 7.1.B.1 and an appropriate remedy.

AWARD

1. Article 7.1.B.1 of the APWU National Agreement (and the corresponding provision in the NALC and NPMHU National Agreements) establishes a separate restriction on the employment of casual employees, in addition to the other restrictions set forth in other paragraphs of Article 7.1.B.

2. The Postal Service may only employ (hire) casual employees to 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.

3. The following formulation in the May 29, 1986 Downes Memorandum sets forth a jointly endorsed understanding as to the circumstances under which it is appropriate to employ (hire) casual employees to be utilized as a limited term supplemental work force consistent with Article 7.1.B.1:

> Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate.

Shyam Das, Arbitrator