

Withdrawal or Failure to Provide Limited Duty

Guide to NRP

National Reassessment Process



National Association of Letter Carriers, AFL-CIO
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Guide to NRP National Reassessment Process

Introduction

The Postal Service is contractually and legally obligated to make every effort to assign limited duty work to employees who have not fully recovered from an on-the-job injury. The Service, with the development of a new program called National Reassessment Process (NRP), is ignoring that obligation. With NRP, the Service is reducing the effort it makes in offering limited duty work from the effort it made since 1979. Depending on whether or not management deems an injured worker's limited duty is **productive**, that injured worker may be "Sent home, no work available" under NRP.

If this happens, the injured worker should fill out a CA-2a and CA-7 to ensure receipt of wage loss compensation for which he or she may be eligible. The injured worker should also contact his or her union representative to file a grievance regarding the withdrawal of limited duty. The purpose of this Guide is to assist NALC representatives in protecting the rights of injured workers and in requiring management to comply with its legal and contractual obligations.

Note: Where this Guide uses the term "limited duty", the intention is to include modified work provided to employees

with temporary work restrictions as well as those with permanent work restrictions. See JCAM page 13-10:

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.

Part 1—Understanding the Obligation

What is the origin for the USPS legal obligation for limited duty?

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.

Where can I find the Postal Service's legal obligations for limited duty?

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 applicable parts of 5 CFR Part 353 are printed here within this Guide starting at right. However, to read or print the entire text, both 5 USC 8101 and 5 CFR Part 353 can be accessed on the Internet:

www.gpoaccess.gov

For 5 CFR Part 353:

- ◆ Click on Code of Federal Regulations
- ◆ Click on “Browse and/or Search the CFR”
- ◆ Click on the most current version of Title 5 “Administrative Personnel”
- ◆ Click on Parts 1-699 “Office of Personnel Management”
- ◆ Click on Part 353

- ◆ For 5 USC 8101:
- ◆ Click on United States Code
- ◆ Click on “Browse the 2000 Edition of the US Code” (or the latest edition)
- ◆ Click on Title 5 “Government Organization and Employees”
- ◆ Click on Part III “Employees”
- ◆ Click on Subpart G “Insurance and Annuities”
- ◆ Click on Chapter 81 “Compensation for Work Injuries”
- ◆ Click on Subchapter I “Generally”
- ◆ Click on any Section 8101 through 8152 for specific subjects

What are the Postal Service's obligations under 5 CFR Part 353?

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 Part 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 agencywide 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. (Emphasis added)

5 CFR 353.301(d)

*Partially recovered. Agencies **must make every effort** to restore in the local commuting area, according to the circumstance 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.*

(Emphasis added)

www.gpoaccess.gov

For 29 CFR 1614:

- Click on Code of Federal Regulations
- Click on “Browse and/or Search the CFR”
- Click on the most current version of Title 29 “Labor”
- Click on Parts 1600-1699 “Equal Employment Opportunity Commission”
- Click on Part 1614
- Click on Part 1614.203

Because of the fact that 5 CFR 353 holds the Postal Service to **at least** the standards of the Rehabilitation Act, the Postal Service must act as a “model employer” and must give “full consideration” to the placement of injured workers.

Further, the Rehabilitation Act defines the standards by which it can be determined if it has been violated as the same standards of the Americans with Disabilities Act:

ADA Regulations:

29 CFR 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.
 (Emphasis added)

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For 29 CFR 1630:

- ◆ Click on Code of Federal Regulations
- ◆ Click on "Browse and/or Search the CFR"
- ◆ Click on the most current version of Title 29 "Labor"
- ◆ Click on Parts 1600-1699 "Office of Personnel Management"
- ◆ Click on Part 1630
- ◆ Click on Part 1630.9

It is clear that federal law requires the Postal Service to make every effort to restore injured workers to limited duty. It must also act as a **model employer** and provide reasonable accommodations for injured workers.

How can the union require the Postal Service to follow the law?

The National Agreement requires the Postal Service to comply with the law. It is mentioned in many places in the JCAM. Compliance with federal regulations therefore may be enforced through the grievance procedure.

Article 5—Prohibition Against 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.***

(Emphasis added)

Article 15—Grievance-Arbitration Procedure

Article 15.1

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:***

Alleged violations of postal handbooks or manuals (see Article 19). . .

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. . .

Alleged violations of law (see Article 5);

(Emphasis added)

Article 14.3.C

The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs, including employee choice of health services.

Article 21—Benefit Plans

Article 21.4 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.***
 (Emphasis added)

Article 2—Non-discrimination and Civil Rights

Article 2.1
The Employer and the Union agree that there shall be no discrimination by the Employer or the Union against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

JCAM Article 2.1 explanatory language: 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.

M-1316

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

What constitutes "reasonable accommodation"?

Reasonable accommodation is the Postal Service's obligation to find "reasonable ways to accommodate" an injured worker. It is just one element of the larger picture, which is the obligation to provide limited duty. It is just one brick in the wall of "making every effort" to provide limited duty.

The Postal Service has a handbook called the EL-307, which spells out the process that the USPS must follow to meet its legal obligations under 5 CFR 353.301(d) and, through it, the Rehabilitation Act. Following are relevant excerpts from the EL-307. For further reading, or to print from the EL-307, visit the Internet:

www.nalc.org

- ◆ Click on Departments
- ◆ Click on Contract Administration
- ◆ Click on USPS Manuals
- ◆ Click on EL-307 "Reasonable Accommodation"

EL-307 Reasonable Accommodation

Section 131 The Rehabilitation Act
The Rehabilitation Act prohibits discrimination against qualified employees and job applicants with disabilities in the fed-

*eral 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.** (Emphasis added)*

Section 531 Reassignment as a Reasonable Accommodation

Reassignment is a form of reasonable accommodation that may be appropriate if no other accommodation will allow the employee to perform the essential functions of the position. Barring undue hardship, reassignment will be considered as a reasonable accommodation if it is determined that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position. (Emphasis added)

Part of “making every effort” to restore an injured worker to duty is a requirement that the Postal Service “consider ways to change the manner of doing a job.” The Service states this in the handbook EL-307, “Reasonable Accommodation”. This is significant with regard to the National Reassessment Process (NRP).

Through NRP, the Service has actually taken work away from injured workers that it had previously provided with reasonable accommodation and designated

these employees as “sent home, no work available” (NWA). The Service now argues that it has the right to take away a carrier’s regular bid route and put it up for bid solely because he or she has physical restrictions (using a push cart to deliver mail, as an example).

The Service tries to use JCAM Article 41.1.C.1 as its basis for taking away a letter carrier’s bid position. However, the JCAM language does not support the Service’s position. The relevant JCAM language states:

Successful bidders who develop a disability after a position is awarded are entitled to retain the position if the disability is temporary. . . If the letter carrier’s personal physician determines that the disability results from a medical condition that is permanent and stationary, and prevents the letter carrier from performing the functions of the position, the letter carrier may be removed from the position and the position posted for bid.

Reasonable accommodation makes it possible for many carriers to perform the functions of their positions. The Service is required to provide that reasonable accommodation—it’s not an option.

At times, however, there may be an employee who is unable to perform the functions of his or her position even with reasonable accommodation. Only in that case would the Service have the right to remove an employee from his or her bid position in accordance with Article 41.1.C.1.

Let's look at the example of the letter carrier who requires a push cart to deliver his residential route. The push cart is a reasonable accommodation. However, management may argue that the carrier no longer has the ability to deliver his route while carrying the mail in his hands or satchel. Due to the fact that he cannot carry the mail in his hands, management may argue that Article 41.1.C.1 comes into play because the carrier cannot perform the "functions of the position."

However, the "essential functions" of a job are defined in the postal handbook EL-307. That language states:

Section 147 Determining the Essential Functions of the Job

The essential functions of a job are those functions that define the job. In other words, the job exists to perform those tasks.

Remember these words—they're important. It says, "The job exists to perform those tasks." The Postal Service's central objective in creating a letter carrier job was to deliver mail to patrons. The job exists to deliver mail. Therefore, the essential function of the letter carrier position is to deliver mail. In contrast, the Postal Service's objective in creating a letter carrier job was not for the purpose of having an employee hold mail in his hands or satchel. Holding mail in one's hands or satchel are, therefore, not essential functions of the job.

Another example is an accommodation in which management has the letter carrier casing DPS mail. Delivering DPS mail as a separate bundle is not an essential function of the position because the job was not created for the purpose of having an employee carry DPS mail as a separate bundle. As stated before, the job exists to deliver the mail.

It is clear that the language in Article 41.1.C.1 does not authorize the Service to remove an employee from his or her bid position merely because he or she needs a reasonable accommodation to perform the job functions. It only authorizes such removal if reasonable accommodation does not enable the employee to perform the functions of the job.

Despite the fact that the Service has been providing reasonable accommodations for years, it now maintains it is no longer required to. This is certainly a violation of the Rehabilitation Act and is also in direct contradiction to the Service's own handbook EL-307, which requires it to "consider ways to change the manner of doing a job."

The EL-307 Section 531 provides that another type of reasonable accommodation is "reassignment." If no other accommodation will enable the injured worker to perform the duties of his or her position, the Rehabilitation Act provides for reassignment to other work.

What are the Postal handbook/manual provisions for reassignment to limited duty?

Up until 1979, the ELM provisions regarding restoration to duty restricted the Postal Service to placing injured workers into “established jobs.” The ELM language, which is now obsolete, specifically referred to returning injured workers to “productive employment.” The language stated:

*Employee & Labor Relations Manual
(Issue 1, 4-1-78)*

ELM 546.2 Duty Assignments

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

To read a copy of the now obsolete ELM 546.2 language, see Appendix A. This ELM language was replaced as a result of a 1979 National level grievance settlement. To read the settlement, go to Appendix B. Effective with the 1979 settlement, the Service was no longer able to limit its search for work for injured employees to just “established jobs” or “productive” work. These words were stripped out of the ELM and replaced with language that mirrored the “must make every effort” terminology found in 5 CFR 353.301(d)—previously discussed on page 3. Currently, the language states:

ELM 546.142

When an employee has partially overcome the injury or disability, the Postal Service 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.

(Emphasis added)

Note that the pre-1979 ELM language that only placed employees into "established jobs" was replaced with new ELM language that provides "limited duty" work that is available within or without the employee's craft, work facility, and regular work hours. The words "maximum efforts" were replaced with "must make every effort" to make the ELM conform to the law. And, to repeat an important point, the reference to "productive" work was eliminated from the ELM provisions.

As of this writing, it has been 28 years since this National settlement was signed. For the past 28 years, the parties have interpreted the "make every effort" language to mean that the Postal Service would offer limited duty to injured workers without regard to the work's operational necessity.

Limited duty work for the past 28 years would range anywhere from answering phones, handling Edit Books, delivering Express Mail pieces, all the way to carrying one's assignment with accommoda-

tion. The matter of what constitutes "productive employment" was never a consideration after the 1979 National level settlement.

To access the current ELM language on the Internet, follow the directions below. This portion of the ELM is also printed and discussed at the end of Article 13 in the JCAM.

www.nalc.org

- ◆ Click on Departments
- ◆ Click on Contract Administration
- ◆ Click on USPS Manuals
- ◆ Click on the blue arrow "ELM"
- ◆ Click on Manuals
- ◆ Click on Employee & Labor Relations Manual
- ◆ Click on Chapter 540 "Injury Compensation Program"

Does written evidence exist of the National parties' interpretation of "make every effort"?

Yes, it does. As stated above, since 1979 the Service provided limited duty to employees without any regard to the productivity of that work. The Service has acknowledged this fact. Fortunately, it has done so not only verbally, but also in documents. Two of those documents are discussed below.

NRP Handout

The Postal Service verified that it provided all types of work, including what it refers to as "make work", in an NRP handout introducing the program. One of the pages from that handout can be viewed as Appendix C of this Guide.

Note where the Service acknowledges that, historically, it always returned the employee to an assignment—whether “make work or necessary work.”

For nearly 3 decades, “make every effort” meant returning employees to work without consideration of what constitutes productive employment.

USPS National Arbitration Brief

It has also been established in the written record in National arbitration cases. The Postal Service argued in writing that its “make every effort” obligation required it to offer work for which there was no operational necessity. The Service put these arguments in a written brief, which is available for use as evidence.

Here’s the background to the National arbitration for which the Service wrote the brief. The APWU filed a grievance protesting the fact that an injured letter carrier was given limited duty in the clerk craft. The APWU maintained that the work should not have been limited duty and should have, instead, been posted for bid for members of the clerk craft.

The Postal Service defended the fact that it had not posted the work for bid by arguing that the limited duty work had no operational necessity and that the position was only created out of its contractual and legal obligations.

This brief is important because the Postal Service, at any level of management, may not make simultaneous and conflicting arguments—according to whatever suits

its self-interest at the moment. Therefore, the Service may not argue with APWU in one forum that it has a legal obligation to provide what it calls “make-work” and then turn around in another forum with NALC and argue that it does not.

What follows are just a few excerpts from the brief (for Case No. E90C-4E-C 9507 6238). As a point of information, “Article 37 duty assignments” are operationally-necessary duty assignments in the clerk craft—in other words, normal clerk jobs. A copy of the brief and the National Award that goes with it are included in this Guide as Appendix D & Appendix E.

Excerpts from the USPS brief:

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 obligation to the injured employee, the rehabilitation assignment would not exist and would not be created under Article 37. (page 8 of brief)

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. (page 2 of brief)

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 not have been created by management because no need for the Article 37 duty assignment existed. (page 6 of brief)

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. (page 7 of brief)

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. (page 4 of brief)

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. (page 4 of brief)

Excerpts from the National Award from Arbitrator Das (C-23742):

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. 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. (page 12 of the award)

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. (page 13 of the award)

Moreover, in that case, the assignment would not exist, but for the obligation to reemploy the injured employee, it would not have been created. (page 14 of the award)

What has been the Postal Service's policy with regard to providing limited duty?

In the past, the Postal Service has always acknowledged its legal responsibilities in this area. One example is in the following ELM cite:

ELM 546.11

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.

Management's obligation toward limited duty is also found in another Postal manual. It is called the EL-505 "Injury Compensation" and can be accessed on the Internet in the same manner as the ELM.

EL-505 Section 7.1

*The USPS has **legal responsibilities** to employees with job-related disabilities under OPM regulations. Specifically, with respect to employees who partially recover from a compensable injury, the USPS **must make every effort** to assign the employee to limited duty consistent with the employee's medically defined work limitation tolerance.*

(Emphasis added)

Section 11.1--Obligation: Recognizing OWCP and USPS Responsibilities

It is the administrative responsibility of the Secretary of Labor, pursuant to Title 5, United States Code, Chapter 81, to direct the rehabilitation efforts of those permanently disabled individuals covered under FECA. OWCP, Employment Standards Administration, DOL, administers those responsibilities at the discretion of the Secretary.

*The USPS responsibility is outlined in FECA, 8151(b)(2). **It is the policy of the USPS to make every effort to reemploy or reassign IOD employees with permanent partial disabilities to positions consistent with their medical work restrictions.*** (Emphasis added)

Not only does the Postal Service acknowledge that it has legal responsibilities to provide limited duty, it also acknowledges that providing temporary and permanent

limited duty has been beneficial to both the Service and the employee:

EL-505 Section 11—Rehabilitation Program

*The Joint DOL-USPS Rehabilitation Program was developed to fulfill the USPS legal obligation to provide work for injured-on-duty (IOD) employees. **Providing gainful employment within medically defined work restrictions has proven to be in the best interest of both the employee and the USPS. In many cases, returning to work has aided the employee in reaching maximum recovery. This program is also one of the most viable means of controlling workers' compensation costs.*** (Emphasis added)

The Postal Service also acknowledged its "make every effort obligation" in an August 19, 2005 National level correspondence, designated as M-1550. Significant parts of that correspondence:

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. . .

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. . .

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.

To print copies of M-1550, refer to Appendix F or go to the Internet:

www.nalc.org

- ◆ Click on Departments
- ◆ Click on Contract Administration
- ◆ Click on MRS
- ◆ Type “1550” in the box requesting a specific M-number (Other M-number documents that may be of interest: M-1010 (Appendix B), M-1264 (Appendix G), and M-1316 (Appendix H))

Is NRP consistent with the Postal Service’s “make every effort” obligation?

No. The Service’s new program, NRP, is nothing more than its attempt to begin making **less than every effort** in providing limited duty. Management is now beginning to withdraw limited duty on the basis of whether or not it deems certain work to be “productive.”

The alleged productivity of any particular limited duty has never been part of the criteria for providing limited duty for the

past 28 years. In fact, the Postal Service’s manual EL-505 clearly defines the only 3 criteria that the Service is authorized to use in its determination for providing permanent limited duty:

EL-505 Section 11—Overview

To be eligible for participation in the Rehabilitation Program, the employee must meet the following criteria:

- ◆ *He or she must have an **approved FECA claim** on file with OWCP.*
- ◆ *He or she must have a **job-related permanent partial disability** documented by medical evidence.*
- ◆ *He or she must be receiving or be **eligible to receive compensation payments for the disability**. (Note that an employee working in a limited duty assignment is eligible for disability compensation but is not receiving it because an appropriate limited duty assignment has been made available.)*

Contractually, the employee’s only limited duty eligibility requirements are having a partial disability following an on-the-job injury for which there is an approved OWCP claim making him or her eligible to receive compensation. That’s it. There have never been criteria related to the availability of operationally-necessary work. NRP is in violation of the Service’s legal and contractual obligations to “make every effort” to provide limited duty.

Summary Points to Remember

1. The Postal Service has a contractual obligation to make every effort to provide limited duty. Article 19 requires the Service to adhere to postal handbooks and manuals related to restoration to limited duty. Postal handbooks and manual references are:
 - ELM 540, Injury Compensation Program
 - EL-505, Injury Compensation
 - EL-307, Reasonable Accommodation, an Interactive Process
2. The Postal Service has a legal obligation to make every effort to provide limited duty. The legal obligation is found within 5 CFR 353 and the Rehabilitation Act.
3. The National Agreement requires the Postal Service to comply with its contractual and legal obligations to make every effort to provide limited duty.
4. JCAM references to management's obligation are Articles 2.1, 5, 13.6, 14.3.C, 15.1, and 21.4.
5. Documentary evidence exists that, since 1979, the Postal Service has complied with its "make every effort" obligation by providing limited duty to injured workers that included both productive work and also work that was not as productive as work performed by able-bodied employees.
6. NRP is the Postal Service's attempt to make "less than every effort."

Part 2—Grieving the Violation

What should be the focus of a limited duty grievance?

The union has a basic task of proving that the Postal Service did not make every effort to provide limited duty. Union representatives must stay focused on that. The union must meet its burden of proof that 1) the limited duty work exists and 2) the Service did not make every effort to provide it.

The Service is trying to disguise the withdrawal of limited duty by giving its program a fancy name like NRP—National Reassessment Process. Union representatives should not allow the Service to cloud the issue or allow themselves to be distracted by the existence of a Postal program. Focus on the violation of the National Agreement and federal law—that violation being the improper withdrawal of limited duty.

What are the basic case elements of a limited duty grievance?

Four elements will exist in every viable grievance on this issue:

1. The employee has an on-the-job injury with an accepted OWCP claim.
2. The injury results in work restrictions that either prevent the employee from doing all or part of his or her regular job, or require accommodation in order to do it.
3. Management withdraws or fails to provide limited duty work.
4. The limited duty work is available.

What evidence should be included in the grievance?

Certain basic documents should be included in any grievance on the withdrawal of limited duty. In addition to that, the NRP process utilizes certain reports, which the union representative should also include.

Documents to be included in grievance:

1. Letter from OWCP accepting the injured worker's claim.
2. Written Limited Duty Job Offer (LDJO) that is being withdrawn.
3. All prior LDJOs to show the history.
4. Current CA-17 to show the injured workers physical restrictions.
5. Prior CA-17s should be included to show the history.
6. All correspondence or other written documents concerning the LDJO.
7. Written notice from management that the LDJO is withdrawn.
8. Current and recent Form 50s.
9. Carrier schedules showing letter carrier duties performed by the injured worker (e.g. casing auxiliary routes, doing collections, etc.) for period of LDJO.
10. TACS records showing hours spent doing actual duties for the entire period of the LDJO.
11. Copy of the ICCO (Injury Compensation Control Office) file on the injured worker's claim. This is the Postal Service's file and must not be confused with OWCP's files. The OWCP and ICCO are completely separate entities.

12. Be sure to include and highlight historical documents in which management has stated that the Service “is able to accommodate all restrictions, short of complete bed rest.” This is often found in letters to physicians, stamped on the bottom left of CA-17s, letters to injured workers, and so on. (It’s true that the Postal Service is barred from making alterations to CA forms. However, if the union has copies of CA-17s altered in this way, by all means use them to prove the case.)
13. Signed statements by the injured worker detailing the actual work he or she has been doing (which may or may not match duties listed on the LDJO). It can be important for the statement to detail how long certain work has been performed. For instance, if management has accommodated an employee with a push cart or provided other specific limited duty for a certain number of years, the statement should say so.
14. Signed statements by the injured worker’s co-workers detailing the actual work they witnessed the injured worker performing.
15. Signed statements from the injured worker’s co-workers who have observed this work being performed by other employees (after it was taken away from the injured worker) or that the work otherwise continues to exist.
16. Signed statements from the workers who are performing the work that the injured worker used to do.
17. Evidence to show who is performing the work now that it has been taken away from the injured worker. This

may include workhour reports for PTFs, casuals, ODL employees or other career employees—depending upon where the work went.

18. Evidence to counter any reason management gives for having taken away the limited duty. For instance, if management states that “declining volume” is the reason, counter it with documents to show otherwise. Note that this is just one example. Be certain to provide evidence to counter any excuse that management may use.

In addition to the above evidence, management creates reports specific to the NRP process. These should also be requested and included in the grievance:

Request the following NRP documents dealing with each injured worker:

1. The injured worker’s “NRP Activity file.” Management also sometimes refers to this as the “shadow file.” Appendix J is a copy of the USPS instruction to its managers to “create a NRP Activity file for all limited duty and rehabilitation employees.” Ensure that the management provides all of the listed documents that are included in that file.
2. The injured worker’s “Current Modified Assignment/Position Worksheet”. See Appendix K, which is a sample of this form.

Request the following NRP reports dealing with limited duty/Rehab employees as a whole. To see what these reports look like, refer to the appropriate appendix:

1. NRP Tracking Sheet—Limited Duty Employees (See Appendix L)

2. NRP Tracking Sheet—Rehabilitation Employees (See Appendix M)
3. NAP Tracking Sheet—Sent Home, No Job Offer, NRP NWA Employees (See Appendix N) Note: NWA is the Service’s abbreviation for “No Work Available.”

What arguments should be made?

1. The Postal Service has contractual obligation under Article 19, which states that postal handbook and manual provisions directly relating to wages, hours, and working conditions are as enforceable as if they were a part of the National Agreement. The Postal Service has a contractual obligation to make every effort to provide limited duty. Contractual references are found in JCAM Articles 2.1, 5, 13.6, 14.3.C, 15.1, and 21.4. Handbook and manual references are ELM 546.14, the EL-307, and EL-505.
2. The Postal Service is required to comply with the clear language of M-1010, which is a settlement of a National level grievance. This settlement provides restoration rights to all injured workers who have partially recovered from compensable injuries. This language was incorporated into the ELM under Section 546.14 and has been in place since October 26, 1979.
3. The Postal Service has a legal obligation to make every effort to provide limited duty. The legal obligation is found in 5 CFR 353 and the Rehabilitation Act.
4. The withdrawal of limited duty is a violation of the above-cited legal and contractual requirements to make every effort.
5. Management’s actions violate the 28-year history of providing both productive work and also work that is not as productive as that performed by able-bodied employees. For 3 decades, this has been how the Service met its “make every effort” obligation. (Provide copies of the Service’s NRP handout (Appendix C) and the USPS brief and National Award C-23742 (Appendix D and Appendix E)
6. The work still exists (provide evidence).
7. The work is within the grievant’s restrictions (provide evidence).
8. Argue on behalf of each grievant’s situation on a case-by-case basis. Particulars are too varied to list here, but may include things like how many years the grievant has been performing certain work, how management has accommodated the grievant’s restrictions in the past, how management has accommodated similar restrictions of other employees in the past, and so on.
9. If the Postal Service failed or refused to allow input or participation from the injured worker regarding the search for limited duty, this would be an additional violation of the Rehabilitation Act (on top of the failure to accommodate). Refer to Sections 223 and 223.1 of the EL-307, which describes the required interactive process.
10. Argue M-1550, as applicable. For example, if the Service sends an employee home with “no work available” because he or she is capable of casing

but not carrying, this would be a violation of M-1550. Another example of an M-1550 violation would be denying work to an employee because his or her restrictions permit only 4 hours of work per day.

11. The union representative should also be prepared to counter a common argument from management regarding the Rehabilitation Act. That is, management may try to cloud the issue by saying that the Rehabilitation Act does not apply because the injured worker is not a “handicapped individual” as defined by the Act. This is a false argument. The regulation 5 CFR 353.301(d) states that injured workers will be **treated the same as handicapped workers** are treated under the Act (when it comes to restoration to limited duty). The regulation **does not say** that injured workers must be handicapped to be protected by the Rehabilitation Act.
12. Management may also try to cloud the issue or confuse the union representative by arguing about the date the injured worker reached Maximum Medical Improvement (MMI). The Service has suddenly begun offering superior rights to injured workers who reach MMI within 1 year of the injury as opposed to those who reach MMI after 1 year. There is no legal or contractual basis for this favored treatment. Do not allow management to use date of MMI to distract from the issue. Remember, focus on the issue, which is the Service’s obligation to make every effort to provide limited duty and its refusal to do so.

What remedies should be requested?

1. Immediately restore the employee to limited duty.
2. Make the grievant whole for all lost wages and benefits, including but not limited to, lost wages, annual leave, sick leave, TSP benefits, and overtime pay.
3. Any other remedy deemed appropriate by the parties or an arbitrator.

What happens to the Postal Service’s obligations if OWCP sends the injured worker to Vocational Rehab?

It does not diminish management’s obligations in any way, whatsoever. **This is important.** No matter what OWCP may or may not do with regard to Vocational Rehabilitation, it has absolutely nothing to do with the Postal Service’s obligation to provide limited duty. These two things are completely unrelated.

The fact that an employee is undergoing Vocational Rehab with OWCP has no effect on his or her job status with the Postal Service. He or she is entitled to all the contractual protections guaranteed to all other employees.

In fact, even if, down the line, the employee were to be ultimately separated from the Postal Service rolls, USPS obligations toward the injured worker do not end:

5 CFR 353.304

. . . **an injured employee or former employee** of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) **may appeal to the MSPB an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence.** (Emphasis added)

ELM 546.4 Employee Appeal Rights

Current or former employees who believe they did not receive the proper consideration for restoration, or were improperly restored, may appeal to the Merit Systems Protection Board under the entitlements set forth in 5 CFR 353. (Emphasis added)

EL-505 Section 11—Overview

Over the years, an in-house rehabilitation program has evolved and has been incorporated into the Rehabilitation Program as a means of facilitating the proper placement and accommodation of current employees with permanent partial disabilities resulting from injuries on duty. This program is also appropriate for re-assigning to permanent modified positions employees who have not received compensation but have been in temporary limited duty assignments for an extended period of time. . . **The Rehabilitation Program is applicable for both former and current USPS employees on OWCP rolls.** (Emphasis added)

C-7233 National Arbitration (Bernstein)

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. (Emphasis added)

Because management's obligations to make every effort to provide limited duty are ongoing and continuing, union representatives should ensure that any OWCP referral to Vocational Rehab that may occur **in no way** delays or prevents a grievance from being filed for the injured worker.

In addition, any attempt by the Postal Service to issue a Separation to an injured worker who has undergone Vocational Rehabilitation should be grieved if that employee has not yet had at least 1 year of continuous LWOP in accordance with ELM 365.342 (or even longer in accordance with 365.342.b). This would be a grievance that is separate and distinct from the limited duty grievance already filed. (See Appendix O for ELM 365.342.)

Part 3—Additional Avenues of Appeal

The following information is being included in this Guide so that injured workers will be fully informed about other avenues of appeal. It is not the intention of this Guide to have local union officers or stewards making attempts to represent injured workers with their MSPB or EEOC appeals. Rather, injured workers should consult with an attorney who specializes in field of MSPB and/or EEOC if they wish to pursue such appeals.

MSPB

In addition to the grievance procedure, injured workers also have the right to appeal the Service's failure to provide limited duty to MSPB. It is important to realize that **MSPB appeal rights apply to all compensably injured employees, not just preference eligible veterans.**

Moreover, the contractual provision in Article 16.9 that limits dual grievance-MSPB filings does not appear to apply to appeals regarding restoration to duty following compensable injuries.

C-18148—Arbitrator Das

The parties are in agreement that Article 16.9 does not apply to appeals to the MSPB pursuant to 5 USC 8151 and 5 CFR 353 in so called "restoration to duty" cases. Under those Federal provisions, all Postal Service employees are

provided certain rights to appeal to the MSPB in cases where they protest not being restored to duty following recovery from compensable injury. Such rights are not limited to preference eligible veterans and are not derived from the Veterans Preference Act referred to in Article 16.9. (Underline in original)

Federal regulations also require the Postal Service to notify employees of their appeal rights. There is a possibility that MSPB would consider a failure of the Postal Service to provide such notice of appeal rights as "harmful procedural error" resulting in reversal, similar to a prior ruling in *Pittman vs. Merit Systems Protection Board*.

5 CFR 353.104 Notification of rights and obligations

*When an agency separates. . .or fails to restore an employee because of. . .compensable injury, it **shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal rights.** (Emphasis added)*

5 CFR 353.304(a)

*Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of . . .the U.S. Postal Service. . .**may appeal to the MSPB** an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB's regulations. (Emphasis added)*

5 CFR 353.304(c)

*An individual who is partially recovered from a compensable injury **may appeal to MSPB** for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration.*

(Emphasis added)

The Postal Service's requirement to provide notification to employees of MSPB appeal rights is located at ELM 546.4:

ELM 546.4 Employee Appeal Rights

***Current or former employees** who believe they did not receive the proper consideration for restoration, or were improperly restored, may appeal to the Merit Systems Protection Board under the entitlements set forth in 5 CFR 353. (Emphasis added)*

EEOC

Although an injured worker may not be fully recovered following an on-the-job injury, it does not necessarily mean that the employee is defined as “handicapped” or having a “disability” within the meaning of the Rehabilitation Act. However, an injured worker who happens to fall within that definition and believes that he or she has been discriminated against on the basis of disability has appeal rights in accordance with 29 CFR 1614. Normally, those appeals are made through the EEOC. However, 29 CFR 1614.302 also provides for appeals to MSPB in certain mixed case complaints.

Equal Employment Opportunity

29 CFR 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of em-

ployment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA

(discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sexbased wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

Mixed Case Complaints29 CFR 1614.302 Mixed case complaints.

(a) Definitions—(1) Mixed case complaint. A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) Mixed case appeals. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

(b) Election. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB

pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. . .

Reminder: An injured worker may want to consult with an attorney who specializes in MSPB or EEOC appeals. The NALC does not represent employees in MSPB or EEOC. ■

545.5 Death

.51 Burial. A sum, not to exceed \$800, may be paid for funeral and burial expenses. When an employee's home is within the United States an additional sum may be paid for transporting the remains to his home if he dies away from his home, official duty station, or outside the United States.

.52 Dependents

(a) When there are no children entitled to compensation, the employee's widow or widower may receive compensation equal to 45 percent of the employee's pay until death or remarriage. Upon remarriage, a widow or widower will be paid a lump sum equal to 24 times the monthly compensation she or he was receiving on her or his own behalf.

(b) When there is a child entitled to compensation, the compensation for the widow or widower will equal 40 percent of the employee's pay plus 15 percent for each child, but no more than 75 percent of the employee's pay. A child is entitled to compensation until he dies, marries, or reaches 18 years of age, or if over 18 and incapable of self-support, becomes capable of self-support. In an unmarried child is a student at the time he reaches 18 years of age, compensation may be continued for as long as he remains a student or until he marries. It may not, however, be continued beyond the end of the semester or enrollment period after he reaches 23 years of age or has completed four years of school beyond the high school level.

545.6 Minimum And Maximum Compensation

Although Postal Service employees are not subject to the General Schedule, maximum and minimum amounts of compensation which Postal Service employees receive are determined by reference to salary rates established by the General Schedule:

a. *Disability.* Compensation for disability may not exceed 75 percent of the monthly pay of the highest step of grade 15 of the General Schedule. For total disability, it may not be less than 75 percent of the monthly pay of the first of grade 2 of the General Schedule or his actual pay, whichever is less.

b. *Death.* Compensation for death is computed on a minimum pay equal to the first step of grade 2 of the General Schedule. The total compensation may not exceed the employee's pay or 75 percent of the monthly pay of the highest step of grade 15 of the General Schedule.

545.7 Vocational Rehabilitation

Vocational rehabilitation, job counseling, and placement assistance may be provided an injured employee when he is unable to return to his usual employment because of permanent disability due to the injury. He may also receive additional compensation, not to exceed \$100 per month, necessary for his maintenance when he is pursuing an approved training course.

545.8 Continuation Of Compensation

In order to avoid the prospect of an overpayment to an employee because of certain legal requirements con-

cerning dual Federal compensation, employees should be alerted to those possibilities and assisted by appropriate correspondence with the district office of the OFEC:

a. *Civil Service Annuity.* As a general rule, a person may not concurrently receive compensation from OFEC and a retirement or survivor annuity from the Civil Service Commission. The beneficiary may elect to receive the benefit which is more advantageous to him.

b. *Military Retirement/Retainer Pay.* The military finance center paying retirement or retainer pay may determine that receipt of these benefits concurrently with compensation is prohibited. If this prohibition exists, it will be necessary for the employee to select the benefit he desires.

c. *Veterans Benefits.* OFEC benefits are not payable concurrently with benefits being paid by the Veterans Administration for the same injury or death, with one exception. Some payments made by the VA are classified by that agency as pensions. A pension is the only type of VA payment that may be received concurrently with OFEC compensation. When an election is required between OFEC compensation and other VA benefits, the beneficiaries are fully informed by the OFEC of the applicable compensation rates and VA payments before they make their decision.

546 FITNESS FOR DUTY**546.1 Rehabilitation And Therapy**

Each designated USPS physician shall assure that employees for whom their attending physicians have prescribed rehabilitation or therapy do, in fact, obtain such treatment as scheduled. Employees shall be advised that failure to keep appointments, whether with a U.S. Government medical facility or private physician, or hospital, is a form of absenteeism. Unexcused failures to keep appointments shall be brought to the attention of the OFEC district office, which shall secure the employee's reason for failure to keep appointments before taking action, if indicated, to discontinue compensation.

546.2 Duty Assignments

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

.22 The medical progress reports received from the attending physician will, in most instances, show whether the employee is capable of some form of work during his convalescence or after medical treatment has been completed. If not, this information should be requested from the attending physician or the OFEC district office. The designated USPS physician shall assist postal managers in placing employees with physical limitations into USPS positions where they may be utilized without adversely affecting their physical condition. An employee

on extended injury compensation shall not be separated from the rolls of the USPS on account of his injury or illness unless the designated USPS physician and installation head both certify that a duty assignment suitable for the employee's physical limitation is not available. Employees who refuse to report for or to accept a duty assignment determined to be medically within their physical ability shall be reported to the OFEC district office with a recommendation that compensation payments be stopped.

546.3 Fitness For Duty Determinations.

.31 The following refers only to fitness-for-duty determinations incident to an injury or illness alleged to be occupationally incurred. Fitness-for-duty determinations for other purposes are not covered by this instruction:

- a. The U.S. medical facility or the private physician or hospital shall, on the occasion of each visit of the employee, make a professional statement showing either fit for duty, or not fit for duty with an expected fitness date.
- b. Postal Service management, relying upon such professional certification, shall establish return to work dates and job assignments.
- c. If the U.S. medical facility or private physician or hospital is unable to furnish information on an employee's fitness for duty on a long range basis (i.e., 6 months or more), Postal Service management may request information from the OFEC by sending form 2573, *Request for FEC Claims Status*, in duplicate to the OFEC district office. If the OFEC's response does not fully clarify the situation, a fitness for duty examination may be authorized as provided in 546.33.
- d. Should the results of the fitness for duty examination indicate a disagreement with the findings of the attending physician, the matter should be referred to the OFEC district medical director for resolution along with a justification for the USPS position.
- e. Fitness for duty determinations shall not be limited only to the employee's regular duties, but shall be based on whether the employing installation has any temporary alternative work available which is not medically contraindicated.

.32 The fact that an injured or ill employee has been scheduled for a series of treatments or appointments by a U.S. medical facility or private physician does not per se establish that the employee is *not fit for duty* in the interim.

.33 A USPS physician (or contract equivalent) may suggest to the postmaster that a USPS employee currently undergoing treatment by a U.S. medical facility or a private physician or hospital report to the USPS for a fitness for duty examination. Such physical examination may include the parts of the anatomy being treated, provided the examination in no way disturbs or interferes with the treatment regimen. The results of this examination shall be brought to the attention of the OFEC district office.

.34 In the event the USPS physician questions the medical procedures and/or determinations of the employee's attending physician, no administrative action shall be taken to change the employee's compensation or duty

status until the medical issue is settled (see 429.44, *Review of Medical Treatment*).

546.4 Extended Leave Cases

Employees with work related illness or injury incurred in the performance of duties who are on OFEC rolls may be granted leave without pay for an initial period up to 1 year rather than be separated. At the end of the initial 1-year period on LWOP, a determination will be made whether the employee may be able to return to duty at the end of an additional 6 months to 1-year period. If the review indicates the employee will be unable to return to duty at the end of the additional period, he will be separated at the end of the initial period. If additional LWOP is granted, a new determination must be made at the end of each additional period. To assist in making these determinations, the following is required:

- a. Send Form 2573 to the appropriate OFEC district office.
- b. Take one of the following actions upon receipt of completed Form 2573 from OFEC:
 - (1) Extend LWOP for an additional period at the end of which an additional determination must be made; or,
 - (2) Terminate LWOP as follows:
 - (a) If the employee has 5 or more years of creditable civilian service, inform him of his retirement rights. Allow him 14 calendar days to file a retirement application under the Civil Service Retirement Law; or,
 - (b) If the employee does not file a retirement application within the 14-day period, terminate LWOP and take action to separate him under applicable procedures; or,
 - (c) If the employee has less than 5 years creditable civilian service, terminate LWOP and take action to separate him under the applicable procedures.
- c. An employee separated under these procedures may apply for reinstatement when he fully recovers.

547 SUBMISSION OF OFEC FORMS

547.1 Immediate supervisors of employees injured in the performance of duty shall immediately prepare and submit Form CA-2, *Official Superior's Report of Injury*, along with the employee's Form CA-1 to the OFEC in all instances where:

- a. The injury causes disability for the employee's usual work beyond the shift it occurred, or
- b. It appears that the injury will result in prolonged treatment, permanent disability or serious disfigurement of the head, face or neck, or
- c. It appears that the injury will result in a charge for medical or other related expense.

547.2 If none of the above occur or appear likely to occur, the CA-2 (reverse) need not be completed and the CA-1 and 2, with the employee's part (front) completed, should be placed in the employee's official personnel file. In all instances, the employee shall be given the receipt part of CA-1 and 2 for his personal use.

547.3 When an employee on compensation returns to work his supervisor shall immediately report that fact



M-01010

Appendix B

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.

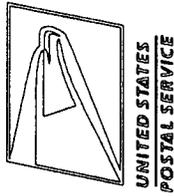
With regard to individual grievances which arise in connection with implementation of these procedures, the parties agree that such grievances must be filed at Step 2 of the Grievance-Arbitration Procedure within five (5) days of the effective date of the limited duty assignment. The parties further 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



Health and Resource Management National Reassessment Process (NRP)

Rehabilitation / Limited Duty Assignment

Traditional

- Employee returned to an assignment – make work or necessary work
- Employee not returned to an assignment – OWCP Disability Rolls
- OWCP determines: compensation eligibility – Vocational Rehabilitation participation

Reassessment Process

- Employee returned to an assignment – necessary work only
 - Employee formally informed no work available – file for OWCP compensation
 - OWCP determines: compensation eligibility – Vocational Rehabilitation participation
-

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 temporary rehabilitation 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:

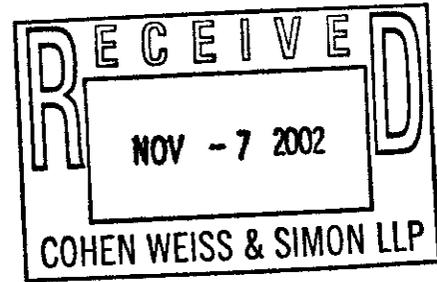

John W. Dockins, Esquire
Labor Relations Specialist
U. S. Postal Service

April 15, 2002

C-23742

Appendix E

National Arbitration Panel



In the Matter of Arbitration)
)
 between)
)
 United States Postal Service)
)
 and)
)
 American Postal Workers Union)
)
 and)
)
 National Association of Letter)
 Carriers - Intervenor)

Case No.
E90C-4E-C 95076238

Before: Shyam Das

Appearances:

For the Postal Service: John W. Dockins, Esquire

For the APWU: Darryl J. Anderson, Esquire

For the NALC: Keith E. Secular, Esquire

Place of Hearing: Washington, D.C.

Dates of Hearing: October 16, 2001
January 23, 2002

Date of Award: October 31, 2002

Relevant Contract Provisions: Articles 19, 21.4, and 37;
ELM Section 546

Contract Year: 1994-1998

Type of Grievance: Contract Interpretation

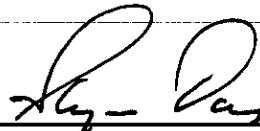


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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

Award Summary

As set forth in the above Findings, the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 of the National Agreement, and the creation of that assignment pursuant to provisions of Section 546 of the ELM did not impair the seniority rights of PTF clerks.



Shyam Das, Arbitrator

This case arises under the 1994-1998 National Agreement between the American Postal Workers Union (APWU) and the Postal Service. The National Association of Letter Carriers (NALC) intervened and supports the position of the Postal Service in this case.

The Federal Employees' Compensation Act (FECA) and regulations issued thereunder impose certain obligations on the Postal Service to provide suitable work to employees who partially recover from a job-related injury. Article 21.4 of the APWU National Agreement provides:

Section 4. Injury Compensation

Employees covered by this Agreement shall be covered by subchapter I of Chapter 81 of Title 5 [FECA], 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.

The NALC National Agreement includes a similar provision. Section 546 of the Employee and Labor Relations Manual (ELM) includes provisions relating to Reemployment or Reassignment of Employees Injured on Duty.

In May 1995, a partially recovered letter carrier who had been injured on the job was reassigned to the Clerk Craft as a part-time flexible (PTF) employee and assigned to a "General Clerk Modified" position at Cactus Station in Phoenix, Arizona.

This was a permanent reassignment made pursuant to a Form 50. The reassigned employee was assigned to work a fixed work week of 40 hours, beginning at 6:30 a.m. and ending at 3:00 p.m., with Sundays and Mondays off. Management created this assignment as a rehabilitation position for the injured letter carrier as an application of provisions in ELM Section 546. It appears from the record that the General Clerk position at this facility (and other similar facilities in Phoenix) previously had been abolished.

The APWU filed a grievance in which it asserted that management violated the collective bargaining agreement in creating a new General Clerk position for the PTF rehabilitation employee. The Union asserted a violation of Articles 19, 37 and 12 of the National Agreement.

The Postal Service's Step 4 denial of this grievance states:

The issue in this grievance 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.

The Union contends that the reassignment of an injured employee to the clerk craft as a PTF with a fixed schedule violates the National Agreement unless the assignment is to a residual vacancy.

...[I]t is our position that the Postal Service has legal responsibilities to employees with job related injuries under 5

USC 8151 and the Office of Personnel Management. Article 21.4 provides for the promulgation of regulations to comply with those responsibilities. Those regulations are incorporated into the Employee & Labor Relations Manual 540. The assignment in this case was made in accordance with those regulations.

The rehabilitation assignment is uniquely created as required in ELM 546.222. As such, it does not constitute a newly established position which must be posted for bid under Article 37.3.A.

The assignment is an incumbent only assignment created to meet the restrictions of the employee being placed. Further, if for any reason the employee vacates the position, it will not be posted for bid.

Furthermore, past practice, negotiation history, case law, handbooks and manuals and a reading of the contract as a whole supports management's position in this case. National Arbitrator Aaron has already ruled in case number H1C-5D-C 2128 that it is too late in the day for the Union to challenge the proposition that FECA regulations can augment contractual rights.

The provisions of Article 37 cited by the APWU include the following:

ARTICLE 37

CLERK CRAFT

Section 1. Definitions

* * *

B. Duty Assignment. A set of duties and responsibilities within recognized positions regularly scheduled during specific hours of duty.

* * *

Section 2. Seniority

* * *

D. Application of Seniority.

1. Seniority for full-time employees and part-time regular employees for preferred duty assignments and other purposes shall be applied in accordance with the National Agreement. This seniority determines the relative standing among full-time employees and part-time regular employees. It begins on the date of entry into the Clerk Craft in an installation and continues to accrue as long as service is uninterrupted in the Clerk Craft and in the same installation, except as otherwise specifically provided for.

* * *

Section 3. Posting, Bidding, and Application

A. Newly established and vacant Clerk Craft duty assignments shall be posted as follows:

1. All newly established Clerk Craft duty assignments shall be posted to craft employees eligible to bid within 28 days....

Relevant provisions of ELM Section 546 include the following:¹

546.14

Disability Partially Overcome

546.141 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 USPS 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 USPS should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

¹ Issue 12 of the ELM was in effect when this grievance arose in 1995. It was replaced by Issue 13 in 1998. To the extent relevant provisions of Issue 13 differ from those in Issue 12, the parties seem to agree that the provisions in Issue 13 reflect the manner in which the corresponding provisions in Issue 12 actually were applied in practice in 1995. The provisions of Section 546 quoted in this decision are taken from Issue 13. The APWU has noted that it has challenged Issue 13 under the procedures of Article 19, but that challenge is not involved in this case.

- (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.

* * *

546.142

Rights and Benefits Upon Partial Recovery

- a. Seniority. Former employees who are reemployed into bargaining unit positions or current career employees who are reassigned into such positions are credited with seniority in accordance with the collective bargaining agreements covering the position to which they are assigned.

* * *

546.2

Collective Bargaining Agreements

546.21 Compliance

Reemployment or reassignment under this section must be in compliance with applicable collective bargaining agreements. Individuals so reemployed or reassigned must receive all appropriate rights and protection under the newly applicable collective bargaining agreement.

546.22 Contractual Considerations

546.221 Scope

Collective bargaining agreement provisions for filling job vacancies and giving promotions and provisions relating to retreat rights due to reassignment must be

complied with before an offer of reemployment or reassignment is made to a current or former postal employee on the OWCP rolls for more than 1 year.

546.222 Reemployment or Reassignment

A partially recovered current or former employee reassigned or reemployed to a different craft to provide appropriate work must be assigned to accommodate the employee's job-related medical restrictions. Such assignment may be to a residual vacancy or to a position uniquely created to fit those restrictions; however, such assignment may not impair seniority rights of PTF employees....

(Emphasis added.)

APWU POSITION

The APWU stresses that all of the duties listed in the "General Clerk Modified" position at issue also are found in the standard position description of a "General Clerk", except the delivery of Express Mail, which is a duty regularly performed by general clerks and other employees, as needed. Moreover, when the APWU Steward who filed this grievance asked the bid clerk in Phoenix why this position was designated "Modified", she was told that was because the rehabilitated letter carrier would not have to pass a typing test.

The APWU contends that the Postal Service in this case established a new full-time duty assignment, as defined in Article 37.1.B of the National Agreement, which it was required

to post for bid under Article 37.3.A.1. In violation of Article 37, the APWU charges, the rehabilitated letter carrier was reassigned as a PTF clerk to a full-time regular duty assignment, without regard to the fact that she had no seniority in the Clerk Craft. This reassignment occurred when there were clerks with over 20 years of seniority waiting to bid on a day job with the hours and days off of this position, as well as PTF clerks waiting to be converted to full-time regulars.

The APWU further contends that the Postal Service violated Article 19 and ELM Section 546 by failing to post this assignment. Section 546 does not -- as the Postal Service argues -- authorize the Employer to ignore the seniority and job posting requirements of the National Agreement, but rather requires compliance with the National Agreement.

The APWU insists that the Employer's obligation to "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance", set forth in ELM Section 546.141 cannot justify violation of Article 37. First, that provision is applicable to temporary "limited duty" assignments, not to permanent reassignment following partial recovery, as was the case here. Second, the vague reference to making "every effort" in Section 546.141 cannot overcome the requirement clearly and repeatedly expressed elsewhere in Section 546 that applicable collective bargaining agreement provisions must be followed.

The requirement in Section 546.142a that employees reassigned into the Clerk Craft must be credited with seniority in accordance with Article 37 of the APWU National Agreement also means that the reassigned letter carrier's status must be determined by the employee's relative seniority within the unit. This employee had no seniority in the Clerk Craft, yet she was assigned to a full-time job with favorable hours and days off. Application of Article 37 also is expressly required by Sections 546.21 and 546.221.

The APWU argues that Section 546.222 cannot justify creating a unique position and then reassigning an employee into it in violation of the seniority and posting requirements of Article 37. What the Postal Service did here -- contrary to Section 546.222 -- undisputedly impaired the seniority rights of PTF clerks under Article 37. If the assignment had been posted for bid, there ultimately may have been a residual full-time regular vacancy that a PTF clerk could have exercised seniority to convert into it. The Postal Service's action in this case, the APWU urges, is analogous to the assignment of supervisors to the NALC bargaining unit as full-time regular employees, which National Arbitrator Snow held violated the seniority right of PTF letter carriers waiting to convert to full-time regular status in Case Nos. H7N-4U-C 3766 et al. (1990).

The APWU insists that the Employer's contention that the Union's interpretation of Section 546.222 would preclude the Postal Service from ever creating a unique position under that provision is demonstrably false. Jim McCarthy -- now APWU

Director of the Clerk Craft -- testified that as a Local Union official in Boston he regularly negotiated with management modification of residual clerk vacancies to make them consistent with the needs of letter carriers reassigned into those "uniquely created positions". Greg Bell -- now APWU Director of Industrial Relations -- also testified that, while he served as a Local Union official in Philadelphia, the Union did not grieve when letter carriers were placed in negotiated limited and light duty assignments that the local parties had agreed upon to be set aside for that purpose.

In Case No. H94N-4H-C 96090200 (1998), an NALC case in which the APWU intervened, National Arbitrator Snow ruled that any reassignment of a letter carrier into a clerk position under Section 546.141a must be made in accordance with the APWU's National Agreement and, in particular, must not impair the seniority rights of PTF clerks. That can be accomplished, the APWU asserts, by ad hoc agreements between the parties (like those testified to by McCarthy) or agreements made in advance (like those testified to by Bell) about how to handle such reassignments. In this case, however, the Postal Service's unilateral creation of a full-time assignment without posting that assignment for bid impaired the right of full-time regular and PTF employees in violation of the APWU National Agreement.

POSTAL SERVICE POSITION

The Postal Service maintains that the issue in this case, as stated in its Step 4 denial, 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.

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.

The Postal Service stresses that under Article 3 the discretion to create (or not to create) a full-time Article 37

² The Postal Service acknowledges that the issue of whether the injured employee's reassignment actually is a uniquely created assignment or rather is a pre-existing duty assignment would be subject to review based on the particular facts of each case. That is not an interpretive issue, however. The Postal Service asserts that the APWU has acknowledged that, for purposes of deciding the interpretive issue in this case, the reassignment was a uniquely created rehabilitation assignment.

duty assignment rests exclusively with management. Similarly, management has the exclusive right to abolish or revert Article 37 duty assignments, as provided in Article 37.1.F and 37.1.G.

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.

Section 540 of the ELM was promulgated to meet the Postal Service's obligations under Article 21.4 of the National Agreement and FECA. Cross-craft rehabilitation assignments are made pursuant to Section 546.141.a, which was promulgated in 1979 pursuant to an agreement with the NALC. The record establishes that this agreement was discussed with the APWU which concurred in the change. Moreover, the APWU raised no objection to these changes under Article 19 when they were incorporated into the ELM in 1979. The Postal Service stresses that there was no claim at that time by the APWU that assignments made pursuant to the "pecking order" in Section 546.141a actually were duty assignments that had to be posted under Article 37 or otherwise violated the APWU National Agreement. It clearly is too late for the APWU to now make such a claim.

The Postal Service argues that the APWU's position leads to absurd results and would greatly impede the established injury compensation program. If, as the APWU asserts, 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. Moreover, because management has no need for the assignment other than to reemploy the injured employee, if some other able-bodied employee were the successful bidder, the assignment would be abolished at management's discretion pursuant to Article 37.1.F. These actions, as well as other actions triggered by them in a domino-like effect, would create ongoing inefficiencies in the work place, and the injured employee would be no closer to being reemployed.

The Postal Service stresses that the APWU's current Article 37 duty assignment argument was made and rejected in a national arbitration case decided by Arbitrator Dobranski in 1998, Case No. J90C-1J-C 92056413. That case involved temporary rehabilitation assignments of rural carriers into the clerk craft, but the APWU's Article 37 argument was essentially the same.

The Postal Service further insists that creation of the rehabilitation assignment in this case did not impair PTF clerk seniority rights. Assuming, for the sake of argument, that this is an Article 37 duty assignment, PTFs cannot bid on such assignments. Moreover, in that case, the assignment would

not exist; but for the obligation to reemploy the injured employee, it would not have been created. By agreement of the parties, the Postal Service asserts, the argument that if the rehabilitation assignment was posted as an Article 37 duty assignment, that eventually would lead to a residual vacancy that might lead to conversion of a PTF clerk is not before the arbitrator. In addition, if the rehabilitation assignment was posted and filled by an able-bodied regular clerk, it surely would be abolished -- there being no need for such a duty assignment -- and that regular employee would become an unassigned regular subject to being assigned to a residual vacancy prior to consideration of converting a PTF to regular.

Finally, the Postal Service contends that testimony in the record shows that the past practice of the parties supports its position. Rehabilitation assignments have never been posted.

NALC POSITION

The NALC, as intervenor 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 Section 540 for the express purpose of providing an assignment to a person on limited duty, and, as

such, they are not subject to the bidding provisions in the NALC National Agreement, which are not different to those in the APWU's Agreement.

The NALC points out that to the extent the APWU may be claiming that the assignment at issue is not a genuine rehabilitation assignment, that claim does not raise an interpretive issue to be resolved at national level arbitration.

The NALC also argues that the APWU's claim that failure to post this rehabilitation assignment violates the seniority rights of PTF clerks is not properly before the arbitrator. That issue, the NALC asserts, was not raised at any prior stage of the grievance. Moreover, the facts do not establish a violation of ELM Section 546.222. That provision does not generally protect seniority interests or expectations of PTFs. To show a violation of 546.222, the APWU would have to establish that a contractual seniority right of PTFs has been impaired. PTFs, however, have no right to bid on assignments. At most, they might have conversion rights to a residual vacancy at the end of the bidding cycle. If, as the Postal Service and NALC argue, Article 37 of the APWU National Agreement does not require that full-time regulars be allowed to bid on a rehabilitation assignment, there will not be any residual vacancy. If, on the other hand, the arbitrator were to find that this rehabilitation assignment should have been posted for bid, that would be sufficient to sustain the APWU's grievance without the need to consider the seniority rights of PTFs, which

raise other issues that the parties agreed are not to be decided in this case.

FINDINGS

In his 1985 decision in Case No. H1C-4K-C 17373, National Arbitrator Mittenthal pointed out:

Part 540 of the ELM was a response to the fact that the Postal Reorganization Act placed all Postal Service employees under the coverage of the Federal Employees Compensation Act (FECA). Part 540 was a means of implementing the injury compensation program set forth in FECA. It concerns employees who suffer job-related disabilities; it requires the Postal Service to make "every effort" toward placing an injured employee on "limited duty" consistent with his work limitations. Management must make that "effort" even though no "request" has been submitted by the employee and even though no "light duty assignments" have been negotiated by the parties.

(Footnote omitted.)

Even earlier, in 1983, National Arbitrator Aaron stated in Case No. H1C-5D-C 2128:

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....

In this case, the Postal Service created a full-time assignment with fixed hours and days off consisting of various clerk duties that were within the medical restrictions of the injured letter carrier. This rehabilitation assignment was not a residual vacancy in the Clerk Craft, but was a "position uniquely created to fit those restrictions", as provided for in ELM Section 546.222.

Section 546.222 specifically recognizes the reassignment of a partially recovered employee to a different craft to provide appropriate work and authorizes the Postal Service to establish a "uniquely created" position for that purpose. As best I can determine, the issue in this case essentially is (1) whether the assignment in question must be posted for bid under Article 37 of the APWU National Agreement -- given the requirement in ELM Section 546.21 that reassignment under Section 546 must be in compliance with applicable collective bargaining agreements -- and/or (2) whether that assignment impaired seniority rights of PTF clerks contrary to Section 546.222.

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. In a particular case, the APWU may factually challenge whether a designated rehabilitation assignment actually is a uniquely created position, under Section 546.222, but that is not the issue in this case.³

Article 37.3.A.1.a(1) requires management to post "[n]ewly established full-time duty assignments". Article 37.1.B defines "Duty Assignment" as: "A set of duties and responsibilities within recognized positions regularly scheduled during specific hours of duty." Under Article 3, the Postal Service has the exclusive right -- consistent with other provisions of the Agreement and applicable laws and regulations:

- C. To maintain the efficiency of the operations entrusted to it;

³ At one point in the hearing (Tr. p. 202) the APWU's counsel asserted that General Clerk Modified jobs "are nothing but general clerk duties that have been reverted and set aside so that they [the Postal Service] could diminish their worker's compensation liability". This allegation is not established in the record in this case, and, in any event, raises an issue of fact. The interpretive issue in this case is predicated on the Postal Service having uniquely created the position in issue as a rehabilitation assignment.

- D. To determine the methods, means, and personnel by which such operations are to be conducted;

These management rights encompass the right to establish new duty assignments to meet its operational needs.

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 that must be posted for bid. Requiring the assignment to be posted would defeat the sole purpose for establishing the assignment, because the injured employee -- who has no seniority in the Clerk Craft -- could not bid on that assignment. To paraphrase Arbitrator Aaron, it is too late in the day for the APWU to challenge the proposition that the Postal Service may reassign an injured employee to a uniquely created position in another craft to provide appropriate work to that employee, which essentially is what the APWU's Article 37 position in this case does.

The APWU also has not established in this case that the reassignment in question impaired seniority rights of PTF employees in contravention of ELM Section 546.222.⁴ PTF clerks

⁴ Despite the various advocates' efforts to dance around this issue, I believe it needs to be addressed in the context of this grievance. I have attempted to say no more than necessary to resolve this case.

have no seniority right to be assigned to a uniquely created rehabilitation position. Certainly if, as already determined, such a position is not subject to Article 37's posting provisions, it would be topsy turvy to conclude that PTFs have a seniority right to that position when full-time regulars do not. Also, because Article 37's posting provisions do not apply, PTFs were not deprived of any opportunity to convert to regular full-time status as a result of a residual vacancy occurring at the end of the bidding cycle.⁵

In this case, the injured letter carrier was reassigned as a PTF clerk -- at the bottom of the PTF seniority roll -- not as a full-time regular. This case is not analogous to Arbitrator Snow's 1990 decision in Case No. H7N-4U-C 3766 et al., in which he concluded that "the reassignment of a supervisor who has not retained his or her seniority to full-time regular status violates the seniority right of part-time flexible employees waiting to convert." Moreover, this case does not involve assignment of an injured letter carrier to a residual clerk vacancy. The issue left open in National Arbitrator Snow's 1998 decision in Case No. H94N-4H-C 96090200 is not raised and need not be decided here.

⁵ If Article 37's bidding procedures were applicable -- and they are not -- management obviously would not have posted, or would have abolished, this assignment, because it had no need for it if it could not be used as a rehabilitation assignment. Whether a PTF has a priority right to fill a residual full-time vacancy that could otherwise accommodate an injured worker under Section 546 is not an issue in this case, and no opinion is expressed on that issue.

In its post-hearing brief, the APWU argues that:

The impairment of seniority rights of part-time flexible employees occurs because of the aggregation of 40 hours per week of clerk hours into a position taken out of the normal operation of the seniority system. It is not merely the right to bid for the particular position that has been "uniquely created" that is at stake, it is the possibility of having other regular assignments created on tour 2 that might permit conversion of a part-time flexible employee into a regular assignment, and thereby advance that possibility for every other senior part-time flexible clerk.

If I understand the logic of this argument, the APWU basically is claiming that the seniority rights of PTF clerks are impaired whenever Clerk Craft duties are packaged into a rehabilitation assignment for an employee in a different craft, because some or all of that work otherwise ultimately might be included in a newly created full-time clerk position at some indefinite time in the future, and that might result in a conversion opportunity for a PTF. In making this argument, the APWU in effect is challenging the entire notion of assigning injured employees in one craft to a uniquely created rehabilitation assignment in another craft -- at least whenever there are any PTF employees in the craft in which the assignment is created. If such an attenuated proposition was the intent behind Section 546.222, which in context seems improbable, presumably it simply would state something to the effect that injured employees may only be reassigned to a uniquely created rehabilitation position if there are no PTF employees in the facility. It does not do

that, and I am not otherwise persuaded that the impact of the rehabilitation assignment cited by the APWU constitutes impairment of seniority rights of PTF clerks.

For the reasons set forth above, I conclude that the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 and that the creation of that assignment did not impair the seniority rights of PTF clerks.

AWARD

As set forth in the above Findings, the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 of the National Agreement, and the creation of that assignment pursuant to provisions of Section 546 of the ELM did not impair the seniority rights of PTF clerks.



Shyam Das, Arbitrator

LABOR RELATIONS

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AUG 25 2005

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

August 19, 2005

AUG 24 2005

OFFICE of the PRESIDENT
NALC. HDQTRRS., 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**

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,

Handwritten signature of Paul A. Lyons in cursive.

Paul A. Lyons
Labor Relations Specialist
Grievance and Arbitration

Handwritten signature of Vincent R. Sombrotto in cursive.

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

Date

1/28/97

LABOR RELATIONS



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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.

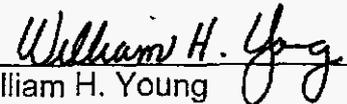
However, the parties agree that pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations.

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

NRP Phase 1, Step 11

Responsible Team Member(s):

- District Injury Compensation staff

Action - Create a NRP Activity file for all limited duty and rehabilitation employees. The files must contain copies of:

- Checklist of documents contained in the shadow file (left side stapled)
- The most current medical and current medical with restrictions
- Worksheet from supervisor indicating actual tasks being performed
- The current limited duty modified assignment or rehabilitation modified position offer
- The original claim form (CA 1 or CA 2) and any subsequent CA 2a's
- The employee's first medical indicating MMI (MMI statement must be highlighted)
- The D254 and the most recent Form 50
- AQS printout by SSN indicating all OWCP file numbers for this employee
- ICPAS printout for this injury
- Any other pertinent information required in reassessing this employee (ex. – open injury cases with medical restrictions; EEO/grievances/MSPB settlements or decisions pertinent to this claim)

On the outside of the shadow file, the following information must be indicated (if applicable):

- Employee's Name
 - OWCP Claim file number
 - Date of Injury
 - MMI date
 - LWEC Date
 - Claim closed or open at OWCP
 - Any other OWCP open claim numbers on similar body parts
 - Current Form 50 craft and installation
- All NRP Activity files must be stored alphabetically and secured in a locked space.
 - All NRP Activity files must be updated as any new information is received.
 - All NRP Activity files must be purged of any outdated information (old medical or job offer).

Outcome:

- All NRP Activity files have been created.
- Manager, IC (D) must notify the Area IC team leader when all NRP Activity files have been created.
- Phase 1 Checklist – Step 11 has been updated.

XXXX PERFORMANCE CLUSTER
Current Modified Assignment/Position Worksheet

(Check Appropriate Box)

-
- Limited Duty Assignment
-
-
- Rehabilitation Position

Part 1 – Employee Information

Employee's Last Name, First Name <<NAME1>><<NAME2>>	DOI <<DOI>>	Claim No <<OWCPCLAIM#>>	SSN <<SSN>>	(Reserved)	Pay Location <<PAY LOC>>
Craft <<JOBTITLE>>	Installation <<OFFICE>>	Installation Phone No.			
Enter On Duty Date	Name of Supervisor Completing Worksheet (Please Print)				
Date Worksheet Completed/Signed	Signature of Supervisor Completing Worksheet				

Part 2 – Modified Assignment/Position Identification

Supervisor: List actual duties the employee is performing. Provide detailed information below with approximate amount of time work is available daily in each task.

- () Employee currently has a bid assignment and is working that assignment with the modifications listed below. Identify bid assignment _____.
- () Employee currently has a bid assignment and is NOT working that assignment and is working a Limited Duty Modified Assignment with the tasks listed below. Identify bid assignment _____.
- () Employee is currently working the Rehabilitation Modified Position listed below.

<u>Job Duty/Task/Activity</u>	<u>Amount of Time</u>	<u>LDC</u>
(Example) Letter Carrier/casing letters	2 hours	21

Is this assignment is based on a prior settlement (EEO, Grievance, MSPB, etc.)? NO YES Not Sure
 (circle one)

365.324 Who Initiates Action

Supervisors may recommend separation-disqualification, but such recommendations must be referred for decision to the official having authority to take the action.

365.325 Procedure in Separating

If an appointing official decides to terminate an employee who is serving a probationary period due to conditions arising prior to appointment, or because work performance or conduct during this period fails to demonstrate qualification for continued postal employment, the employee's services are terminated by notifying the employee in writing as to why he or she is being terminated and the effective date of the action. The written notice of termination must at a minimum consist of the appointing official's conclusions about the inadequacies of performance or conduct.

365.326 Effective Date

The *effective date* of separation must be before the end of the probationary period and must not be retroactive.

365.33 Termination or Separation of Temporary or Casual Employees

An employee serving under a temporary appointment may be separated at any time after notice in writing. In determining the proper action for a particular case, the following criteria are used:

- a. *Termination, expiration of appointment*, is the term used to separate an employee whose services are no longer required.
- b. *Separation* is the term used when describing the discontinuance of the service of a temporary or casual employee because of unsatisfactory performance that warrants termination from the Postal Service.

365.34 Separation-Disability**365.341 Definition**

Separation-disability is a term used to indicate the separation of an employee other than a temporary, casual, or a probationary employee whose medical condition renders the employee unable to perform the duties of the position and who is ineligible for disability retirement.

365.342 Applicability

- a. At the expiration of 1 year of continuous absence without pay, an employee who has been absent because of illness may be separated for disability. This action is not mandatory, however, and if there is reason to believe the employee will recover within a reasonable length of time beyond the 1-year period, the employee may be granted additional leave in 30-day periods, not to exceed 90 days. If the employee's condition indicates that LWOP beyond that period is necessary incident to full recovery, the postal official must submit a comprehensive report to the area manager of Human Resources with appropriate recommendation and retain the employee on the rolls pending a decision.

- b. If an employee on the rolls of the Office of Workers' Compensation Programs (OWCP) is unable to return to work at the end of the initial 1-year period of LWOP, the LWOP may be extended for successive additional periods of up to 6 months each. Extensions are granted only if it appears likely that the employee will be able to return to work within the period of the extension. If it does not appear likely that the employee will be able to return to work during the period, the employee, upon approval of the area manager of Human Resources, is separated subject to reemployment rights.
- c. Before any employee on the rolls of the OWCP can be separated, the requesting postal official must submit a comprehensive report through channels to the area manager of Human Resources, with appropriate recommendations. The employee must be retained on the rolls of the Postal Service pending a decision.
- d. If the area approves the request, and if the employee has sufficient service for entitlement to retirement, the employee is not separated until given an opportunity to retire. For involuntary separation, the notice and appeal procedures outlined in 650 or the applicable collective bargaining agreement, whichever is appropriate, is followed.
- e. An employee who is eligible for disability retirement but chooses not to apply is not separated for disability until a complete medical report has been received and the employee has received retirement counseling.
- f. An employee who is eligible for disability retirement is not separated for mental disability. Rather, the appointing official files an application for disability retirement on the employee's behalf provided the requirements are met (see 568 and 588).

365.343 Notice to Employee

No employees who have completed their probationary period are separated for disability until given a notice in writing of the proposed action and an opportunity to reply in accordance with appropriate adverse action procedures. Employees eligible for disability retirement are advised and notified that unless they file application for disability retirement within 1 year of separation their rights will lapse.

365.344 Effective Date

Separation-disability is effective on the date determined by the Human Resources official or on the date authoritative notice is received in the case of legal incompetence. If unused sick leave remains to the employee's credit, the effective date may be extended to permit payment for the unused sick leave. If an annuity is involved, an employee may wish to evaluate an earlier annuity payment against the unused sick leave. Separations for disability may not be effected retroactively or before the date of expiration of the time specified in the notice.

365.35 Separation, Reduction in Force

The Postal Service procedure for effecting reductions in force parallels the OPM procedure. The Postal Service attempts to make personnel adjustments by various administrative actions other than RIF. If these actions are not