

C#16292

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration)
between) GRIEVANCE: Lump Sum Payment
NATIONAL ASSOCIATION OF) under the Stark
LETTER CARRIERS) Award
and) CASE NO.: Q94N-4Q-C 96092491
UNITED STATES POSTAL SERVICE)

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Mr. Kevin B. Rachel
For the Union: Mr. Keith E. Secular

PLACE OF HEARING: Washington, D.C.

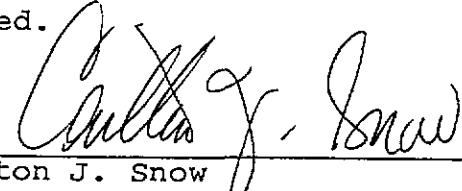
DATE OF HEARING: September 27, 1996

POST-HEARING BRIEFS: November 25, 1996

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that lump sum provisions of the Stark Award apply to Transitional Employees and that all Transitional Employees who were covered by the provision and not serving an initial probationary period shall be made whole. There is no award of interest in this case. The arbitrator shall retain jurisdiction to resolve any remedial issues in this case. It is so ordered and awarded.

Date: February 22, 1997



Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
BETWEEN)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS)
AND)
UNITED STATES POSTAL SERVICE)
(Lump Sum Payment Under the)
Stark Award))
(Case No. Q94N-4Q-C 96092491))
ANALYSIS AND AWARD
Carlton J. Snow
Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to collective bargaining agreements between the parties effective from 1990-94 and 1994-98. A hearing occurred on September 27, 1996 in a conference room of Postal Headquarters located at 955 L'Enfant Plaza S.W. in Washington, D.C. Mr. Kevin B. Rachel, Labor Relations Counsel, represented the United States Postal Service. Mr. Keith E. Secular of the Cohen, Weiss & Simon law firm in New York City represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

Ms. Donna Ferguson of Diversified Reporting Services, Inc. reported the proceedings for the parties and submitted a transcript of 91 pages.

The parties stipulated that the matter properly had been submitted to arbitration and that there were no challenges to the substantive or procedural arbitrability of the dispute. The arbitrator officially closed the hearing on November 25, 1996 after receipt of the final post-hearing brief in the matter. Influenza delayed preparation of the arbitration report.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

Are Transitional Employees entitled to two lump sum cash payments provided by the Stark arbitration award? If so, what shall the remedy be?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 9 - SALARIES AND WAGES

Section 11 - NALC Transitional Employees

During the term of the 1990 Agreement, NALC transitional employees' hourly rate will be as provided in this section.

- A. Transitional employees hired during the life of this agreement will be hired at Level 5, Step A, part-time flexible employee base hourly rate.
- B. Transitional employees will be paid at Step A. of the part-time flexible employee base hourly rate of the position to which they are assigned.

IV. STATEMENT OF FACTS

This dispute arose in an effort by the parties to resolve a disagreement about the proper application to Transitional Employees of certain economic provisions in an arbitration decision rendered by the Stark Interest Arbitration Board on August 19, 1995. The 1990-94 collective bargaining agreement between the parties expired on November 20, 1994. On August 31, 1994, negotiations for a new agreement already had begun. When the negotiations failed to be productive, the parties entered into a dispute resolution process set forth in the Postal Reorganization Act.

The first stage of the process consisted of mediation and factfinding conducted by Mr. Rolf Valtin, past president of the National Academy of Arbitrators. Mr. Valtin had recent experience in the industry as a result of serving

on an arbitration board in connection with a dispute concerning health benefit costs. (See, Joint Exhibit No. 4, p. 3). After meeting on a daily basis for almost five weeks, the parties terminated their efforts on April 4, 1995. In his mediation-factfinding report, Mr. Valtin described a theme of his efforts. He stated:

It is a report, in other words, which is designed to induce the parties to return to the negotiating table with modified stances on those issues and thus with a mind set which will facilitate the reaching of a new Agreement without recourse to arbitration. (See, Union's Exhibit No. 5, p. 3).

Regarding economic issues, Mr. Valtin suggested that a new contract should maintain the status quo with regard to Cost-Of-Living Adjustments and that a general increase should be provided employees in the form of three "lump sum increases" over a period of years, the first to be paid as soon as practicable on ratification of the agreement. (See, Joint Exhibit No. 4, pp. 5-6).

Unfortunately, Mr. Valtin's insightful observations failed to coax the parties into reaching an agreement, and the full range of economic and noneconomic issues brought to the bargaining table proceeded to the tripartite Stark Arbitration Board. Mr. Arthur Stark, past president of the National Academy of Arbitrators, chaired the three member board and offered a 40-page opinion. Joining Mr. Stark on the Board was the management representative, Mr. Joseph J. Mahon, Jr., who submitted three pages of separate comments, and Mr. Bruce H. Simon, who represented the Union on the Board. Both of the partisan Board members participated in

the Valtin mediation/factfinding effort and were members of arbitration panels which heard interest arbitration disputes in 1984 (the Kerr Panel) and in 1991 (the Mittenthal Panel). In addition to comments by Chairman Arthur Stark and Member Joseph Mahon on August 19, 1995, the Stark Arbitration Board issued a 23-page decision signed by all members which stated that:

The terms and conditions of the parties' 1990-94 Agreement shall remain in effect until the expiration of the new Agreement except for the changes which are set forth below. (See, Joint Exhibit No. 4, p. 1, Decision of Board).

The parties themselves were charged with incorporating into their agreement changes made by the decision of the Stark Arbitration Board. During the process of incorporation, there arose a dispute involving a question about certain economic provisions of the Stark Award with regard to Transitional Employees. The dispute centered on whether Transitional Employees are entitled to benefit from the "lump sum" provision set forth under "Wages" in the decision of the Stark Arbitration Board. (See, Joint Exhibit No. 4, pp. 1-2, Decision of the Board).

On July 24, 1996, the parties met to discuss the issue of lump sum applicability to Transitional Employees. They were unable to resolve the dispute. The parties agreed to consider this discussion as a Step 4 meeting. (See, Joint Exhibit No. 3). On September 19, 1996, the Employer denied the Step 4 grievance. (See, Joint Exhibit No. 3). When the

parties were unable to resolve their differences, the matter proceeded to "rights" arbitration pursuant to their collective bargaining agreement.

V. POSITION OF THE PARTIES

A. The Union

The Union contends that "lump sum" provisions in the decision of the Stark Arbitration Board apply to Transitional Employees. It is the position of the Union that, because there is no language excepting Transitional Employees, there is no logic or rationale for excluding Transitional Employees from the contractual benefits. According to the Union, support for this conclusion is found in language of the "lump sum" provision in the decision of the Stark Arbitration Board as well as the negotiation and arbitration context from which the award emerged. The Union argues that, because the award provides a lump sum payment to all "nonprobationary hourly rate employees," the parties and the Arbitration Board intended for Transitional Employees to receive the lump sum payment. Moreover, the Union contends that the decision of the Stark Arbitration Board neither limited lump sum payments to career employees nor specifically excluded Transitional Employees from such payment.

The Union rejects management's contention that Transitional Employees are deemed to be excluded from all generic

references to "employees." According to the Union, such a presumption is not warranted as a general rule in understanding National Agreements. Nor does the Union believe there is any basis for assuming that the Stark Arbitration Board followed such a stylized rule of drafting in crafting the interest arbitration decision. It is the contention of the Union no evidence supports a conclusion that the Stark Arbitration Board was aware of this alleged presumption. Nor does the Union believe that any proof showed the Stark Arbitration Board actually relied on such a presumption. Moreover, the Union argues that Union negotiators themselves certainly were not aware of such a drafting convention.

The Union contends that the Mittenthal Award of June 12, 1991 supports conclusions urged by the Union in this case. It is the belief of the Union that the Mittenthal Award shows the following points that are relevant in this particular proceeding:

- (1) All employees not in probationary status were eligible for some form of a lump sum payment; and
- (2) At the time, there were no Transitional Employees in the workforce on June 12, 1991.

The Union also emphasizes the fact that the Mittenthal Award of January, 1992, which helped resolve entitlements of Transitional Employees, awarded Transitional Employees "the base hourly rate." By awarding "base pay," the Mittenthal decision allegedly guaranteed Transitional Employees the same basic pay increases that career employees received.

The Union argues that, although a distinction between "base" and "basic" pay is now abolished, use of the distinction existing at that time demonstrates a linkage between the pay of Transitional Employees and career employees.

The Union argues that there is no support for a presumption excluding Transitional Employees from generally applicable contractual or interest arbitration provisions of the Stark Award. The Union rejects the Employer's contention that complete and exclusive terms covering Transitional Employees are contained in the 1990-94 National Agreement. The Union does not agree that, because the Stark Award did not explicitly modify provisions regarding Transitional Employees, a search for Transitional Employee rights begins and ends with the National Agreement. It is the assertion of the Union that many proposals covering Transitional Employees were placed before the Stark Arbitration Board and that, because of an absence of language dealing with Transitional Employees, it is more appropriate to interpret language in the Stark Award as covering the entire bargaining unit. The Union contends that management's theory of exclusion should not be approached as an impenetrable fortress. The Union argues that, although such an exclusionary theory has been advanced in many "rights" arbitration disputes regarding Transitional Employees, it consistently has been rejected by arbitrators.

B. The Employer

It is the position of the Employer that the "transitional employee" classification has caused much disruption between the parties simply because the Union is unwilling to accept the fact that Transitional Employees presumptively are not entitled to the same economic benefits as "career" employees. The Employer argues that Transitional Employees do not enjoy the same salaries, fringe benefits, and general working conditions of career employees and that the Union is in a state of denial with regard to this fundamental difference of employe classifications.

The Employer argues that a fundamental principle of "transitional employee" status is that rights and benefits of Transitional Employees are merely constrained by the incorporation of the January 19, 1992 Mittenthal Award into the National Agreement. (See, Joint Exhibit No. 2, pp. 241-261). Management argues that this structural framework is designed to treat Transitional Employees as members of a unique employe classification, and the agreement allegedly makes clear that no contractual language is generally applicable to Transitional Employees. Portions of the National Agreement apply to Transitional Employees only if enabling language is explicitly included in the agreement of the parties. It is the position of the Employer that this fundamental difference in the applicability of contractual provisions creates a presumption which means that in all situations Transitional Employees are to be treated

differently from career employees. According to the Employer, this basic presumption is at the core of understanding the Stark decision and the applicability of lump sum payments to Transitional Employees. The Employer contends that the position taken by the Union in this "rights" dispute is merely an attempt to expand contractual rights of Transitional Employees beyond the scope of the Stark Award.

The Employer also argues that an arbitration decision in the "four hour call back" dispute confirmed a basic presumption that Transitional Employees enjoy limited rights under the parties' National Agreement. (See, Employer's Exhibit No. 1). Management argues the "four-hour-call back" decision firmly established the principle that Transitional Employees are entitled only to those rights and benefits explicitly set forth in the parties' agreement. It is the contention of the Employer this principle of itself is all that is needed to refute the Union's theory of the case because the Union never argued that the Stark Award expressly applies the "lump sum" provision to Transitional Employees. The Employer maintains that the Union inappropriately is attempting to impute to management the task of proving that language in the Stark Award carved out an exception that excluded Transitional Employees from the award. It is the belief of the Employer, however, that the exact opposite is what is warranted by the already established principle. The Employer responds that it is the Union which must prove an intention on the part of the Stark Arbitration Board to

grant lump sum payments to Transitional Employees. Since the Union allegedly failed to do so, the Employer concludes that this grievance must be denied.

Alternatively, the Employer argues that a review of the Stark Award, an examination of the history of language used in the award, and the negotiation context of the "transitional employee" classification all prove there was no intent to provide Transitional Employees with lump sum payments.

Moreover, the Employer believes the fact that economic benefits for Transitional Employees generally are much lower than those of career employees provides a logical basis on which to conclude that Transitional Employees should be denied the lump sum payments. According to the Employer, it is not surprising that the Stark Award would grant fewer benefits to Transitional Employees because such a conclusion would be consistent with their lower economic benefits.

The Employer argues that comments by Chairman Arthur Stark in his individual comments in the decision, entitled "Opinion of Chairman," advanced management's argument that neither the parties nor the interest arbitrators intended for Transitional Employees to enjoy the benefit of the "lump sum" provision. Moreover, the "lump sum" provisions of the Stark Award allegedly were designed like and represent a continuation of Article 9.4 of the 1990-94 agreement, a contractual provision that did not apply to Transitional Employees. Because the Stark Award did not explicitly modify provisions of Article 9.11 which outlines benefits for Transitional

Employees, the Employer concludes that there is no reason to apply the new "lump sum" provision from the Stark Award to Transitional Employees.

VI. ANALYSIS

A. A Helpful Principle of Contract Interpretation

A difference exists between construing and interpreting agreements. While there is no bright line between the two concepts, interpretation is a process for determining the meaning given by the parties to verbiage in their agreement. The concept of construction refers to a process that determines the effect of the contract's operation on the parties. The process of construction encompasses the legal effect of the agreement, while the process of interpretation seeks to determine the true meaning of words in an agreement. As one scholar stated:

Construction, which may be usefully distinguished from interpretation, is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to a specific situation. Construction may be applicable along with interpretation, or it may take over when interpretation wholly or partly fails. (See, Patterson, 64 Colum. L. Rev. 832, 835 (1964)).

Both the great contract scholars, Corbin and Williston, defined the process of construction in terms of determining the legal effect and meaning of an entire contract. (See, Corbin on Contracts, § 534 (1960), and Williston on Contracts, § 202 (1961)).

An ideal world of linguistic precision would allow a contract reader "to retire into that lawyer's paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but

but with fullness and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes." (See, Thayer, A Treatise on Evidence, 428-429 (1898)). Such a linguistic paradise, however, is rarely found, and ambiguities in a document often must be supplemented by extrinsic evidence in order to show the meaning of a contract. As parties become more sophisticated in negotiation, about word usage, and as linguists, a fixed and plain meaning of an agreement becomes less certain.

The case before the arbitrator is one in which the true meaning of the parties cannot be found by poring over the four corners of their collective bargaining agreement. Extrinsic evidence has been offered by both parties as a source of determining their contractual intent. Evidence offered by the parties themselves has made it unnecessary to determine whether the agreement contained a latent ambiguity that permitted the arbitrator to consider evidence of surrounding circumstances as an interpretive aid. Both parties have offered extrinsic evidence to help the arbitrator better understand surrounding circumstances of the Stark Award.

At the heart of the dispute is a phrase set forth in the Stark Award, namely, "non-probationary hourly rate employees." (See, Joint Exhibit No. 4, pp. 1-2, Decision of Board). The plain and ordinary meaning of language used in the Stark Award must provide the departure point for the arbitrator's analysis. Words, however, must be seen in more

than their ordinary dictionary sense, and any private codes used by the parties in advance of making their agreement provide a context for interpreting the plain meaning of terms in their agreement. It is entirely possible that the transactional context of communication may limit the ordinary, dictionary use of words.

Focusing on extrinsic evidence requires a determination concerning the weight that evidence should be accorded. It also requires an examination of the principal purpose of the parties as they relied on extrinsic evidence to communicate their contractual meaning. As Restatement (Second) of Contracts makes clear, "if the principal purpose of the parties is ascertainable, it is given great weight." (See, § 202(1), p. 86 (1981)). It is important to emphasize that the parties intended the redrafted Article 9 in the 1994-98 agreement not to prejudice the position of either party with respect to the dispute before the arbitrator. Accordingly, Article 9 of the new agreement between the parties has been treated as essentially nonexistent. Only the Stark Award itself and other relevant extrinsic evidence have been considered in interpreting the parties' agreement. While data preceding the 1994-98 National Agreement have been evaluated, the primary focus of the arbitrator has been on the Stark Award alone.

B. Meaning of the Stark Award

In a section entitled "Wages," the Stark Award stated:

2. Wages

For 1994-95:

(1) All non-probationary full-time employees covered by the Agreement who are in a full-time regular pay status during the pay period immediately prior to the date of this Award shall receive a one-time cash payment, not to be included in basic pay, of \$950. This is in lieu of COLA and a percentage wage increase.

(2) Non-probationary hourly rate employees who have been paid for less than 2000 hours during the 26 pay periods prior to the date of this Award and who are in a pay status during the pay period immediately prior to the date of this Award shall receive a payment based on their number of paid hours during the period in accordance with the table contained in Article 9, Section 4.B. of the 1990-94 Agreement. This payment shall not become part of the employees' basic pay.

For 1995-96:

(1) For those grades and steps in effect during the term of the Agreement, the basic annual salary schedules, with proportional application to hourly rate employees, for those employees covered under the terms and conditions of the Agreement, shall be increased by an amount equal to 1.2% of the base annual salary for the applicable grade and step. (See, Joint Exhibit No. 4, pp. 1-2, Decision of Board, emphasis added).

Article 9.11 of the parties' National Agreement makes clear that Transitional Employees are "hourly rate employees." (See, Joint Exhibit No. 2, p. 258). Pursuant to Article 9.11, Transitional Employees were to be paid in accordance with the specified base hourly rate of a part-time flexible employee. The parties, of course, disagreed vigorously

regarding the significance of the language stating that only "non-probationary" employes may receive a lump sum award.

The phrase "probationary employee" is a term of art.

According to one source, it means:

Generally a new employee who is on trial status and attempting to establish a right to permanent status. During the probationary period, the individual usually does not have seniority rights and may be discharged without cause, except where the discharge is based on discrimination. The probationary period is designed to give the company an opportunity to find out whether the employee is qualified to carry on the work for which the individual was hired. (See, Roberts' Dictionary of Industrial Relations, 617 (1994)).

The term "probationary," as it is used in Article 12.1 of the parties' agreement, does not apply to Transitional Employees.

As used in Article 12.1, the reference to probationary employes was intended to curtail an employe's access to the grievance procedure during an initial period of employment.

As the parties agreed:

The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period, and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. (See, Joint Exhibit No. 2, p. 42).

The parties used the term "probationary employee" to encompass a process of giving employes a "trial run" during which time management retained the right to determine a person's capabilities while denying a probationary employe the right to use the grievance procedure. The parties agreed on a different approach to Transitional Employees. They agreed that:

Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual.

Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. (See, Joint Exhibit No. 2, p. 247, (emphasis added).

The parties found different meaning in the provision from the Mittenthal Award covering Transitional Employees. The Employer argued that, since the provision failed to make any explicit reference to the term "probationary period," there was no intent to establish such a period for Transitional Employees. Management argued that, since Transitional employees do not serve a probationary period, they, therefore, may not be "non-probationary" employees who qualify for a lump sum cash payment.

The Employer reasoned that use of the verbiage "non-probationary hourly rate employees" in the Stark Award was more than mere happenstance. Such language has a history to it. Management argued that a review of "lump sum" provisions in the Mittenthal Award of June, 1991 showed the source of language that later appeared in the Stark Award. According to management, the Stark Arbitration Board, in turn, crafted a "lump sum" provision that was rooted in Article 9 of the 1990-94 National Agreement between the parties. Moreover, management found significance in the fact that the prior provision applied only to career employees.

The Employer argued that there was no need to change Article 9 for the increases to apply. As the Employer viewed it, if the Stark Arbitration Board had wanted Transitional Employees to receive "lump sum" payments, the logical place to have inserted such a requirement would have been in Article 9, Section 11 of the agreement.

In the opinion of the Union, a straightforward reading of the Stark Award supports exactly the opposite conclusion, namely, that Transitional Employees are covered by the "lump sum" provision because such employes never serve a probationary period explicitly mentioned in the parties' agreement. In other words, they are always "non-probationary" employes, as the Stark Board of Arbitration used the term in its decision.

Neither construction of the parties' agreement provided a dispositive explanation of their contractual intent. A reading of the agreement more consistent with the totality of the language supports a conclusion that Transitional Employees, in fact, serve a probationary period during which they are scrutinized by management for an interim period before being granted access to the grievance procedure. The point is that, although laboring under more contractual restrictions, Transitional Employees enjoy access to the grievance procedure, provided they have completed 90 days of work or have been employed for 120 calendar days, whichever comes first. While a nonpretextual separation from service with the Employer is not grievable by a Transitional Employee, a pretextual separation is grievable. Moreover,

a removal may be tested in the grievance procedure by the standard of just cause, except that the concept of progressive discipline is not applicable. A Transitional Employee's guilt or innocence of alleged misconduct may be challenged in the parties' grievance procedure. Any Transitional employee, however, who failed to complete a probationary period would not be covered by the Stark Award.

An evaluation of the parties' 1990-94 National Agreement combined with language in the Stark Award supports a conclusion that Transitional Employees are entitled to the contractual protection of the "lump sum" provision. The Stark Award itself did not incorporate the "lump sum" provision into the parties' agreement interlinearly. Instead, the Stark Board of Arbitration drafted references to lump sum as a general award under the heading of "wages." This initial conclusion is premised primarily on a "four corners" interpretation of the Stark Award and the parties' existing collective bargaining agreement. To test the soundness of the conclusion, it is necessary to review extrinsic evidence submitted by the parties.

C. Use of An Interpretive Presumption

Since the "Transitional Employee" classification came into existence, a bevy of disputes has arisen between the parties regarding rights of Transitional Employees pursuant to the Mittenthal Award. Some disputes proceeded into arbitration when the parties failed to settle their differences at Step 4 of the grievance procedure. The parties have submitted a number of such decisions to the arbitrator as an aid to help interpret the Stark Award. The Employer argued that Transitional Employees do not receive rights and benefits under the parties' National Agreement unless there is an explicit grant to Transitional Employees by express language in the parties' agreement. Management argued that:

TEs are a special category within the bargaining unit, limited term non-career employees who do not enjoy the salary, fringe benefits, or working conditions of career, or as Article 7 refers to it, regular employees.

Rather, Transitional Employees are entitled to such provisions, such rights and benefits, such economic and non-economic provisions as are explicitly applied to them. (See, Tr. 40, emphasis added).

The Employer argued the existence of an interpretive presumption. According to the Employer, there exists a negative intent, a presumption that an article of the parties' agreement does not apply to Transitional Employees unless explicitly so stated. According to the Employer's theory of the case, there is a "drafting convention" overarching the parties' agreement of which both obviously were aware, making it completely binding on them and any arbitrator who might interpret their agreement. The Employer advanced

this argument a step further and posited that this "drafting convention" supplies the interpretive context for determining the meaning of the Stark Award. In other words, because Transitional Employees have not been explicitly provided "lump sum" benefits, they are not entitled to them. Moreover, management argued the Union is attempting to establish the converse proposition, namely, that Transitional Employees are entitled to economic benefits and working conditions of regular, career employees and, furthermore, that the burden of proof is on the Employer to disprove the applicability of such a presumption.

The Union rejected management's theory of the case and argued that "there is simply nothing in the award to justify carving out an exception for Transitional Employees." (See, Tr. 29). The Stark Arbitration Board had before it all the terms and conditions of members in the bargaining unit represented by the National Association of Letter Carriers, including Transitional Employees. Hence, the Union concluded that general language in the Stark Award warrants a finding that Transitional Employees need not be specifically included in order for them to be covered by the "lump sum" provision. The Union argued that the "lump sum" language of the Stark Award covered the entire bargaining unit, and that the decision of the Stark Board should be examined closely to determine whether Transitional Employees fall within its protection. There should be no presumption that the Stark Award excluded Transitional Employees by reference back to a previous agreement.

The Union's analysis made no attempt to establish an interpretive presumption one way or another and did not attempt to shift the burden of proof to management. What the Union contended was that general provisions of the Stark Award entitled "Wages" apply to all employes and that the "rights" arbitrator in this case must determine whether or not such provisions encompass Transitional Employees. The Employer failed to be persuasive in its contention that the Union sought to establish an interpretive presumption supporting an entitlement of Transitional Employees to all economic benefits and working conditions of regular employes.

It must be recalled that the Stark Board of Arbitration, in fact, modified certain articles and sections of the parties' collective bargaining agreement. Where it interlined such changes, the Stark Board of Arbitration included language stating that such provisions were applicable to Transitional Employees. For example, after setting forth a Memorandum of Understanding on the topic of leave-sharing, the Board concluded by stating that "the preceding Memorandum of Understanding, Leave-Sharing, applies to Transitional Employees." (See, Joint Exhibit No. 4, p. 19). Likewise, the Board, after changing Article 28, made clear that "the preceding Article 28 shall apply to Transitional Employees." (See, Joint Exhibit No. 4, p. 11). Those provisions were to be included in the parties' agreement as they stood. In contrast, provisions regarding "lump sum" payments were not drafted into separate sections of the parties' agreement but

were placed in the Decision of the Board as general provisions. The Employer failed to be persuasive that a drafting convention or interpretive presumption became so well established in the relationship of the parties it pervaded and controlled general provisions like those found in the "Wage" section of the Stark Award.

The Employer relied on an arbitration decision in the "Four-hour Work Rule" grievance as support for the interpretive presumption it espoused. In the "Four-Hour Work Rule" grievance, a dispute arose about the appropriate interpretation of Article 8.8.D of the parties' agreement. Unlike the present case before the arbitrator, the dispute about Article 8.8.D involved a contractual provision that specifically applied to Transitional Employees; while a separate provision on the same topic applied to regular employees. The parties expressly interlinedated a specific reference to Transitional Employees in Article 8.8.D of their agreement. (See, Joint Exhibit No. 2, p.24).

Part of the reason for the form of specific interlineation in the National Agreement was the fact that rights and benefits of Transitional Employees were determined after the 1990-94 National Agreement had been bargained. It was not until later that the Mittenthal panel separately determined rights and benefits of Transitional Employees. Once determined, the parties added material to the National Agreement. In this context, management argued that "what the Panel did not say must also be honored." (See, Tr. 50, emphasis added).

Some broad dictum in the "Four-Hour Work Rule" grievance did not create an absolute rule of interpretation that now must bind any reading of the Stark Award. While it is understandable that parties will extrapolate principles from prior decisions, such principles must be understood in view of the factual context from which they arose. In the "Four-Hour Work Rule" grievance, there were two contractual provisions covering the topic of call-back pay, one for "employees" and one specifically for "Transitional Employees." Some language found in the "Transitional Employee" provision did not exist in the provision covering "employees." It was reasonable to conclude that the Mittenthal Award of January, 1992 explicitly granted Transitional Employees certain rights through verbiage used in Article 8.8.D and that what the Mittenthal Panel did not say (meaning the same language in Article 8.8.C) should not be inferred into Article 8.8.D. Moreover, it would not have been logical to interpret two provisions on the same subject matter, but that were sufficiently different based on a straightforward interpretation, as two provisions that conveyed the same meaning.

The two cases are simply different. In the present case before the arbitrator, there exists one general provision and not two differently worded provisions that deal with Transitional Employees and other "employees" separately. In fact, this is one of the differences that distinguished the "NALC TE" situation from the "APWU TE" situation. The Stark Board of Arbitration had a determination before it

involving the entire bargaining unit.

The Employer referenced an earlier statement by the arbitrator to the effect that "in the Interest Arbitration Award, the panel members indicated that an existing contractual provision applied to Transitional Employees by including explicit language in the provision to that effect." (See, Tr. 48-49). According to the Employer, this statement defines the context for understanding the Stark Award. In other words, the Employer was reiterating its "negative presumption" principle of drafting. Although it is correct that the Mittenthal Award explicitly provided that certain existing articles were to be applied to Transitional Employees, it is equally correct that the parties incorporated the Interest Arbitration Award itself into their collective bargaining agreement. In fact, the portion of the award determined by this arbitrator to be the equivalent of a probationary period was part of the general incorporation. (See, Joint Exhibit No. 2, pp. 241-247). Even though this general framework exists in the parties' National Agreement, the arbitrator is not remaking that framework by concluding that the Stark Award's general provision regarding lump sums applies to Transitional Employees. (See, Tr. 49). The general incorporation of the January, 1992 Mittenthal Award supplied Transitional Employees with rights and benefits beyond those explicitly provided in the body of the National Agreement. Likewise, it is logical to review the general language of the Stark Award regarding wages to determine whether

Transitional Employees fell within its purview.

A review of past arbitration decisions involving Transitional Employees, while not fundamental to this analysis, supports a conclusion that Transitional Employees were not automatically excluded from the "lump sum" provision of the Stark Award. The "12-Hour Work Rule" decision showed that Transitional employees are not always limited to provisions that are explicitly set forth in the parties' National Agreement. In fact, the arbitrator interpreted the "transitional Employee" provision of Article 19 of the parties' agreement as providing no basis for sealing off Transitional Employees from handbook and manual provisions.

In other words, Article 19, in effect, incorporates handbook and manual provisions that logically connect or are consistent with other rights of Transitional Employees. Although in many instances rights of Transitional Employees are expressly delineated, there are rights and benefits that remain uncertain and may require later clarification. Such clarification is reached through agreement of the parties or, as occurred in the "12-Hour Work Limit Rule" case, by clarification from a third party neutral. Just as the arbitrator earlier concluded that any expansion of rights for Transitional Employees constitutes a *per se* inconsistency with the National Agreement, it is also reasonable to reject a presumption that the parties have adopted an interpretive principle that automatically determines the meaning of general provisions in the Stark Award without further analysis. As previously

observed, some rights of Transitional Employees have been found to be inextricably linked to provisions of the National Agreement which were not highlighted in the January, 1992 Mittenthal Award as being applicable to Transitional Employees. A decision involving the roll-in of COLAs for APWU Transitional Employees allowed a provision not specifically applicable to Transitional Employees to apply to them because "the agreement between the parties reached in 1991 expressly tied Transitional Employee pay to a particular wage scale established by the 1990 collective bargaining agreement." (See, Union's Exhibit No. 6, p. 27). The earlier decision demonstrated that, although drafting methods used by the January, 1992 Mittenthal Panel might be persuasive in limiting Transitional Employees to certain contractual provisions, Transitional Employees are not presumptively limited to those rights expressly granted. The "COLA roll-in" case involving APWU Transitional Employees taught that the January, 1992 Mittenthal Panel did not in all cases explicitly provide absolutely for every benefit that logically applied to Transitional Employees.

Finally, Arbitrator Mittenthal concluded in the "I.B. Saenz" case that parts of Article 16 in the parties' agreement applied to Transitional Employees even though the Interest Arbitration Award itself stated that Article 16 was one of those provisions not applying to Transitional Employees. (See, Case No. G90N-4G-D 93040395). The Saenz Decision demonstrated that analyzing the complex problem of

Transitional Employees in terms of presumptions, rebuttable presumptions, or *per se* rules does not illuminate the contractual intent of the parties. What is required is a careful weighing of the evidence in an effort to gain a reasonable understanding of the parties' principal purposes and motivation. In the presence of ambiguous language, there is a need to understand the circumstances of the transaction that show how a provision came to be adopted so that the meaning of contractual terms may be ascertained.

D. Surrounding Circumstances

When the Stark Board of Arbitration issued its decision, it was accompanied by a 40-page "Opinion of the Chairman" as well as three pages of separate comments by Mr. Mahon. In his insightful statement, Chairman Stark made the following comment regarding economic issues:

Too much time and effort have been spent by the parties in negotiations and arbitrations in recent years to warrant the elimination of the Transitional Employee category or a revision of the rates, benefits, or working conditions of such persons. Moreover, this small group of employees, numbering only about 1.5% of the career workforce in recent months should dwindle away to zero during the next few years. (See, Joint Exhibit No. 4, p. 35, emphasis added).

The Employer argued that such comments provided a helpful signal from Arbitrator Stark regarding Transitional Employees. Management argued the Stark Board of Arbitration clearly did

not intend to provide Transitional Employees with the benefit of lump sum payments, especially since Transitional Employees had not received lump sum payments in the past. To grant Transitional Employees such lump sum payments would be to revise their economic benefits and, accordingly, would contradict the express statement by Chairman Stark, according to the Employer.

The Union, however, saw the history of the parties rooted in a policy of equal treatment. Such equal treatment began when the Mittenthal Board in 1992 granted Transitional Employees the same compensatory adjustment previously awarded to career employees. Any decision by the Stark Board of Arbitration denying Transitional Employees the same economic benefits received by career employees would have been a significant deviation from the established policy of equal treatment. In effect, the Union met management's presumption of exclusion with a historical presumption of inclusion for Transition Employees with regard to relative economic rights of the two groups. It is reasonable to construe Arbitrator Stark's comments as standing for the proposition that no major change in policy was warranted with regard to issues affecting compensation for Transitional Employees.

"Purpose Interpretation" is a well-established common law rule in aid of contract interpretation. To the extent that it can be determined, the principal purpose of the parties is given great weight as an interpretive guideline. (See, e.g., New England Structures, 234 N.E.2d 888 (1968);

Hensler, 268 P.2d 12 (1964); and Spaulding, 76 N.E.2d 137 (1947)).

It is not certain precisely what purpose Arbitrator Stark had in mind by reference to "a revision of the rates, benefits, or working conditions" of Transitional Employees. (See, Joint Exhibit No. 4, p. 35). The Employer interpreted his reference as a rejection of any changes. The Union concluded that he referred to no change in the policy of equal treatment. It is probable Arbitrator Stark meant that there should be no redrafting of existing provisions by the Board of Arbitration with regard to economic rights of Transitional Employees. Such a statement lacked sufficient content to provide a definitive guideline or contractual purpose.

While lump sum payments provide Transitional Employees with an economic benefit, it is unclear whether the benefit, in fact, is "new" to them. Lump sum payments were by no means a new benefit established by the Stark Award. In fact, lump sum payments had been granted by the Mittenthal Award in the 1990-94 agreement under Article 9.4. Lump sum payments were given to employees who were "in pay status during the pay period immediately prior to the effective date of the one-time cash payment, i.e., June 15, 1991." (See, Joint Exhibit No. 2, p. 29).

It is important to note the date set forth in the Mittenthal Award. On the same date, the "transitional employee" classification came into existence. The Mittenthal Board of Arbitration understandably did not assess the propriety of including a disclaimer saying that the provision was applicable to

Transitional Employees because no such classification existed that was eligible for the benefits. The lump sums described in the Mittenthal Award were effective immediately and were to be a one-time cash payment. They were part of an award applicable to all existing employes that qualified under specific terms of the provision. The Mittenthal Board of Arbitration did not foresee the use of lump sum payments by the Stark Board of Arbitration in a decision that would apply to all employes, including Transitional Employees. The Mittenthal Panel did not intend, by the fact that Transitional Employees were not specifically included in the "lump sum" provision, to decide whether Transitional Employees were entitled to lump sums then or in the present case. It simply would not have been sensible for the Mittenthal Award to provide that lump sums were applicable to Transitional Employees, and the fact that the Mittenthal Award failed to present such an explicit benefit was not dispositive in this case. Moreover, the Stark Board of Arbitration did not revise these existing provisions in its award, provisions which were not accompanied by a statement of applicability to Transitional Employees. As previously observed, the Stark Award drafted a general provision dealing with wages.

Nor should it be forgotten that, prior to hearings by the Stark Board of Arbitration, the parties engaged in mediation/factfinding under the expert guidance of Arbitrator Rolf Valtin. Although no agreement resulted from this process, Mr. Valtin's report offered insight into the underlying idea

of lump sum payments. He stated:

Prompted by reasonable balancing of these factors, in my judgment, is the use of lump-sum payments (obviously in appropriate amounts). Lump-sum payments constitute a device by which money can be put in workers' pockets while keeping down the wage rate which is repeatedly applied, currently and in years to come, in arriving at what is to be paid under overtime and various fringe-benefit requirements. The unions' opposition to the use of lump-sum payments is easily understandable, but the fact is that lump-sum payments constitute an imaginative compromise by which to increase pay without the compounding effect. (See, Union's Exhibit No. 5, p. 15, emphasis added.)

Expanding on the Valtin theme, Arbitrator Stark noted that "lump sum" payments are not new to the parties' relationship (although more frequently appearing in awards involving other bargaining units) and can have the effect of reducing the long-run impact of increased labor costs (which comprise more than 80% of the cost of doing business)." (See, Joint Exhibit No. 4, p. 38). The significance of the Valtin-Stark statements is that they demonstrated the purpose of lump sum payments. Such payments constituted the sort of "imaginative compromise" that replaced compounding economic increases such as the four increases called for in Article 9.1 of the parties' agreement. (See, Joint Exhibit No. 2, pp. 24-5). Those increases changed "the basic annual salary schedule, with the personal application to hourly rate employees." (See, Joint Exhibit No. 2, p. 24). Although those provisions were not explicitly made applicable to Transitional Employees because Transitional Employees are paid in accordance with Step A of the part-time flexible base hourly rate of the

position to which they are assigned, the increases, nevertheless, tied in to their wages.

Lump sum payments constituted a compromise, one sought by management. The classification of Transitional Employees was created to permit flexibility during a transition to automation and not to create a permanent two-tier wage structure. Lump sum payments properly addressed a general wage problem for the parties who were attempting to remain competitive in a global economy. This aspect of the parties' bargaining history gave further support to a conclusion that the parties intended to apply lump sum provisions to Transitional Employees, since such benefits are replacing provisions which tie in to wages of Transitional Employees.

E. Interest on the Award

The Union sought a grant of interest as a part of a "make whole" remedy. It is the contention of the Union that an award of interest is especially appropriate in a case of this sort. Since management withheld payments due to employes for services already rendered and itself had access to the funds, the Employer allegedly has been unjustly enriched.

As a general principle, "a person who has been unjustly enriched at the expense of another is required to make restitution." (See, Restatement of Restitution, §1). There, however, are exceptions to the general principle, and restitution of

a benefit may not be required if the benefit is not measurable or has been given gratuitously or has been conferred officially. (See, Wade, 19 Vand. L. Rev. 1183 (1966)).

The parties agreed on a mandatory standard in discipline-discharge cases but adopted a different standard by which to judge the applicability of interest on monetary awards in non-disciplinary cases. The parties expressly agreed that the Employer is obligated to provide interest on a back pay award in disciplinary-discharge cases. This, of course, is not such a case, and there is no explicit contractual mandate requiring an award of interest. The parties inferentially adopted a "good faith" standard to be applied in nondisciplinary cases. As a general rule, the concept of good faith requires parties to perform an agreement in accordance with their reasonable expectations.

The principle of reasonable expectations is an important interpretive tool of modern contract law. It is a fundamental precept of contract law that, in interpreting terms of an agreement, an arbitrator should honor the reasonable expectations of contracting parties. (See, Corbin on Contracts, §§ 1, 2 (1963)). One scholar suggested that the principle of reasonable expectations may be as old as contract law itself. (See, Horowitz, The Transformation of American Law 180-8 (1977)).

The parties agreed that, "in a case involving disciplinary suspension or removal," the Employer obligated itself to pay interest on back pay recovered from an arbitration award.

(See Joint Exhibit No. 2, p. 284). The Union's theory was that the arbitrator should add an intended, but unspoken, term to the parties' agreement, namely, that management agreed to add interest to any monetary benefits recovered from an arbitration award. No evidence, however, suggested that such an obligation was within the reasonable expectations of the parties at the time of contracting. They expressly agreed that interest was mandatory in selected cases and implicitly had an expectation that the pervasive doctrine of good faith would govern an award of interest in nondisciplinary-nondischarge cases.

By adopting a requirement of interest payments in specified cases and relying on the default principle of good faith in others, the parties designed a system calling for a "good faith" analysis in this case. To test whether the Employer must pay interest on a monetary award in a nondisciplinary, nonremoval case, it must be determined if management engaged in opportunism at the expense of the Union or acted vindictively or advanced to interests in bad faith to prevent Transitional Employees from obtaining a contractual benefit.

Management's conduct in this case was premised on an interpretation of the parties' agreement which was not irrational. There was no evidence showing that management acted vindictively in advancing the position it held in this case or that the Employer violated an established, well-defined public policy. No evidence showed that management acted in bad faith to prevent or hinder the Union from

enjoying a contractual benefit. There was no evidence that management set out deliberately to hurt the Union or to seize a windfall at the expense of the Union.

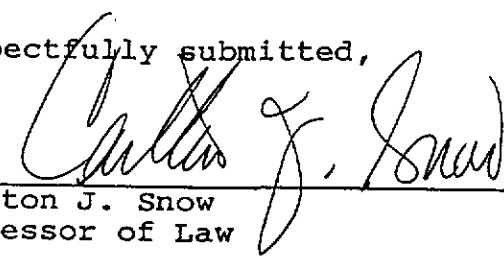
Although incorrect, the Employer's interpretation of the agreement was not so unreasonable as to constitute an abuse of contractual discretion. (See, Burton, "Breach of Contract and Common Law Duty to Perform in Good Faith," 94 Harv. L. Rev. 359 (1980)). When arbitrator Aaron adopted a rule requiring a payment of interest on monetary awards and the parties codified his decision in their agreement, it is reasonable to conclude that they expected a principle of good faith to be applied in nondisciplinary discharge cases. It is the default principle contained in Restatement (Second) of Contracts, and there is no indication that the parties negotiated a contrary standard. This means that management's conduct must be measured by standards of behavior inconsistent with common decency, fairness, and reasonableness in order to test whether an award of interest was appropriate in a non-disciplinary, nonremoval case. (See, Best v. United States Nat'l Bank, 739 P.2d 554 (1987)).

Such an analysis supports a conclusion that interest is not appropriate in this case. Management proceeded through the grievance procedure on the basis of a "good faith" theory premised on its interpretation of the Stark Award, and the general applicability of the disputed provision was open to question.¹ The correct interpretation was sufficiently unclear that management did not act arbitrarily or in bad faith when it denied the grievance. Accordingly an award of interest is inappropriate in this circumstance.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that lump sum provisions of the Stark Award apply to Transitional Employees and that all Transitional Employees who were covered by the provision and not serving an initial probationary period shall be made whole. There is no award of interest in this case. The arbitrator shall retain jurisdiction to resolve any remedial issues in this case. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date: February 22, 1997