

U.S. MERIT SYSTEMS PROTECTION BOARD

LATHAM et al. v. U.S. POSTAL SERVICE

ORAL ARGUMENTS

Washington, D.C.

Tuesday, December 13, 2011

1 PARTICIPANTS:

2 For Merit System Protection Board:

3 SUSAN TSUI GRUNDMANN, Chairman

4 ANNE M. WAGNER, Vice Chairman

5 MARY M. ROSE, Member

6 For Appellants:

7 MATTHEW DOWD

8 For National Association of Letter Carriers:

9 KEITH SECULAR

10 For American Postal Workers Union:

11 DARRYL ANDERSON

12 For US Postal Service:

13 WILLIAM BUBB

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1 please the Board, thank you for the time today. And before
2 I get into the merits, I would like to just say for the
3 record, it is an honor and a privilege for me to represent
4 these five employees of the Postal Service. This is Ms.
5 Albright, Ms. Lundy, Ms. Reaves, Ms. Turner, and Mr. Latham.
6 Together they represent about 120 years of loyal service to
7 the Postal Service.

8 With that being said, I'd like to focus on the
9 issues before the Board today. In each of the five cases,
10 the administrative judge erred because the national
11 reassessment process, on its face, is arbitrary and
12 capricious. That's so because the NRP violates the Postal
13 Service's longstanding internal guidelines and regulations
14 that govern the restoration of partially recovered Postal
15 Service employees.

16 VICE CHAIRMAN WAGNER: Mr. Dowd, I'm sorry to
17 interrupt or to jump right in here so early, but did the
18 Postal Service negotiate the NRP policy or implementation
19 with the various unions that represent postal workers?

20 MR. DOWD: Based on the record that I've seen, I'm
21 not certain that is the case. I don't believe that the NRP
22 has been negotiated with these five individuals. I'm almost
23 certain of that. But my understanding of the NRP is that it
24 almost announced a unilateral decision by the Postal Service
25 to modify and change the status of these five individuals

1 who were restored under the Postal Service's longstanding
2 guidelines and rules that govern partially recovered
3 employees.

4 CHAIRMAN GRUNDMANN: But the question is not
5 necessarily about the NRP itself. The question is about the
6 Agency's rules and whether we have the jurisdiction to hear
7 cases like this.

8 MR. DOWD: Yes, Chairman Grundmann, that's
9 correct. And the question is jurisdiction and the
10 jurisdiction for the Board is set under 5 CFR 353.301C,
11 353.301D, and 353.304C. Both of those work together and
12 there the issue is whether the Postal Service's actions are
13 arbitrary and capricious.

14 CHAIRMAN GRUNDMANN: Well, what about the agency's
15 argument that the statute really only applies to fully
16 recovered or those who have overcome their disability, and
17 to be restored to a full or a whole position.

18 MR. DOWD: Well, Chairman --

19 CHAIRMAN GRUNDMANN: And generally we don't have
20 jurisdiction.

21 MR. DOWD: Chairman Grundmann, that is, in my
22 opinion, a completely separate issue. What the Board did in
23 its announcement in the federal regulations is presenting
24 two issues for consideration by the five appellants in the
25 parties here. None of those considerations -- neither of

1 those issues addressed the authority of OPM to promulgate
2 the rules in 353.

3 What the Postal Service has done here is sort of
4 tried to shift the focus of what's being discussed today.
5 And if you read the Postal Service's brief carefully -- and
6 I think even a generous reading of the Postal Service's
7 brief in these cases -- they never ever dispute the fact
8 that the NRP is inconsistent with their rules and
9 regulations that have been in place for 30 years. What
10 they've tried to do is present a new issue to the Board and
11 what they presented is an issue that has not been raised in
12 any of the five cases before the administrative judge. And
13 --

14 VICE CHAIRMAN WAGNER: So are you suggesting we
15 shouldn't consider it all based on the fact that it wasn't
16 raised before?

17 MR. DOWD: I think that's the strongest point,
18 Vice Chairman Wagner, because under this court's precedent
19 in banks, this Board requires parties to raise issues before
20 the administrative judge before the Board itself -- the full
21 Board -- will consider it. And I don't think there's any
22 question that that issue has been presented. And it's even
23 more telling than the fact that the Board -- and I'm not
24 saying that there's anything wrong with this, but when the
25 Board issued the order explaining the procedure of the oral

1 argument here today, what the Board had to do is add those
2 two issues. And so those are now presented as issues 3 and
3 4 in terms of the authority of OPM to promulgate those
4 rules.

5 And so that's just one -- that's just the main
6 point about the --

7 VICE CHAIRMAN WAGNER: But the point about -- can
8 I -- but if the Postal Service raised those arguments as a
9 result of our having requested OPM for an advisory opinion
10 with regard to an interpretation of its regulations, I mean
11 --

12 MR. DOWD: Yes.

13 VICE CHAIRMAN WAGNER: -- I think it could be
14 argued that that issue was interjected by the Board. So why
15 shouldn't we consider it as a matter that's been properly
16 raised before us?

17 CHAIRMAN GRUNDMANN: State it another way. If we
18 don't have jurisdiction to hear this case, we don't have
19 jurisdiction. The Board's jurisdiction is not plenary.

20 VICE CHAIRMAN WAGNER: Well, no --

21 MR. DOWD: Yeah, I think those are two questions.
22 Let me address Vice Chairman Wagner's question first, if I
23 may. In terms of it being implicitly raised in the question
24 presented to OPM, I don't think that's even a question
25 because if you look at OPM's response and you look at the

1 question presented to OPM, the only question presented was
2 the interpretation of 353 and the scope of 353. And in
3 their response, what does OPM focus on? OPM focuses on the
4 Supreme Court's longstanding precedent in multiple cases --
5 Vitarelli v. Seaton, the Service v. Dulles, these and
6 multiple cases -- that say that the agency, even if not
7 bound by statute or regulation, if that agency promulgates
8 stricter regulation, the agency has to follow it.

9 And that's what OPM addressed in their letter in
10 response to the Board. OPM did not address the authority
11 under 8151 to promulgate the rule. And that's a completely
12 different issue. And, in fact, there's a D.C. Circuit case,
13 Railway Labor Executives Association, from 1994, that
14 explains that those two issues are distinct.

15 Now, I think that's a very strong case where the
16 Postal Service has waived that argument. They never
17 presented it below and it's -- you know, I'll admit that it
18 could be a complex issue, and I'm happy to discuss the
19 merits of that as well today. But the point here is that no
20 administrative judge has addressed this specific question of
21 whether OPM has the authority to promulgate that rule? In
22 fact, the Postal Service in its brief, at page 7, complains
23 that OPM doesn't address it. OPM doesn't address it because
24 the question wasn't presented. And I think it's really
25 telling in the fact that the only party here today that has

1 addressed the question, the ultra vires question, is the
2 Postal Service.

3 Neither of the amicus briefs have addressed it.
4 None of the parties have addressed it and they haven't,
5 quite simply, because it wasn't raised.

6 CHAIRMAN GRUNDMANN: Are you saying that we cannot
7 raise it sua sponte?

8 MR. DOWD: I think that would be unwise at this
9 point. I'm not saying that it's probably not within the
10 power of the Board, but given the, you know, issues that
11 were fairly presented and the time span on this case, if the
12 Postal Service wants to take up that fight, there are
13 probably plenty of other cases that the Postal Service can
14 do.

15 I'm also happy to address that --

16 CHAIRMAN GRUNDMANN: Please do.

17 MR. DOWD: -- the substance of it, right? Well,
18 the second point I would argue that the Postal Service is
19 judicially stopped. They've adopted affirmatively in a
20 number of the cases below the fact that 8151 gives OPM the
21 authority to promulgate the rules at 353.

22 Another point --

23 CHAIRMAN GRUNDMANN: In other words, they haven't
24 raised it before in any other forum.

25 MR. DOWD: It's slightly different. It's not only

1 that they haven't raised it, but in their briefs to the AJs
2 they have actually stated that 8151 is the source of
3 authority for 353. So it's related, but a little different.

4 The other thing I would say is that what the
5 Postal Service tries to do in terms of the
6 authority/promulgate the rule issue is that it looks at the
7 statute and, without citing a single case in the six pages
8 of the brief, they just go on and on and say this is what
9 the text means. But in my view, the text isn't that clear.
10 It never defines what is meant by "overcome." And when you
11 look at the history of 8151 -- and this is also set out in
12 the Postal Service's brief, but they don't really -- think
13 they try to slide by it -- is that prior to 8151 being
14 adopted in 1974, it's pretty clear that employees didn't
15 have to recover 100 percent to be restored to a position.

16 If you look at the legislative history of FECA,
17 there are two explicit statements in the legislative history
18 that address this issue. And Congress explicitly said that
19 the goal and the intention of FECA was to cover partially
20 recovered employees. There's no question about that, and
21 the Postal Service adopts that.

22 VICE CHAIRMAN WAGNER: But it is true that that
23 clear statement occurs in the legislative history and the
24 language of the statute, on its face, doesn't appear to
25 address partially recovered individuals at all. Isn't that

1 -- at least in 1974.

2 MR. DOWD: Yeah, and I'll adopt that and I think
3 that's a fair reading of the statute. And because the
4 statute doesn't directly address the issue, under Chevron,
5 what the courts and the Board -- I think the proper way to
6 look at the statute is you look at the agency that has the
7 authority to administer the statute. 8151B explicitly says
8 that OPM has the authority to administer the statute, so OPM
9 gets Chevron deference in terms of interpreting the statute.

10 VICE CHAIRMAN WAGNER: They only get to Chevron
11 deference if the statute is unclear.

12 MR. DOWD: If the statute is unclear or is silent
13 on the issue. And the statute is silent, in terms of the
14 complete definition of "overcome." And when you look at the
15 legislative history, when you look at the 30 years that OPM
16 and the Postal Service itself has interpreted the statute,
17 and if you look at how other Circuits have interpreted this
18 statute, it's pretty clear that up until August 24, 2011,
19 when the Postal Service submitted its brief to the Board,
20 everyone had the understanding that 8151 in FECA covered
21 partially recovered employees.

22 CHAIRMAN GRUNDMANN: So your argument is that the
23 ambiguity is in "overcome." Are there any other terms in
24 FECA that you deem ambiguous?

25 MR. DOWD: I think if you look at "overcome" and I

1 think if you look at -- let me just pull it up. If you look
2 at "overcome" and you look at it read in the context of
3 "suitable position," so it's the same or suitable position.
4 I think if you look at those terms holistically, you have to
5 understand that Congress did not speak directly in the text
6 of the statute with respect to fully recovered.

7 CHAIRMAN GRUNDMANN: What about equivalent
8 positions?

9 MR. DOWD: Pardon me?

10 CHAIRMAN GRUNDMANN: What about equivalent
11 positions?

12 MR. DOWD: Equivalent positions, I would agree
13 with that as well, too. I mean, there's no definition of
14 equivalent positions in the statute. And so, there's the
15 question on the Chevron, you know? Is that term defined or
16 is it clear on its face? And I'd submit to the Board that
17 it's not and you have to look at the context of FECA, the
18 legislative history and the longstanding of both OPM, the
19 Postal Service, and the courts.

20 VICE CHAIRMAN WAGNER: If you look at the language
21 in B-1 and B-2, you mention the ambiguity in the word
22 "overcome" --

23 MR. DOWD: Yep.

24 VICE CHAIRMAN WAGNER: -- but to me, it actually
25 comes before that, which is in B-1. You have, "where the

1 injury of disability has been overcome." And then in B-2,
2 "if the injury or disability is overcome." Is there
3 anything to be made of this different usage of tense that
4 Congress employed here? I mean, can we read into -- if
5 we're going to read into the statute at all, could we read
6 into the "is overcome" a concept of, you know, an ongoing
7 process of overcoming, as opposed -- which would encompass
8 the partially recovered individuals?

9 MR. DOWD: Vice Chairman Wagner, I think that's a
10 perfectly reasonable interpretation of the statute. And the
11 ultimate question on this Chevron is whether the agency's
12 interpretation is reasonable. I mean, any ambiguity -- I'm
13 not going to come up here and advocate that this is a
14 crystal clear statute, right? It wasn't because it was all
15 drafted as a short statute. And when you think about all of
16 what goes on in the federal government in terms of restoring
17 injured employees within these, you know, two paragraphs,
18 this statutory text, there is no way that 8151 can be viewed
19 as covering every possible scenario.

20 And I think that's precisely why Congress wrote
21 that in 8151 B-2, "under regulations issued by the Office of
22 Personal Management." Congress intended for OPM to fill in
23 the gaps and that's exactly what OPM has done over the past
24 35 years.

25 VICE CHAIRMAN WAGNER: But the problem is in part

1 due to the fact that this 1966 of FECA did, arguably,
2 plainly encompass in the language of the statute itself the
3 partially recovered individuals. And so the 1974
4 amendments, in terms of -- you know, you talk about
5 ambiguity and silence, I mean, one could argue, and I'm sure
6 the Postal Service will and has -- that the fact that the
7 1974 amendments do not specifically address partially
8 recovered individuals is to indicate congressional intent to
9 actually exclude them from coverage of the statute. What do
10 you say to that?

11 MR. DOWD: Well, I think that that's just an
12 improper reading because what you're doing there is
13 inferring congressional intent based on silence in the
14 statute. And the inference there is actually directly
15 contrary to the explicit statements in the legislative
16 history.

17 With that being said, I would like to turn to just
18 a couple of the other issues because I am running short on
19 time.

20 In terms of the first question, "May denial of
21 restoration be arbitrary and capricious solely for being in
22 violation of the agency's own internal rules," I think
23 there's absolutely no question about the correct answer to
24 that. And here it's clearly yes, the Postal Service has
25 violated the ELM and the EL 505. The Postal Service doesn't

1 dispute in their briefs Supreme Court precedent, Federal
2 Circuit precedent, other Circuit Court precedents clearly
3 say that an agency has to abide by its regulations, even if
4 the agency gratuitously promulgates regulations that are
5 stricter than what are required under the statute.

6 CHAIRMAN GRUNDMANN: Let's say we agree with you
7 on that point. Let's take it to the next step. Is there an
8 unconditional right to restoration? And does work have to
9 be available? I mean, what makes work available and
10 unavailable?

11 MR. DOWD: Chairman Grundmann, there's no absolute
12 right to being restored. I think that's pretty clear for
13 partially recovered employees. But what the Postal Service
14 does have to do is just comply with the steps and the
15 procedures it set forth in its own regulations and rules,
16 which are clearly set forth in the ELM and EL 505.

17 So, if for each of these five individuals today,
18 if the Postal Service can demonstrate and prove that the
19 Postal Service complied with ELM and EL 505, and there was
20 no work available, and they couldn't make work -- because
21 under 546.222 in the ELM, the Postal Service acknowledges
22 that it has a duty to actually, you know, make work. Not
23 silly work, but it has to combine tasks so that it could
24 accommodate the medical restrictions of the employee, so it
25 doesn't just have to be open vacancies.

1 MEMBER ROSE: So if they're not classified
2 positions, how do they define what work is available?

3 MR. DOWD: Once again, you go to the ELM and you
4 go to EL 505 and you look at the medical restrictions of the
5 individual. And this is, again, set forth in 353, where
6 part of figuring out if there's arbitrary and capricious is
7 you look at the circumstances of each case.

8 CHAIRMAN GRUNDMANN: So what if somebody was doing
9 it on overtime? Somebody in the same craft was performing
10 the same type of work overtime, would that make the work
11 unavailable or available?

12 MR. DOWD: Are you referring to another
13 individual?

14 CHAIRMAN GRUNDMANN: Yes.

15 MR. DOWD: Yes. And they're doing the work in
16 overtime?

17 CHAIRMAN GRUNDMANN: Yes. Say it's in the same
18 craft.

19 MR. DOWD: In the same craft, I think that's -- if
20 you go through the procedure that's set forth in the Postal
21 Service's guidelines, I think that's available work.

22 CHAIRMAN GRUNDMANN: That would be available work?

23 MR. DOWD: I mean, it also makes sense. Why would
24 the Postal Service want to pay extra to have someone do it
25 in overtime when they could have a fully capable individual

1 within their medical restrictions to do that work?

2 CHAIRMAN GRUNDMANN: Well, then --

3 MEMBER ROSE: So if an employee has a job, an
4 8-hour job and this employee has 6 hours of heavy duty work,
5 lifting bags of 60 pounds or whatever, and then 2 hours is
6 just sweeping up the letters that fall out of the bags,
7 right?

8 MR. DOWD: Yes.

9 MEMBER ROSE: This is an exaggerated example. So
10 do they just snap that right out of that guy's job
11 description and give it -- make another available work
12 situation? Is that how they do it?

13 MR. DOWD: I'm not sure they do it that way, but,
14 again, it has to be done with respect to the procedure set
15 forth in the ELM. In the ELM it has a pretty clear table
16 that shows the Postal Service what to do. And keep in mind
17 it also has to restore the employee -- the partially
18 recovered employee -- in a way that doesn't detrimentally
19 effect current employees, with respect to seniority, for
20 example.

21 MEMBER ROSE: Okay.

22 MR. DOWD: I only have one minute of my rebuttal
23 time, so I --

24 VICE CHAIRMAN WAGNER: We can --

25 CHAIRMAN GRUNDMANN: We'll take care of that.

1 MR. DOWD: Okay.

2 VICE CHAIRMAN WAGNER: I have a question. If
3 these cases actually involve employees who were working in
4 modified assignments and then being reassigned or denied
5 that work, so, I mean, in that instance, I mean, is the fact
6 that the work -- that they were performing the work at all,
7 prima facie evidence that it was available?

8 MR. DOWD: Absolutely. Absolutely. Under the
9 ELM, because these five individuals, they were all restored
10 as partially recovered employees under the Postal Service's
11 guidelines that have been in existence for about 30 years.
12 What happened was that the NRP came along, they changed
13 their way -- and what's also notable is that -- and this is,
14 again, another example of arbitrary capricious action by an
15 agency. The NRP was in effect for a certain amount of time,
16 and as of January 31, 2011, of this year, the Postal Service
17 is no longer implementing the NRP. And they've stated in a
18 letter -- I'm not sure if this is in the record, but Mr.
19 Bubb, I'm sure, can confirm this -- they're going back to
20 the provisions that are set forth in the ELM.

21 So the way I understand it, if my five clients,
22 Postal Service employees, if they apply for restoration
23 today, they could possibly get it back.

24 CHAIRMAN GRUNDMANN: Let me ask you one question.
25 One of the unions argued that the Board should defer

1 adjudication of these cases to the parties' collective
2 grievance procedure. Do you have a position on that?

3 MR. DOWD: Yes, Chairman Grundmann. I don't see
4 any reason to defer. The Board's jurisdiction is set forth
5 in 353 -- 5 CFR 353. You have an obligation to carry out
6 the Board's duty. Now, of course, if there is some strong
7 compelling reason to defer, you might want to consider that.

8 And I believe this is the APWU's brief. They only
9 cite one case. They cite no other cases that support the
10 reason for deference. And the other thing to keep in mind
11 is that the Board's jurisdiction with respect to restoration
12 of employees is limited to denials of restoration.

13 So if you get into an issue of whether the actual
14 restoration was appropriate or sufficient or consistent with
15 the medical restrictions, that's something that goes over to
16 OWCP. And maybe that's something that's more appropriate to
17 be dealt with in the grievance procedure, but here the Board
18 does have an obligation to carry out its regulatory mandate.

19 CHAIRMAN GRUNDMANN: Thank you, Mr. Dowd. We'll
20 give you an additional --

21 MEMBER ROSE: Just one more?

22 CHAIRMAN GRUNDMANN: Sure, okay.

23 MEMBER ROSE: I would like to ask a question. It
24 is clear that the Board has ruled that substantive rights
25 provided by the federal law and regulation to employees who

1 have partially recovered from a compensable injury are
2 limited to restoration to a position that constitutes a
3 separate and distinct unencumbered position. Now, this has
4 been since the Civil Service Reform Act and yet you explain
5 that we're making available work that aren't classified
6 positions for employees.

7 MR. DOWD: Yes.

8 MEMBER ROSE: And I would like to ask you,
9 wouldn't the Board have exceeded its legal rights or its
10 authority in restoration appeals by making a decision on
11 this? We're speaking purely of contractual rights, you
12 know. And again, I think that maybe a negotiated grievance
13 procedure would be the proper forum for this.

14 MR. DOWD: Member Rose, I appreciate that question
15 and concern. I have a couple of points on that. First is
16 that although there are contractual rights implicated in
17 this case, it's not solely contractual rights. These are
18 rights that are set forth in the Agency's regulations and
19 guidelines. And if you look at 39 CFR -- I forget the
20 section -- but what it does is it explicitly incorporates
21 into the regulations sections of the ELM and the ELM itself.
22 And what ELM 546.222 states is that with respect to
23 reassignment or reemployment of a partially recovered
24 employee, such an assignment may be to a residual vacancy or
25 to a position uniquely created to fit those restrictions.

1 However, such assignment must not impair seniority rights of
2 PTF employees.

3 Now, with respect to a prior Board decision that
4 might have ruled contrary to what is set forth in the ELM,
5 I'm not really certain, in terms of the timing of this. It
6 might have been that the ELM was different in the past. And
7 honestly, it might have been that that Board decision is not
8 correctly decided. But here, under Supreme Court precedent,
9 under the Circuit precedent, what the Agency is obligated to
10 do is to comply with the regulations that it has set forth.

11 And as far as I can tell with my review of the
12 record, the Postal Service does not dispute that their
13 conduct under the NRP is not consistent with their
14 regulations. Thank you.

15 CHAIRMAN GRUNDMANN: Thank you, Mr. Dowd. Save
16 five more minutes, will you?

17 Next we have Mr. Secular for an amicus curiae,
18 National Association of Letter Carriers. Good morning, sir.

19 MR. SECULAR: Good morning. May it please the
20 Board, thank you of the opportunity to address you. Let me
21 state at the outset that NALC agrees with the Postal Service
22 that the question of limited duty is fundamentally a
23 contractual issue. And those disputes over the assignment
24 of limited duty as a general rule can be resolved in the
25 parties' grievance arbitration procedure.

1 But having said that, we believe that as to the
2 pure legal issue that's presented here, the Appellants do
3 have the better argument and that the regulation which gives
4 employees the option of appealing disputes over limited duty
5 to the Board is, in fact, consistent with the statute.

6 Now, Mr. Dowd has addressed the ambiguity arising
7 over the word "overcome." We think it's telling that the
8 statute does not use the term "full recovery." There's no
9 reason to assume that "overcome" is synonymous with "full
10 recovery." In fact, it's reasonable, in our view, to
11 suggest that an employee who was injured and has recovered
12 to the point where he or she can assume productive work with
13 the Postal Service has overcome the injury.

14 CHAIRMAN GRUNDMANN: Let me pick up where the vice
15 chair started with Mr. Dowd. Did the agency bargain the
16 National Reassessment Program with the unions?

17 MR. SECULAR: No.

18 CHAIRMAN GRUNDMANN: With respect to provisions
19 governing the ELM and the EL, are there local agreements
20 that further affixiate --

21 MR. SECULAR: There can be local agreements or
22 local practices.

23 CHAIRMAN GRUNDMANN: Okay. What do those look
24 like? What impact do they have?

25 MR. SECULAR: Well, local practices are looked to

1 on a case-by-case basis by arbitrators in resolving these
2 disputes. Maybe I should address Member -- I think it was
3 Member Rose's line of inquiry or perhaps Vice Chairman
4 Wagner's about how the work is deemed available.

5 Overwhelmingly, these cases are about limited duty
6 that is taken away from employees. And what happens is the
7 focus of the inquiry is, is the work still there? Now, the
8 reason we have an NRP, the reason we have such an explosion
9 in the number of cases is that the Postal Service's workload
10 is shrinking. Everyone knows that. And so what happens is
11 you have disputes over whether work that was given to
12 injured employees still exists. And when the employees
13 prevail in the grievance procedure, the union is successful
14 in showing that the work has not disappeared; that, in fact,
15 the work that had been given to the employee was reassigned
16 to somebody else. Typically, that's perhaps a non-career
17 employee or it may be to an employee who is now performing
18 the tasks on overtime. And so if the tasks still exist,
19 then there is no justification under the Postal Service's
20 regulations for taking it away from the employee.

21 CHAIRMAN GRUNDMANN: Well, going down that line of
22 reasoning, then an employee's rights under the ELM and the
23 EL can trump the operational needs of an agency.

24 MR. SECULAR: Yes. Well, depending on how you
25 define "operational needs." The regulations --

1 CHAIRMAN GRUNDMANN: How would you define it?

2 MR. SECULAR: -- as we see it, do not permit the
3 Postal Service to make the most efficient choice, to assign
4 work to an able-bodied employee because that able-bodied
5 employee can do the work more quickly, for example. It does
6 have an obligation under its own regulations to restore the
7 employees to work and to provide them with limited duty if
8 the work is there.

9 CHAIRMAN GRUNDMANN: Well, when can the
10 operational needs of an agency trump, loosely speaking, the
11 ELM and the EL?

12 MR. SECULAR: Well, we don't recognize operational
13 needs as a relevant concept in these cases. In our view the
14 issue is, is the work there? And, again, I want to
15 emphasize that the cases come up because work had been given
16 to the employee. The Postal Service, back in the day, when
17 these regulations were formulated, was doing everything it
18 could to bring injured employees back to work and make them
19 productive because the Postal Service is on the hook for the
20 compensation costs. And it is only in this new era of
21 shrinking mail volume and work disappearing that we now have
22 disputes over whether work exists. But if the work exists,
23 the regulations -- which admittedly were crafted in a
24 different era -- do require the Postal Service to give the
25 work to the employee, if it is within the employee's medical

1 restrictions, and if the work still exists and is available
2 to the employee.

3 VICE CHAIRMAN WAGNER: What does that mean, if it
4 still exists, in the sense of is there some objective
5 financial, economic rationale for continuing --

6 MR. SECULAR: Well, you know, mail volume may have
7 shrunk to the point where there isn't enough work to occupy
8 an employee who can't go out on the street and deliver it,
9 but was just casing it, for example.

10 VICE CHAIRMAN WAGNER: Okay. So the idea of make-
11 work is really inconsistent with your formulation of the
12 tasks still exist.

13 MR. SECULAR: Right. Well, we're not talking
14 about counting paper clips, we're talking about work that
15 normally has to get done by somebody for the Postal Service
16 to function.

17 CHAIRMAN GRUNDMANN: So there is no make-work.

18 MR. SECULAR: There's also another example. This
19 may make more sense. There's a lot of consolidation going
20 on in the Postal Service right now and work -- mail is being
21 routed through different post offices. So, if an employee
22 was working in the office to case mail in an office, that
23 mail may now be cased in some other office and may no longer
24 exist.

25 VICE CHAIRMAN WAGNER: Oh, so it's like it exists

1 per local --

2 MR. SECULAR: Within each office, yes. The focus
3 is local under the regulations.

4 VICE CHAIRMAN WAGNER: So does the union concede
5 that the Postal Service can unilaterally determine whether
6 that task still exists or not?

7 MR. SECULAR: No, that's normally what -- is the
8 inquiry. It's a fact, case-by-case inquiry, but that's
9 usually what the issue is. Does the task still exist?

10 CHAIRMAN GRUNDMANN: And is someone else doing it?

11 MR. SECULAR: That's normally how the union proves
12 that the task still exists, by showing that another employee
13 is doing it.

14 VICE CHAIRMAN WAGNER: But another employee could
15 be doing it at a different location.

16 MR. SECULAR: Right.

17 VICE CHAIRMAN WAGNER: That's --

18 MR. SECULAR: Right. Another employee within the
19 same office.

20 CHAIRMAN GRUNDMANN: What about a different
21 office?

22 MR. SECULAR: Well, that's getting harder and
23 harder to make that case, but it could be made. Employees,
24 generally, are fighting to remain in the office where
25 they're assigned. And it's increasingly difficult to get

1 employees assigned to limited duty work in another office
2 because there are normally employees there who need the
3 limited duty work.

4 VICE CHAIRMAN WAGNER: So I'm sure you're familiar
5 with the 50-mile radius concept that we have generally
6 incorporated into determining these types of cases. I mean,
7 that would seem to exceed beyond the specific office inquiry
8 that you're talking about.

9 MR. SECULAR: Well, I would say that, yes, that's
10 different. The regulations to that extent differ from the
11 concept of a commuting area for restoration. I'm not saying
12 that the employees, when they come here, will be arguing the
13 exact same concepts and rules that they would be in the
14 context of a grievance procedure.

15 VICE CHAIRMAN WAGNER: But you are -- maybe I'm
16 just confused, but it does sound like that the grievance --
17 that the contractual right now sounds actually more narrow
18 than the regulatory right to restoration.

19 CHAIRMAN GRUNDMANN: In other words, it's beyond
20 the facility.

21 MR. SECULAR: The contractual right is to work
22 outside the facility. The reason I'm hesitating to answer
23 is because the regulations were set up to prevent employees
24 from being transferred out of their office. The origin of
25 the regulation had to do with --

1 CHAIRMAN GRUNDMANN: Are you talking about CFR or
2 the ELM?

3 MR. SECULAR: The ELM.

4 CHAIRMAN GRUNDMANN: Okay.

5 MR. SECULAR: The ELM was changed in 1979 by the
6 virtue of an agreement between the union and the Postal
7 Service. That was done because, in the union's view, the
8 Postal Service was exploiting the limited duty options by
9 assigning people to graveyard shifts in distant offices to
10 discourage them from making compensation claims. And so the
11 protections were incorporated into the ELM to allow
12 employees to work their normal schedules in their home
13 offices.

14 So moving outside their office is, actually, a
15 last resort under the regulations.

16 VICE CHAIRMAN WAGNER: That's the pecking order,
17 correct?

18 MR. SECULAR: That's the pecking order.

19 VICE CHAIRMAN WAGNER: And at some point, down
20 pecking order, there is the right to go beyond the facility.

21 MR. SECULAR: Yes, yes. Right.

22 CHAIRMAN GRUNDMANN: But that's --

23 MR. SECULAR: I can't say that there couldn't be a
24 case where someone is claiming work in a distant office
25 under the pecking order, but that would be very rare.

1 Usually the focus is not being sent to another office.

2 MEMBER ROSE: I'm still having difficulty with the
3 legal authority that the Board has to restore someone to a
4 task rather than a separate or distinct or already separate
5 --

6 MR. SECULAR: Well, yes. Member Rose, thank you
7 for raising that. I think that there's obfuscation going on
8 here between the concept of a position and the concept of an
9 assignment. All these employees have positions and I think,
10 if you read the Anchetta line of cases on disability
11 retirement that it becomes very clear. An employee who is
12 reassigned to limited duty has an on-the-rolls complement
13 position of city letter carrier. What may change is the
14 tasks that the employee is assigned, the duty assignment.

15 And, for example, when Anchetta applied for
16 disability retirement, the Board concluded that her modified
17 letter carrier job was not a separate position, but that
18 didn't mean Anchetta didn't have a position. Instead it
19 meant that her position remained, as it does for these
20 limited duty letter carriers, city letter carrier.

21 Positions in the Postal Service have standard
22 descriptions in their regulations. Anyone on the complement
23 has a position of record, so these limited duty employees,
24 they come back to work, they are still on the rolls as city
25 letter carriers, but they may have a modified assignment.

1 It doesn't mean they don't have a position. When they have
2 these modified assignments, they're still being restored to
3 a position that we think easily fits within the notion of an
4 equivalent position at its stature.

5 VICE CHAIRMAN WAGNER: But what's the position
6 without any assignments? What does that become?

7 MR. SECULAR: There is a position or a concept in
8 the Postal Service of unassigned regular. That happens all
9 the time. A letter carrier could have his route abolished,
10 for example. He could go from having a delivery route that
11 he delivers every day to having no set duties and be
12 assigned to different duties each day, filling in for other
13 carriers because the route no longer exists. That has
14 nothing to do with injuries, but --

15 CHAIRMAN GRUNDMANN: Well, let me ask you this.
16 Let's go the next step further. Say I'm a partially
17 recovered employee coming up with an unassigned regular
18 person, who gets what?

19 MR. SECULAR: Well, again, it depends on what the
20 injured letter carrier has been doing. You know, I don't
21 know off the top of my head -- and I'm not sure the Postal
22 Service would be on the hook if work has been assigned to an
23 unassigned regular. I don't know that the injured letter
24 carrier necessarily gets priority for work he's never done
25 before.

1 CHAIRMAN GRUNDMANN: So then, that would be work
2 unavailable, if it's the same craft?

3 MR. SECULAR: Yes, yes.

4 VICE CHAIRMAN WAGNER: But these cases involve
5 people who've been sent home, so what does it mean for them
6 to have the position? I'm unclear about that, when they're
7 not actually working. And I presume they're not getting
8 paid if they're not actually working.

9 MR. SECULAR: Right. That's right, but when they
10 are working they have a position as part of the complement
11 as city letter carrier. I'd ask the Board to recall that
12 the Board has recognized that positions in the Postal
13 Service don't line up with the standard Civil Service
14 definitions. And in the Anchetta line of cases, the
15 question of what is a position -- what the employee's
16 position is -- was treated as an issue of fact.

17 In fact, I believe all those cases were remanded
18 to the administrative judge for findings on that issue. And
19 I think the recognition was that it's specific to each
20 individual, but there is always a position of record when
21 someone is on the rolls and working for the Postal Service.

22 CHAIRMAN GRUNDMANN: Thank you, sir.

23 MR. SECULAR: Thank you.

24 VICE CHAIRMAN WAGNER: Thank you.

25 CHAIRMAN GRUNDMANN: Next we have Mr. Anderson,

1 amicus curiae for the American Postal Workers Union. Good
2 morning, sir.

3 MR. ANDERSON: Good morning. May it please the
4 Board, I'm Darryl Anderson, as you know, and I represent the
5 American Postal Workers Union. On behalf of the American
6 Postal Workers Union, thank you for making this time
7 available.

8 I want to start with the issue of jurisdiction.
9 It seems to me the Board needs to consider whether and how
10 to give meaning to the words, what is arbitrary and
11 capricious? Because as you look at contract violations,
12 which is what ELM violations are, the ELM is incorporated by
13 reference into the collective bargaining agreement. As the
14 Board looks at those contract violations, if every contract
15 violation becomes arbitrary and capricious, I mean, that's
16 almost an oxymoron. We have thousands of arbitration cases
17 every year in the Postal Service --

18 CHAIRMAN GRUNDMANN: Well, you have a statement in
19 your brief -- and that was kind curious to me. I mean, you
20 state that not every violation of the ELM is arbitrary and
21 capricious.

22 MR. ANDERSON: Right.

23 CHAIRMAN GRUNDMANN: What, in your opinion, would
24 not be arbitrary and capricious?

25 MR. ANDERSON: Well, for example -- and I guess

1 maybe the way -- I want to start the other way, if I may?
2 And that is that when the NRP arguably was arbitrary and
3 capricious because the Postal Service, they didn't negotiate
4 it. They brought the NRP in and slammed it in and took
5 people off jobs where the work was still there. That's
6 pretty arbitrary.

7 On the other hand, it may well be -- and we've had
8 many cases -- we've arbitrated many cases under 546 of the
9 ELM where the issue becomes was there work available? And
10 also, 546 of the ELM, for example, requires the Postal
11 Service to respect seniority rights of other employees. And
12 so often there's a conflict between the employees, some of
13 whom may be represented by one union, some of whom may be
14 represented by another union. And we've had arbitrations
15 where the issue becomes did the Postal Service correctly
16 apply the contract?

17 That is a garden variety contract interpretation
18 case. It may well be that the supervisors and managers
19 applying in that case were looking at the 505, looking at
20 the 546, looking at the collective bargaining agreement, and
21 were trying in good faith to figure out what to do. What
22 were their obligations? It's not clear. And they might
23 have made a mistake, but the arbitrator will tell them
24 whether or not they made a mistake six months after they
25 make their decision. And so to say that every mistake they

1 make is arbitrary and capricious, it seems to me, is not
2 correct.

3 It's arbitrary when they come in and say nothing
4 has changed. No contract has changed. No fact has changed.
5 The work is still there. We're taking this new program and
6 we're taking you out of your job. That's pretty arbitrary
7 and we think it violated the contract that violated the
8 regulations. But not every case is arbitrary. In fact,
9 most of them are not.

10 I mean, I've spent my career arguing that the
11 Postal Service has made mistakes. That's what I do for a
12 living. And they make mistakes all the time. And sometimes
13 they're arbitrary, but most of them, frankly, aren't. They
14 try to do their job. They try to interpret the contract.
15 It's my job to disagree with them when they're wrong, and I
16 do that. But it seems to me not necessarily arbitrary just
17 because they're wrong.

18 VICE CHAIRMAN WAGNER: I thought the APWU's
19 argument in this regard somewhat curious because it seems
20 like when you're trying -- number one, you're going actually
21 to the merits of the arbitrary and capricious determination.
22 I mean, and that's -- you know, a contractual violation
23 arguably states -- makes a non-frivolous allegation of
24 arbitrary and capricious denial. It would be then a
25 question of getting to the merits of that, whether, in fact,

1 there was, you know, the denial, you know, the kind of
2 contractual violation reached the level of arbitrary and
3 capriciousness. That's really what you're getting at. And
4 I'm just curious why is the APWU taking that position in
5 this case when the issue is about really our jurisdictional
6 authority and whether individual Postal employees can come
7 in and attempt to seek relief at the Board for arguably
8 arbitrary and capricious denial based on contractual
9 violation.

10 MR. ANDERSON: Well, the serious concern the APWU
11 has is respect for seniority rights. The pattern has tended
12 to be over the years that city letter carriers have become
13 unable to carry their routes anymore after 20 years of
14 carrying a route, and they deserve accommodation and they
15 seek accommodation in clerk jobs, many of which tend to be
16 more sedentary. And there may be clerks who have worked
17 their jobs, perhaps more vigorous jobs working on machinery,
18 loading and unloading mail processing machinery, who've
19 waited for 25 years to get one of those jobs that's
20 sedentary. And so there becomes a conflict between the
21 seniority of the clerks who are waiting to bid for that job
22 and the needs of the carrier for accommodation.

23 And that's a very complex question. I mean,
24 there's a moral and ethical obligation to accommodate an
25 employee injured on the job. There's another type of

1 imperative to recognize seniority rights and to respect the
2 interests of somebody who may have worked the graveyard
3 shift working heavy machinery for 25 years, and wanted for
4 all that time to have a day job where they didn't have to
5 kill themselves and get carpal tunnel syndrome or risk
6 carpal tunnel syndrome or a bad back. But now that work's
7 unavailable because it's been taken up by somebody
8 accommodated who needs an accommodation. Those are
9 difficult and very complicated questions.

10 VICE CHAIRMAN WAGNER: So are you suggesting that
11 the Board is incapable in some way --

12 MR. ANDERSON: Not in the least.

13 VICE CHAIRMAN WAGNER: -- in making --

14 MR. ANDERSON: But --

15 VICE CHAIRMAN WAGNER: -- its determination?

16 MR. ANDERSON: No, not at all. What I'm saying
17 is, though, that they raise contractual seniority rights
18 issues. And if the Board decides that it has jurisdiction
19 over every one of these cases, you're taking jurisdiction
20 over potentially thousands of cases, individual cases, which
21 will turn -- unlike the NRP program which they slammed in
22 nationwide, these other cases are going to be garden variety
23 contract interpretation cases. You're going to be
24 interpreting seniority right under the contract. You're
25 going to be interpreting the ELM, which is part of the

1 contract, incorporated by reference into the contract. So
2 you're going to be dealing with garden variety contract
3 interpretation cases in parallel with a very active and very
4 numerous arbitration system operated by the Postal Service
5 and its unions. So you'll be having parallel cases dealing
6 with contract interpretation issues, and that's what they
7 are.

8 CHAIRMAN GRUNDMANN: And are you conceding that
9 the National Reassessment Program is not part of the
10 analysis of the cases before us?

11 MR. ANDERSON: I'm sorry, Chairman Grundmann, your
12 question's beyond my knowledge. I don't know the answer to
13 that question.

14 I want to say that the APWU believes it's correct
15 that the Postal Service should be required to adhere to its
16 contracts and to its regulations and to its ELM, but, again,
17 not every violation is arbitrary and capricious. And if the
18 term "arbitrary and capricious" has any meaning, then there
19 has to be a distinction between a good faith effort, but
20 mistaken effort, to apply the contract or not. I would like
21 to make an analogy, if I may.

22 Under the National Labor Relations Act if the
23 employer violates a contract, that's not an unfair labor
24 practice. If the employer knows what the contract requires
25 and they arbitrarily and obstinately violate the contract

1 knowing that they're violating it, that's an unfair labor
2 practice.

3 CHAIRMAN GRUNDMANN: So it's a matter of intent.

4 MR. ANDERSON: It's a matter of intent. And if
5 they absolutely flaunt their determination to violate the
6 contract regardless of their contractual obligations, you've
7 got bad faith. That's arbitrary -- that's a violation. You
8 can take it to the National Labor Relations Board and you
9 can get an unfair labor practice complaint issued. But if
10 it's simply a contract violation, they dismiss it because
11 it's not within their jurisdiction. It was not a violation
12 of the act, that is.

13 And I would just mention that desirable as it is
14 to enforce the ELM and the contract against the Postal
15 Service, the Congress when they legislated did not
16 necessarily make provision for that. I mean, if the
17 question is arbitrary and capricious, if that defines the
18 Board's jurisdiction, then that defines the Board's
19 jurisdiction. And I would offer the familiar case of Fausto
20 decided by the U.S. Supreme Court as an example of how even
21 in a comprehensive Civil Service Reform Act scheme, the
22 Congress did not choose to make every avenue of relief
23 available to every employee. And so I think the Board needs
24 to consider very carefully whether and how it can give
25 substantive meaning to the term "arbitrary and capricious."

1 CHAIRMAN GRUNDMANN: Anything else? Thank you,
2 sir.

3 MR. ANDERSON: Thank you very much for your
4 courtesy and for your time.

5 CHAIRMAN GRUNDMANN: Finally we have Mr. Bubb for
6 the Agency.

7 MR. BUBB: Good morning.

8 CHAIRMAN GRUNDMANN: Good morning.

9 VICE CHAIRMAN WAGNER: Good morning.

10 MR. BUBB: If it please the Board, my name is
11 William Bubb and, as you know, I'm here on behalf of the
12 Postal Service. Thank you very much for this time.

13 I don't think any of us thought when we read the
14 consolidation order that it would take us where it has, but
15 we've tried to follow the law. We hope we are leading you
16 in that direction as well and we appreciate the time you
17 have spent considering our arguments, which is obvious from
18 your questions.

19 It is clear in our mind that OPM has exceeded its
20 authority under FECA to require any agency under the guise
21 of 8151, which is the section of FECA that deals with
22 restoration and, by the way, the only section of FECA under
23 which the OPM has any authority -- the balance of the
24 statute, there's no blanks that need to be filled in to use
25 Mr. Dowd's analogy, is administered by the secretary of

1 labor. And I'd like to come on to that in a few minutes if
2 I have time. But focusing on 8151, I think the statute
3 reads clearly. And I can tell that you do understand our
4 argument in that regard and I don't believe there's much
5 more I can say about it here than we have said in our
6 briefs.

7 VICE CHAIRMAN WAGNER: Actually I do have a
8 question.

9 MR. BUBB: Right.

10 VICE CHAIRMAN WAGNER: And even if we were to
11 agree with you, and I'm not suggesting that we do --

12 MR. BUBB: I understand.

13 VICE CHAIRMAN WAGNER: -- in terms of what the
14 statute means and what authority it gives OPM, I mean, I do
15 think that -- I do see ambiguity in that language to a
16 certain degree. I understand the Postal Service argument
17 and I think in some level they're well taken. But you're
18 raising an ultra vires argument. You're challenging OPM's
19 authority to issue the regulation and our authority to
20 declare an OPM regulation invalid is really limited to when
21 there is -- it's under USA 1214. It's when a prohibitive
22 personnel practice would be committed as a result of the
23 regulation or implementation of the regulation. We don't
24 have the general APA jurisdiction to declare OPM's action to
25 be ultra vires. So where does that leave you?

1 MR. BUBB: I'm not asking you to do that. I'm
2 asking you to determine your own jurisdiction based on that
3 regulation.

4 VICE CHAIRMAN WAGNER: But our jurisdiction is
5 regulatory under OPM's --

6 MR. BUBB: You have in the past, Vice Chairman
7 Wagner, said that you are suspicious of grants of
8 jurisdiction to you, that your jurisdiction is not plenary.
9 And while you tend to generally acknowledge that OPM is an
10 agency that can establish jurisdiction for you, you still
11 have taken a jaundiced eye of that. And you certainly don't
12 look to any other -- you don't, in my mind, seem to be
13 willing to allow any other agency, like the Postal Service,
14 for example, to do something that would grant or establish
15 jurisdiction for you.

16 CHAIRMAN GRUNDMANN: Let me ask you this. You're
17 talking about particularly 301C and D especially, not the
18 grant of jurisdiction for arbitrary and capricious. So do
19 we even have to invalidate an OPM reg to answer the question
20 which we posed to the parties, which is, is a violation
21 arbitrary and capricious if the Agency's own internal rules
22 grant greater substantive rights than the statute or
23 regulation? We're not talking about the OPM rules. We're
24 talking about the Agency rules.

25 MR. BUBB: I think so, Chairman Grundmann, because

1 when I read your question I believe you were asking whether
2 you could exercise jurisdiction when that was based only on
3 an internal Agency rule. I respectfully disagree with Mr.
4 Dowd's view of that. We know, do we not, that the arbitrary
5 or capricious standard is all about your jurisdiction?
6 That's in the section of the regulations that say these are
7 the appeals that may be brought to the MSPB with respect to
8 restoration rights granted elsewhere in these regulations.
9 That's all about your jurisdiction.

10 And also, contrary to what Mr. Dowd said, the OPM
11 did address that issue. If you're not asking us about
12 jurisdiction, which I understood you to be doing, then I'm a
13 little taken aback.

14 CHAIRMAN GRUNDMANN: Okay. Let me just ask you a
15 question.

16 MR. BUBB: All right.

17 CHAIRMAN GRUNDMANN: 301C and D, would we have to
18 invalidate that in order to find that we have or do not have
19 jurisdiction? Because you've argued throughout your brief
20 that 301C and D are ultra vires, which goes back to the vice
21 chair's question of is this a prohibitive personnel
22 practice, which is where we derive our jurisdiction.

23 MR. BUBB: You would have to -- I don't know that
24 you would have to completely invalidate -- and if you'll
25 forgive me, I'd like to focus on D, the partially recovered

1 one, which I understood to be the focus of your inquiry. We
2 can go back to C, if you'd like.

3 You just can't read it, Chairman Grundmann, to
4 require restoration under 8151 to something other than a
5 position or to someone other than a fully recovered
6 individual. There are ways to read it where that -- in that
7 way it uses the word "restore." That's a term of art.
8 That's not a coincidence. That means to a position. If you
9 go back and read all the regulations, "restoration,"
10 "restore," term of art. As a matter of fact, 3101C is the
11 only one of the restoration obligations that does not use
12 some form of the word "restore" or "restoration." You could
13 easily say we're reading this to require an assignment to a
14 regular position and that's as far as we're going to go.

15 VICE CHAIRMAN WAGNER: You know, even if we -- I
16 mean, there's no dispute that the regulation talks about
17 restoration to a position, and that's not the question here.
18 The question is did the Postal Service in agreeing to the
19 ELM provisions and the handbook, the EL and whatnot, take
20 upon itself an obligation to define restoration as something
21 more than that, which the regulation D, and certainly as OPM
22 has construed it, would allow the Postal Service to do. So
23 in terms of what is the content of arbitrary and capricious
24 denial, you know, if the Postal Service has taken on
25 additional obligations, then do we have the authority under

1 304C to enforce those in terms of looking at them, you know,
2 under the arbitrary and capricious standard.

3 My question is our authority is completely
4 regulatory. It's pursuant to 304C, which is contingent upon
5 the validity of, as you point out, the, you know, 301C and D
6 -- forget C for a second because that's not really what
7 we're talking about -- D, partially recovered. If OPM
8 doesn't have authority to have issued that substantive
9 regulation creating right, presumably we don't have
10 jurisdiction to enforce a right if OPM didn't have authority
11 to create it. That's your argument, right?

12 MR. BUBB: Yes.

13 VICE CHAIRMAN WAGNER: Okay. But my question to
14 you is we don't have authority to tell OPM whether it could
15 or couldn't create that right.

16 MR. BUBB: But you have the authority, Vice
17 Chairman Wagner, to say whether you can have jurisdiction.
18 You have to have that authority.

19 VICE CHAIRMAN WAGNER: Yeah. Our jurisdiction is
20 pursuant to an OPM reg, which is --

21 MR. BUBB: And it failed to grant you jurisdiction
22 is all that we're asking you to determine.

23 VICE CHAIRMAN WAGNER: No, the regulation clearly
24 grants us jurisdiction to look at restoration rights of
25 partially recovered employees. There's no doubt about that,

1 right.

2 MR. BUBB: I understand the question.

3 VICE CHAIRMAN WAGNER: You're saying that OPM
4 didn't have authority to create restoration rights for
5 partially recovered individuals.

6 MR. BUBB: Or to assign an appeal right for those
7 individuals with you.

8 CHAIRMAN GRUNDMANN: So because 301D is invalid,
9 then we can't enforce it under 304. Is that what you're
10 saying? Because it relates to --

11 MR. BUBB: Yes.

12 CHAIRMAN GRUNDMANN: It relates to partially --

13 MR. BUBB: Yes, that is what we're saying. That
14 is what we're saying.

15 CHAIRMAN GRUNDMANN: Okay. So we would have to
16 invalidate D in order to find that we don't have
17 jurisdiction.

18 MR. BUBB: I wouldn't use the word "invalidate"
19 because -- and this gets back to your question, Vice
20 Chairman Wagner. I think we may be mischaracterizing what
21 we're asking you to do if we're saying that you have to
22 somehow decide that an OPM regulation was ultra vires and
23 you believe that you don't have the ability to do that. I
24 understand that there is a line of cases that may go in that
25 direction, but it cannot be that you can be required to

1 exercise jurisdiction when that grant of jurisdiction was
2 invalid, and you have to be the arbiter of that.

3 VICE CHAIRMAN WAGNER: No, we don't.

4 MR. BUBB: If that's not true, then -- I'm sorry.

5 VICE CHAIRMAN WAGNER: No, I mean, this isn't a
6 situation where we're interpreting a statutory grant of
7 jurisdiction, you know, from Congress. This is, you know,
8 Congress authorized the creation of jurisdiction through
9 regulation. OPM has issued a regulation creating that
10 jurisdiction. You're saying it's outside of its statutory
11 authority to do that. We don't have judicial review
12 authority in that regard. We can't invalidate regulations
13 because they're outside OPM's statutory authority to issue
14 them.

15 CHAIRMAN GRUNDMANN: Let me ask you another
16 question along these lines. What prohibitive personnel
17 practice can be committed or is the OPM reg invalid on its
18 face because it requires someone to commit a prohibitive
19 personnel practice, which is our granted jurisdiction?

20 MR. BUBB: Right. I'm not sure, Chairman
21 Grundmann, what the answer to that question is.

22 CHAIRMAN GRUNDMANN: Okay.

23 MEMBER ROSE: Can I go at a little bit of a
24 different direction on this? In most or all of the
25 situations in which the Board has enforced internal Agency

1 rules and collective bargaining terms, the Agency rules in
2 question were procedural in nature. Here, by contrast,
3 we're talking about substantive rights that are not provided
4 for by federal law or regulation. By what legal authority
5 could the Board enforce a substantive entitlement that is
6 not authorized by federal law or a regulation?

7 MR. BUBB: I don't believe there is any. That's
8 essentially my response to Vice Chairman Wagner's point
9 about ultra vires. I have to say I did not consider before
10 this morning the precise argument that you're making, Vice
11 Chairman Wagner. But intuitively, I believe you're correct,
12 Member Rose.

13 If the grant of jurisdiction is ultra vires, it's
14 up to you to say -- and I would think it's your
15 responsibility to say -- that's ineffective, we do not have
16 that jurisdiction.

17 CHAIRMAN GRUNDMANN: Or we don't have that
18 authority.

19 MR. BUBB: What if it were something ridiculously
20 obvious? OPM said -- I don't know, I can't even think of
21 anything off the top of my head, but it was clear that it
22 was something that OPM didn't have the ability to say you
23 could hear, what would you do? Would you say, well, it's a
24 regulation even if it's ultra vires, even if they didn't
25 have the authority to adopt it, and even if it's clear,

1 like, 99 out of 100 people or maybe 100 out of 100 people
2 would agree with that, we have to hear those cases? I'm
3 struggling standing here this morning with you to think that
4 that could possibly be the law.

5 CHAIRMAN GRUNDMANN: Let me ask you a different
6 question then. You've argued for the last 13 minutes and in
7 your brief that the CFR is invalid in some form. Have the
8 Agency ever made this argument before during the several
9 years of litigation that we've had with the National
10 Reassessment Program?

11 MR. BUBB: Not as far as I've been able to find,
12 Chairman Grundmann.

13 CHAIRMAN GRUNDMANN: Mr. Dowd made an interesting
14 point. He said that the Agency has thrown out the National
15 Reassessment Program and that his employees -- his clients
16 today could reapply for restoration under the ELM and they
17 would be restored consistent to the ELM. Do you agree with
18 that point?

19 MR. BUBB: No, I do not.

20 CHAIRMAN GRUNDMANN: Okay. Why?

21 MR. BUBB: For two reasons. The first reason is
22 that there was an agreement with our unions that the ELM
23 provisions in play here were not affected in the first place
24 by the NRP.

25 CHAIRMAN GRUNDMANN: So you collectively bargained

1 the NRP with the unions?

2 MR. BUBB: No, we reached an agreement with the
3 unions on or about the time the NRP was instituted in
4 response to concerns from the unions that we were not
5 changing ELM Section -- it's not our intention to change ELM
6 Section 546 by anything that's substantive. That's in the
7 NRP. Our view was that if you wanted to say that someone
8 who was affected by the NRP was -- those circumstances
9 somehow did not comply with 446, have it. And they have.

10 CHAIRMAN GRUNDMANN: Okay. So you reserve that
11 for litigation.

12 MR. BUBB: Yeah. The second thing is that because
13 of that, if someone comes today, even though the NRP does
14 not exist in name any longer, we're still faced with the
15 same sorts of issues that the amici both described with
16 respect to the size of the workforce and the availability of
17 work and those sorts of things. And I wouldn't say that
18 we've -- stopping the NRP does not equate to we're no longer
19 going to consider assignments and decide whether they're
20 necessary or not. I believe that that will happen.

21 CHAIRMAN GRUNDMANN: So you still --

22 MR. BUBB: I can't speak definitively about that,
23 but that's my sense only to describe that it's not a light
24 switch situation, Chairman Grundmann --

25 CHAIRMAN GRUNDMANN: So if I were a letter carrier

1 and I'm partially restored, would I be restored pursuant to
2 the ELM today?

3 MR. BUBB: Whatever is going to happen to you
4 today is no different under the ELM than would have happened
5 to you in the NRP.

6 CHAIRMAN GRUNDMANN: Okay. I don't know if they
7 would agree with you on that, but.

8 MR. BUBB: Well, they may not --

9 CHAIRMAN GRUNDMANN: Okay.

10 MR. BUBB: -- which is actually illustrative of
11 why this belongs where it is, which is under their
12 collective bargaining agreements.

13 VICE CHAIRMAN WAGNER: Well, I think that they
14 might not agree with you because the NRP incorporates a
15 standard of operational necessity that appears -- at least I
16 didn't see it in the ELM -- there was a whole different
17 analysis of when modified assignments were to be created and
18 how they were to be created in the ELM that really doesn't
19 take into account the operational needs of the Postal
20 Service. The NRP seems to be really focused on that or had
21 been really focused on that. So how can you -- I'm --

22 MR. BUBB: Right. I think that there was -- we
23 would say, and I think this is a fair view of this, there
24 was always an implication under the ELM that there was some
25 operational necessity. I mean, that's too strong of a word

1 because it's provocative in terms of how the unions of the
2 Postal Service view this issue, but it always was some
3 requirement that when we gave somebody work, there needed to
4 be some substance to it in the sense that it was meaningful
5 in some ways. Now, there was a continuum, no question about
6 it, of that conclusion, but still that was true.

7 I think it's fair to say that when the NRP came
8 into existence, probably just because of circumstances, Vice
9 Chairman Wagner, I mean, there was -- we were focused more.
10 The reason for the NRP is because we were focused more on
11 our circumstances, on our operational circumstances, on the
12 reduction of mail. And we needed to look maybe more closely
13 than we would have -- than we did in the past at these
14 assignments and see what, if anything, could or should be
15 done with respect to those assignments in a fair way.

16 I know that there is some disagreement about what
17 we did. I do not think there was any ill motive involved in
18 that. I think the motive is what I just described to you.

19 So in that sense, I think there might be a
20 difference between the ELM and ELM plus NRP. But
21 analytically, I don't believe there was any difference. And
22 the reason that the unions are winning the grievance when
23 they win -- they don't always win -- but the reason they're
24 winning the grievances, as Mr. Secular described, that they
25 are winning under the collective bargaining agreements is

1 because they're able to win on that issue. They're able to
2 say the work -- as Mr. Secular described, the work's still
3 there.

4 But we're winning those grievances when the case
5 is that the work either is gone or was not -- even though it
6 still could be done, was at the bottom of that continuum I
7 described earlier about whether it really should be done.
8 Is it reasonable for us to have somebody to do it even
9 though it's helpful to them based on the fact that it's just
10 meaningless or substantially meaningless work? Those things
11 are happening every day. Those decisions are happening
12 every day, as Mr. Secular points out, in case-specific
13 situations.

14 But if I can bring you back, this discussion
15 actually makes our argument for us. We're not saying, we've
16 never said that that ELM does not have force, that we don't
17 have to follow it, that there isn't a means by which it can
18 be enforced. There certainly is. It's the collective
19 bargaining agreements and the grievance procedures. What
20 we're trying to say is that it's not for you to enforce it.

21 And I believe, again, what you asked us when you
22 asked us whether a violation of the Agency's rules --
23 whether only a violation of the Agency's rules can be an
24 arbitrary and capricious violation of restoration, you were
25 saying can we base jurisdiction under 301D when the only

1 thing that was violated was an Agency rule? To me, and I
2 hope to you, it's all about your jurisdiction, not about the
3 merits of claims under 546.

4 CHAIRMAN GRUNDMANN: This goes back to the
5 argument that Mr. Dowd raised in the first place, that the
6 statute is ambiguous in many ways. "Overcome," we've talked
7 about "equivalent position," I mean, what is an equivalent
8 position other than a former position, which is what the
9 statute says?

10 MR. BUBB: Well, but the term "equivalent
11 position" comes right after "former position or its
12 equivalent."

13 CHAIRMAN GRUNDMANN: So what is an equivalent
14 position if not the former position? Can it be a lesser
15 position?

16 MR. BUBB: I don't think so. We do not think so.
17 We think what Congress was saying is if you are able to do
18 your old job -- I think equivalence there, because your
19 precise old job may no longer be there, not because they
20 were trying to establish some sort of classification of jobs
21 that somehow was broader than your old job. If you've
22 recovered enough to perform your old job, then you have a
23 restoration right.

24 By the way, you don't have to -- it's not a
25 medical term. Don't get caught up in that. These phrases

1 like "partially recovered," "physically disqualified," even
2 "fully recovered" didn't exist when that statute was
3 written. We're thinking in terms of what the regulations
4 say today. Think of it in terms of plain English. That's
5 what Congress was doing.

6 VICE CHAIRMAN WAGNER: Well, wait. There was --
7 the Civil Service Commission and the FPN had issued their
8 regulations and content given to these terms back before
9 1974, correct, before Congress enacted the amendment? So to
10 say that these were concepts that have just sort of come out
11 of thin air is not quite correct in terms of understanding
12 what the statute means.

13 MR. BUBB: What you just said may be true, I do
14 not know. And if I misspoke, I apologize. What I was
15 trying to say is that the regulations today and the meanings
16 of terms under the regulations today, like "physically
17 disqualified," "partially recovered," "fully," did not
18 exist. Those regulations -- I think the existing
19 definitions were published in, I don't remember, sometime in
20 1990. It's in our brief.

21 I'm just saying that the concept is not your
22 medical state. You could be not medically recovered from
23 whatever your illness or injury -- completely recovered,
24 fully recovered in the medical sense from whatever your
25 illness or injury is, but you may very well be fully

1 recovered in the restoration sense because you can perform
2 your old job.

3 CHAIRMAN GRUNDMANN: So in your mind equivalent
4 and former position are the same thing?

5 MR. BUBB: In my mind the term "former position or
6 equivalent" is intended to give meaning to the term
7 "overcome." And what "overcome" meant to Congress was
8 overcome your injury sufficiently so that you are able to
9 perform the job you were performing before.

10 CHAIRMAN GRUNDMANN: But it's not medical
11 overcome. It's --

12 MR. BUBB: I may not be better medically, but once
13 I get to the point where I'm able to -- I've recovered to
14 the point where I can perform my old job, I have overcome my
15 injury in the sense of 8151 and, by the way, in the sense of
16 the current regulations. If you read the definition of
17 "fully recovered" you'll see that it's not a medical
18 concept. It's a functional concept. You're able to perform
19 the job you had when you were injured.

20 CHAIRMAN GRUNDMANN: And the equivalent only comes
21 in if my former position was abolished.

22 MR. BUBB: I'm guessing. I believe that that
23 would be a reason to put "equivalent" in there. I think the
24 language of the statute indicates that "equivalent" must
25 mean functionally equivalent in terms of your ability to

1 perform the duties of the job to your former position
2 because the location of that word in the prose. I think --
3 the reason I suggested it might be there, that was a guess
4 on my part. But it is true, particularly in the fully
5 recovered requirements, which are not controversial, that
6 there --

7 CHAIRMAN GRUNDMANN: Well, the term is not "fully
8 recovered," is it?

9 MR. BUBB: But I'm just saying it's true that if
10 you have an obligation to put someone in their former job,
11 you've got to find an equivalent because it's an absolute
12 obligation, as you know, for a fully recovered person. So
13 that would be another reason -- would be explanatory of why
14 that term was used.

15 VICE CHAIRMAN WAGNER: Can I just go back to your
16 point that the ELM tacitly or implicitly incorporated a
17 concept of operational necessity? And I understand that
18 that's kind of a loaded term, but just --

19 MR. BUBB: Right, right.

20 VICE CHAIRMAN WAGNER: But if that were the case,
21 then why did the Postal Service feel the need to create the
22 NRP to begin with? I mean, if it could have achieved simply
23 through the ELM process the necessary, or in the Postal
24 Service's view the economically necessary, reductions and
25 changes and whatnot, if they could have done that under the

1 ELM, why not just do that? Why create this --

2 MR. BUBB: I don't know. I don't know. It's well
3 before my time. But I do know that there was a need to
4 focus for the reasons that I gave you before on operational
5 necessity, on costs, on things like that. But --

6 VICE CHAIRMAN WAGNER: I guess what I'm asking --

7 MR. BUBB: -- I'm sorry, I don't know the answer
8 to your question.

9 VICE CHAIRMAN WAGNER: -- is if -- I mean, if we
10 were to find that we have jurisdiction and we're looking at
11 what is arbitrary and capricious, I mean, you're saying that
12 the Postal Service is winning cases where it can show that
13 even under the ELM that these were tasks that were no longer
14 being performed or needed to be performed.

15 MR. BUBB: Or were eliminated.

16 VICE CHAIRMAN WAGNER: Or were eliminated.

17 MR. BUBB: Right.

18 VICE CHAIRMAN WAGNER: So, I guess, is there some
19 objective evidence that the ELM, in fact, incorporates this
20 concept of meaningful work or operational necessity in terms
21 of the modified assignments question? It's not there in the
22 language --

23 MR. BUBB: I do not know of any --

24 VICE CHAIRMAN WAGNER: Okay.

25 MR. BUBB: I believe, as I said before, it's

1 implicit. There could be. I'm ignorant about it, I don't
2 know, I'm sorry.

3 CHAIRMAN GRUNDMANN: Anything else?

4 MEMBER ROSE: Nothing else.

5 CHAIRMAN GRUNDMANN: Thank you, Mr. Bubb.
6 Appreciate it.

7 MR. BUBB: Thank you.

8 CHAIRMAN GRUNDMANN: Thank you. And we're back to
9 Mr. Dowd again.

10 MR. DOWD: I shall try to be fast, although
11 there's a lot to cover. And I can honestly say that I'm
12 actually confused as to the Postal Service's position after
13 this discussion.

14 Mr. Bubb mentions this implicit incorporation of
15 the operational necessary tasks into the ELM. I've never
16 heard of that before. That's a new argument. It's never
17 been raised before by the Postal Service. And Mr. Bubb
18 admits that he doesn't know where it comes from.

19 I believe Mr. Bubb said that the NRP is equivalent
20 to the ELM. The Postal Service has never argued that. And
21 I honestly don't think there's any dispute about that
22 because in each of these cases -- actually in three of the
23 cases the administrative judge analyzed the case under
24 standards that are not consistent with the ELM. So there's
25 really no dispute that the National Reassessment Program is

1 inconsistent with the ELM.

2 CHAIRMAN GRUNDMANN: Mr. Bubb raised a point that
3 the ELM never disappeared, never went out the window when
4 the NRP came in. Do you agree with that?

5 MR. DOWD: Absolutely not, Chairman Grundmann.
6 And I think, I don't know, every few people in this room
7 could possibly agree with that because if you look at the
8 administrative judge's decisions they're all based on the
9 fact that the analysis was done according to the NRP, not
10 according to, for example, ELM 546.222 where you actually
11 look for work that may not comprise a complete vacant
12 position. So there's no -- in my mind there's no way that
13 we can argue about this. It's clear, and the Agency has
14 never disputed, that the NRP is inconsistent with its ELM
15 guidelines.

16 On that point, and I think this is a particularly
17 important point, and I know it's a complex issue because you
18 do have these issues about contractual rights and grievances
19 and arbitrations, and the APWU mentioned this and I believe
20 Mr. Bubb mentioned this, but it does need correction. And
21 both attorneys said that the ELM violation is solely a
22 contract violation. As a matter of law that is incorrect
23 because under 39 CFR 211.2 the Postal Service has
24 incorporated into its regulations the provisions of the ELM.

25 So as a matter of law when the Postal Service

1 violates ELM provisions, those are regulatory violations.
2 They may also be contractual violations and there might be
3 concurrent jurisdiction, but there's nothing in the law that
4 says two fora can adjudicate the similar or same issues.

5 Now, that being said, I'll also mention that I
6 think the APWU's concerns about the explosion of cases that
7 the Board may experience, well, one, I think it's overblown
8 because I have full confidence in the Board to be able to
9 handle as many cases as it can get. But second, the
10 question isn't whether every violation of the ELM will end
11 up here. It's only whether a violation of the ELM will
12 constitute arbitrary or capricious conduct under 304C.

13 And I think that's -- in our discussion today I
14 think what Mr. Bubb has done a very good job of avoiding is
15 the discussion of what's arbitrary and capricious. And I
16 mentioned these in my opening argument, but the Supreme
17 Court case law is clear. And, in fact, the Circuit Court
18 case law is clear. And it's so clear, for example, the 10th
19 Circuit in Duane v. The Department of Defense, they write,
20 "It is, of course, conventional wisdom that agencies must
21 abide by their own regulations." And the Postal Service has
22 conceded that it has not abided by its regulations as set
23 forth in the ELM.

24 Because of that, that conduct on its face
25 constitutes arbitrary and capricious conduct. So,

1 therefore, you have jurisdiction and that finding itself
2 constitutes a violation of the restoration rights of the
3 partially recovered employees.

4 CHAIRMAN GRUNDMANN: I am not sure Mr. Bubb
5 conceded that point because it sounded like that both the
6 ELM and the NRP existed together.

7 MR. DOWD: Well, I may give you that --

8 CHAIRMAN GRUNDMANN: I'm just --

9 MR. DOWD: I may give you that --

10 CHAIRMAN GRUNDMANN: What I heard, sorry.

11 MR. DOWD: -- and maybe that's my confusion
12 because, again, Mr. Bubb has presented new arguments today
13 that haven't been presented in his briefs themselves. I
14 mean, if I understood him correctly he was trying to say
15 that the Postal Service wasn't really trying to invalidate
16 OPM's regulation, but that's exactly what the Postal Service
17 said in their brief. The Postal Service said in their brief
18 that the regulations exceed the statutory authority of OPM.
19 And when you make that argument, that's an ultra vires
20 argument. And the only logical conclusion from that is that
21 the Postal Service is trying to invalidate OPM's regulation.

22 And that goes to another reason -- two more
23 reasons. One, all of this argument by the Postal Service is
24 classic post hoc rationalization. Under the Supreme Court's
25 precedent in *Bowen v. Georgetown University Hospital*, courts

1 can't accept a post hoc rationalization. You have to look
2 at what the Agency did and why they did it. The Agency
3 never instituted the NRP because it believed that OPM's
4 regulation at 353.304C was invalid. That rationalization
5 and that explanation came years later. And because of that,
6 under Bowen and under Chenery, a court can't accept that
7 explanation of Agency conduct. And there's really no
8 question about that.

9 VICE CHAIRMAN WAGNER: Mr. Dowd, can I just ask
10 you, I want a --

11 MR. DOWD: Sure.

12 VICE CHAIRMAN WAGNER: -- point of clarification.
13 Would you agree that an appellant who comes to us and says
14 that the Postal Service has violated the ELM and, therefore,
15 state a non-frivolous allegation of jurisdiction under 304C,
16 okay, but that may be different? I mean, at that point, I
17 mean, we would have jurisdiction, but would you concede that
18 at that point the Postal Service may be able to come in and
19 say while that may be true, it was a good faith violation,
20 therefore, it's not arbitrary and capricious or it was a de
21 minimis violation? I mean, would you agree that merely
22 being able to make the non-frivolous allegation doesn't
23 necessarily mean you win on the merits?

24 MR. DOWD: I'm not sure I can agree with you, Vice
25 Chairman Wagner. This is a classic administrative law

1 problem. And what the courts generally do is when they look
2 at rules and regulations, if an agency violates a regulation
3 set forth in the CFR, that's the end of the story. An
4 agency has to -- and particularly when it's a regulation
5 that protects the rights of individuals, and that's what you
6 have here.

7 VICE CHAIRMAN WAGNER: So you're saying it's a per
8 se.

9 MR. DOWD: It is a per se violation of the rule
10 and, therefore, a per se arbitrary and capricious and,
11 therefore, per se invalid agency conduct. And I think
12 that's clear.

13 And when you look at the Supreme Court case of
14 Vitarelli, when you look at Service v. Dulles, and those
15 cases even go farther, right, because in those cases what
16 the Court found was an invalid agency action not based on a
17 regulation set forth in the CFR, as we have here with the
18 ELM, but as an internal rule. So there the Department of
19 State and the Department of Interior actually set up
20 procedural guidelines to protect employees. In each of
21 those cases the secretary of the respective departments
22 could have summarily dismissed the employees. But what the
23 Court found was that because there were guidelines and
24 regulations set forth to protect those individuals and
25 because the secretary did not comply with those guidelines,

1 then those actions were invalid. And I think that is our
2 argument here.

3 And, you know, we could present more evidence that
4 if you look at the rationalization of the NRP, there's
5 another line of cases in admin law that looks under the
6 reasoning, the bases for the agency action, and those are
7 the State Farm cases. And there you sort of -- you look
8 more towards the merits and you look to see whether the
9 agency considered something that Congress didn't want it to
10 consider or you look to see whether the agency failed to
11 consider an important factor. And if the agency goes
12 outright and fails to consider an important factor
13 altogether, that can constitute arbitrary and capricious
14 conduct. And here I don't think we have to -- I don't think
15 the Board has to reach this decision and, in fact, probably
16 shouldn't. And if you get this far, you can send it to the
17 AJ and have them look at it.

18 But here the Agency, in my opinion, has completely
19 failed to consider whether the NRP is consistent with its
20 longstanding policy of protecting partially recovered
21 employees. That's a little separate and distinct from the
22 question of whether the NRP itself on its face violates the
23 regulations. So it's a little more towards the substance.

24 MEMBER ROSE: I was wondering if you would answer
25 the question that I asked Mr. Bubb, that is about when the

1 Board has the responsibility to oversee agencies that have
2 violated their procedural rules. And by what legal
3 authority can the Board enforce a substantive right that is
4 not authorized by statute or federal law or regulation? I
5 didn't -- Mr. Bubb said he agreed that -- or he said that we
6 do not have the authority or the juris to do that. So the
7 difference between procedural rules and substantive rights
8 is where I'm stuck and like to have you explain that to me.

9 MR. DOWD: Sure, Member Rose. And I think it ties
10 into a little of what I just discussed. But here I don't
11 think there's any dispute and I don't believe the Postal
12 Service has disputed that the provisions in the ELM provide
13 substantive rights to the employees. So it's not a rule
14 that just governs internal procedure of, you know, how mail
15 is shuttled from one place to another. These are
16 substantive employment rights. So there that's one thing.

17 And the second thing is when you do look at 39 CFR
18 211.2, that explicitly incorporates the ELM provisions into
19 the CFR. So not only do you have here a violation of an
20 agency guideline or manual, if you will, but I believe you
21 have a violation of an agency regulation. It's incorporated
22 into this Code of Federal Regulations.

23 MEMBER ROSE: Thank you.

24 MR. DOWD: Sure.

25 CHAIRMAN GRUNDMANN: Thank you, Mr. Dowd.

1 MR. DOWD: Thank you.

2 CHAIRMAN GRUNDMANN: This concludes the oral
3 argument in the appeals of Latham et al. v. U.S. Postal
4 Service. The parties will be given an additional three
5 weeks to brief on specific issues stated in an order that
6 will be issued later on today. The briefing will be
7 simultaneous. The briefs will be filed no later than close
8 of business January 6, 2012, at which point the record will
9 close.

10 The Board thanks counsel and amici for the time
11 and detail they have put into their briefs and their
12 argument today and their collective effort to inform the
13 Board. In particular we thank Mr. Dowd, who contributed his
14 time pro bono in his representation of all five appellants.

15 This hearing is adjourned.

16 (Whereupon, at 1:32 a.m., the
17 PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Stephen K. Garland, notary public in
and for the District of Columbia, do hereby certify
that the forgoing PROCEEDING was duly recorded and
thereafter reduced to print under my direction;
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under penalty of perjury; that said transcript is a
true record of the testimony given by witnesses;
that I am neither counsel for, related to, nor
employed by any of the parties to the action in
which this proceeding was called; and, furthermore,
that I am not a relative or employee of any
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