

James C. Latham, et al v. U. S. Postal Service

MSPB Docket Number DA-353-10-0408-I-1

Amicus Brief

Submitted by:
Richard M. Gallo, President
Kenosha, Wisconsin Local
American Postal Workers Union, AFL-CIO
P. O. Box 1396
Kenosha, Wisconsin 53141-1396

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2011 AUG 25 PM 2:55
CLERK OF THE BOARD

Via the Federal Register dated July 25, 2011, MSPB invited interested parties to submit Amicus Briefs in the above-captioned matter.

According, this brief is submitted to address the following legal issues: (1) May a denial of restoration be "arbitrary and capricious" within the meaning 5 CFR 353.304(c) solely for being in violation of the ELM, i.e., may the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules; and (2) what is the extent of the agency's restoration obligation under the ELM, i.e., under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

1) May a denial of restoration be "arbitrary and capricious" within the meaning 5 CFR 353.304(c) solely for being in violation of the ELM, i.e., may the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules?

I believe the answer is unequivocally yes. This is because the ELM language at issue was constructed for the express purpose of implementing the law, under title 5, and the related Code of Federal Regulations pertaining thereto. The law itself, and the CFR implementing the law have been adequately described in a document entitled "Withdrawal or Failure to Provide Limited Duty – Guide to NRP – National Reassessment Process" constructed by the National Association of Letter Carriers. The following explanation has been excerpted from that document.

The origin for the USPS legal obligation for limited duty is derived as follows:

The laws for the United States are compiled into what is known as the U.S. Code. The U.S. Code has 50 titles. Title 5, called "Government Organization and Employees", is the one that pertains to federal workers. Within Title 5 is Chapter 81—"Compensation for Work Injuries." This is where the general law is found related to all aspects of work injuries in the federal workplace. One section of that law, 5 USC 8151 (Civil Service Retention Rights), grants authority to the Office of Personnel Management (OPM) to issue the specific regulations for restoration to duty following an on-the-job injury.

The OPM took the authority granted to it by 5 USC 8151 and issued regulations regarding restoration to duty in the Code of Federal Regulations (CFR). The regulations are found in 5 CFR Part 353 - "Restoration to Duty from Uniformed Service or Compensable Injury." The regulations in 5 CFR 353 grant varying restoration rights to injured workers depending upon the timing and extent of recovery following the injury. Naturally, some employees will fully recover following an on-the-job injury, while others will not. This Guide focuses on the latter - employees who have not fully recovered, but are able to work limited duty. These employees are further broken down into 2

categories by 5 CFR 353, based on whether or not the injured worker is expected to fully recover at some point in the future. "Partially recovered" employees are not yet fully recovered but are expected to at some point, while "physically disqualified" employees are considered to have little likelihood of doing so. The restoration rights of both types of injured workers are in 5 CFR 353.301(c) & (d):

5 CFR 353.301(d)

*Partially recovered. Agencies **must make every effort** to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. **At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973.***

(Emphasis added) The phrase "must make every effort" provides strong protection.

The law requires the Postal Service to do more than make some effort. It must do more than make a lot of effort. It must make **every** effort. The second thing to note is that the law gives the Postal Service an example of the **bare minimum** way that injured workers must be treated—the Rehabilitation Act of 1973. The regulations for the Rehabilitation Act are also found within the Code of Federal Regulations. However, it is located in Title 29, not Title 5:

Rehabilitation Act:

29 CFR 1614.203 Rehabilitation Act.

*a) Model employer. **The Federal Government shall be a model employer of individuals with disabilities.** Agencies shall give **full consideration** to the hiring, placement, and advancement of qualified individuals with disabilities.*

(b) ADA standards. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.

2.) What is the extent of the agency's restoration obligation under the ELM, i.e., under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

Contractual history and argument on this very point was provided in a brief on behalf of the NALC position for an arbitration case in case number USPS J06N-4J-C 09160991. That brief, written by NALC Advocate Jeffrey Fults is completely on point. The following excerpt is taken from pages 10-24 of that brief:

[Note: you may see references to documents cited in the following material identified as "M-xxxx." The excerpt has been re-printed as it appeared in the original, and the cited documents are included as an attachment to this brief for your reference.]

"VII. CONTRACTUAL HISTORY FOR THE INJURED EMPLOYEE

Prior to 1979 the Service was only required to restore injured workers into "established jobs". Also the old ELM language specifically referred to returning injured workers to productive employment. ELM Issue 1, 4-1-1978:

*546.21 The early return of an injured or ill employee to **productive employment** is a prime means of therapy and rehabilitation. Maximum efforts shall be given toward*

*assignments for employees with occupational-related illnesses or injuries to **established jobs** which are not medically contraindicated, and within the requirements of applicable collective bargaining agreements.*

The language and application of the above provision was subsequently changed in 1979 as the result of a dispute over the language placed in the first edition of the ELM. This was following the Postal Reorganization Act which placed all employees under the Federal Employees Compensation Act [FECA]. Section 540 of the ELM was the means of implementing the injury compensation program set forth in the FECA. The national parties negotiated the new provision and placed it into the ELM and the basic language has never been changed. M-1010 changed the language in the ELM 546.142 requiring the Service to no longer limit its search for work for injured workers to just **established jobs** or **productive** work. These words were removed from the language in the ELM and replaced with the language mirroring the "**must make every effort**" terminology found in 5CFR 353.301(d).

It should be noted that the words "established jobs" were replaced with the new ELM language which provides "limited duty" work that is available within or without the employees craft, work facility, and regular work hours. The words "maximum efforts" were replaced with "must make every effort". The previous reference to "productive" work was eliminated from the old 1978 ELM provisions. Since 1979 the USPS, until recent implementation of NRP by a few over zealous districts, the USPS has agreed with the NALC. Looking over the M-1550 document of the USPS response to the NALC questions on the NRP program and the M-1706 document, settlement of the NRP

program, it is very clear the Service takes the same position as the NALC in that the collective bargaining agreement must be held in compliance.

For nearly 30 years the parties have interpreted the "make every effort" language to mean that the Service will offer limited duty to injured workers with importance not only given to the work's operational necessity but also the inclusion of answering phones, handling edit books, delivering Express mail, sorting and delivering mail with accommodations in one's assignment or in other's assignments. This obligation includes cross-craft assignments as well. As we stated in our opening John Dockins argued for the Service [E90C-4E-C 95076238] that the APWU had lost their opportunity to grieve the provision in the ELM when it was submitted in 1979. Not only did the APWU challenge this provision again in 2001, they had previously challenged the provision in 1983.

Aaron CASE # HIC-5D-C 2128

In 1983, National Arbitrator Aaron faced the issue of whether the transfer of an injured rural carrier to a full time regular position in the clerk craft violated Article 1.2 or Article 13. Aaron held:

It is obviously too late in the day for the Union IAPWW to challenge the proposition that FECA regulations can augment or supplement reemployed persons contractual rights. The language of Article 21, Section 4 of the 1981- 1984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply.

*...(T)he applicable regulations, previously quoted, make it clear that an employee who has partially recovered from an on- the-job accident, and for whom no work within prescribed medical limitations in his or her own craft is available, **must be offered a position in another craft** in the same work facility that minimizes adverse or disruptive impact on the employee. [Emphasis added]*

In 1987, National Arbitrator Bernstein in Case No. H1N-IJ-C23247 settled a dispute clarifying the Service's obligation to continue to search for work for an injured worker as for the duration of that workers employment:

*Pg. 10 Further, the present National Arbitrator is not bound in any way by awards issued by regional arbitrators on this issue. The whole purpose of the national arbitration scheme is to establish a level of definitive rulings on contract interpretation questions of general applicability. **National decisions bind the regional arbitrations, and not the reverse.***

*Pg.13-14 The Arbitrator holds that this interpretation of the provision is barred by the specific mandate in the section that the Service "should minimize any adverse or disruptive impact on the employee". **The Arbitrator agrees with-the union that this mandate creates an obligation on the Service that is a continuing duty for the entire period of the employee's disability. The Service is contending that there should be a point in time at which it has the right to "wash its hands" of a particular injured employee and move him out of his craft and into another one for the remainder of his career. Perhaps it would be sound policy to have such a provision in the section, but there is no language to that effect in that section at this time. Section 546.14 must be read to impose a continuing duty on the***

Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place.

Therefore, the Service must be prepared to modify a limited duty assignment outside of the employee's craft, facility or hours, when work within those conditions becomes available.

January 1997

M-01264 G90N-4G-C 95026885 We agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process.

May 1998

M-01316 Established actions inconsistent with applicable laws are grievable.

June 14 1999

Again in 1999, the APWU challenges the 1979 provision of the ELM. The issue resurfaced in this case determining whether the Postal Service violated Article 37 of the APWU National Agreement by assigning rural letter carriers to temporary limited duty work in the clerk craft when no work was available within their medical restrictions within their own craft. **National Arbitrator Dobranski** found no violation and his review of the Postal Service position in the case, as well as his quote of Aaron, are significant:

The Postal Service asserts that its workers are covered and protected by the Federal Employee Compensation Act (FECA) which makes certain provisions for the treatment of employees who suffer on-the-job injuries. In essence, FECA (5 CFR 353 .304)

provides that employees who are injured on-the-job through no fault of their own should not be penalized solely because of their injuries. To that end, the Postal Service is required to make "every effort" to find such employees meaningful work. The FECA requirements have been expressly recognized by the parties in the National Agreement in Article 21, Section 4, Injury Compensation. This language has been in the National Agreement since 1973, and pursuant to this contractual commitment, the Postal Service published Section 546 of the ELM. Pursuant to the legal obligation of the Postal Service to comply with FECA and the contractual obligation to issue appropriate regulations to comply with FECA, the Postal Service, pursuant to Article 19 of the National Agreement. published Section 546. The parties recognized that Section 546 contained the Postal Service's legal responsibilities to employees with job related injuries. The language of Section 546 was approved by the APWU pursuant to their rights under Article 19 under the National Agreement.

...Arbitrator Aaron, in relevant part, stated: "It is obviously too late in the day for the Union [APWU] to challenge the proposition that FECA regulations can augment or supplement reemployed persons contractual rights. The language of Article 21, Section 4 of the 19811984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply..."

This rationale from the Aaron award is most persuasive.

In 2001, the Service themselves recognized the requirement of "make every effort" in a **National Arbitration case (E90C-4E-C95076238)**. In that case the Service gave-

an injured letter carrier a limited duty job in the clerk craft. The APWU filed a grievance maintaining that the position should be given to a member of the clerk craft. The Service defended their position by stating that the position was not posted for bid because the limited duty work had no operational necessity and that the position was created out of its contractual and legal obligations. Relevant excerpts from the Dockins brief for the USPS are as follows:

Pg. 2 The rehabilitation assignments at issue are by definition uniquely created for employees who were injured on the job and continue to have work restrictions. A uniquely created rehabilitation assignment is therefore not an Article 37 duty assignment. It only exists as a result of the need to reassign an injured employee.

Pg.4 If there was a bona fide operational need for the craft duty assignment it would have been created long before the rehabilitation assignment was created.

Pg.4 However, nothing in the Agreement impedes management's exclusive right to assign employees to work when or where they are needed and create Article 37 duty assignments to maintain efficiency of the operations. This is in sharp contrast to the rehabilitation assignments created under Article 21, Section 4.

Pg. 6 In the instant case... the rehabilitation assignment was created as a result of the injury compensation contractual requirements. The rehabilitation assignment did not exist before the employee was injured on

duty and would never have been created by management because no need for the Article 37 duty assignment existed.

Pg. 7 Article 37 duty assignments and Article 21 Rehabilitation Assignments are separate and distinct... Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates. Those were the words of John Dockins,

legal counsel for the US Postal Service cited above. These remarks parallel the opinion shared by the NALC in the instant case. When you read the award Das renders, it is of interest to note that the NALC was a joiner in this action with the Service. NALC Vice President Ronald G. Brown testified on behalf of the Postal Service position. At conclusion of the reading of this award, we are convinced that you too, Mr. Arbitrator, will take notice that the local management of the Detroit district deviated from the path it had taken for over 30 years. The same path it shared with the NALC regarding treatment of its injured workers. More importantly, they have deviated from the once again agreed upon language of the M-1706 settlement. Arbitrator Das makes the following remarks in his opinion after the briefs had been submitted by the parties:

National Arbitration Case No. E90C-4E-C95076238; Arbitrator DAS :

Pg. 12 This issue, the Postal Service stresses, is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on-the-job injury .2 The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment. It only exists as a result of the need to reassign the injured employee. It is created under Article 21.4

and ELM Section 546. When the injured employee vacates the assignment, it will no longer exist.

Pg. 13 Creation of duty assignments is based on management's operational needs. The present assignment, in contrast, was only created because of the Postal Service 's legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job. This assignment did not exist before the employee was injured and otherwise would not have been created by management, because no need for an Article 37 duty assignment existed.

Pg.15 Finally, the Postal Service contends that testimony in the record shows that the past practice of the parties supports its position.

Pg. 17 Additionally, the implementation of the APWU's position would lead to a continuous game of musical chairs with rehabilitation assignments being created and abolished while the injured employee is no closer to being restored to duty as required by law.

August 19, 2005 (M1550)

In a correspondence dated August 19, 2005 the Service acknowledged their responsibilities regarding a series of grievances which arose out of Valley Stream, New York:

First, the NALC is concerned that "...management appears to assert that it has no duty to provide Limited-duty to an injured letter carrier if the carrier cannot deliver mail, even though the employee is capable of performing casing and other letter carrier duties in the office."

The Postal Service makes no such assertion. The Postal Service may provide casing duty and other city letter carrier duties to city letter carriers suffering a job-related illness or injury when it is available within the employee's medical limitations on record. When this occurs, it does not preclude, based on medical documentation, the Postal Service from offering the employee a duty assignment the essential functions of which the employee can perform. All assignments will comply with the Employee and Labor Relations Manual (ELM) Section 546 and the Rehabilitation Act, if appropriate, based on individual circumstances.

Second, the NALC is concerned that "...it appears to be management's position that it has no duty to provide limited duty if available work within the employee's limitations is less than 8 hours per day or 40 hours per week."

The Postal Service makes no such assertion. The Postal Service may provide work of less than eight hours a day or forty hours a week to city letter carriers suffering a job-related illness or injury when it is available within the employee's medical limitations on record. When this occurs, it does not preclude, based on medical documentation, the Postal Service from offering the employee a duty assignment the essential functions of which, the employee can perform. All assignments will comply with the Employee and Labor Relations Manual (ELM) Section 546 and the Rehabilitation Act, if appropriate, based on individual circumstances.

Third, the NALC is concerned that "...it appears to be management's position that there is no obligation to provide limited duty when the employee's treating physician indicates that the employee is unlikely to fully recover from the injury"

The Postal Service makes no such assertion. If an employee reaches maximum medical improvement and can no longer perform the essential functions of the city letter carrier position, the Postal Service is obligated to seek work in compliance with ELM Section 546 and, if applicable, the Rehabilitation Act.

June 2009

As you are aware the application of the National Reassessment Program (NRP) became an Interpretive issue which was eventually resolved by the National Parties upon the signing of the Step 4 Agreement (**M-01706**) in the summer of 2009. Important excerpts from that decision are as follows:

1. *The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM has not been amended and remains applicable to all pending grievances.*
2. *The Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 C. F. R. Part 353*
3. *Employees on existing non-workers compensation light duty assignments made pursuant to Article 13 of the National Agreement will not normally be displaced solely to make new limited duty or rehabilitation assignments unless required by law or regulation. The foregoing sentence does not establish any guarantee of daily work hours for employees in a light duty assignment.*

This settlement is without prejudice to the right of the Postal Service to propose changes to ELM 546 in the Article 19 process.

The cited resolution established that the Service's obligations regarding limited duty positions have never changed. The Service has agreed that new criteria have not been established in assigning limited duty jobs. Of utmost importance is the fact that the Service has acknowledged that the ELM has not changed or its legal requirements and in order for the Service to change their criteria it must be accomplished through the

Article 19 process. Simply stated it establishes that the past practices of assigning work will remain in effect, largely because they are bound both legally and contractually.”

The above citations and arguments are clear. Both the unions and the U. S. Postal Service have long recognized that the employer’s obligation, both legally and contractually, is to provide rehabilitation assignments for injured employees. Expressly and purposefully, USPS has steadfastly maintained that such assignments need not be operationally necessary, and can include make-work duties. The rules that were promulgated in the ELM have not changed one single word, comma, or period since agreed to in 1979. In initiating its NRP process however, USPS has effectually unilaterally wiped out that entire 32-year history. Such an action constitutes a clear violation of the National Labor Relations Act, as well as the collective bargaining agreements with employee unions. This action itself, by its very nature can only be viewed as arbitrary and capricious. In almost all of the NRP cases being challenged, there is one common theme. The work the individual employee(s) was doing existed, often for many years until a prescribed hour and minute on a given day; after which the Postal Service alleged they could no longer find “any available work.” Such a preposterous statement can only be arbitrary, capricious and unreasonable. This is even more true when viewed in the perspective of the legal and contractual obligations previously discussed which are recognized by all parties.

In almost every case appealed to the Board, USPS has dumped volumes of exhibits into the file. They have attempted to shift the focus away from their legal, contractual, regulatory, and moral obligation to provide work for injured employees. Instead, they try to suggest that their actions are somehow justified due to some financial hardship.

In fact, there is no hard evidence to support that claim, and such a claim really has no bearing whatsoever on the central issue in this matter. That issue remains whether or not the agency is required to provide work to injured employees and nothing further.

In almost every case appealed to the Board, a common set of facts seems to emerge. Duties that had been assigned to an injured employee, often-times for a period of many years were removed under the NRP program. The agency does not dispute *that certain tasks formerly performed by limited duty/ rehabilitation employees is "make work"*. However, under the agency's NRP "rules" they instruct that EAS (managerial work), bld assignment work, and crossing crafts can no longer be permitted. USPS does not refute that some of the work performed by the appellants was necessary, productive work. However, they claim that the operational needs dictate that the appellants can no longer perform work rightfully assigned to other crafts or to management personnel. The agency admits the work did not disappear. They say it is now assigned where it must be assigned. In almost every case, the work itself continues to exist; it has simply been taken away from the appellant. The only reason for such a conclusion is because of the rules the agency itself inserted in its NRP program. This can only be viewed as further evidence of the arbitrary and capricious nature of the action.

The ultimate result of the USPS NRP program has been to reduce the number of employees on the agency's rolls. But the reduction is made at the expense of only injured employees. Clearly this act must be found to be discrimination due to physical handicap. If the agency goal was to reduce the number of employees, it has other non-discriminatory means at its disposal to accomplish that result. The collective

bargaining agreements provide a system of excessing and reassignments, as well as lay-off provisions. These methods accomplish the same result using seniority, without discriminating against handicapped employees.

It is also suggested that the Board would be well-served to apply any conclusion resulting from its Amicus Brief announcement to any USPS NRP cases, even if such cases have already been adjudicated. It would serve no judicial benefit to limit these clarifications only to a prospective application. In fact, such a decision would automatically disenfranchise every appellant who simply had the bad fortune to have filed their appeal before Latham. Clearly, if the Board determines that it had taken an incorrect path; there must be some mechanism to apply any new clarification or standard to those cases presenting like or essentially similar issues which have already had decisions issued. Justice implores that such appeals be adjudicated based upon the facts, not based upon the time the appeal was initiated. It is also imperative that USPS NRP cases are, at a minimum, subjected to the same standards by the Board.

The following documents are included as attachments:

1. M-01010 October 26, 1979 settlement in grievance N8-NAT-003.
2. M-01550 August 19, 2005 settlement in Valley Stream, NY Limited Duty issues.
3. M-01706 June 18, 2009 settlement in Q01N-4Q-C-07190177.
4. M-01264 January 28, 1977 Settlement in G90-4G-C 95026885.
5. M-01316 May 21, 1998 Settlement in F94N-4F-C 96032816.
6. NALC Arbitration Brief in case J06N-4J-C-09160991 by Jeffrey Fults.
7. USPS Brief in case E90C-4E-C-95076238 by John Dockins.

RICK GALLO

From: KENOSHAAPWU840 [APWU840@wi.rr.com]
Sent: Wednesday, August 24, 2011 2:46 PM
To: 'mspb@mspb.com'
Subject: Amicus Brief
Attachments: AMICUS BRIEF.docx; Moore NRP Brief.PDF; USPS(LegalBrief).PDF; m01010.pdf; m01264.pdf; m01316.pdf; m01550.pdf; m01706.pdf

Dear Sirs:

I tried unsuccessfully to contact you via telephone today.

I spoke to Matthew Shannon in the Office of the clerk of the Board on Monday 8/22. I was advised that I could file an Amicus Brief regarding James C. Latham, et al v. U. S. Postal Service [DA-0353-10-0408-I-1] via electronic filing. Your system will apparently not allow it.

The Amicus Briefs are due today – August 24, 2011. I am attaching the Brief, and supporting attachments to this e-mail.

Additionally, I will Express Mail the Brief with attachments postmarked today. I hope the postmark will allow my Brief to be accepted as "filed" on today's date.

Thank you in advance for your anticipated cooperation.

Sincerely,
Richard M. Gallo, President
Kenosha, WI Local, A.P.W.U.
Director of Education and Organization
A.P.W.U. of Wisconsin

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RICK GALLO

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Delivery to the following recipients failed permanently:

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Reporting-MTA: dns; bizpsie1.9services.com [84.96.93.163]
Received-From-MTA: dns; hrndva-omtalb.mail.rr.com [71.74.56.123]
Arrival-Date: Wed, 24 Aug 2011 21:45:13 +0200

Final-recipient: rfc822; mspb@mspb.com
Action: failed
Status: 5.1.1

Diagnostic-Code: smtp; 550 5.1.1 <mspb@mspb.com>: Recipient address rejected: mspb.com
Last-attempt-Date: Wed, 24 Aug 2011 21:45:13 +0200



M-01010

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

October 26, 1979

Mr. Vincent R. Sombrotto, President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, N. W.
Washington, D. C. 20001

Re: Grievance No. N8-NAT-003

Dear Mr. Sombrotto:

On July 24, 1979, and several subsequent occasions, we conducted pre-arbitration discussions relative to the above-captioned grievance.

Pursuant to these discussions, the Postal Service prepared, and forwarded to you, proposed new language for inclusion in Part 546.14 of the Employee and Labor Relations Manual. The proposed new language is as follows:

New Part 546.14, E&LR Manual

.14 DISABILITY PARTIALLY OVERCOME.

.141 Current Employees.

When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances (see 546.32). In assigning such limited duty the USPS should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

- a. To the extent that there is adequate work available within the employee's work limitation tolerances within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work shall constitute the limited duty to which the employee is assigned.

- b. If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned, within the employee's regular hours of duty, other work may be assigned within that facility.
- c. If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts shall be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.
- d. An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances every effort will be made to assign the employee to work within the employee's craft, within the employee's regular schedule and as near as possible to the regular work facility to which normally assigned.

.142 When a former employee has partially recovered from a compensable injury or disability, the USPS must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which qualified, including a lower grade position than that held when compensation began.

This language, to which you indicated you and other Unions with whom you discussed it are amenable, incorporates procedures relative to the assignment of employees to limited duty that you proposed. Subchapter 540 of the Employee and Labor Relations Manual was published on October 22, 1979, as a Special Postal Bulletin. It is the intent of the Postal Service to publish Part 546.14 with the language set forth in this letter, separately, after transmitting it to the Unions under Article XIX of the National Agreement. Part 546.14 subsequently will be published along with the rest of Subchapter 540 in the Employee and Labor Relations Manual.

With regard to individual grievances which arise in connection with implementation of these procedures, the parties agree that such grievances must be filed at Step 2 of the Grievance-Arbitration Procedure within five (5) days of the effective date of the limited duty assignment. The parties further agree that, if such a grievance remains unresolved through Step 3 of the Grievance-Arbitration Procedure, the grievance may be appealed to Expedited Arbitration under Article XV, Section 4 C, of the National Agreement.

In view of the foregoing, the issue raised by this grievance relative to the assignment of letter carriers who incur job related injuries is resolved as the Postal Service, in accordance with the assignment procedures set forth above, may assign letter carriers who have partially recovered from job related disabilities to limited duty assignments outside of their regular work schedules and/or their regularly assigned work facilities. The grievance can, therefore, be considered closed.

Sincerely,

W. E. Henry, Jr.
for William E. Henry, Jr.
General Manager
Grievance Division
Labor Relations Department

Vincent R. Sombrotto
Vincent R. Sombrotto,
President
National Association of Letter
Carriers, AFL-CIO

LABOR RELATIONS

**RECEIVED**

AUG 25 2005

RECEIVEDEXEC. VICE PRESIDENT'S OFFICE
NALC HDQTRS., WASHINGTON, D.C.

August 19, 2005

AUG 24 2005

OFFICE of the PRESIDENT
NALC HDQTRS., WASHINGTON, D.C.

Mr. William H. Young
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, DC 20001-2144

Certified Mail Number:
7099 3400 0009 5111 7741

Dear Bill:

This is in response to your September 28 correspondence regarding Valley Stream, New York "Limited-Duty Grievances" and whether they raise three interpretive issues pursuant to Article 15.2 Step B(e) of the National Agreement. The Postal Service does not believe the grievances raise any interpretive issues. The following is our response to the three concerns raised by the NALC.

First, the NALC is concerned that "...management appears to assert that it has no duty to provide limited duty to an injured letter carrier if the carrier cannot deliver mail, even though the employee is capable of performing casing and other letter carrier duties in the office."

The Postal Service makes no such assertion. The Postal Service may provide casing duty and other city letter carrier duties to city letter carriers suffering a job-related illness or injury when it is available within the employee's medical limitations on record. When this occurs, it does not preclude, based on medical documentation, the Postal Service from offering the employee a duty assignment the essential functions of which the employee can perform. All assignments will comply with the Employee and Labor Relations Manual (ELM) Section 546 and the Rehabilitation Act, if appropriate, based on individual circumstances.

Second, the NALC is concerned that "...it appears to be management's position that it has no duty to provide limited duty if available work within the employee's limitations is less than 8 hours per day or 40 hours per week."

The Postal Service makes no such assertion. The Postal Service may provide work of less than eight hours a day or forty hours a week to city letter carriers suffering a job-related illness or injury when it is available within the employee's medical limitations on record. When this occurs, it does not preclude, based on medical documentation, the Postal Service from offering the employee a duty assignment, the essential functions of which, the employee can perform. All assignments will comply with the Employee and Labor Relations Manual (ELM) Section 546 and the Rehabilitation Act, if appropriate, based on individual circumstances.

Third, the NALC is concerned that "...it appears to be management's position that there is no obligation to provide limited duty when the employee's treating physician indicates that the employee is unlikely to fully recover from the injury."

The Postal Service makes no such assertion. If an employee reaches maximum medical improvement and can no longer perform the essential functions of the city letter carrier position, the Postal Service is obligated to seek work in compliance with ELM Section 546 and, if applicable, the Rehabilitation Act.

We do not believe these issues to be interpretive, nor do we believe we have a dispute on the application of ELM Section 546 or the Rehabilitation Act.

If you wish to discuss this matter further, please contact Charles Baker at (202) 268-3832.

Sincerely,



A. J. Johnson
Acting Manager
Labor Relations Policies and Programs

- _____ **WHY**
- _____ **JW**
- _____ **GHM**
- _____ **JEB**
- _____ **JK**
- _____ **FVR**
- _____ **BEH**
- _____ **MW**
- _____ **THY**
- _____ **DTS**

M-01706

Mr. William H. Young
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2144

Re: Q01N-4Q-C-07190177
Class Action
Washington, DC 20260-4110

Dear Mr. Young:

Recently, our representatives met in prearbitration discussion of the above-referenced grievance.

This grievance was filed regarding the Postal Service's application of the National Reassessment Program (NRP). The grievance contained three issues. The first issue involves the Union's contention that through the NRP the Postal Service has implemented a new 'necessary work' standard for the creation and continuation of limited duty and rehabilitation assignments. The second issue involves the Union's contention that as part of the NRP the Postal Service has developed new criteria for assigning limited duty. The third issue concerned the potential impact of the NRP on employees assigned to light duty under Article 13 of the Agreement.

In resolution of these issues the parties agree as follows:

1. The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM 546 has not been amended and remains applicable to all pending grievances.
2. The Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 C.F.R., Part 353.
3. Employees on existing non-workers' compensation light duty assignments made pursuant to Article 13 of the National Agreement will not normally be displaced solely to make new limited duty or rehabilitation assignments unless required by law or regulation. The foregoing sentence does not establish any guarantee of daily work hours for employees in a light duty assignment.

All grievances which have been held in abeyance will be processed in accordance with the foregoing.

This settlement is without prejudice to the right of the Postal Service to propose changes to ELM 546 in accordance with the Article 19 process.

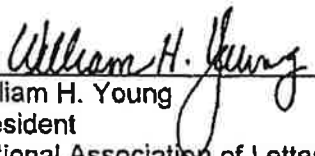
Please sign and return the enclosed copy of this settlement as your acknowledgment that this case is closed, removing it from the national arbitration docket.

Time limits were extended by mutual consent.

Sincerely,



Alan S. Moore
Manager, Labor Relations
Policy and Programs
U.S. Postal Service



William H. Young
President
National Association of Letter
Carriers, AFL-CIO

Date: 6/18/2009

LABOR RELATIONS

**RECEIVED**

JAN 27 1997

**CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.**

Mr. Vincent R. Sombrotto
President
National Association of Letter Carriers, AFL-CIO
100 Indiana Avenue NW
Washington DC 20001-2197

RE: G90N-4G-C 95026885
Kurszewski, T.
G90N-4G-C 95026886
Starrett, D.
G90N-4G-C 95026887
Niewdach, D.
Little Rock, AR 72231-9511

Dear Mr. Sombrotto:

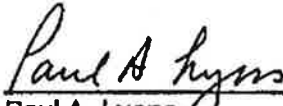
On January 10, 1997, I met with your representative to discuss the above-captioned grievances at the fourth step of our contractual grievance procedure.

The issue in these cases is whether management violated ELM Section 546.14 in moving the grievants' limited duty assignments.


During this discussion, we mutually agreed that no national interpretive issue was fairly presented. Accordingly, we agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process. Whether an actual violation occurred is fact based and suitable for regular arbitration if unresolved.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to remand these cases.

Sincerely,



Paul A. Lyons
Labor Relations Specialist
Grievance and Arbitration



Vincent R. Sombrotto
President
National Association of Letter Carriers,
AFL-CIO

Date 1/28/97

LABOR RELATIONS



RECEIVED

MAY 18 1998

CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.

Mr. William H. Young
Vice President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue
Washington, DC 20001-2196

RE: F94N-4F-C 96032816
WHITLEY, P.
SONOMA CA 95476-9998

Dear Mr. Young:


Recently, our representatives met in a pre-arbitration discussion of the above referenced case.

After reviewing the matter, it was mutually agreed that in the instant case there is no interpretive issue presented.

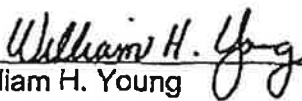
However, the parties agree that pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to settle this case and remove the case from national arbitration.

Sincerely,



Pete Bazylewicz
Manager
Grievance and Arbitration



William H. Young
Vice President
National Association of Letter
Carriers, AFL-CIO

Date: 5/21/98

**POST HEARING BRIEF FOR
THE NATIONAL ASSOCIATION OF LETTER CARRIERS
BEFORE
ARBITRATOR DAVID DILTS**

ARBITRATION HEARING]	IN THE MATTER OF
]	USPS J06N-4J-C 09160991
BETWEEN]	NALC DRT # 06-130442
]	
UNITED STATES POSTAL SERVICE]	
]	
and]	GREIVANT
]	
NATIONAL ASSOCIATION of]	VESTA MOORE
]	
LETTER CARRIERS]	
]	
]	
]	APRIL 23, 2010
]	Detroit, Michigan
]	

**NALC Advocate
Jeffery S. Fultz
Regional Administrative Assistant
KIM Region
National Association of Letter Carriers**

I. ISSUE PRESENTED

The Union at hearing accepted the Issue as framed by the Dispute Resolution Team. The USPS offered a different version requesting the arbitrator to reframe the issue to include Article 13.

“Did management violate Articles 2, 3, 5, 13, 19 and 21 of the National Agreement, and Federal law by presenting the grievant with an NRP job offer? If so, what is the appropriate remedy?”

II. PRELIMINARY STATEMENT

This Arbitration was conducted on April 23, 2010, at the Detroit, Michigan, Post Office, before Arbitrator David Dilts. The Service was represented by Wanda VanHorn, Labor Relations Representative, USPS, Detroit District, and the Union was represented by Jeffery S. Fultz, Regional Administrative Assistant, NALC, who was assisted by Carl Blassingame, Vice-President, Branch 1, NALC. Prior to the conclusion of the hearing both parties agreed to submit post-hearing briefs. The briefs and citations were to be submitted to the arbitrator by May 7, 2010. This document shall serve as the Union's clarification of the facts and contentions in the instant case as well as the final arguments and summation.

III. STIPULATIONS

1. The parties agreed that Vesta Moore was officially moved into the Mailhandler craft effective 3-28-09 for purposes of the dispute.
2. The parties also agreed that Vesta Moore was officially excessed as a mailhandler from the Detroit district to Pittsburgh, Pennsylvania on 2-28-10.
- Regarding redacted medical evidence within the DRT package the Union made the USPS and Arbitrator aware that any medical within the file would result in a Union objection due to the inability to authenticate, verify of defend it's existence with unknown factors.

IV. SUMMARY OF EVIDENCE

- A. Joint 1 2006-2011 National Agreement ***** Inclusive of the 2009 Joint Contract Administration Manual
- B. Joint 2 Joint Package as developed by the Dispute Resolution Team
- C. Missing page added to DRT Package as 21A
- D. Joint 3 M-1706: USPS agreement with the NALC resolving the NRP national level dispute.
- E. Management 1 USPS agreement with the Mailhandlers Union regarding NRP.

Management 1 was entered under the Union's objection to allowing new argument into the packet which had previously never been considered or discussed.

V. LIST OF WITNESSES

Carl Blassingame, Vice Pres. 1 / Technical Advisor for the Union

UNION

Steve Burt, Steward
Vesta Moore, Greivant

EMPLOYER

Debra Doss, NRP team member
Ken Bunch, Manager of Compensation, NRP team member

VI. RELEVANT CONTRACT PROVISIONS

ALL PERTINENT PARTS HIGHLIGHTED IN BOLD LETTERING, ITALICS, UNDERLINED OR ANY COMBINATION THEREOF WERE ADDED BY THE NALC ADVOCATE TO SHOW EMPHASIS. ALL INDENTED ENTRIES SHOWN IN ITALIC CASE IDENTIFIES LANGUAGE EXTRACTED FROM ARBITRATION AWARDS OR WERE QUOTES FROM THE INSTANT CASE.

JCAM page 2-1 / ARTICLE 2

Article 2 also gives letter carriers the contractual right to object to and remedy alleged violations of the Rehabilitation Act through the grievance procedure. **Postal Service guidelines concerning reasonable accommodation are contained in Handbook EL-307, Guidelines on Reasonable Accommodation.**

JCAM page 3-1 / ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, **subject to the provisions of this Agreement and consistent with applicable laws and regulations:**

JCAM page 5-1 / ARTICLE 5 PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Prohibition on Unilateral Changes. Article 5 prohibits management taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the **National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement.**

In H1N-5G-C 14964, March 11, 1987 (C-06858) National Arbitrator Bernstein wrote concerning Article 5:

The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism—it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act is persuasive evidence that the parties were especially interested in utilizing the grievance and arbitration

procedure spelled out in Article 15 to enforce the Service's NLRB commitments.

Not all unilateral actions are prohibited by the language in Article 5—only those affecting wages, hours or working conditions as defined in Section 8(d) of the National Labor Relations Act. Additionally, certain management decisions concerning the operation of the business are specifically reserved in Article 3 unless otherwise restricted by a specific contractual provision.

JCAM page 13-1 / ARTICLE 13 ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

The provisions of Article 13 govern voluntary requests for light duty work by employees who are temporarily or permanently incapable of performing their normal duties as a result of illness or injury. The term "light duty" should not be confused with the term "limited duty." **The term limited duty is not used in the National Agreement. Rather, the term limited duty was established by 5 Code of Federal Regulations, Part 353—the O.P.M. regulation implementing 5. U.S.C. 8151(b), that portion of the Federal Employees' Compensation Act (FECA) pertaining to the resumption of employment following job-related injury or illness. USPS procedures regarding limited duty are found in Part 540 of the Employee & Labor Relations Manual (ELM). Limited duty may be provided for an employee who is temporarily or permanently incapable of performing his/her normal duties as a result of a job related compensable illness or injury. National Arbitrator Mittenhal held in H8N-5B-C 22251, November 14, 1983 (C-03855), that Article 13, Section 4.H applies to both light and limited duty situations (see below).**

An employee who has suffered a compensable illness or injury may seek permanent light duty work through the procedures provided in Article 13. However, in most circumstances such employees will find the procedures and regulations provided in ELM Chapter 540 better suited to their needs. The limited duty provisions contained in ELM Section 540 will be discussed at the end of this article.

JCAM pages 13-10 and 13-11

Limited Duty work is work provided for an employee who is temporarily or permanently incapable of performing his/her normal duties as a result of a compensable illness or injury. The term limited duty work was established by 5 Code of Federal Regulations, Part 353—the O.P.M. regulation implementing 5. U.S.C. 8151(b), that portion of the Federal Employees' Compensation Act (FECA) pertaining to the resumption of employment following compensable injury or illness. USPS procedures regarding limited duty are found in Part 540 of the Employee & Labor Relations Manual (ELM). The Office of Workers' Compensation Programs has the exclusive authority to adjudicate compensation claims and to determine the medical suitability of proposed limited duty work. **However, ELM Section 546.14, below, provides for additional rules that must be observed when offering limited duty work.**

546.14 Disability Partially Overcome

546.142 Obligation.

When an employee has partially overcome the injury or disability, the USPS has the following obligation:

a. **Current Employees.** When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

(1) To the extent that there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.

(2) If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.

(3) If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.

(4) **An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility.** In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned. ELM 546.14 specifies the steps that must be taken in seeking limited duty work in order to ensure the assignments are minimally disruptive to the ill or injured employee. The Step 4 Settlement G90N-4G-C 95026885, January 28, 1997 (M-01264), specifically provides that the provisions of ELM 546.141 (currently ELM 546.142) are enforceable through the grievance/arbitration procedure.

JCAM page 15-1 / ARTICLE 15

Broad Grievance Clause. Article 15.1 sets forth a broad definition of a grievance. This means that most work related disputes may be pursued through the grievance/arbitration procedure. The language recognizes that most grievances will involve the National Agreement or a Local Memorandum of Understanding. Other types of disputes that may be handled within the grievance procedure may include:

- **Disputes concerning the rights of ill or injured employees, such as claims concerning fitness-for-duty exams, first aid treatment, compliance with the provisions of ELM Section 540 and other regulations concerning OWCP claims.**

JCAM page 19-1 / ARTICLE 19

Handbooks and Manuals. Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement. Changes to handbook and manual provisions directly relating to wages, hours, or working conditions may be made by management at the national level and may not be inconsistent with the National Agreement. A challenge that such changes are inconsistent with the National Agreement or are not fair, reasonable, or equitable may be made only by the NALC at the national level.

JCAM page 21-3 / ARTICLE 21.4

Section 4. Injury Compensation

Employees covered by this Agreement shall be covered by Subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. **The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.**

Workers' Compensation. Letter carriers who sustain occupational injury or disease are entitled to workers' compensation benefits under the Federal Employees' Compensation Act (FECA), administered by the U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP). Sources of information concerning federal workers' compensation benefits are:

- **ELM Chapter 540**—USPS regulations governing workers' compensation;
- **USPS Handbook EL-505**, Injury Compensation (December 1995);
- **Title 5 United States Code Section 8101** (5 U.S.C. 8101)—the Federal Employees' Compensation Act (FECA);
- **Title 20 Code of Federal Regulations Section Chapter 1** (20 C.F.R. 1) —regulations of the Office of Workers' Compensation Programs;
- **Title 5 Code of Federal Regulations Part 353** (5 C.F.R. 353)—regulations concerning the restoration to duty of employees who sustain compensable injuries.

THE EMPLOYEE AND LABOR RELATIONS MANUAL (ELM)

541.11 Law

Under the provisions of the Postal Reorganization Act, 39 U.S.C. 1005 (c), all employees of the United States Postal Service are covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. 81.

546.11 General

The Postal Service has legal responsibilities to employees with job-related disabilities under 5 U.S.C. 8151 and the OPM regulations as outlined below.

546.141 General

The procedures for current employees cover both limited duty and rehabilitation assignments. Limited duty assignments are provided to employees during the recovery process when the effects of the injury are considered temporary. A rehabilitation assignment is provided when the effects of the injury are considered permanent and/or the employee has reached maximum medical improvement.

546.14 Disability Partially Overcome

546.142 Obligation.

When an employee has partially overcome the injury or disability, the USPS has the following obligation:

Current Employees. When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

(1) To the extent that there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.

(2) If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.

(3) If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.

(4) An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.

b. Former Employees. When a former employee has partially recovered from a compensable injury or disability, the Postal Service must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which he or she is qualified, including a lower grade position than that which the employee held when compensation began. Note: Placement priority for rehabilitation assignment is the same as for limited duty.

EL-307 Guidelines on Reasonable Accommodation

Section 131 — The Rehabilitation Act

The Rehabilitation Act prohibits discrimination against qualified employees and job applicants with disabilities in the federal government, including the United States Postal Service.

The Rehabilitation Act also imposes an obligation on the Postal Service to find reasonable ways to accommodate a qualified individual with a disability. **In other words, the Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of the particular job, or to be considered for a position he or she desires.**

THE REHABILITATION ACT / 29 CFR 1614.203

§ 1614.203 Rehabilitation Act. (a) **Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.** (b) ADA standards. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.

THE REHABILITATION ACT / 29 CFR 1630.9

§ 1630.9 Not making reasonable accommodation. (a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. (b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or

employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments

US CODE TITLE 5 / RESTORATION RIGHTS

5 CFR 353.301 (a)

Fully recovered within 1 year. An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee's basic entitlement is to the former position or equivalent in the local commuting area the employee left.

5 CFR 353.301 (b)

Fully recovered after 1 year. An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation

5 CFR 353.301(c)

Physically disqualified. An individual who is physically disqualified for the former position or equivalent because of a compensable injury, is entitled to be placed in another position for which qualified that will provide the employee with the same status and pay, or the nearest approximation thereof, consistent with the circumstances in each case. This right is agency wide and applies for a period of 1 year from the date eligibility for compensation begins. After 1 year the individual is entitled to the rights accorded individuals who fully or partially recover; as applicable

5 CFR 353.301(d)

Partially recovered. Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this means treating these employees the same as other handicapped individuals under the Rehabilitation Act of 1973.

VI. UNDISPUTED FACTS OF THE LOCAL PARTIES

NONE.

VII. CONTRACTUAL HISTORY FOR THE INJURED EMPLOYEE

Prior to 1979 the Service was only required to restore injured workers into "established jobs". Also the old ELM language specifically referred to returning injured workers to productive employment. ELM Issue 1, 4-1-78:

546.21 The early return of an injured or ill employee to productive employment is a prime means of therapy and rehabilitation. Maximum efforts shall be given toward assignments for employees with occupational-

*related illnesses or injuries to **established jobs** which are not medically contraindicated, and within the requirements of applicable collective bargaining agreements.*

The language and application of above provision was subsequently changed in 1979 as result of a dispute over the language placed in the first edition of the ELM. This was following the Postal Reorganization Act which placed all employees under the Federal Employees Compensation Act [FECA]. Section 540 of the ELM was the means of implementing the injury compensation program set forth in the FECA. The national parties negotiated the new provision and placed it into the ELM and the basic language has never been changed. M-1010¹ changed the language in the ELM 546.142 requiring the Service to no longer limit its search for work for injured workers to just **established jobs** or **productive** work. These words were removed from the language in the ELM and replaced with the language mirroring the “**must make every effort**” terminology found in 5CFR 353.301(d).

It should be noted that the words “established jobs” were replaced with the new ELM language which provides “limited duty” work that is available within or without the employees craft, work facility, and regular work hours. The words “maximum efforts” were replaced with “must make every effort”. The previous reference to “productive” work was

¹ SEE Joint Package B PGS 114 - 115 / M-1010 ELM Settlement

eliminated from the old 1978 ELM provisions. Since 1979 the USPS, until recent implementation of NRP by a few over zealous districts, the USPS has agreed with the NALC. Looking over the M-1550² document of the USPS response to the NALC questions on the NRP program and the M-1706³ document, settlement of the NRP program, it is very clear the Service takes the same position as the NALC in that the collective bargaining agreement must be held in compliance.

For nearly 30 years the parties have interpreted the "make every effort" language to mean that the Service will offer limited duty to injured workers with importance not only given to the work's operational necessity but also the inclusion answering phones, handling edit books, delivering Express mail, sorting and delivering mail with accommodations in one's assignment or in other's assignments. This obligation includes cross-craft assignments as well. As we stated in our opening John Dockins argued for the Service [E90C-4E-C 95076238] that the APWU had lost their opportunity to grieve the provision in the ELM when it was submitted in 1979. Not only did the APWU challenge this provision again in 2001, they had previously challenged the provision in 1983.

Aaron CASE # HIC-5D-C 2128

In 1983, National Arbitrator Aaron faced the issue of whether the transfer of an

²SEE Joint Package B PGS 161 - 162 / M-1550 NRP Dispute

³SEE Joint 4

injured rural carrier to a full time regular position in the clerk craft violated Article 1.2 or Article 13. Aaron held:

It is obviously too late in the day for the Union [APWU] to challenge the proposition that FECA regulations can augment or supplement reemployed persons contractual rights. The language of Article 21, Section 4 of the 1981- 1984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply. ... (T)he applicable regulations, previously quoted, make it clear that an employee who has partially recovered from an on- the-job accident, and for whom no work within prescribed medical limitations in his or her own craft is available, must be offered a position in another craft in the same work facility that minimizes adverse or disruptive impact on the employee. [Emphasis added]

In 1987, National Arbitrator Bernstein in Case No. H1N-IJ-C23247 settled a dispute clarifying the Service's obligation to continue to search for work for an injured worker as for the duration of that workers employment:

Pg. 10 Further, the present National Arbitrator is not bound in any way by awards issued by regional arbitrators on this issue . The whole purpose of the national arbitration scheme is to establish a level of definitive rulings on contract interpretation questions of general applicability . National decisions bind the regional arbitrations, and not the reverse .

Pg.13-14 The Arbitrator holds that this interpretation of the provision is barred by the specific mandate in the section that the Service "should minimize any adverse or disruptive impact on the employee " . The Arbitrator agrees with-the union that this mandate creates an obligation on the Service that is a continuing duty for the entire period of the employee' s disability . The Service is contending that there should be a point in time at which it has the right to "wash its hands" of a particular injured employee and move him out of his craft and into

another one for the remainder of his career . Perhaps it would be sound policy to have such a provision in the section, but there is no language to that effect in that section at this time . Section 546 .14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hour . The fact that such duty might not be available at any point in time does not mean that it will never become available , because there are many changes that can take place . Therefore, the Service must be prepared to modify a limited duty assignment outside of the employee 's craft, facility or hours, when work within those conditions becomes available .

January 1997

M-01264⁴ G90N-4G-C 95026885 We agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process.

May 1998

M-01316⁵ Established actions inconsistent with applicable laws are grievable.

June 14 1999

Again in 1999, the APWU challenges the 1979 provision of the ELM. The issue resurfaced in this case determining whether the Postal Service violated Article 37 of the APWU National Agreement by assigning rural letter carriers to temporary limited duty work in the clerk craft when no work was available within their medical restrictions within their

⁴SEE Joint Package B PG 163 / M-1264 , Step 4, enforceable through grievance procedure

⁵SEE Joint Package B PG 164 / M-1316 , Step 4, actions inconsistent w/law grievable

own craft. **National Arbitrator Dobranski** found no violation and his review of the Postal Service position in the case, as well as his quote of Aaron, are significant:

The Postal Service asserts that its workers are covered and protected by the Federal Employee Compensation Act (FECA) which makes certain provisions for the treatment of employees who suffer on-the-job injuries. In essence, FECA (5 CFR 353 .304) provides that employees who are injured on-the-job through no fault of their own should not be penalized solely because of their injuries. To that end, the Postal Service is required to make "every effort" to find such employees meaningful work. The FECA requirements have been expressly recognized by the parties in the National Agreement in Article 21, Section 4, Injury Compensation. This language has been in the National Agreement since 1973, and pursuant to this contractual commitment, the Postal Service published Section 546 of the ELM. Pursuant to the legal obligation of the Postal Service to comply with FECA and the contractual obligation to issue appropriate regulations to comply with FECA, the Postal Service, pursuant to Article 19 of the National Agreement, published Section 546. The parties recognized that Section 546 contained the Postal Service's legal responsibilities to employees with job related injuries. The language of Section 546 was approved by the APWU pursuant to their rights under Article 19 under the National Agreement.

...Arbitrator Aaron, in relevant part, stated: "It is obviously too late in the day for the Union [APWU] to challenge the proposition that FECA regulations can augment or supplement reemployed persons contractual rights. The language of Article 21, Section 4 of the 1981-1984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply..." This rationale from the Aaron award is most persuasive.

In 2001, the Service themselves recognized the requirement of "make every effort" in a National Arbitration case (E90C-4E-C95076238). In that case the Service gave an

injured letter carrier a limited duty job in the clerk craft. The APWU filed a grievance maintaining that the position should be given to a member of the clerk craft. The Service defended their position by stating that the position was not posted for bid because the limited duty work had no operational necessity and that the position was created out of its contractual and legal obligations. Relevant excerpts from the Dockins brief for the USPS are as follows:

Pg.2 The rehabilitation assignments at issue are by definition uniquely created for employees who were injured on the job and continue to have work restrictions. A uniquely created rehabilitation assignment is therefore not an Article 37 duty assignment. It only exists as a result of the need to reassign an injured employee.

Pg.4 If there was a bona fide operational need for the craft duty assignment it would have been created long before the rehabilitation assignment was created.

Pg.4 However, nothing in the Agreement impedes management's exclusive right to assign employees to work when or where they are needed and create Article 37 duty assignments to maintain efficiency of the operations. This is in sharp contrast to the rehabilitation assignments created under Article 21, Section 4.

Pg.6 In the instant case...the rehabilitation assignment was created as a result of the injury compensation contractual requirements. The rehabilitation assignment did not exist before the employee was injured on duty and would never have been created by management because no need for the Article 37 duty assignment existed.

Pg. 7 Article 37 duty assignments and Article 21 Rehabilitation Assignments are separate and distinct...Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates.

Those were the words of John Dockins, legal counsel for the US Postal Service cited above. These remarks parallel the opinion shared by the NALC in the instant case. When you read the award Das renders, it is of interest to note that the NALC was a joiner in this action with the Service. NALC Vice President Ronald G. Brown testified on behalf of the Postal Service position. At conclusion of the reading of this award, we are convinced that you too, Mr. Arbitrator, will take notice that the local management of the Detroit district deviated from the path it had taken for over 30 years. The same path it shared with the NALC regarding treatment of its injured workers. More importantly, they have deviated from the once again agreed upon language of the M-1706 settlement. Arbitrator Das makes the following remarks in his opinion after the briefs had been submitted by the parties:

National Arbitration Case No. E90C-4E-C95076238; Arbitrator DAS :

Pg. 12 This issue , the Postal Service stresses , is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on - the-job injury .2 The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment . It only exists as a result of the need to reassign the injured employee . It is created under Article 21 .4 and ELM Section 546 . When the injured employee vacates the assignment , it will no longer exist .

Pg. 13 Creation of duty assignments is based on management's operational needs. The present assignment , in contrast, was only created because of the Postal Service ' s legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job . This assignment did not exist before the employee was injured and otherwise would not have been created by management, because no need for an Article 37 duty assignment existed .

Pg.15 Finally, the Postal Service contends that testimony in the

record shows that the past practice of the parties supports its position .

Pg. 17 Additionally, the implementation of the APWU's position would lead to a continuous game of musical chairs with rehabilitation assignments being created and abolished while the injured employee is no closer to being restored to duty as required by law.

August 19, 2005 (M1550)

In a correspondence dated August 19, 2005 the Service acknowledged their responsibilities regarding a series of grievances which arose out of Valley Stream, New York:

First, the NALC is concerned that "...management appears to assert that it has no duty to provide Limited-duty to an injured letter carrier if the carrier cannot deliver mail, even though the employee is capable of performing casing and other letter carrier duties in the office."

The Postal Service makes no such assertion. The Postal Service may provide casing duty and other city letter carrier duties to city letter carriers suffering a job-related illness or injury when it is available within the employee's medical limitations on record. When this occurs, it does not preclude, based on medical documentation, the Postal Service from offering the employee a duty assignment the essential functions of which the employee can perform. All assignments will comply with the Employee and Labor Relations Manual (ELM) Section 546 and the Rehabilitation Act, if appropriate, based on individual circumstances.

Second, the NALC is concerned that "...it appears to be management's position that it has no duty to provide limited duty if available work within the employee's limitations is less than 8 hours per day or 40 hours per week."

The Postal Service makes no such assertion. The Postal Service may provide work of less than eight hours a day or forty hours a week to city letter carriers suffering a job-related illness or injury when it is available within the employee's medical limitations on record. When this occurs, it does not preclude, based on medical documentation, the Postal Service from offering the employee a duty assignment,

the essential functions of which, the employee can perform. All assignments will comply with the Employee and Labor Relations Manual (ELM) Section 546 and the Rehabilitation Act, if appropriate, based on individual circumstances.

Third, the NALC is concerned that "...it appears to be management's position that there is no obligation to provide limited duty when the employee's treating physician indicates that the employee is unlikely to fully recover from the injury."

The Postal Service makes no such assertion. If an employee reaches maximum medical improvement and can no longer perform the essential functions of the city letter carrier position, the Postal Service is obligated to seek work in compliance with ELM Section 546 and, if applicable, the Rehabilitation Act.

June 2009

As you are aware the application of the National Reassessment Program (NRP) became an interpretive issue which was eventually resolved by the National Parties upon the signing of the Step 4 Agreement (M-01706) in the summer of 2009. Important excerpts from that decision are as follows:

- 1. The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM has not been amended and remains applicable to all pending grievances.*
- 2. The Postal Service has not developed new criteria for assigning limited-duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 C.F.R. Part 353*
- 3. Employees on existing non-workers compensation light duty assignments made pursuant to Article 13 of the National Agreement will not normally be displaced solely to make new limited duty or rehabilitation assignments unless required by law or regulation. The foregoing sentence does not establish any guarantee of daily work hours for employees in a light duty assignment.*

This settlement is without prejudice to the right of the Postal Service to propose

changes to ELM 546 in the Article 19 process.

The cited resolution established that the Service's obligations regarding limited duty positions have never changed. The Service has agreed that new criteria have not been established in assigning limited duty jobs. Of utmost importance is the fact that the Service has acknowledged that the ELM has not changed or its legal requirements and in order for the Service to change their criteria it must be accomplished through the Article 19 process. Simply stated it establishes that the past practices of assigning work will remain in effect, largely because they are bound both legally and contractually.

VIII. TESTIMONY AND NALC POSITION

Injured employees placed into rooms doing nothing, this was one of the USPS advocates opening remarks. This is of course is very consistent with the entire Service opening, it isn't true about the grievant, it isn't a part of the case file and it is a completely new argument to deflect the reality of the case before you. We will discuss the testimony and how it relates to the contractual provisions, as well as addressing both the management opening and the Step B management impasse.

The case itself is a very simple case, Vesta Moore has worked in a Modified Job Offer since her injury was accepted until the work she was performing was withdrawn on 2/17/2009. The management contentions in the case file and the Step B impasse both validate this point, the work was withdrawn. The Union has clearly shown the work still

exists, the crux of the grievance centers around the reasoning that was used to withdraw the work. The three central reasons used by the USPS in withdrawing this work were injured letter carriers can no longer perform managerial work, can no longer cross crafts to find work and can no longer work within their own craft if it is what the USPS have determined to be bid assignment work. This was the USPS position in this case, this along with a fabricated story about Vesta Moore having medical restrictions which required her to not be in contact with employees in uniform. I say fabricated because keep in mind that Moore testified that she wore a uniform from the time she returned to work until she was detailed to the GWY building in operations. She also testified that from the time she left operations until she was sent into the Mailhandler craft she wore a uniform and worked around postal police and window clerks in uniform. The service did not attempt to dispute this testimony any time during the hearing. We will address those reasons for withdrawal throughout the brief and as we address those specific reasons we ask you to pay particular note to the way injured employees were treated in the past as compared to present time and what contractual basis exists for the changes made to finding work or withdrawal of work.

It is also necessary that the union establishes this grievance is not a dispute against the National Reassessment Process, but a dispute about local management's application of that process and the recent Step 4 Settlement M-01706. To clarify this even further, while the Service may attempt to justify its actions as being acceptable through the National Reassessment

Process, we are grieving the actions of the Service relative to Vesta Moore as a violation of the contractual pecking order established with 546.142 of the ELM.

First, we must address the USPS theory of the case as they addressed it through the opening statement. Hard times for the USPS, plain bad luck and can you please look the other way while we violate our agreement with the NALC. I know those are harsh words but they are in fact, very true. Once again the Service wants to create a new case within their opening and refuse to discuss those facts after the seeds are sown, hoping to reap a benefit from an arbitrator that they are not entitled to receive. They want to speak of USPS excessing, declining mail volumes, without supporting facts or documentation. Then they created an overview of how they made work for injured employees in the past, and financial hard times forced a change in strategy, again without supporting facts or documentation. They admit in their opening that they changed the procedure used for injured letter carriers. What is before you is the question, Is the change contractually proper. The Postal Service failed to provide either testimony or documentation in support of it's chief opening argument, one of financial hardship. In fact they have attempted to change the entire case placed before you regarding both fact and argument during the hearing. There is not a single instance within the case file where local management argued in their contentions financial hardship as a reason of changing the practice of assigning work to injured employees. There is absolutely zero documentation within the case file to support this position. The Postal Service financial status and the grievance of Ms. Moore's are two separate issues.

In the Service's opening, they make a claim that the work Ms. Moore performed at the Linwood Finance section of the North End Station was no longer present. The grievant testified unrefuted that the work she performed as a custodian and AMS data entry technician provided her eight hours of daily work within her restrictions until the day was she was forced to the mailhandler craft. She further testified that she could have stayed busy just with custodial work because the place was so dirty and had not had a custodian when she arrived or previous to her arrival. The Union points to both of the USPS representatives in the grievance procedure, at steps A & B, to show the work still exists but was withdrawn.

The USPS advocate stated in her opening, *"The Postal service can no longer operate in the same mind set or mode that we formerly did business. It is mandatory for the Postal Service to have Good Business sense while maintaining our obligations to our employees; including but not limited to the employees holding bid assignments, the-ill and injured."* This was following her reaffirmation of the USPS obligation to federal laws, rules, regulations and CBA's. Normally the Union would be charged with showing the work still exists within the facility the employee was originally employed, before the injured worker was moved, provided the USPS had offered through documentation, that the work no longer exists. The question here is, not whether or not the work still exists, but does the USPS in Detroit district have the right to take it away based on the reasons they provided. While the advocate eludes to the fact the work was taken away from Ms. Moore and USPS witnesses Bunch and Doss evade the question, we will show you the USPS position from

both the Formal A and Step B representatives from the USPS to clarify, the work was taken away. The advocate in her opening speaks of redefining "make work" and identifying "tangible work" *while overcoming the challenge to find productive work for all employees.*

It is also important to identify a few items within the Step B decision that will not reconcile with the testimony of the Service. In the Step B decision, management takes a stronger stance and refers to excessing and loss of mail volume as a reason used to withdraw Vesta Moore's previous duty assignment. On page 5 of the DRT impasse, USPS Step B Yavello writes...

Management did find suitable work in the GWY/PEDC but could not assign it to the grievant due to excessing of clerks.

Further on page 11 of the DRT impasse...

At Step A management makes it clear that certain tasks formerly performed by limited duty/ rehabilitation carriers is "make work". It is also pointed out that EAS (managerial work), bid assignment work, and crossing crafts could no longer be permitted. Management does not refute that some of the work performed by the grievant was necessary, productive work. However, the operational needs dictate that the grievant can no longer perform work rightfully assigned to clerks

or to management personnel. **Management admits the work did not disappear. It is now assigned where it must be assigned.**

Yavello of Step B goes on to identify exactly what work can be performed by Ms. Moore on the top of page 12 of the joint packet, comparing his list to what Moore was asked to provide the NRP team on page 63 of the packet. Yavello systematically identifies 12 different duties previously performed by Moore in the past nine years on that page and puts them into three different groups, Management Work, Crossing Crafts and Bid Assignment Work. According to the Detroit district, in the three new categories they have established, Ms. Moore can no longer work productively and produce a tangible product, everything she performed for the past nine years has become "make work". The Union finds this insulting to both the grievant and our National Agreement. The Service at step B contends that cross-craft assignments are not permitted. This was cited without contractual language to support their position due to the fact there simply isn't any contractual language which supports this fiction. Quite the contrary, we will offer national level awards that require crossing crafts in an attempt to "make every effort". Review of the Step B impasse on page 7 reveal that immediately following 3 statements and responses, that the Union will identify as hearsay argument presented to the B team, Mr. Yavello describes this as an **extensive data collection and analysis effort** that met the compliance of ELM 546.142. and subsequently found work for her at the GWY Plant.

The Union was never offered an *extensive data collection and analysis effort* within this case file. Testimony by the US Postal Service NRP team members confirmed this fact during hearing. Not only had the information not been shared with the Union it amounted to mere 3 phone calls to one supervisor at Taylor, a CSOM in Detroit, and a POOM in Detroit. The "Necessary Worksheets" referred to by Yavello were not part of the file.

However, Yavello appears to have read management contentions the same way the Union did from the file. He emphasizes this at the end of his statement verifying that the work did not disappear it was reassigned.

On page 17 Supervisor Yavello makes reference that the CA-810 is not supported by Article 19. He is correct, it is supported by Article 21.4 which promulgates appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto. The Department of Labor which oversees the Office of Workers' Compensation Programs implements the FECA. OWCP updates and issues the CA-810 for compliance of the FECA.

It is also important to refer to Moore's rights under The Rehabilitation Act. Yavello at Step B makes a personal statement based on ignorance of the contract and disturbing stereotypes of handicapped individuals rather than facts based on the CBA or on Federal Law.

Further on page 13 Yavello states...

The Union now contends the grievant is disabled and must receive a reasonable accommodation. The Union has not supported its contention that the grievant qualifies for reasonable accommodations under The Rehabilitation Act of 1973. Nothing contained in the joint file leads to the conclusion the grievant has a disability, a record of disability, is associated with a person with a disability or is regarded as having a disability. The joint file contains no evidence that the greivant has a physical or mental impairment that substantially llimits a major life activity.

I don't believe the Union could find a better example of an employee than Ms. Moore that the Restoration language in Title V Section 353.301 (d) is referring to when stating...

Partially recovered. Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this means treating these employees the same as other handicapped individuals under the Rehabilitation Act of 1973.

The facts are quite simple. Ms. Moore was identified and approved as a Post Traumatic Stress victim by the Department of Labor. Her single medical issue is that she cannot go door to door as a letter carrier. Not much of a disability for an agency with over 650,000 employees. The employer in this case would have to find a job for an employee with zero physical limitations, a position in city the size of Detroit to be in compliance with the Rehabilitation act of 1973. To send her to Pittsburgh, Pennsylvania would be a violation of the law and to refuse her work in Detroit is a violation of the law, she is not being treated the same as handicapped individuals protected by the law. The NALC believes the Service not only violated federal law in this instance but also the CBA when they failed to acknowledge the grievant's rights and protections within the EL 307. When the Agency takes a position like the one above regarding handicapped individuals they have also failed to comply with 29 CFR 1614.203 of the Rehabilitation Act⁶, which states... The Federal Government shall be a model employer of individuals with disabilities.

Clearly the work was at Linwood finance while the grievant was assigned there and the service offered no testimony to take the position the work does not exist today. What you will find in the Joint Packet, specifically on page 77, is the argument of Deborah Gruschow, at Formal A stating there was a 2-3 hour gap between duties for Ms. Moore. Now it becomes imperative that we address the Formal A meeting to clarify details and

⁶SEE Joint Package B PG 95 / REHABILITATION ACT

missing events that would normally be deemed worthy of fact development during the hearing.

Isn't it odd the USPS would fail to offer as a witness, the author of their Management Contentions, Ms. Gruschow. One such example was already addressed above in the 2-3 hour gap in her contentions. Of more importance was the USPS position on assigning work within the NRP process as they have defined it. Once again, referring to Management Contention's on page 76 of the joint packet, the first three paragraphs contain the new "Detroit definition" of changing the principles of the ELM 546.142 that have been practiced by the parties for over thirty years. When you look at the bargaining history it becomes very apparent various districts of the USPS have strayed away from legal and contractual requirements and thirty year labor practices.

Ms. Gruschow on behalf of the Service wrote that first of all, all injured letter carriers would be segregated into three distinct groups, Limited Duty carriers who have not been determined to be permanently injured, those permanently injured letter carriers who have reached MMI within a year would be the second group and finally the third group would be permanently injured letter carriers whose MMI is beyond one year. This designation of three groups of injured employees is a serious departure from the way the USPS has handled injured employees in the past. This poses the NALC such possibilities of serious repercussions and the harm to our established process could not be fully articulated in this document. As you are aware, based on the number of cases you have decisioned for the NALC and USPS in regional level arbitration for injured employees, there are 8 steps to

applying ELM 546.142, the system outlined in Management Contentions would equate to 24 steps with three different levels of seniority. This new system Detroit management is attempting to develop would establish a "pecking order" for the ELM 546 "pecking order". Ironically, if you recall Arbitrator Dilts, the USPS testified that they had yet to start this application to limited duty employees, only rehabilitation letter carriers at this time. If their own system were contractually compliant, then they would be in violation of it as well. Reality is that both of the Service's NRP committee witnesses testified to the language in ELM 546.141 as applying equally to both limited duty and rehabilitation assignments. After section 141 of 546 defines who the provision applies to, it then explains both temporary and permanent restriction positions before ELM 546.142 defines the obligation for all injured employees as a single group.

Another argument raised by the Service within those first few paragraphs is the new definition of "make work" within the Detroit district. When the Union became aware that the Service was failing to put Ms. Gruschow on the witness stand, we did the only thing we could possibly do, have the steward Steve Burt testify to his recollections of the events as they occurred. Mr. Burt's testimony of those events was unrefuted the USPS Step A representative. To take it a step further, the USPS did rebut any of Mr. Burt's testimony offered to you on the 23rd. Mr. Burt stated that the USPS had taken the position "make work" was any work performed in another craft, work defined by they USPS as EAS work, or anything they might declare to be miscellaneous. Their new definition of "make work" would not only include cross-craft assignments but any work which could be performed by

a city letter carrier on a "bid assignment". It is easier to define what the USPS believes an injured carrier can do that would now qualify as productive work, the answer is nothing! There wasn't any contractual reasoning provided as to why Ms. Moore could not remain at the Linwood Finance unit doing a combination of letter carrier work and custodial work. When Mr. Bunch was asked this very question, he sloughed it off saying her was not the decision maker in this case and was not aware of the circumstances. Then what was his reason to testify in this case? Ms. Doss simply evaded this questioning by responding that she (Moore) could not be around uniforms. Ms. Doss testified to the one document in the file with her name on it but when cross examined by the Union could not answer questions with certainty. Particularly with the issue of excessing, as noted on page 65 lines 8&9, which states in part...Detroit excessing, so no excessing in Detroit. (Mr. Bunch is also only verified once in this case file on the same document, page 66 of the joint packet.) When asked about this statement attached to her name she had zero recollection of the event. When Ms. Doss was asked by the Union ...If Ms Moore could not be placed into the clerk craft because of excessing then why could she be put into the mailhandler craft who was also under excessing. Her response was one of confusion, the USPS advocate objected to new argument regarding mailhandlers and her objection was sustained. However, if Ms. Doss cannot answer the question regarding differences in consideration of crafts, then the response on page 65 must not be hers. Ms. Groschow as the NRP team leader during the time of the grievance, clearly states in her contentions, and verified by steward Burt, that Moore could not be placed into the clerk craft due to being under excessing in the Detroit

district. The above quoted contentions from the Service are validated a second time on pages 4 and 5 of the USPS Management Rep contentions in the B impasse. In the B impasse on page 9, the USPS Management Rep restates... ***Management did find suitable work in the GWY/PEDC but could not assign it to the grievant due to the excessing of clerks.*** The B representative was very specific in how he wrote his impasse regarding excessing.

The Union must bring up the point that management never offered any contractual support to their position, of excessing, at any time during the hearing. Where is it in Article 12 that the Dobranski national award is excluded during a period of excessing? Management simply cannot support this position contractually, that ELM 546.142 does not apply during excessing. Quite the contrary, the APWU has made the argument in front of national arbitrator Dobranski stating the Memo of Understanding regarding Articles 7, 12 and 13 allows them exclusivity to their craft, he responded "it is not persuasive". Simply put, the CBA nor any national award can provide language to support the USPS position that ELM 546.142 does not apply during a period of excess and covered under Article 12.

Ms. Gruschow speaks briefly about Ms. Moore's medical documentation in her contentions, stating she perform "inside work only" and her physician states she could work as a mail processing clerk but not as a letter carrier, attempting to justify why she was placed into the mailhandler craft. Mr. Bunch and Ms. Doss both testified to this same "interpretation" of the CA-17. When questioned, Ms. Doss kept going back to "no uniforms"

as her answer. When she was asked whether or not she had the right to send Moore back to her physician for clarification she deferred to the medical members of the team. These people were never identified in the file and it failed to answer the Unions question. Mr. Bunch answered the same question similarly in referring to the medical team members. Regarding the CA-17⁷, to consider its value, you must look at the entire NRP and procedure it developed. As you recall, The NALC questioned Ms. Doss if she was required to have the grievant's most recent medical information, she said yes she used the CA-17, dated 10-17-08, in the file. When asked again if the NRP required her to use the most current medical and was it in the file she shrugged her shoulders and went back to her first answer. The NALC will show the arbitrator where it is at in the file. On page 47 of Joint Packet A, Step 2 , first diamond point, states... Medical Update, show a copy of their most recent medical update, confirm that this medical documentation is the most current with the employee. Page 21A, specially item 7H., speaks to Moore receiving her medical documentation (CA-17)

Ms. Doss message was very clear based on her answer to the question involving medical documentation, the grievant could not be exposed to anyone wearing a uniform. Ms. Doss was questioned by the Union questioning why the NRP committee did not seek clarification on medical documentation within the file when the grievant clearly objected to the USPS interpretation of what the CA-17 noted. Part of the NRP is to obtain the most

⁷ Found on page 5 of the JOINT FILE A

current medical to properly place the injured employee into the correct position. This was not the case when Ms. Doss shrugged off the inquiry and stated she understood what it said. The NALC maintains, when Ms. Moore objected to the medical documentation cited on 11-12-08 and put the USPS on notice she would clarify they not only failed to meet their own obligation of the NRP in using current medical but violated the EL-307 Reasonable Accommodation. The explanation under Section III of the PS Form 2499⁸ requires an interactive discussion on all medical document issues and accommodations.

Step 4 M-1500 injured employee displaces a PTF on a hold down

To counter the position on what work the USPS is now defining as belonging to a bid assignment we offer the above cited Step 4. For the Agency to take the position now that any letter carrier work that can be performed by a letter carrier on a bid assignment can no longer be given to a injured worker is contrary to what the parties have practiced in the past. Not only has it been the practice in the past to provide any work available to an injured employee to provide eight hours of employment but the M-1500 Step 4 shows the parties believe that to be the proper procedure even if it means removing a PTF from an opt.

As we cited earlier in this brief, John Dockins defends the actions of the USPS to Arbitrator Das;

Article 37 duty assignments and Article 21 Rehabilitation Assignments are separate and distinct...Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for

⁸ SEE PAGE 18 OF THE JOINT PACKET A

rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates.

Mr. Dockins rightfully defended those actions, the NALC was a joining party to the USPS position in that hearing that Arbitrator Das decided. The following is what Das had to say about the NALC involvement in that case.

The NALC as an intervener in this case, agrees with the Postal Service's position that a rehabilitation position "uniquely created" to accommodate a specific injured employee does not have to be posted for bid by able bodied employees. As NALC Vice President Ron Brown testified, such positions have long existed in the Letter Carrier craft and the NALC's consistent position has been that these rehabilitation positions are created under ELM 540 for the express purpose of providing an assignment to a person on limited duty...

As you can see our position of past practice has been consistent from the period of 1979 when the implementing regulations of FECA required the USPS to bring the ELM Section 546 in compliance with the Act. The correction made by the USPS in 1979 to bring the FECA regulations into contractual compliance were a result of the negotiated language in Article 21.4 of the National Agreement of all crafts at that point in time. ALL CRAFTS AND THE USPS held this to be the position of the parties, therefore binding. The obligation to injured employees is both a contractual and legal obligation to find these people work within their restrictions.

This was Arbitrator Das within his award responding to both the APWU and the joining parties, the NALC and USPS...

The General Clerk Modified assignment in question consists of a number of clerk duties - - a subset of duties included in the standard

position description of a General Clerk. That does not detract from the fact that it was uniquely created as a rehabilitation assignment. As the Postal Service stresses, this assignment would not have existed, but for the obligation to find work for the injured employee.

It becomes obvious, the Detroit district is of a differing opinion than their leaders at the national level when it comes to defining what work can be performed by injured letter carriers.

This leads into the next claim the USPS advocate made in her opening. *The NALC would attempt to discredit the NRP process by saying this process is in violation of ELM 546.* We agree with the settlement language cited in the Step 4 by management. We agree so much that we requested that step 4 be entered into the record as a joint exhibit, M-1706. The disagreement we have with the Service is the Detroit district is applying their own interpretation to the settlement in defining work to injured carriers prior to implementation.

An example to the Agency's understanding of ELM 540 requirements can be illustrated in the citation they offered to you during its opening. The Agency cited Arbitrator Lennart V. Larson, S1C-3U-C 794, in their opening, this particular case involved one of "Light Duty", not one of "Limited Duty". Mr. Acevedo was injured during his duty in the U.S. Navy prior to his employment with the U.S. Postal service. He was not injured as a result of his employment thereby requesting light duty as opposed to limited duty. We refer you back to the JCAM page 13-1 of Article 13 which states in part...

The term "light duty" should not be confused with the term "limited duty." The term limited duty is not used in the National Agreement. Rather, the term limited duty was established by 5 Code of Federal Regulations, Part 353.

Going back to documentation from the service to establish withdrawal of work from the grievant. Where were these records we heard about in the opening? Records of job searches for Moore, none of these records were ever presented to the Union. No such records are available for your review, quite simply, because they do not exist. The NRP committee people who testified, Doss and Bunch, did not address the fact documentation was not provided to the Union. Moore was moved and there was not any intention to return her to her home station.

As Arbitrator Lange, W4N-5C-C 43784, stated in this award...

In order to successfully defend against an employee' challenge to a limited duty assignment, the Service must make at least a prima facie showing that it has attempted to implement the progression set out in the ELM and has been unable to make a successful accommodation at each step prior to the level of the modification of craft duties, non-craft duties, work hours, or work location that was finally implemented . The showing may be made by way of documents, testimony, or other relevant and admissible evidence . After the Service has made an acceptable showing that it has attempted to satisfy each step in the progression of Sections 546.141a-c, it may then allege that no work is available at the regular work location and that an assignment within the parameters of Section 546 .141d is the only appropriate course of action . The burden to challenge the lack of available work at the employee's regular assigned work location then shifts to the Union .However, a bare assertion that there was no available work, without additional substantiation, is insufficient to demonstrate compliance with

Section 546 .141 and does not shift the burden of proof to the Union to demonstrate that work was available.

The Union maintains that the Service has not met the necessary requirements in the ELM to eliminate Vesta Moore's modified job. In further support of the union's position on this matter the union has submitted a number of other regional arbitrations supporting our position.

Arbitrator Barker W7N-5N-C 22042

The testimony was credible and demonstrated effort at various stages to achieve appropriate placement of the grievant in accordance with the requirements of ELM 546 .141 . But the testimony was insufficiently detailed, precise and documented to carry the burden imposed upon the Postal Service . Pertinent to the present case is the concept discussed by Arbitrator Lange, in Case No . W4N-5C-C 43785 . Therein, Arbitrator Lange observed

In order to successfully defend against an employee ' s challenge to a limited duty assignment , the Service must make at least a prima facie showing that it has attempted to implement the progression set out in the ELM and has been unable to make a successful accommodation at each step prior to the level of the modification of craft duties, non-craft duties, work hours, or work location that was finally implemented . The showing may be made by way of documents, testimony, or other relevant and admissible evidence . After the Service has made an acceptable showing that it has attempted to satisfy each step in the progression of Sections 546 .141a-c, it may then allege that no work is available at the regular work location that an assignment within the parameters of Section 546 .141d is the only appropriate course of action . The burden to challenge the lack of available work at the employees regular assigned work location then shifts to the Union . However, a bare assertion that there was no available work, without additional substantiation is insufficient to demonstrate compliance with Section 546 .141 and does not shift the burden of proof to the Union to demonstrate work was available .

The deficiency in the Postal Service 's case is that it failed or was unable to bring forward substantiation of the testimony of Tan and Davis which, while credible as reflecting evaluation and decision with respect to assigning the grievant, did not possess the qualitative detail, supported by documentation necessary to meet the burden imposed upon the Postal Service to show, in the words of Arbitrator Lange, that " . . . it attempted to implement the progression at each step prior to the level of the modification of craft duties , non-craft duties, work hours , or work location that was finally implemented . " In essential terms, the testimony of each was in the nature of " bare assertions " pertaining to findings made and conclusions reached. It was dependent upon recollection, augmented by expertise and insight , to be certain .

Arbitrator Barker further opines:

This same deficiency in documentation carries over to the other six stations - comprising the Bakersfield Post Office . The testimony of Tan and of Davis is entitled to be weighed favorably in any evaluation of the proof submitted by the Service, but it is not sufficient , standing alone , to carry the burden . The memoranda from other station managers relative to the unavailability of limited duty work in their facilities , in evidence as Management Exhibit 3, referencing the time period of June and July 1989, is entitled to little evidentiary weight as reflecting the situation that pertained in the February 8, 1990 through September 15, 1991 time period relevant and pertinent here . A state of affairs once existing in the staffing of Postal operations and facilities is not presumed to continue unchanged over so extensive a period of time and in an operation as labor intensive, viable and dynamic .

In this case is that there isn't even one day of proof to show continuation of the "ongoing" job search beyond the job offer after moving her from Linwood to the Mailhandler craft. Both Bunch and Doss testified that they did not believe they had to continue the search if the employee was able to continue working at the new location or had not experienced a change in medical conditions. She was moved into the mail handler craft and subsequently excessed to Pittsburgh as a mailhandler which violates the requirement in

Title V Section 353.301 (d) , that states she must be kept in her local commuting area. Had the "ongoing obligation" to search for work been continued as described by Arbitrator Bernstein, this would not have happened. The transfer to Moore occurred a year ago, in that period of time there hasn't been effort to restore her back to a higher level in the pecking order of ELM 546. Instead, the Detroit district ignored the obligation to continually put an injured employee back to her original status prior to her injury.

Arbitrator LaLonde B01N-4B-C 06189348 had this to say regarding the new definition used by the USPS in an attempt to show they had searched for "Productive and Necessary" work. We will reference LaLonde again later in this brief.

The terms of the Settlement clearly support the Union position that the Service was employing new and different criteria (or its interpretation) in the Grievant's situation; criteria different from what had been done in the past. The "necessary work" and "operational needs" standards used by the Service as justification where it has not been shown to have applied in the past is not in conformance with clear understands derived from the Settlement between the parties.

Paramount to the Union case is the recent Step 4 Settlement M-01706 which establishes that **"The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees or not developed new criteria for assigning limited duty."** The modified job offers in the case file clearly show newly established criteria that the Service had used to assign limited duty work. Testimony from the grievant established her medical restrictions had not changed

since her return to duty in the last part of 2000. Thus the Service changed the criteria by eliminating all the duties it previously offered the grievant.

Applying Settlement M-1706 the Service is obligated to follow the same criteria and obligations that they did in the past as applied to the ELM 546. There cannot be any dispute that when the Service at the local level unilaterally redefined and eliminated possible duties they were in violation of the Step 4 Settlement. As stated in the M-1706, the ELM 546 language has not changed. Therefore, all aspects must be observed until such a change has been established under Article 19.

There can be no doubt that the provisions of ELM 546.142 are applicable to the grievant. The union maintains that the burden then shifts to the Service to establish that they had followed those provisions of making every effort. The union maintains that the quantum of proof in meeting their burden entails more than bare assertions. It requires detailed, precise and documented evidence to necessitate the change they attempted to make. The testimony of their witnesses failed to prove they made any effort, let alone "every effort".

Arbitrator Abernathy WON-5TC-862

Moreover, arbitrators have held, contrary to the position of the Postal Service in the present case, that once the Union shows that the employee is subject to this section, the Postal Service has the burden of proof that it followed the pecking order in assigning work to the limited duty employee . See, for example, Case No . W4N-5C-C43784 (Arbitrator Lange, 1989), supra. I am persuaded by the weight of arbitral authority and shall follow it . In addition, arbitrators have held that it is not sufficient for the Employer merely to assert that it considered each of these elements in the sequence described above . Rather, the Employer must substantiate any such assertions with documented testimony and other evidence .

Arbitrator Axon E90N-4E-C94004012

It is at this point that Section 546 .141 of the ELM comes into play . Section 546 .141 demands that management make substantial accommodations for employees who suffer on-the-job injuries . Arbitral authority is well established that Section 546 .141 places significant constraints on management's ability to assign limited duty employees . In the present case , Postal Service accommodated Grievant in two bid jobs over a period of two years .

Where the Postal Service has successfully accommodated a limited duty employee for two years , it bears a heavy burden to demonstrate that it can no longer accommodate that employee . The Arbitrator holds the Postal Service's evidence was insufficiently detailed, precise and documented, that it could no longer accommodate Grievant in his bid assignment .

Arbitrator Reeves E94N-4E-C 9921 5892

It is management 's burden to demonstrate in arbitration that it attempted to comply with each step outlined in Section 546.141 , beginning with the need show there was no longer any available work at the Ivywild facility . After all, the Grievant had been working at that facility for approximately two years prior to management's decision to transfer him to Antares Station. There was no testimony that the Grievant's performance was unacceptable or that he was ever chastised for not staying busy. Management simply makes an assertion in its Step 2 response that "Ivywild Station has three permanent rehab positions . Sufficient work was not available for a fourth permanent rehab position." As noted by Arbitrator Lange (C#09589), "However, the bare assertion that there was no available work, without additional substantiation , is insufficient to demonstrate compliance with Section 546 .141 and does not shift the burden of proof to the Union to demonstrate that work was available."

The union will also rely on this arbitration in support of their claim that the service has the same obligation to provide a "rehabilitation job" under 546 ELM as it does to provide "limited duty".

Arbitrator Gentile F90N-4F-C 95045308

Arbitrator Abernathy then concluded after an analysis of a number of prior arbitral decisions, that . the USPS has the burden of proof that it followed the "pecking order" or "progression" of ELM Section 546 .141a (1), (2), (3) and (4) when it assigned the

work to the limited duty employee . As already noted, the NALC has demonstrated that the Grievant was subject to this provision . It is clear that such a determination is a condition precedent to the application of this provision to a given employee .

In satisfying this burden of proof, Arbitrator Abernathy stated the following in relevant part:

“ arbitrators have held that it is not sufficient for the Employer merely to assert that it considered each of these elements in the sequence described above . Rather , the Employer must substantiate any such assertions with documented testimony and other evidence” . [Id .]

This Arbitrator is persuaded by Arbitrator Abernathy's analysis and will follow it in the instant case .

Management has improperly interpreted other aspects of this case. One of which deals with their obligation under the Rehabilitation Act. The Service maintains that they have no obligation under the Rehabilitation Act because the grievant does not have a life altering disability. The union contends that the clear and unambiguous language in 5CFR 353.301 (d) which states in part...**At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973,** gives the Postal Service an example of the bare minimum requirements in their treatment of injured workers. Citing 29CFR 1614.203 Rehabilitation Act we see that **the Federal government shall be a model employer of individuals with disabilities.**

Based on the above reference the union maintains that the grievant is therefore covered under the provisions in the EL 307 Section 131 The Rehabilitation Act. The Rehabilitation Act **requires the Postal Service to consider ways to change the manner**

of doing a job to allow a qualified person with a disability to perform the essential functions of the particular job, or to be considered for a position he or she desires.

Management also contends that once it did its job search and found no work they are no longer obligated to search for work. There is no dispute that on March 30, 2009 the Service "washed their hands" of the grievant when it discontinued its search to provide suitable work for her. The union maintains that the Service was obligated to continue that search as long as the grievant was in their employment. The case file clearly establishes that in the past the Service continued their search to find jobs for the grievant and others when circumstances had changed. They have clearly violated the Step 4 Settlement 01706 by changing their obligation to continue to search for work for the grievant. That obligation is on going and was first established by National Arbitrator Bernstein H1N-1J-C 23247

pgs 13-14:

The Arbitrator holds that this interpretation of the provision is barred by the specific mandate in the section that the Service "should minimize any adverse or disruptive impact on the employee ". The Arbitrator agrees with the union that this mandate creates an obligation on the Service that is a continuing duty for the entire period of the employee's disability. The Service is contending that there should be a point in time at which it has the right to "wash its hands" of a particular injured employee and move him out of his craft and into another one for the remainder of his career. Perhaps it would be sound policy to have such a provision in the section, but there is no language to that effect in that section at this time. Section 546 .14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place. Therefore, the Service must be prepared to modify a limited duty assignment outside of the employee 's craft, facility or hours, when work within those conditions becomes available.

It has been established that National Level Arbitrations are binding in Regional Arbitrations as established in the Step 4 Settlement M-1372. Since the Bernstein decision in 1987 there have been numerous Regional Arbitrations that have relied on that decision in support of the union's position.

Before listing a few of those arbitrators lets look back at the testimony from the NRP members. Not once during the hearing did the USPS advance an argument that they followed their contractual and legal obligations in pursuit of work for Vesta Moore to place her back in her facility at Linwood Finance working as a city letter carrier. Injury Compensation manager and NRP team member Ken Bunch was questioned about putting an employee back to their original place of injury. He stated that he didn't believe that was a requirement unless something happened to the new job offer. National Arbitrator Bernstein disagrees with those positions held by the Detroit NRP committee.

Arbitrator Barker W7N-5N-C 22042 pg. 18

Arbitrator Lange's analysis and summation is consistent not only with the literal language of Section 546 .141, but accurately reflects the clear weight of arbitral authority In stressing the ongoing, continuing obligation on the part of management to remain vigilant for work opportunities within the tolerance limitations of limited duty employees so as to comply with the "every effort" and "minimize any adverse or disruptive impact on the employee" mandate of Section 546 .14

Arbitrator Abernathy WON-5TC-862 pg. 23-24

That is, as numerous arbitrators, as well as the Union in this case, have pointed out, management has an on-going and continuous obligation to try to provide work to limited duty employees within the sequence specified in this provision. See, for example, the national level award of Arbitrator Bernstein in Case No. H1N-IJ-C23246 (1987), as well as the decision of Arbitrator Barker, cited earlier in this opinion.

Arbitrator Freitas E98N-4E-C 01097720 pg.21

For example, Mr. Wisner stated at the arbitration hearing that he was unaware that the Postal Service has an on-going obligation to monitor the situation of limited duty employees to ensure that if there is work for them at a higher level of the "pecking order" it must be offered to them. The general rule in this regard was stated in a national decision by Arbitrator Bernstein and has been uniformly followed by other arbitrators when faced with the issue.

If the Postal Service advocate does cite in her brief a regular panel arbitration case dated 10/22/09 by Arbitrator Vickie Peterson Cohen that addressed Postal Service NRP issues, as she identified it during her opening, please consider the following arguments considering the lack of persuasive value of that decision.

As a regional decision, Arbitrator Cohen's award is not binding on any other regional arbitrator. Rather, other arbitrators may accept or reject her opinion, depending on the persuasiveness of her rationale and/or the similarity of the facts giving rise to the grievance.

The persuasive value of Arbitrator Cohen's decision is diminished in two ways: First, there is absolutely no indication in her award that she considered or even was aware of the 6/18/09 national level settlement on NRP identified as M-01706, as we clearly established in the instant case. There is no mention of this settlement in her decision. Moreover,

Arbitrator Cohen's mistaken belief that an NRP issue was still under dispute at the national level lends support to the idea that she did not consider, or even know about, the national level settlement in M-01706. Arbitrator Cohen wrote:

The Postal Service has the management right to decide that available work cannot be work tentatively associated to another bid assignment, or dependent on uncertain factors. Since this argument or issue is apparently pending at the National level for a final resolution, it will not be addressed in further detail in this grievance.

In fact, Article 15 Section 2 Interpretive Step of the National Agreement provides that when there is a national level appeal, any local grievances filed on the specific interpretive issue shall be held in abeyance pending resolution of the national appeal. Arbitrator Cohen had to be mistaken about the issue being "*apparently pending at the National level for a final resolution*" because if that were so, the case before her would have been on hold, not before her.

Second, in M-01706, the Postal Service agreed that NRP has not redefined or changed its obligation to provide Limited Duty and that USPS has not developed new criteria for assigning limited duty. Arbitrator Cohen's rationale directly conflicts with M-1706. M-1706 includes the following: "**The Postal Service has not developed new criteria for assigning limited duty.**" Yet Arbitrator Cohen, in discounting the relevancy of the fact that the grievant had previously productively worked the original Rehabilitation Job Offer, including overtime, wrote: "***However, under the newly implemented NRP criteria, which***

requires that the Grievant's daily assignment consist of necessary work, such past work assignments become irrelevant."

Thus, USPS agreed in M-1706 there were no new criteria, but arbitrator Cohen relied on newly implemented NRP criteria. Thus, Arbitrator Cohen's decision should not be considered persuasive because it did not take into account the mutual agreement of the parties at the national level and because it is inconsistent with that same national level agreement – M-1706.

Arbitrator LaLonde B01N-4B-C 06189348

More persuasive you will find is Regional Arbitrator LaLonde in his recent decision regarding the M-1706 settlement. Arbitrator LaLonde was faced with a similar case from Buffalo, New York earlier this year regarding a letter carrier who had his modified job changed through NRP. He had this to say:

Pg. 16 What the Settlement language reveals is that nothing changed in the obligation of the Service to provide limited duty and rehabilitation jobs to injured employees. Further, there have been no new criteria developed by the Service for assigning limited duty jobs. Also, the settlement reaffirms that ELM 546 and CFR Part 353 are controlling when it comes to limited duty assignments and the requirements and extent of the obligation placed on the Service. The terms of the Settlement clearly support the Union position that the Service was employing new and different criteria (or its interpretation) in the Grievant's situation; criteria different from what had been done in the past. The "necessary work" and "operational needs" standards used by the Service as justification where it has not been shown to have applied in the past is not in

conformance with clear understands derived from the Settlement between the parties.

Pg. 18 Certainly these were legitimate and productive job functions that contributed to the overall operation and delivery of the mail. The Union also demonstrated, without contradiction, that the work at Amherst station that the Grievant was performing (in conformity with his medical restrictions) before he was released, still existed after he was let go. The Service did not refute this fact. The Service contention that this work was deemed to (sic) longer be productive or necessary is not persuasive.

We again ask that you not be distracted by the variety of adjectives thrown at you by the Service when describing different work. The words necessary, productive and tangible when used as a description to the noun work must still be kept in context of the subject matter. For example, when looking at the statement made by John Dockins, on page 7 on the USPS legal brief submitted, he states...***Article 37 duty assignments and Article 21 Rehabilitation Assignments are separate and distinct...Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates.*** The descriptions offered by necessary, productive and tangible would certainly take on different meanings when distinguished between craft assignment and rehabilitation job assignments. The generic, one size fits all, example of work, employed by the USPS advocate, can not be considered at face value. We offer three such examples of the USPS attempts at

redefining existing contractual language in our next two citations, one awarded within the last two weeks and the other two in the last few months.

Arbitrator Vonhof E06N-4E-C 08200936

Yet another case directly on point is the award of Arbitrator Jeanne M Vonhof, in which she states on page 16...

*In this case Management has argued that there was not sufficient work for the grievant to perform within his limitations at the Gladstone branch so as to justify keeping him in the Modified Rehabilitation position he had occupied for the previous 9 years. **The Service has not established that the work he had been performing under this position no longer exists. In describing the reason for change, the Service points to duties in the grievant's position that are clerk or management duties, and argues that there was not sufficient carrier work for a full-time position at Gladstone.***

Further on the same page...

At Step B Management argued that the Greivant was performing Clerk work under his 1999 Modified Rehabilitation Position and this violated the Clerk Craft contract. However, that issue has clearly been laid to rest in a national award, USPS and APWU and NALC, Case No. E90C-4E-C 95076238 (Das, Arb. 2002) where he ruled that a position uniquely created for a Carrier out of Clerk duties need not be posted for bid as a Clerk craft position because,

In this case, the rehabilitation assignment in question was not created to meet the operational needs of the Postal Service, but to fit the medical restrictions of the injured employee with minimum disruptive impact on the employee. By definition, it would make no sense to treat such a uniquely created assignment as a duty assignment to be posted for bid.

Arbitrator Monet E06N-4E-C 10001623

This is from a very recent decision from another district, within the last month, that failed to follow the NRP protocol from the national parties, we cite as a second recent example.

Arbitrator Monet had this to say,

The pecking order requires that Management make every effort to find work within the employee's limitations. Management's limited external searches do not meet this test. Rather than follow the pecking order to its logical extension, Management substituted criteria and findings from the NRP. This is a clear violation of the National Settlement (J2:102-103).

Second, Mr. White redefined and reinterpreted ELM 546 in violation of the National Settlement between the parties wherein the parties agreed that the Postal Service had not developed new criteria for assigning limited duty (J2:102-103). Mr. White used the terms "essential work", "tangible work" and "necessary work" neither of which can be found in the ELM although "tangible work" is found in HBK EL 505. These terms are touchstone for management in all NRP cases before this arbitrator. The ELM sections 546.141 and 546.142, do not use these terms to define Management's obligation toward limited duty and Rehab employees. Management is obligated to find work within the employee's medical limitations. Essentially, as Arbitrator Levak stated, "adequate work" and "tangible work" mean "productive work," not "make work". Non-productive work is make-work.

It is well established by a line of arbitration decisions referenced by the parties that Management is not obligated to provide "make work" assignments. Some arbitrators have used the term "productive work";

that is, it must be work based upon the production needs of the facilities. While Management may prioritize the work, the ELM does not allow Management to exclude low priority work that meets production needs from consideration for limited duty and rehab assignments. The work must be "adequate" or "tangible", not high priority. Neither Arbitrators Levak, Snow (National) or Lange, who wrote definitive decisions on ELM 546 used the terms "essential work" or "necessary work".

Management has further modified the criteria for establishing modified assignments by claiming that the work cannot come from bid assignments. According to Mr. White, any work not found in a bid position is make work. There is simply no language in the ELM 546 that places such a restriction on limited duty and rehab assignments. To the contrary, such assignments are often cobbled together from elements of many positions and available work, depending on facilities and their production needs. To exclude elements of existing bid positions is not the stated intent of ELM 546. Tasks primarily integrated and delegated from management positions is not make work irrespective of the funding source. If it is work incidental to the production needs of the facilities, it is tangible work that management has the authority to delegate such tasks under article 3. It is not make work.

ARBITRATOR EISENMENGER E06N-4E-C 09370199

Arbitrator Eisenmenger, on page 30, had this to say about a city letter carrier from Cheyenne Wyoming who had work withdrawn similar to the grievant in a case from a couple of weeks ago. Our final cite on the USPS attempt to redefine the word "WORK".

The reference to tangible product in the EL-505 seems misplaced. The Postal service is not a manufacturing entity: it produces no real product as that term is commonly used in the industrial relations lexicon. The Postal Service, as its name suggests, provides postal services to its customers; i.e., the delivery and collection of mail, the sale of postal products such as stamps and postage, the rental of mail boxes, etc. In absence of real tangible products made by the Postal Service, I find the interpretation of "tangible product" to consist of

specific work tasks a postal employee would perform in the furtherance of the mission of the Postal Service.

The definition given by Arbitrator Eisenmenger above parallels the Union contentions, that the work Moore had been performing since her return from her injury was certainly tangible, whether doing portions of routes, delivering splits, going to job sites for the USPS or performing work that would typically be performed by supervisors. Arbitrator Eisenmenger, on page 31 goes on...

However, the process undertaken in the NRP assessment, which led to relieving the Grievant of duties he had performed without incident, was based on a faulty premise. The Postal Service simply refused to accept that the work the Grievant had been doing for the previous decade was acceptable for the purposes of assigning limited duty work under ELM 546.142.

The standard of necessary work is faulty on many counts. ELM 546.142, the primary governing regulation in the Grievant's case, does not require high standard of "necessary" work as the Postal Service defines it.

Page 32...From an evidentiary standpoint, the criteria of necessary work has been created in contravention of the applicable contractual, statutory and regulatory provisions that apply to situations such as the grievant's. A careful review of all such provisions fails to reveal that the Postal Service is permitted to raise the bar of what constitutes limited duty to the heightened standard of "necessary" work, at least to the extent the Postal Service applied it in an improper and narrow manner.

On page 36, the arbitrator states...In doing so, the Postal Service is ORDERED, to cease and desist from utilizing the erroneous standard of "necessary" work as the Postal Service has improperly restricted its meaning.

ARBITRATOR JACOBS J06N-4J-C 09214081

There has been much debate about medical documentation in this case file, what is sufficient, what is current, and more importantly who can make a qualified determination based on medical evidence. This is not the first occasion this argument has arisen within the Detroit district. In a case similar to Ms. Moore's, Arbitrator Jacobs was presented with the same problem, an NRP committee member determining the medical value of a document when not qualified to do so. The difference in this case as opposed to the instant case is the grievant in the cited case obtained clarifying medical documentation when asked to do so, unlike the case of Moore where they let the dispute stand. Arbitrator Jacobs had this to say on page 7 of her award...

The narrative medical report and CA-17 dated April 1, 2009 prepared by the doctor as clarification, are in the file. The Postal Service suggests the clarification should not be considered because there is a problem with the timeliness of these medical reports.

This argument fails because, according to the Postal service's closing brief, (pg. 15, last paragraph) the NRP team "ensured that every injured /limited duty employee had a current medical on file" and had identified the work that the employee had been doing. Any earlier CA-17 or other contemporaneous medical report is not in this file. But if there was a discrepancy between the NRP's team interpretation of the medicals and the work that the Greivant had been in fact doing they should have resolved the discrepancy.

The NRP team decided that Greivant could not do work that Greivant could not do work that required driving, according to the testimony of Ms. Johnson. The NRP representative testified she decided he could not drive because of the limitation on turning his head. This was in spite of the doctor's statement that he can drive; and the limitation is "No extremely repetitive turning

of the head." (Emphasis added) and the fact the grievant had driven a postal vehicle as a part of his duties over the 8 years he had a rehabilitation job offer.

The NRP representative cited no medical expertise on her part. She did not testify to seeking medical expertise in evaluating what the limitation meant, either from someone in the Postal Service or from the Doctor who submitted the medical report. She decided Greivant can drive a personal vehicle, but cannot drive an LLV. I find no rational basis in the file to conclude that Greivant cannot do work that requires driving a postal vehicle.

CONCLUSION

The central issue to the Union in this case is the USPS unilaterally redefining a provision in the ELM that has applied by the parties for over 30 years. The Service provides no evidence to support their claim, actually, to the contrary, they support our position of changing a nearly 30 year practice of implementing the ELM 546 provision. The Service's claim of not having a full day's work for Moore must be questioned and dismissed given the new definitions applied to previously existing work the grievant was performing. This even more so, considering utilization of the previous application of ELM 546 her job at Linwood Finance was adequate. We maintain the work was, and still remains at Linwood Finance, both Moore and Burt testified unrefuted to that point in this case. There is still eight hours of work available to gainfully employ Ms. Moore in her job offer at Linwood Finance unit at the North End station. Nothing has changed regarding Ms. Moore's injuries or abilities and willingness to work when the USPS withdrew work from her and placed her into the mailhandlers craft.

We believe we have proven the events that transpired through the attempt at relocating Ms. Vesta Moore in the format used in the Detroit district was a direct violation of both the ELM 546 pecking order, as well as the historical practice in place by the Union and the U.S. Postal Service. For those reasons, we urge you to find in favor of the Union and sustain this grievance in its entirety, including application of the remedy requested by the NALC.

IX. REQUESTED REMEDY

The following remedy request was made by the local union in the joint file and was advanced to you during arbitration as the remedy sought by the Union.

1. Find the subject NRP Job Offer a violation of the Collective Bargaining Agreement and/or applicable law.
2. Vacate the subject NRP Job Offer.
3. Return the grievant to her original Form 50 assignment, or as close as the pecking order of ELM 546 possibly allows.*
4. Reimburse the grievant for any mileage incurred while reporting to the new NRP Form 50 assignment, at \$.55/mile (IRS Rate).
5. Pay the grievant "Out -of Schedule Overtime as a fashioned Remedy for any hours worked outside of the prior work schedule of the grievant at the original Form 50 Assignment.

*Item three was changed to comply with the contractual application of the ELM.

Arbitrator Dilts, after hearing the NALC presentation on April 23, 2010 and after

examination of submitted post-hearing briefs by the parties, we are confident that you will be convinced a breach of our collective bargaining agreement occurred. With that said, they only way to repair the harm the grievant suffered, at a minimum, is the execute requested remedy of the NALC.

X. CITATIONS OFFERED AS PERSUASIVE

The following Lange case was used as a citation within the text of the Union brief.

CASE # W4N-5C-C 43784 Carl Lange--Arbitrator
CASE # C-09589 Hearing in Long Beach CA 12-20-1989

The following Barker case was used as a citation within the text of the Union brief.

CASE # W7N-5N-C 22042 James Barker--Arbitrator
CASE # C-11589 Hearing in Bakersfield, CA 12-20-1991

The following Abernathy case was used as a citation within the text of the Union brief.

CASE # W0N-5T-C 862 John Abernathy--Arbitrator
CASE # C-12861 Hearing in San Fernando CA 03-01-1993

The following Axon case was used as a citation within the text of the Union brief.

CASE # E90N-4E-C 94004012 Gary Axon--Arbitrator
CASE # C-14347 Hearing in Portland OR 03-24 1995

The following Gentile case was used as a citation within the text of the Union brief.

CASE # F90N-4F-C 95045308 Joseph Gentile--Arbitrator
CASE # C-17301 Hearing in Ventura, CA 09-12-1997

The following Reeves case was used as a citation within the text of the Union brief.

CASE # E94N-4E-C 99215892 T. Zane Reeves--Arbitrator
CASE # C-21511 Hearing in Colorado Springs, CO 12-12-2000

The following Freitas case was used as a citation within the text of the Union brief.

CASE # E98N-4E-C 01097720 Joseph Freitas--Arbitrator
CASE # C-22990 Hearing in Layton, UT 01-17-2002

The following Vonhof case was used as a citation within the text of the Union brief.

CASE # E06N-4E-C 08200936 Jeanne M. Vonhof--Arbitrator
CASE # C-28624 Hearing in Kansas City, MO 1-28-2010

The following LaLonde case was used as a citation within the text of the Union brief.

CASE # J06N-4J-C 08372998 Stephen LaLonde--Arbitrator
CASE # C-28641 Hearing in Buffalo, NY 1-19-2010

The following Monat case was used as a citation within the text of the Union brief.

CASE # E06N-4E-C 10001623 Jonathan S. Monat--Arbitrator
CASE # C-28705 Hearing in Colorado Springs, CO 4-1-2010

The following Jacobs case was used as a citation within the text of the Union brief.

CASE # J06N-4J-C 09214081 Karen H. Jacobs--Arbitrator
CASE # C-28731 Hearing in Taylor, MI 4-12-2010

The following Eisenmenger case was used as a citation within the text of the Union brief.

CASE # E06N-4E-C 09370199 Kathy L. Eisenmenger--Arbitrator
CASE # C-28732 Hearing in Cheyenne, WY 4-22-2010

XI. CITATIONS OFFERED AS PRECEDENTIAL AND BINDING

The following cases were cited throughout the text of the brief and are listed here for reference purposes.

CASE # HIC-5D-C 2128
CASE # C-00936

Benjamin Aaron --Arbitrator
05-20 1983

CASE # H1N-1J-C 23247
CASE # C-07233

Neil Bernstein --Arbitrator
08-07 1987

CASE # J90C-1J-C 92056413
CASE # C-19717

Bernard Dobranski- Arbitrator
06-14-1999

CASE # E90C-4E-C 95076238
CASE # C-23742

Shyam Das- Arbitrator
10-31 2002

XII. OTHER DOCUMENTS OFFERED FOR REVIEW

Step 4 M-1500 *establishes PTF's may be removed from a hold down assignment to provide limited duty work.

USPS Legal Brief for the above mentioned DAS Award

--found on pages 118 to 135 in JOINT PACKAGE B

XIII. CERTIFICATE OF SERVICE

I certify that a copy of the attached brief and cites were sent by Regular Mail this day to the following:

**Arbitrator
David Dilts
4505 REDSTONE CT
FORT WAYNE, IN 46835-4270**

Respectfully submitted,



**Jeffery S. Fultz
Regional Administrative Assistant**

May 1, 2010

**CC: USPS Advocate
NALC/NBA Pat Carroll
File**

**UNITED STATES POSTAL SERVICE
POST HEARING BRIEF**

Case No. E90C-4E-C 95076238

Dates of hearing: October 16, 2001 and January 23, 2002

**Submitted by: John W. Dockins, Esquire
Labor Relations Specialist
U.S. Postal Service**

INTERPRETIVE ISSUE PRESENTED

As stated in the Step 4 denial (Joint Ex. 2) the interpretive issue heard at Step 4 and appealed to arbitration by the APWU is:

Whether the duties of a rehabilitation position created for an employee with work restrictions due to an on the job injury must be posted for bid to all clerk craft employees.

Additionally, after much obfuscation and discussion, the issue was sharply defined by the arbitrator and acknowledged by all parties at the end of the second day of hearing as follows:

I think we at least are understood we're dealing with the uniquely created position, whether there's an obligation there to post. (See Transcript for second day of hearing at page 312, TR2-312)

ARGUMENT

As indicated above, the interpretive issue presented is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on the job injury. But for the employee's on the job injury, the uniquely created rehabilitation assignment would not exist and would not be posted for bid as a duty assignment.

I. The Rehabilitation Assignments at Issue are Uniquely Created and Would Not Exist But For the Obligation to Reassign the Injured Employee

The rehabilitation assignments at issue are by definition uniquely created for employees who were injured on the job and continue to have work restrictions. A uniquely created rehabilitation assignment is therefore not an Article 37 duty assignment. It only exists as a result of the need to reassign an injured employee. It is a uniquely created rehabilitation assignment created under the provisions of Article 21, Section 4 and ELM

Section 546. When the injured employee vacates the uniquely created rehabilitation assignment it will no longer exist. To the extent that the rehabilitation assignment in question overlaps with an existing Article 37 duty assignment is a matter to be decided on the particular fact pattern of each individual case. However, the APWU's position in this interpretive case is that every 40-hour a week rehabilitation assignment created for injured employees must be posted for bid in the clerk craft. The APWU's position is unreasonable and can not be supported.

The simple fact of the matter is that no Article 37 duty assignment has been created. A uniquely created rehabilitation assignment tailored to the employee's work limitation's exists. Such an assignment is created pursuant to Article 21, Section 4, Injury Compensation, and is not a "duty assignment" under Article 37.

II. Management has the Exclusive Right to Create Duty Assignments

It is clear that the right and responsibility of hiring, staffing and assigning employees rests with management. Inherent in this exclusive right is the ability to determine what duties and responsibilities are needed to move the mail at any given time in any given operation. Hence, the discretion to create (or not to create) full-time Article 37 duty assignments rests exclusively with management. Article 3 of the National Agreement states in part:

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;

Accordingly, management has the exclusive right to determine when and where duty assignments are needed in order to maintain the efficiency of the operations entrusted to it. Other provisions of the Agreement such as Article 7.3 do address the ratio of full-time to part-time employees in certain size offices and the criteria for converting part-time employees to full-time. However, nothing in the Agreement impedes management's exclusive right to assign employees to work when and where they are needed and create Article 37 duty assignments to maintain efficiency of the operations.

This is in sharp contrast to rehabilitation assignments created under Article 21, Section 4. As discussed in greater detail below, Management has legal, contractual and regulatory obligations to make "every effort" to reemploy the injured employee.

III. Management Has the Exclusive Right to Abolish and Revert Article 37 Duty Assignments

Hand in hand with the exclusive right to create Article 37 duty assignments is the exclusive right to abolish or revert Article 37 duty assignments. Creating, abolishing and reverting Article 37 duty assignments are all part and parcel of the process of determining the methods, means and personnel by which such operations are to be conducted as contemplated in Article 3.

Article 37 clearly states that management has discretion to abolish or revert. Article 37.1.F states: "Abolishment. A management decision to reduce the number of occupied duty assignment(s) in an established section and/or installation".

Article 37.1.G states: "Reversion. A management decision to reduce the number of positions in an installation when such position(s) is/are vacant".

Both sections unambiguously state that it is "a management decision" to abolish or revert a duty assignment.¹ Additionally, APWU counsel acknowledged that it is management's choice to revert or abolish Article 37 duty assignments. (TR1-19,20) Common sense dictates that if it is a management decision to abolish or revert that it must also be a management decision to create Article 37 duty assignments. This is consistent with the language of Article 3. If management did not have to exclusive right to create Article 37 duty assignments it simply would exercise its ability to abolish a newly created duty assignment that was not wanted. Therefore, contractual language and common sense dictate that management has the exclusive right to control the existence of any Article 37 duty assignment in the work place.

IV. The Rehabilitation Assignment Would Not Have Existed "But For" the Obligation to Find Work for the Injured Employee. Therefore No Article 37 Duty Assignment Exists

Because this is a national interpretive issue of general application we need not address every possible fact scenario regarding the creation of reassignments for injured employees. Indeed, the APWU has acknowledged that for the purpose of this interpretive issue that the reassignment was in fact a uniquely created rehabilitation assignment. (See TR2-312.)

This alone is fatal to the APWU's case. If it is a uniquely created rehabilitation assignment it is by definition not an Article 37 duty assignment. The rehabilitation assignment would not exist but for the obligation to reassign the injured employee. Management never created a duty assignment pursuant to Article 37. Management reassigned an injured employee pursuant to Article 21.4 and ELM Section 546 as part of the established injury compensation program. Had there been no injured employee the rehabilitation assignment would not exist. The decision to create a new Article 37 duty

¹ Of course this decision can be grieved by the Union. For instance, issues of fact application as to the existence of the duty assignment after it was abolished are routinely grieved. Similarly, the issue of whether the injured employee's reassignment was actually a uniquely created assignment or a pre-existing duty assignment would be subject to review based on the particular facts of each case.

assignment is determined by Management based on operational needs, not the needs of injured employees. This distinction is critical.

This is not the first time the APWU has taken the position in a National case that Article 21 rehabilitation assignments are somehow superceded by other contractual provisions. In Case No. G94C-4G 96077397 (See USPS Ex. 11) the APWU argued that rehabilitation assignments trigger the notice requirements of Article 7.2, Employment and Work Assignments. National Arbitrator Dobranski did not agree. In his award he draws a distinction between assignments made for the purpose of Article 7 and those made for the purpose of complying with the rehabilitation and injury compensation program. The same distinction is present in this case.

In yet another National award (N8-NA-0003, Attachment A), Arbitrator Gamser was presented the interpretive issue of whether injured employees reassigned out of their normal schedule were entitled to overtime or out of schedule pay pursuant to Article 8 of the National Agreement. In denying the grievance at page 12 Gamser concluded that the Postal Service was obligated to make "every effort" to find suitable work for injured employees. Accordingly, he held that the provisions of the F-21 and F-22 handbooks disallowing overtime and out of schedule pay were not in conflict with Article 8. The determining factor was that the reassignments were made pursuant to the injury compensation program.

In the instant case, as in the Dobranski and Gamser cases, the rehabilitation assignment was created as a result of the injury compensation contractual requirements. The rehabilitation assignment did not exist before the employee was injured on duty and would not have been created by management because no need for the Article 37 duty assignment existed.

It is undisputed that the reassignment was a uniquely create position created solely because of management's responsibilities to reassign or reemploy employees because of on the job injuries. The guidance provided in these previous national awards should be

followed. The APWU has failed to show why the Dobranski and Gamser rationale should be overruled.

V. Article 37 Duty Assignments and Article 21 Rehabilitation Assignments are Separate and Distinct

As discussed above, management has the exclusive right to create, abolish or revert Article 37 duty assignments. Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates.

The Postal Service's legal obligations to employees injured on duty begin with Title 5, U.S. Code, Section 8151. This is commonly referred to as the Federal Employees Compensation Act (FECA). (See USPS Ex. 1) Section B of Section 8151 authorized the Office of Personal Management (OPM) to issue regulations concerning the administration of injury compensation programs. Pursuant to this authority, OPM issued Title 5, CFR Section 353. (See USPS Ex. 2) Section 353.301 subpart (d) states "The agencies must make every effort to restore an employee in circumstances in each case."

As a result of this legal mandate the parties negotiated Article 21, Section 4 which states:

Injury Compensation

Employees covered by this Agreement shall be covered by subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

Pursuant to this contractual requirement, the Postal Service issued ELM Section 540 which contained the regulations complying with the applicable regulations of the Office of Workers' Compensation. (See USPS Ex. 3) These ELM regulations constitute the basis of the Postal Service's injury compensation program.

The bottom line here is that because the legal, contractual and regulatory mandates drive the decision to create a rehabilitation assignment, it is not an Article 37 duty assignment. The injury compensation regulations require that "every effort" be made to reemploy the injured employee. The every effort mandate has been expressly codified in ELM Section 546 and detailed in ELM Section 546.141(a). Therefore, rehabilitation assignments made under this provision are not Article 37 duty assignments but rather are created and governed by totally separate and distinct dynamics and forces.

Article 37 duty assignments are created by management due to operational needs. Rehabilitation assignments are created as a result of legal, contractual and regulatory requirements. But for the obligations to the injured employee, the rehabilitation assignment would not exist and would not be created under Article 37. Therefore, rehabilitation assignments are not Article 37 duty assignments.

VI. The Established Injury Compensation Program Was Approved By the APWU and It is Far Too Late To Argue that Rehabilitation Assignments are Duty Assignments

As discussed above, Article 21, Section 4 requires Management to promulgate appropriate regulations to comply with federal law. These regulations can be found at ELM Section 540. In 1979 the NALC filed a national level grievance challenging the application of ELM 540 in that Letter Carriers injured on duty were being reassigned to clerk craft positions "well beyond the installation that they worked in and on tours that they—that were alien to them". (See APWU Tab 5, page 13 and USPS Ex. 4)

The filing of this grievance by the NALC led to discussions with the Postal Service regarding the regulations governing the application of the workers' compensation program. On October 26, 1979 the Postal Service came to an agreement with the NALC regarding the injury compensation program. (See USPS Ex. 5)

It is significant to note that this agreement was discussed with the APWU in advance and the APWU concurred with the change to the regulations. Not only does the body of the

settlement expressly state that the changes were discussed with other unions and the other unions were amenable to the changes, the testimony of Richard Bauer also confirmed through personal knowledge that the APWU was involved in the agreement. (See TR1-147) This testimony stands unrebutted. Additionally, Arbitrator Snow found that the APWU was involved in this settlement and did not voice an objection at the time it was negotiated in 1979. At page 15 of Case No.H94N-4H-C 96090200 (See APWU Tab 5) National Arbitrator Snow states:

Discussions between the parties ultimately produced the present language of ELM Section 546.141(a). President Sombrotto's (NALC National President) testimony made clear that the parties anticipated that cross craft transfers would occur. Moreover, the parties gave notice to other unions, specifically the APWU, that the negotiations were occurring, and no one voiced any objection to the agreement reached by management and the NALC on the language of ELM Section 546.141(a).

Testimonial and documentary evidence about the context of the decision to enact ELM Section 546.141(a) made clear that management agreed to make every effort to assure that partially recovered current employees would not be assigned "alien" tours of duty at distant installations. It is clear that a main purpose of the negotiation was to give the Union and the affected employee a degree of control over how reassignment would impact partially disabled workers.

Clearly, the APWU was on notice that cross craft rehabilitation assignments would be occurring. If the APWU felt that these rehabilitation assignments were in violation of the National Agreement or that they were actually Article 37 duty assignments that required posting in the clerk craft, the APWU should have raised those concerns in 1979. To now make such arguments is disingenuous.

Additionally, when the settlement language was incorporated into the ELM in 1979 the APWU was provided the changes pursuant to Article 19 and still did not raise an objection or submit the issue to national arbitration. (See USPS Ex. 6) The reason is obvious: the APWU agreed that such cross craft rehabilitation assignments were necessary to accommodate employees who were injured on duty. The APWU now finds that position to be politically unpopular given the fact that due to mail processing

operational needs there are fewer day shift job assignments. However, the APWU may not escape the consequences of its prior actions.

The NALC settlement agreement became ELM Section 546.141(a) and is the mandatory pecking order used to place injured employees into rehabilitation assignments. If the APWU felt that this regulation violated the National Agreement the APWU was obligated to object at that time. They failed to do so. As Arbitrator Aaron stated in Case No. H1C-5D-C 2128 (APWU Tab 9) at page 6:

It is obviously too late in the day for the Union to challenge the proposition the FECA regulations can augment or supplement reemployed persons' contractual rights. The language of Article 21, Section 4 of the 1981-1984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply. If the Union objects to the changes in the relevant revisions introduced by the Postal Service in purported compliance with government regulations, it may challenge them in accordance with the procedures set forth in Article 19 of the Agreement, previously quoted. This it failed to do. Moreover, it raised no objection to the statement in Gildea's letter of 26 July 1979 to Newman, previously quoted, which clearly anticipated the reason for the action taken by the Postal Service in the case of Akins.

Clearly, the APWU did not object to the detailed language in ELM 546.141(a) that mandates creating rehabilitation assignments, therefore the APWU is obligated to honor the established injury compensation program. If the APWU's "duty assignment" argument is upheld they will have successfully circumvented and thwarted the employer's ability to reemploy injured employees.

VII. The APWU's Position Leads to Absurd Results and Will Greatly Impede the Established Injury Compensation Program

The contract must be read as a whole. The interrelationship of Article 37 duty assignments and Article 21 rehabilitation assignments must be viewed in the context of the real world. Accordingly, an analysis of the impact of the APWU position in this case is very insightful. If uniquely created rehabilitation assignments must be posted for bid as Article 37 duty assignments for all clerk craft employees, it will lead to unproductive

inefficiencies such as ongoing postings, repostings , abolishment of duty assignments and the assignment of unassigned full-time regular clerk into full time residual assignments, without ever being able to assign an rehab injured employee into an assignment under ELM 546. Such an unnecessary administrative effort unrelated to the catalyst for such effort, the need to assign an injured employee, was certainly never intended by the parties. The APWU's approach will lead to absurd results.

This interpretive case is predicated on the fact that these are uniquely created rehabilitation assignments tailor made for the injured employee. If in fact the rehabilitation assignments must be posted, it is almost certain that able bodied clerks other than the injured employee would be awarded the bid. The injured employee would have no right to even bid on the job created for the sole purpose of reemploying the injured employee. (See Suriano testimony at TR1-179) In fact, the injured employee would never be reassigned into the clerk craft until a job offer is made that would pass the approval of the Department of Labor and the Office of Workers' Compensation. Such job offer could not be made if the assignment had to be posted within the gaining craft for bid first. It would not be an available assignment until the bidding process was completed. Therefore, the injured employee for whom the rehabilitation assignment was created would not be able to bid for the assignment since they still have not been assigned to the gaining craft.

Following the APWU logic, if the rehabilitation assignment was posted within the gaining craft the successful bidder would be awarded the uniquely created rehabilitation assignment. Because management has no need for the assignment other than to reemploy the injured employee, if any other employee were the successful bidder the assignment would be abolished at management's discretion pursuant to Article 37.1.F. An abolishment would then leave the senior bidder as an unassigned regular without an assignment and would trigger "an elaborate set of procedures to follow if somebody's position is abolished" according to APWU counsel at TR1-19.

Concurrent with the abolishment of the uniquely created rehabilitation assignment, the vacant duty assignment the successful bidder previously held would probably be posted as operational needs would dictate the filling of the now vacant duty assignment. Accordingly, the currently vacant duty assignment would be posted for bid and another successful bidder would then be placed in that job. The next subsequent vacant duty assignment created by the next sequential job awarding would then have to be posted for bid by all craft employees. This domino effect would create ongoing inefficiencies in the work place. Even worse, the injured employee for whom the original rehabilitation assignment was created for would be no closer to being reemployed.

In an attempt to reemploy the injured employee management would then create another unique rehabilitation assignment. The process would then play itself out all over again as the APWU would require that the new rehabilitation assignment be posted for bid. Mr. Bauer testified that there are presently over 12,000 employees on rehabilitation assignments throughout the country. (See TR1-153) The disruption this would cause to operations nationwide would be monumental and would be disastrous to the injury compensation program.

If the APWU wants to limit, change, alter or amend the established injury compensation program it must do so in collective bargaining, not through arbitral fiat in rights arbitration. It is far too late in the day for the APWU to challenge procedures they agreed to in 1979.

VIII. The APWU's Current Arguments Have Been Rejected In a Previous National Arbitration Award

This is not the first time the APWU has made the same identical Article 37 "duty assignment" arguments in national arbitration. In National Case No. J90C-1J-C 92056413, (APWU Tab 8) Arbitrator Dobranski was presented with the same exact argument that is the lynchpin of the APWU's position in the case at hand. It was rejected in its entirety and the grievance was denied.

The issue in the Dobranski case dealt with temporary rehabilitation assignments of rural carriers into the clerk craft. One of the arguments made by the APWU was that "Article 37, Section 1.B defines duty assignments and Article 37, Sections 3.A.1(a) and (b) require these regularly scheduled duties, full-time or part time, to be posted to the clerk craft." (See APWU Tab 8 at page 12) The instant case deals with a city carrier with a permanent rehabilitation assignment, the Dobranski case dealt with with a rural carrier with a tempory rehabilitatin assignment. However, this minor distinction does nothing to resuscitate the merits of the APWU arguments. The APWU Article 37 "duty assignment" argument fails just the same in both cases.

The Postal Service joined issue with the APWU on the Article 37 "duty assignment" argument at page 21 of the Dobranski award and argued that it had no merit. In making his ruling Arbitrator Dobranski painstakingly addressed every argument presented by the APWU including the Article 37 "duty assignment" argument. He states at page 33:

Finally, in reaching my conclusion in this case, I have carefully considered and examined all of the arguments put forth by the APWU, including the applicability of Articles 37 and 30, and whether specifically addressed above or not, and find them without merit. For all these reasons, the grievance is denied.

Therefore, the identical issue that the APWU has put forth in the instant case has already been joined, presented, argued and denied by a previous National Arbitrator in a nearly identical case. Clearly, the APWU position in this case is without merit. Once again, the instant arbitrator should not disturb established controlling National arbitral precedent. The APWU's position has been previously rejected and this grievance must be denied.

IX. The Creation of the Rehabilitation Assignment Does Not Impair PTF Clerk Seniority Rights

The APWU places heavy reliance on the notion that uniquely created rehabilitation assignments somehow impair PTF seniority rights. This simply is not true for two reasons; 1. Assuming, arugendo, that the rehabilitation assignment is an Article 37 "duty assignment", PTF's can not bid on Article 37 duty assignments, and 2. the rehabilitation

assignment would not exist but for the obligation to reemploy the injured employee and would never have otherwise been created. In any event the PTF's seniority rights are not impaired.

The APWU also argues that if the rehabilitation assignment were to be posted as an Article 37 duty assignment that it would eventually lead to a residual vacancy that may lead to the conversion of a PTF to full-time. (See TR1-22) This argument is speculative and assumes that management would not abolish the original uniquely created rehabilitation assignment when an able bodied clerk bids into it. As the rehabilitation assignment was tailored to the needs of the injured employee it would serve no purpose to allow a healthy employee to work such an assignment. It would surely be abolished. The able bodied craft employee would become an unassigned regular subject to be assigned to a residual vacancy prior to any consideration of converting a PTF to regular. If there was a bona fide operational need for a craft duty assignment it would have been created long before the rehabilitation assignment was created.

Regardless, the residual vacancy argument is not before this arbitrator. (See discussion and agreement of the parties at TR2-311-312) It is only offered to show the further weakness of the APWU logic.

X. Past Practice of the Parties Favors the Postal Service

The Postal Service offered credible testimony from James Ulicnik, Charisse Newberry, Mary Lou Pavoggi, Theresa Hantzsche, Richard Bauer, Janice Smith, David Wichterman and Bill Shane on how the established injury compensation program has been

administered over the past 25 years across the country. Each witness testified that they were not aware of a single rehabilitation assignment being posted as a duty assignment any where at any time. Mr. Bauer gave credible testimony regarding the establishment of the injury compensation program as embodied in ELM 540 and the discussions leading up to the settlement of the current ELM 546.141(a) language. As Headquarters Injury Compensation specialist he also reaffirmed the long standing national practice of not posting rehabilitation assignments as Article 37 duty assignments.

The APWU offered the rebuttal testimony of Cliff Guffey, Greg Bell and Jim McCarthy. They did nothing to rebut the testimony of the Postal Service witnesses regarding application of the injury compensation program. The fact that the Postal Service has never treated a rehabilitation reassignment as a "duty assignment" remains unchallenged. The APWU witnesses did testify that in their local installations they did from time to time file grievances challenging the establishment of some, but not all, rehabilitation assignments.

In fact Mr. Bell testified that that not all rehabilitation assignments would even trigger the need to post a duty assignment. At TR2-259 he admits that "It's not automatic that it would be posted, no." This is fatal to the APWU's position that rehabilitation assignments are always duty assignments. Apparently Mr. Bell is applying criteria that are inconsistent with the APWU's position in this interpretive case.

Similarly inconsistent, Mr. McCarthy first testified that every collection of assignments must be posted as a duty assignment if it totals 40 hours of work without exception. (See TR2-270) He also engaged in an irrelevant dialogue regarding Article 13/30 light duty assignments negotiated at his local office. This case of course does not involve an Article 13/30 assignment. As Mr. McCarthy acknowledged, Article 13/30 is only triggered by an employee request. It is a separate process distinct from the injury compensation program. He then stated that he was not aware of any non-Article 13/30 grievances ever filed as a result of a clerks being reassigned with the clerk craft. (See TR2-276) Surely, if every collection of assignments that totaled 40 hours triggered the obligation to post a new

"duty assignment" as Mr. McCarthy testified, it would apply to clerks being reassigned to rehabilitation assignments as well. Yet, Mr. McCarthy testified that he was not aware of a single such clerk "duty assignment" grievance ever being filed.

It is significant to note that none of the APWU rebuttal witnesses were at the National level when then 1979 ELM 546.141(a) injury compensation language was agreed upon. It is apparent from their collective testimony that a few renegade APWU locals were unhappy with the agreed upon ELM language and hence, occasionally filed grievances to quell dissatisfied clerks who did not understand the agreed upon pecking order to reemploy injured employees. This is understandable but does not negate the established injury compensation program. If the current APWU leadership is dissatisfied with the status quo the place to change it is at the bargaining table, not in rights arbitration.

The single NALC witness gave un rebutted and credible testimony regarding how the Postal Service and NALC have historically applied the duty assignment language. Mr. Brown's testimony dove tailed with that of the Postal Service's witnesses. Rehabilitation assignments within the carrier craft were not, and are not, treated as duty assignments and are not posted for bid. (It was stipulated that the NALC contractual duty assignment language is identical to the APWU duty assignment language, TR2-230)

The witness testimony weighs greatly in favor of the Postal Service's position in this matter.

XI. Prior Regional/Area Arbitration Supports the Postal Service

It is well established that Regional/Area arbitration awards do not control any subsequent National arbitration. Regional/Area awards may be cited for persuasive value only. The rationale for this is obvious; interpretive issues of general application must be decided at the national level with the full involvement of the national parties.

A review of prior Regional/Area awards reveals that several grievances regarding the creation of rehabilitation assignments have been decided by field arbitrators. Most of these cases deal with local facts surrounding the "uniqueness" of the rehabilitation

assignment, i.e., whether or not the assignment existed as an Article 37 duty assignment prior to the creation of the rehabilitation assignment. As previously stated, the present interpretive issue is based on the stipulation that the rehabilitation assignment is in fact a uniquely created assignment. Therefore, the arbitrator need not delve into that thorny issue of fact based application. Accordingly, those prior field arbitrations that deal with that issue offer no insight to the present interpretive issue.

However, as often happens interpretive issues evolve in the field before they are declared interpretive and appealed to national arbitration. This is the case here. With that in mind, one particular field case warrants close attention as it was a virtual dry run of the APWU's interpretive issue arguments as set forth in the instant case. In fact, the APWU advocate in the field case (Mr. Guffy) was also a witness for the APWU in this case.

In Case No. W7C-5R-C 18309 (Attachment B), Arbitrator McCaffree was presented with the same arguments that the APWU presented in the instant interpretive case. At page 26 he states:

Any violation of Article 37.3.A.1 can be disposed of without lengthy consideration. Section A and Section A.1. each refer to "newly established and vacant Clerk Craft duty assignments" or "all newly established craft duty assignments." Thus where Section 546 provides for an assignment pursuant to medically defined work restrictions of a specific employee and duties are collected as found in these cases, no clerk craft duty assignment per se was established. Rather, as the Employer argues, these were special duty assignments mandated by law. None would exist were it not for the presence of an injured worker whose duties are determined by medically defined work limitations. . . The Employer did not violate Article 37.3.A by a failure to post any of the jobs to which the injured workers were assigned under Section 546 of the ELM.

Clearly, Arbitrator McCaffree considered the same arguments set forth in the instant case and soundly rejected them.

SUMMARY

The rehabilitation assignment created pursuant to ELM Section 546 would not exist but for the injured employee. The Postal Service was mandated by Federal law to make

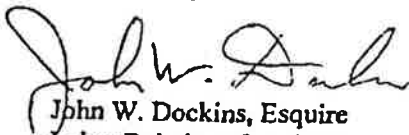
"every effort" to reemploy injured on-duty employees. This legal mandate was incorporated into the Collective Bargaining Agreement in Article 21, Section 4 which further requires the employer to "promulgate appropriate regulations" which comply with Federal law. The Postal Service promulgated ELM Section 546 in direct compliance with Article 21, Section 4. ELM Section 546 was submitted to the APWU pursuant to Article 19 and no objection was forthcoming. It is far too late in the day for the APWU to now object to the injury compensation program that they did not take issue with at its inception.

Additionally, implementation of the APWU's position would lead to a continuous game of musical chairs with rehabilitation assignments being created and abolished while the injured employee is no closer to being restored to duty as required by law. This is an absurd result and would lead to inefficiencies in mail processing operations.

CONCLUSION

Uniquely created rehabilitation assignments created pursuant to Article 21.4 are not considered Article 37 duty assignments. There is no contractual requirement to post such rehabilitation assignments for bid under Article 37 and this interpretive grievance should be dismissed in its entirety.

Submitted by:


John W. Dockins, Esquire
Labor Relations Specialist
U. S. Postal Service

April 15, 2002

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