



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

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

From: Greg Bell, Director *B*
Industrial Relations

Date: August 10, 2009

Re: Das Award on ELM Issue 13

Enclosed you will find a copy of a recent national award on the APWU's grievance challenging the Postal Service's publication of ELM Issue 13 without affording the union proper notice of changes in the printed issue. Arbitrator Das agreed that management failed to provide the union with "timely and appropriate" Article 19 notice of certain changes to the ELM. He ruled that this constituted a violation of Section 8(a) (5) of the National Labor Relations Act. Das's remedy in this case permits the union "to challenge in arbitration any of the changes incorporated in ELM 13 that either were implemented prior to April 24, 1998 (the date management notified the union it was intending to print ELM Issue 13) – with the exception of those changes the Union acknowledged receiving 60 days' advance notice of – or those first included in ELM 13 that were not flagged or identified in the April 24, 1998 transmittal, to the extent the Union believes the substance of those changes violated the 1994-1998 National Agreement, including Article 19." He gave the union 60 days from receipt of his decision to provide management with notice of any changes it elects to challenge in arbitration, and indicated that the challenge would be considered a part of the union's original June 19, 1998 appeal to arbitration over which he retains jurisdiction. (*USPS #Q94C-4Q-C 98092869; 7/23/2009*)

This case arose after management notified the union on April 24, 1998 that it was intending to print ELM Issue 13. With its letter to the union, management enclosed the entire text of ELM Issue 13 containing approximately 500 changes that had been made during the nine-year period from ELM 12's publication in 1989 up to and including the time ELM 13 was published in 1998. The Postal Service claimed that forwarding the ELM issue in its "entirety" was taken "as both a courtesy and in the spirit of compliance with the July 13, 1992 settlement on Issues 11 and 12 of the ELM." The parties' settlement on the two prior issues of the ELM provided that "[e]ach Chapter of ELM Issue 13 will be provided to the Unions in advance of publication." It also provided that "Article 19 time limits are not a bar to the Union initiating an appeal to arbitration at the national level protesting changes to the ELM, if it is determined that the Postal Service has not complied with the notice provisions of Article 19." This 1992 pre-arbitration settlement occurred after the union filed national-level grievances over management's failure to properly notify us of revisions to ELM Issues

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11 and 12. The parties subsequently met and an agreement was reached on revisions to be retained in Issue 12 and those agreed-upon revisions were identified in a September 2, 1993 Postal Bulletin notice.

Following our receipt of notice about ELM 13, the union met with the Postal Service and requested that it delay publication of the ELM until the parties had an opportunity to discuss the changes. Though the Postal Service extended the time limits for further ELM discussions, it refused to delay the time of issuance of a printed version of ELM 13 beyond 60 days. The union thereafter appealed the Postal Service's changes to ELM Issue 13 to arbitration. In addition, we filed a charge with the National Labor Relations Board alleging that the Postal Service violated Sections 8(a)(1) and (5) and 8(d) of the NLRA due to its failure to bargain in good faith over changes in ELM Issue 13. The charge cited management's implementation of changes of which it didn't provide the union notice. The NLRB deferred this matter to arbitration. Before and after the grievance and NLRB charges were filed, the Postal Service provided us with summaries of changes which specified those changes it had previously published in Postal Bulletins or those originating from other published sources and which it later incorporated into the intranet version of the ELM. However, the union requested that management identify all changes made, confirm those changes of which it had previously provided us proper notice under Article 19, and explain the purpose and impact of the changes that were made in ELM 13. Management responded by alleging that changes in ELM 13 had "already been through the Article 19 process" or didn't require Article 19 notification and it didn't "agree that the printing of the ELM, Issue 13, invoked the notice requirements of Article 19 of the National Agreement."

At the hearing, the union's witnesses testified that there were changes affecting wages, hours and working conditions of APWU bargaining unit employees in the ELM 13 summaries of changes of which the Postal Service hadn't provided us earlier notification, as well as changes that weren't flagged or identified by management in these summaries that also affected our bargaining unit's wages, hours and working conditions. Lists of these changes, as well as a comparison of ELM Issues 12 and 13 were introduced into evidence as exhibits in this case.

After the hearing and post-hearing briefs in this case, Arbitrator Das issued his decision. He disagreed with the Postal Service's argument that the 2001 Interest Arbitration award in which Arbitrator Goldberg made changes to Article 19 rendered this grievance moot. He acknowledged that the union was successful in obtaining some changes to Article 19 in 2001, specifically the requirement that management provide a narrative explanation of the purpose and impact on employees of proposed changes to handbooks, manuals and publications. In addition, he noted that Arbitrator Goldberg didn't adopt the union's proposal to include a requirement that management's transmission of proposed changes should be limited to a single chapter of a handbook, manual or published regulations at any one time. However, he found that the union's obtaining of language in Article 19 from Arbitrator Goldberg was "without prejudice to its position as to what the existing contract required [at the time ELM 13 was published] ..." and the union wasn't precluded from arguing that the 1992 settlement between the parties required management to provide the union with one draft chapter at a time of ELM Issue 13. Das said that "[w]hile there was no language in Article 19 requiring [an explanation of the purpose and impact on employees of proposed changes] prior to the Goldberg Award, the Union argues such a statement was an implicit requirement under the 1994-

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1998 and earlier National Agreements” and that it “needs such a statement to perform its duty as exclusive bargaining unit representative,” according to Arbitrator Das.

Arbitrator Das said, however, that the 1992 settlement “does not state [that the ELM will be provided] one chapter at a time, which the parties easily could have done if that was their intent” and there was “no direct testimony or other evidence regarding the 1992 settlement other than the agreement itself and the two grievances that were resolved by the settlement.” On this basis, he rejected the union’s argument that management’s release to it of the entire draft ELM 13 at one time violated the 1992 pre-arbitration agreement. Das also found that the evidence didn’t prove that “statements of purpose and impact on the bargaining unit” had been provided by the Postal Service since the time the Article 19 notice requirement first was included in the parties’ National Agreement in 1973. He thus decided that such a requirement wasn’t an “inherent part of Article 19” prior to the 2001 Goldberg award.

Arbitrator Das further determined that management’s transmission of the draft of the entire ELM 13 at one time didn’t violate “an implied covenant of good faith and fair dealing, provided the Postal Service flagged the changes [to the ELM].” He found that the Postal Service didn’t rebut the union’s evidence that that “there were changes in ELM 13 that directly relate to wages, hours or working conditions which [the Postal Service] failed to flag or identify,” but found that the evidence failed to prove that these omissions were “intentional” or that the unidentified changes were “sufficiently significant to justify finding a failure by the Postal Service to have acted in good faith.” However, he ruled that the Postal Service’s failure to “flag or identify” changes, and its failure to “substantiate its claim that it had provided timely and appropriate Article 19 notice of changes it had published in the Postal Bulletin or elsewhere and then incorporated into the Intranet version of the ELM prior to April 24, 1998” warranted a contractual remedy permitting the union to challenge changes of which it didn’t receive proper notice “to the extent the Union believes the substance of those changes violated the 1994-1998 National Agreement, including Article 19.” Arbitrator Das said, however, that no additional remedy would be granted due to management’s violation of Section 8(a)(5) of the NLRB given “all the circumstances in this case – including the passage of more than a decade, the revisions of Article 19 that have been made in the interim, subsequent publication of several further editions of the ELM that were subject to the revised provisions of Article 19, and the lack of a showing that the changes in ELM 13 that were not properly notified to the Union had a significant impact on the APWU bargaining unit”¹

Enclosure

GB/MW:jm
OPEIU#2
AFL-CIO

¹ The union requested a substantial remedy including a cease-and-desist order, restoration of the status quo before the unilateral changes were made, and a make-whole remedy for any affected employees.

National Arbitration Panel

In the Matter of Arbitration)
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 between)
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United States Postal Service) Case No.
) Q94C-4Q-C 98092869
)
)
 and)
)
)
American Postal Workers)
Union)

Before: Shyam Das

Appearances:

For the Postal Service: Martin R. Welles, Esq.

For the APWU: Anton G. Hajjar, Esq.

Place of Hearing: Washington, D.C.

Dates of Hearing: October 23, 2008

Date of Award: July 23, 2009

Relevant Contract Provision: Article 19

Contract Year: 1994-1998

Type of Grievance: Contract Interpretation

Award Summary

The matters raised in this Article 19 proceeding are resolved on the basis set forth in the above Findings.



Shyam Das, Arbitrator

On June 19, 1998, the APWU submitted the following appeal to arbitration to John Potter, then Vice President of Labor Relations, at the Postal Service:

RE: APWU #A19-G1998-1
Changes to Employee & Labor Relations
Manual

Dear Mr. Potter:

Please be advised, in accordance with Article 15 and 19 of the National Agreement, the American Postal Workers Union is hereby appealing the above-referenced issue to arbitration.

By letter received April 24, 1998, the APWU was notified of the Postal Service intent to print an ELM Issue 13 that suppose to contain all the changes currently appearing on the IntraNet ELM and incorporate other previously published changes, as well as updated position titles and revisions reflecting the various organization structure changes that have occurred since 1989.

The Postal Service's issuance of the ELM to the Union is unfair, unreasonable and inequitable and violates Article 19 of the National Agreement.

It is the Union's position, but not limited to that under the provisions of Article 19 of the National Agreement, the Postal Service must notify the union of handbooks/manuals changes that directly relate to wages, hours, or working conditions at least sixty (60) days prior to issuance. Moreover, if the union, after meeting over such changes believe the proposed changes violate the National

Agreement, may appeal to arbitration within sixty (60) days after receipt of notification.

Moreover, at a meeting between the parties, the Postal Service was informed that we believe the Postal Service violated the National Agreement by its failure to notify and meet with the APWU concerning changes in ELM Issue 13 that directly relate to wages, hours, or working conditions. The APWU provided the Postal Service several examples in support of the APWU contention. For example, we identified several changes where the Postal Service added, deleted, or rewritten provisions without notification or discussion with the union, that purported to carry out various collective bargaining agreements.

We also pointed out changes in the ELM Issue 13 that the Postal Service did not highlight or list, and did not provide any previous notice of the changes. Moreover, the Postal Service failed to state its intent and the impact of changes made in ELM Issue 13. It is also the APWU position that previously negotiated language may require further Article 19 notification and discussion given years of delay, which may require an update of provisions to reflect the current agreement. Moreover, the Postal Service violated the July 13, 1992 Pre-Arbitration Settlement (H7C-NA-C 50/H7C-NA-C 62) by its failure to provide the APWU each Chapter of the ELM Issue 13 in advance of publication.

It is the APWU position that any changes in the ELM or other handbook/manual that directly affect wages, hours, or working condition are mandatory subject matters, and subject to the requirement of Article 19 of the National Agreement. Under the terms of the National Agreement, the Postal Service

is barred from making any changes in handbook/manual (including on the Postal Service IntraNet) that directly affect wages, hours, or working condition, unless the requirement of Article 19 are met. The Postal Service actions to unilaterally make contractual changes in handbooks/manuals without notification, meeting, or bargaining with the APWU constitute a mid-term modification of the contract and an unfair labor practice.

Moreover, the Postal Service has failed and refused to identify and acknowledge any changes as directly affect wages, hours, or working conditions. The APWU contends that the Postal Service is obligated under the terms and intent of the agreement to identify those changes they believe directly affect wages, hours, or working conditions, including the intent and impact of such changes.

In addition to this Article 19 appeal, which is the subject of the present arbitration proceeding, the Union also initiated an Article 15 grievance at the Step 4 level concerning the Postal Service's "refusal and failure to notify the Union of changes in the Employee & Labor Relations Manual."

Article 19 of the 1994-1998 National Agreement, in effect when this matter arose, provides in relevant part:

ARTICLE 19
HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to

employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable....

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believe the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance.

The July 13, 1992 pre-arbitration settlement referred to in the Union's June 19, 1998 appeal provides in relevant part:

Recently, we met in prearbitration discussion of the above-captioned cases.

The issue in these grievances involves changes occurring in Issues 11 and 12 of the Employee & Labor Relations Manual (ELM).

After discussing this matter, we agreed to the following settlement of this dispute:

1. The parties will meet within 90 days to identify and discuss the changes between ELM Issues 10, 11, and 12.

* * *

3. Article 19 time limits are not a bar to the Union initiating an appeal to arbitration at the national level protesting changes to the ELM, if it is determined that the Postal Service has not complied with the notice provisions of Article 19. As a matter of clarification, this provision is also applicable to changes initially occurring in issues 11 and 12 of the ELM.

* * *

5. Each Chapter of ELM Issue 13 will be provided to the Unions in advance of publication.

On or about June 26, 1998, the Union filed a charge with the National Labor Relations Board alleging the Postal Service violated Section 8(a)(1) and (5), and 8(d) of the National Labor Relations Act. The Union's asserted basis for the charge is as follows:

Since on or about April 24, 1998, and continuing to date, the Employer has failed to bargain in good faith with the American Postal Workers Union, AFL-CIO, by, among other things, informing the APWU of at least 495 changes in working conditions in the Employee and Labor Relations Manual, Issue 13, and threatening to implement them immediately, without affording the APWU an adequate opportunity to bargain over these and other changes of which the Employer

failed to give notice. The APWU requests injunctive relief pursuant to Section 10(j).

On October 30, 1998, the NLRB deferred this matter to arbitration.

In its April 24, 1998 letter notifying the Union of its intent to print an ELM Issue 13, the Postal Service stated:

...We intend, therefore, to print an ELM Issue 13 that will contain all the changes currently appearing on the IntraNet ELM and incorporate other previously published changes, as well as updated position titles and revisions reflecting the various organization structure changes that have occurred since 1989.

Enclosed is the entire text of ELM Issue 13. While a number of changes in Issue 13 do not relate to bargaining unit policies or procedures, it is forwarded in its entirety as both a courtesy and in the spirit of compliance with the July 13, 1992 settlement on Issues 11 and 12 of the ELM.

Changes, their origin, and brief explanations of each are listed in a Summary of Changes following the table of contents for each tabbed chapter/subchapter. The Summary includes:

- Changes that have been issued in a *Postal Bulletin* (PB) and incorporated in the IntraNet version. These are identified by PB number and the date, which appear in parentheses.
- Changes previously issued in some form other than a *Postal Bulletin*. These are

identified by document and date of issuance.

- Changes for clarity and conformance with organization structure. These are noted accordingly. Title changes are noted specifically in the Summary when they are part of a substantive change. Otherwise they are noted in a general statement.

In addition, all of the changes listed in the Summary, except those described as deleted language, are identified in the text by a bold bar in the margin....

The parties met on June 9, 1998, at which time the Union raised a number of concerns and issues. The Union requested that Article 19 time limits be extended for further discussions. According to the Union, the Postal Service agreed to extend time limits by an additional 60 days, but the Union subsequently discovered that the Postal Service intended to issue ELM 13 in disregard of that agreement, prompting the Union to file this appeal on June 19, 1998. According to the Postal Service there was a misunderstanding -- the Postal Service was willing to extend time limits for filing an appeal or grievance by 60 days, but was unable to delay printing ELM 13. In a letter dated June 18, evidently received by the Union after it had filed its appeal, the Postal Service stated:

However, we propose to continue to meet with you and your staff and HR subject matter experts for as long and as often as may be necessary to fully identify any concerns you may have with the changes incorporated in Issue 13. We will then publish, via the *Postal Bulletin*, any corrections or other changes that need to be made to the printed

Issue 13 as well as update the online version. In addition, if there are enough changes to warrant reprinting, we will print an Issue 14 as soon as practicable thereafter.

The parties did not hold any subsequent meetings regarding ELM 13, but did continue to engage in correspondence relating thereto.

In a letter dated July 16, 1998, the Postal Service stated:

As you requested, we have enclosed information concerning changes to the ELM made subsequent to the July 13, 1992 settlement. The Summary of Changes has been broken down into three categories or items. Item 1 consists of revisions to the ELM that went on line in September 1996. Item 2 consists of revisions added to the on line version between September 1996 and January 1998. To the best of our knowledge, the union received the appropriate Article 19 notification of these changes.

Item 3 is the Summary of Changes with a check mark by the revisions that were added to the recent publication of Issue 13. In our opinion, no changes, other than cosmetic changes, were made to Issue 13. If you have information contrary to that effect, please let us know as soon as possible.

In a letter dated December 9, 1998, the Union stated:

...We requested relevant information such as identification of all changes made; confirmation of any changes the Postal

Service alleged the Union received proper notification; and explanation of intent and impact of any changes that were made in ELM Issue 13; ...This information is needed for the Union to intelligently perform its obligation as exclusive bargaining representative for APWU bargaining unit members. ...At this point we still have not been provided any documentation showing that we were given proper Article 19 notification on any of your listed changes.

...The access provided to the union of the ELM on the Internet has never been considered an official version of the ELM. Any updates through that Internet site or any publication of a Postal Bulletin of changes to the ELM is not proper Article 19 notification. The APWU has consistently raised concerns about handbook and manual changes being made without proper notification of these changes. It should not come as any surprise to you that we feel that providing the union with an entire book listing over 500 changes where it has not been verified that we received proper Article 19 notice or that all the changes were identified, would hinder our ability to represent our membership in an effective way. Especially in view of the grave subsequent effect that even one word might have on employees or the union rights when handbook changes directly relate to employment conditions.

In a letter dated January 21, 1999, the Postal Service stated:

As mentioned in our prior correspondence, ELM Issue 13 was published to provide the field with an updated hard copy version of Issue 12 and corresponding changes that had already been through the Article 19 process. Issue 13 also included changes that, in our

opinion, did not require Article 19 notification to the unions either because the changes only affected non-bargaining employees or because there were no changes being made to wages, hours, or working conditions. Therefore, we do not agree that the printing of the ELM, Issue 13 invoked the notice requirements of Article 19 of the National Agreement. However, since this matter is now in the grievance-arbitration procedure any further comment...is inappropriate.

Phil Tabbita served in 1998 as Special Assistant to the President of the APWU assigned to its Industrial Relations Department. Shortly after the Union received a copy of the draft ELM 13 in April 1998, he reviewed certain pay and benefit sections he was quiet familiar with. He attended the one and only meeting between the parties prior to the Union's June 19, 1998 appeal to arbitration, which was held on June 9. He testified that at the meeting he pointed out certain mistakes he had noted in the draft ELM 13, for example, that the tool and die shop was unrepresented, when in fact the employees by then were represented by the IAM. He also pointed out certain changes that had not been flagged by the Postal Service. He expressed concern about the quality of the draft and the likelihood that there might be other substantive changes that the Union was not aware of. He also raised issues about ELM Section 418 and certain other changes that the Union considered directly related to wages, hours or working conditions.

Sometime after the June 9, 1998 meeting, Tabbita stated, the Union proofreaders completed a comparison of ELM 13 and ELM 12. More recently, in preparation for this arbitration,

the Union prepared two exhibits that provide an in-depth comparison. The first identifies changes that had been flagged by the Postal Service which the Union maintains relate to wages, hours and working conditions of its members. Tabbita specifically pointed to pay administration changes related to the definition and treatment of COLA that directly relate to the pay of bargaining unit employees. The second exhibit consists of changes that were not flagged in some fashion by the Postal Service, but which the Union maintains directly relate to wages, hours and working conditions. These include changes relating to pay computation, the treatment of holiday work pay and what constitutes overtime on a holiday work day. Tabbita noted that the Union was not purporting that these changes actually had some kind of significant impact upon APWU bargaining unit employees, but was citing them with respect to the issue of lack of notification presented by the Union in this appeal.

In the ten years between the filing of this appeal and the arbitration hearing in October 2008, certain changes were made to Article 19. In the 1998-2000 National Agreement, the parties agreed to add two sentences to the second paragraph of Article 19. The first addition was: "Proposed changes will be furnished to the Union by hard copy or, if available, by electronic file." The second addition was:

Within fifteen (15) days after the issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues.

The 2000-2003 National Agreement was the result of a 2001 interest arbitration award issued by a panel chaired by Stephen Goldberg. The Union had proposed a number of changes to Article 19, including changes relating to notification. The Goldberg Award included the following additional language proposed by the Union in the second paragraph of Article 19:

The Employer shall furnish the Union with the following information about each proposed change: a narrative explanation of its purpose and impact on employees and any documentation concerning the proposed change from the manager(s) who requested the change addressing its purpose and effect.

The Goldberg Award did not include the following additional language also proposed by the Union: "Proposed changes transmitted at the same time shall be limited to a single chapter of a handbook, manual or published regulations."

EMPLOYER POSITION

The Postal Service initially contends that the issue of "proper notice" in this grievance is moot because the Union's claim was "self-defeated" in 2001 before Interest Arbitrator Stephen Goldberg. The Union successfully argued that the language in Article 19 had to be amended to require the Postal Service to provide an explanation for each change and a statement of the impact the change would have on the bargaining unit. The Postal Service maintains that the Union's argument in 2001 is contrary to their 1998 argument in this case that this requirement always existed under Article 19. The Postal Service

further points to statements made by the Union leadership to its members following issuance of the Goldberg Award which characterized the changes in Article 19 as "modifications of management's right to change handbooks and impose new working conditions," and as "changes to working conditions." Since the Union successfully changed the terms of Article 19 in 2001, that defeats its claim in this case and renders the issue moot.

The Postal Service next argues that, if the issue is not deemed to be moot, the Postal Service complied with the Article 19 process. The Postal Service provided notice of changes to the ELM at least 60 days in advance of publication, and met with the Union at its request. The Union then appealed to arbitration within 60 days of receiving notice of the changes. After the 60-day period had expired, the Postal Service published ELM 13.

The Postal Service argues that the word "notice" in Article 19 has a clear and unambiguous meaning, citing National Arbitration awards issued by Arbitrator Bloch, Case No. H1C-NA-C 5 (1983), and Arbitrator Snow, Case No. H7C-NA-C 10 (1990). If, prior to its amendment in 2001, Article 19 had required the Postal Service to provide an explanation for each change and a statement of the impact on the bargaining unit, those words and phrases would have been present in Article 19. As Arbitrator Snow stated in 1990:

Article 19 does not, by its terms, contemplate negotiation. It contemplates an expedited process by which the Employer may quickly direct its supervisory personnel,

and the Union, as quickly, may directly arbitrate any unfair consequence of the Employer's action. The process requires little communication. It is a formal process. It obviously has been designed for speed.

The Postal Service further argues that a past practice has developed and the Union has accepted as Article 19 notice a letter sent as a matter of courtesy or general interest. The Postal Services sends over a notice of general interest advising that changes are being made and the Union determines whether or not it believes that the changes directly relate to wages, hours or working conditions of bargaining unit members. The Postal Service stresses that it has no obligation to provide notice to the Union on changes not related or only indirectly related to APWU wages, hours or working conditions. Even if not required, however, the April 24, 1998 letter and draft copy of ELM 13 served as full notice of all ELM changes. The Union's actions confirm that it treated that letter as notice pursuant to Article 19 and availed itself of the protections afforded by the Article 19 process. While the parties may not agree as to which changes directly relate to wages, hours or working conditions of APWU members, the difference of opinion does not undermine the Article 19 process, which is designed to accommodate differences of opinion. The Article 19 process was followed in this case, the Postal Service asserts, and the Union's appeal should be denied.

The Postal Service also insists it complied with the July 13, 1992 pre-arbitration settlement agreement cited in the Union's appeal because each chapter of ELM 13 was provided to

the Union in advance of publication. The Postal Service argues there is no support for the Union's contention that this settlement requires the Postal Service to send only one chapter of the ELM at a time.

In response to the Union's unfair labor practice charge filed on June 25, 1998, which has been *Collyerized* by the NLRB, the Postal Service contends that the Union waived its right under the NLRA to bargain over mid-contract changes that directly relate to wages, hours or working conditions when it agreed to incorporate Article 19 into the parties' collective bargaining agreement. Moreover, the Postal Service acted in good faith and even offered to meet with the Union after the filing of the appeal to arbitration and the filing of the ULP charge. In contrast, the Postal Service maintains, the Union did not act in good faith under Article 19 when it failed to prepare for the June 9 meeting and then used the Article 19 process to unfairly extend the Article 19 time limits. The Union had no justification for filing a charge with the NLRB when its own actions were less than pure.

The Postal Service asserts that the grievance should be denied in its entirety. Even if the Arbitrator were to find a "notice" violation, no remedy is warranted as the Union achieved the "ruling" it seeks in this case in the interest arbitration before Arbitrator Goldberg. If the Arbitrator, nonetheless, were to decide a remedy is warranted, it should be limited to those specific provisions of the ELM raised by the Union during the June 9, 1998 meeting. The Postal Service stresses that the Union demonstrated in preparation for this

arbitration that it was not impossible for it to comply with the time limits of Article 19. It was just unwilling to devote the appropriate resources to do so in 1998.

UNION POSITION

The Union stresses that it is entitled to the prescribed Article 19 notification in order to review proposed changes and to discuss those changes with the Postal Service at least 60 days prior to their publication. In the event the Union determines the changes violate the National Agreement including Article 19, it has a right to submit the dispute to arbitration.

In this case, by letter dated April 24, 1998 the Postal Service sent the Union an entire new version of the ELM, which is a thick binder of provisions covering every aspect of labor and employment in the Postal Service. The Postal Service made numerous changes to provisions in ELM 12 in the nine-year period between ELM 12's publication in 1989 and the publication of ELM 13 in 1998. These changes were published in Postal Bulletins and subsequently posted on the Postal Service's internal IntraNet. The Union stresses there was nothing to prevent the Postal Service from giving the Union Article 19 notice at least 60 days before issuance of these various ELM changes, yet it did not do so.

The Union asserts at no time did the Postal Service take the position or state in its transmittal letter that the ELM 13 draft document it submitted to the Union in April 1998

constituted Article 19 notification. Indeed, the Postal Service's January 21, 1999 letter -- denying that publication of ELM 13 invoked the notice provisions of Article 19 -- makes it abundantly clear this was not the case. The Postal Service's contention that the April 24, 1998 letter constituted Article 19 notification was raised for the first time at the arbitration hearing. Not only is this a new argument, which is prohibited in arbitration, but it is belied by the correspondence and should be rejected.

The Postal Service made approximately 500 changes in the new edition of the ELM. The Union specifically and repeatedly asked the Postal Service to provide evidence of prior notification and to state the purpose and impact on bargaining unit employees of these changes. The Postal Service never produced anything responsive to this request.

The Union asserts that it is obvious that work-related rules such as those found in the ELM are mandatory subjects of bargaining under the NLRA. Although Article 19 does not envision full-scale bargaining before changes are made to handbooks, manuals and published regulations, in order to bypass the statutory obligation to engage in full-scale bargaining the Postal Service must actually comply with Article 19. The Postal Service failed to do so. Accordingly, by making changes without either bargaining with the Union or complying with Article 19, the Postal Service is in violation of the prohibition of unilateral changes under Section 8(a)(5) of the NLRA. The Postal Service also improperly made mid-term modifications to Article 19, by claiming the right to reverse the Article 19

process to permit it to publish changes first and provide notice and information, and hold meetings, later.

The Union further maintains that the Postal Service violated the 1992 pre-arbitration settlement, which resolved the disputes over issuance of ELM 11 and ELM 12, by failing to send the Union proposed ELM 13 changes one chapter at a time, at least 60 days prior to issuance. The Postal Service thereby prevented the Union from viewing the changes in a systematic way -- a key problem addressed in the settlement. The Postal Service basically repeated what it did back in 1983 and again in 1988 when it engaged in a "document dump" by sending the Union an entire ELM edition at one time. That conduct was utterly unreasonable and is the reason for the 1992 settlement. If all the Postal Service was required to do was send the entire ELM with all of its chapters to the Union, the phrase "each chapter" in the settlement would be rendered meaningless. Read in context of the problem addressed in the settlement, the proper interpretation of this phrase is clear -- the Postal Service was obliged to send the Union one chapter at a time.

The Union also contends that the Postal Service violated the implied covenant of good faith and fair dealing. The Postal Service maintains that the Article 19 clock started to run on April 24, 1998, when the Postal Service dumped the entire ELM 13 on the Union, obviously leaving insufficient time for it to review the entire ELM 13. This tactic constituted bad faith on the Postal Service's part. After the Union received this massive document, the parties met on June 9, 1998. During that meeting the Union protested the Postal Service's action and

requested it delay issuing ELM 13 until the parties had an opportunity to discuss the various changes. The Union requested the Postal Service specify the changes, identifying those which it had previously provided notice to the Union, and specify the purpose and impact on employees of the changes. The Postal Service's failure to provide any of this information does not meet the duty of good faith and cooperation implied in the National Agreement.

The Union denies that this grievance is moot, as asserted by the Postal Service. There is no arbitral or other doctrinal support for the argument that an interest arbitration award renders a meritorious dispute moot, even though the dispute was cited to the interest arbitration panel in support of the Union's request for adding clarifying language to the National Agreement. The Union's argument before the interest arbitration panel was that the Postal Service had failed in its pre-existing duty to comply with the notification provisions of Article 19 in a meaningful way. It was to achieve that clarification that the Union proposed additional language, some of which was included in the 2001 Goldlberg Award. Referring to the Union publications cited by the Postal Service as evidence that the Union acknowledged it had obtained new rights through the 2001 revisions to Article 19, the Union points out that a communication to the general membership, which attempted to place the award in the most favorable light possible within the confines of a short article, hardly could be expected to distinguish between new rights and clarification of existing rights.

The Union insists it is entitled to a substantial remedy in this case. The standard remedies for unilateral changes under the NLRA are that the employer cease and desist from violating the Act in this or any like or related manner, and, at the Union's option, restore the status quo before the unilateral changes. In addition, the employer must make any affected employees whole. The right to require a return to the status quo is an important element in restoring the Union's bargaining power after the passage of so much time and the publication of subsequent ELM editions, to enable post-change negotiations to arrive at a reasonable compromise. Restoration of the status quo is particularly important in a case like this, because it is necessary to restore the Union's bargaining power after the passage of so much time and the publication of subsequent ELM editions.

The Union asserts that the contractual remedies are similar. In the specific context of this case, where the Postal Service has "dumped" an entire edition of the ELM on the Union, refused to delay publication, and failed to demonstrate when, if ever, it gave the Union prior Article 19 notification or explain the intent and impact on employees of the changes, additional remedies which comport with good faith dealings are needed. In this regard, the Union has provided a lengthy, detailed statement of its requested remedy.

FINDINGS

The 2001 Goldberg Interest Arbitration Award does not render this 1998 grievance moot. The Union was successful in

getting some of the additional language it sought to have included in Article 19 -- in particular the requirement that the Postal Service provide a narrative explanation of the purpose and impact on employees of proposed changes. But it did so without prejudice to its position as to what the existing contract required, and its Director of Industrial Relations, Greg Bell, did assert that the existing contract required such an explanation. The Union's presentation to Arbitrator Goldberg, however, made clear that was not how the Postal Service had applied Article 19.

The Union contends that the Postal Service should be barred from claiming that its April 24, 1998 transmittal of a draft ELM 13 constituted Article 19 notice because that claim first was raised at arbitration. But this is an appeal under Article 19, not an Article 15 grievance. There was no Step 4 grievance meeting prior to arbitration, nor did Article 19, at that time, require the parties to file statements as to their respective understanding of the precise issues involved. After the Union filed its appeal to arbitration, the next contractual step was arbitration.

The Union further argues that correspondence from the Postal Service makes clear that the Postal Service did not consider its April 24, 1998 transmittal to constitute Article 19 notice. In its January 21, 1999 letter the Postal Service states that it does not agree that printing of ELM 13 required Article 19 notification for the reasons it cited. But the Postal Service goes on to state that since the matter was in the

grievance-arbitration procedure any further comment was "inappropriate".

The April 24, 1998 transmittal letter was sent by a Manager of Labor Relations to the APWU President. It states:

Enclosed is the entire text of ELM Issue 13. While a number of changes in Issue 13 do not relate to bargaining unit policies or procedures, it is forwarded in its entirety as both a courtesy and in the spirit of compliance with the July 13, 1992 settlement on Issues 11 and 12 of the ELM.

The letter goes on to state that the changes and brief explanations thereof are included in the Summary of Changes provided by the Postal Service. In both the April 24, 1998 letter and subsequent correspondence, the Postal Service indicates that -- except for cosmetic changes -- changes between the print version of ELM 12 and the draft version of ELM 13 it was providing to the Union previously had been issued in Postal Bulletins or some other form, after which they had been incorporated into the IntraNet version of the ELM posted on line.

The Union stresses, however, that the Postal Service never documented its repeated assertions that it had notified the Union of changes that had been issued prior to April 24, 1998 that directly related to APWU wages, hours or working conditions. The Union acknowledges it received notice of some of these changes, but not others that it identified at arbitration. Moreover, the Union maintains, the Postal Service

failed to properly state the purpose and impact on employees of those changes as well as changes included for the first time in the print version of ELM 13 -- changes the Postal Service claims were cosmetic only. The Union also insists transmittal of the entire draft ELM 13 violated the 1992 pre-arbitration settlement agreement, which it asserts required the Postal Service to provide draft chapters of ELM 13 one chapter at a time.¹

I will first address the 1992 settlement, which provides:

5. Each Chapter of ELM Issue 13 will be provided to the Unions in advance of publication.

Notably, this provision does not state one chapter at a time, which the parties easily could have done if that was their intent.² There is no direct testimony or other evidence regarding the 1992 settlement other than the agreement itself and the two grievances that were resolved by the settlement. It appears that the Postal Service had sent the Union printed copies of ELM 11 and 12 only upon their publication or issuance -- not 60 days in advance -- which undercuts the Union's argument that the only reasonable interpretation of this provision is the one it asserts. In sum, I do not find a sound

¹ Parenthetically, I note that Arbitrator Goldberg in 2001 did not adopt the Union's proposal to include a general requirement to that effect in Article 19. For reasons already stated, that does not preclude the Union from arguing that the 1992 settlement did require that as to ELM 13.

² Even that would have raised questions as to when another chapter could be sent.

basis on which to read into the 1992 settlement a requirement that only one chapter of ELM 13 be sent at a time.

I also am not persuaded that sending over a draft of the entire ELM 13 at one time violated an implied covenant of good faith and fair dealing, provided the Postal Service flagged the changes. While the Union has identified some changes that were not so identified, there has been no showing that this was intentional or that the unidentified changes were sufficiently significant as to justify finding a failure by the Postal Service to have acted in good faith.

The Union argues that Article 19 of the 1994-1998 National Agreement in part required the Postal Service to provide as part of its Article 19 notice a statement of purpose and impact on the bargaining unit. As already determined, this argument is not mooted, at least as to ELM 13, by the 2001 Goldberg Award's revision of Article 19 to include such a requirement. While there was no language in Article 19 requiring this, prior to the Goldberg Award, the Union argues such a statement was an implicit requirement under the 1994-1998 and earlier National Agreements. The Union claims it needs such a statement to perform its duty as exclusive bargaining unit representative.

The Postal Service stresses, however, that this was not the parties' practice, and points to language in earlier national arbitration awards that generally state that Article 19's requirements are not ambiguous and that the Article 19 process is a formal process that requires little communication.

The Postal Service further notes that the Union can request a meeting to discuss proposed changes at which the Union can ask questions relating to purpose and impact.

The operation of Article 19 prior to 2001 obviously was a sore point for the Union. In the absence of evidence that statements of purpose and impact on the bargaining unit had been provided in the period since Article 19 notice first was included in the National Agreement in 1973, however, I am not persuaded that such a requirement was an inherent part of Article 19 prior to its revision in the 2001 Goldberg Award.

Article 19 of the 1994-1998 National Agreement does state, however, that the Postal Service is to provide: "Notice of such proposed changes that directly relate to wages, hours, or working conditions...." This requires the Postal Service to identify the specific changes it is proposing, particularly when it proposes to revise an entire handbook or manual.³ The Postal Service purported to do that in this case, but it did not rebut the Union's evidence that there were changes in ELM 13 that directly relate to wages, hours or working conditions which it failed to flag or identify. Moreover, as previously noted, the Postal Service failed to substantiate its claim that it had provided timely and appropriate Article 19 notice of changes it had published in the Postal Bulletin or elsewhere and then

³ Obviously, there may be disagreement as to whether a particular change directly relates to wages, hours or working conditions, so that the Postal Service cannot be faulted for providing notice of changes it may not consider to be covered by Article 19 to protect itself from later being found in arbitration to have failed to provide the required notice.

incorporated into the IntraNet version of the ELM prior to April 24, 1998.

The 2001 Goldberg Award responded to the Union's concerns regarding Article 19 notice, at least prospectively. Other editions of the ELM subsequently have been issued in the decade it has taken this case to reach arbitration. Taking into account the parties' agreement in Paragraph 3 of the 1992 pre-arbitration settlement, I find that the appropriate contractual remedy under all relevant circumstances is to permit the Union to challenge in arbitration any of the changes incorporated in ELM 13 that either were implemented prior to April 24, 1998 -- with the exception of those changes the Union acknowledged receiving 60 days' advance notice of -- or those first included in ELM 13 that were not flagged or identified in the April 24, 1998 transmittal, to the extent the Union believes the substance of those changes violated the 1994-1998 National Agreement, including Article 19. The Union may do so by providing notice to the Postal Service of any such changes that it elects to challenge within 60 days of its receipt of this decision. Any such challenge shall be treated as if a part of the Union's June 19, 1998 appeal to arbitration, and I retain jurisdiction to rule thereon.

As to the unfair labor practice charge deferred to arbitration by the NLRB, the Postal Service contends that the Union in Article 19 waived its right to bargain over mid-term changes to handbooks, manuals and published regulations. The Union responds that this waiver is conditional on Postal Service compliance with Article 19's procedures.

To the extent this decision has found that the Postal Service failed to provide proper notification of certain changes under Article 19, it would appear that also constituted a violation of Section 8(a)(5) of the NLRA because the Union's waiver of its right to bargain was qualified by the notice provisions of Article 19. It is worth stressing, however, that the Postal Service has not been shown to have repudiated by words or actions its notice obligation under Article 19, even if it failed in certain instances to comply therewith. Given all the circumstances in this particular case -- including the passage of more than a decade, the revisions of Article 19 that have been made in the interim, subsequent publication of several further editions of the ELM that were subject to the revised provisions of Article 19, and the lack of a showing that the changes in ELM 13 that were not properly notified to the Union had a significant impact on the APWU bargaining unit -- I conclude that the contractual remedy already provided in this decision and Award also is an appropriate remedy for any violation of Section 8(a)(5) of the NLRA that occurred in this instance.

AWARD

The matters raised in this Article 19 proceeding are resolved on the basis set forth in the above Findings.



Shyam Das, Arbitrator