REGULAR ARBITRATION

NALC - USPS

SOUTHERN REGION

C # 10485
A-C

In the Matter of Arbitration	)	Case #S7N-3C-C-30102
Between	)	GTS #004201
United States Postal Service	)	Sylvester Taylor (Grievant)
Memphis, Tennessee	)	Case #S7N-3C-C-30318
and	)	GTS #004200
Branch 27	)	John E. Peterson (Grievant)
National Association of	)	Case #S7N-3C-C-30392
Letter Carriers	)	GTS #004207
AFL - CIO	)	Anthony W. Thornton (Grievant)
	)	Hearing File Closed:
	)	October 24, 1990

Before Irvin Sobel, Arbitrator of Record

Appearances:

For the United States Postal Service (Service, Employer, Management)

Carolyn Shirkey

Labor Relations Representative

Memphis, Tennessee

For the National Association of Letter Carriers (NALC, Union)

Collier James

Regional Administrative Assistant

Nashville, Tennessee

Backgrounds:

The hearings were conducted at the Memphis Main Post Office by the above cited arbitrator pursuant to Article 15 of the National Agreement (N/A). At the hearings the parties appeared, presented evidence, examined and cross-examined witnesses. The issue of timeliness was introduced by the Employer in the matter of the grievance introduced by the Union on behalf of Mr. Peterson. Although the parties opted for closing students the hearing file was kept open until October 24th in order to allow the advocates to submit additional citations as well to permit an interrogatory of the Memphis Director of Human Resources, who was not available during the hearing, but whose testimony in the matter of grievant Peterson was regarded as vital.

Case #S7N-3C-C-30102 - Sylvester Taylor, Grievant

> Did the Employer violate the National Agreement when it denied a Step Increase on June 6, 1990 to Mr. Sylvester Taylor? If so, what is the appropriate remedy?

Facts in Case:

On June 6, 1990 Supervisor Charles E. Ford of the Germantown Station in Memphis iniated a request to deny the grievant his Step Increase due July 14, 1990. Following this on June 13, 1990 the grievant received the following letter in which Irvin R. Jenkins, Director City Operations stated:

> This is to inform you of unsatisfactory elements of your performance record and your failure to satisfactorily meet the requirements of your position.

> Because performance record in the office and on the street is unsatisfactory, your periodic step increase due to become effective July 14, 1990, is deferred.
>
> Section 422.355 of the Employee and Labor Relations Manual provides a seven (7) day period redetermination period following the date your step increase deficiencies. If your service is not satisfactory at the end of the seven (7) period waiting period, severe, progressive, disciplinary action will be taken against you up to removal from the Postal Service.
>
> This action is appealable under the Grievance/Arbitration procedures as outlined in Article 15 of the National Agreement.

On June 26, 1990 following a first step denial on June 20, 1990 a grievance was introduced by the NALC at the 2nd step level. In that appeal which requested that the scheduled step increase and corresponding wage increase "be granted" the Union contended:

> Management states that grievant's office and street performance is unsatisfactory. We contend this is not true grievant stayed at his assignment and worked in a professional manner this is all that is expected of any employee. The same applies to his street duties grievant worked like a professional. We contend management is conducting a witch hunt. The harassment of grievant has produced a stressful situation for grievant, said condition should cease. The actions of management at this station should not be tolerated by those managers in higher positions charged with the responsibility of morale and mental health.

Employer Labor Relations Representative's Tommy L. Nix's 2nd step denial letter addressed to Union Vice President Taylor argued:

> We discussed the above captioned grievance at Step 2 of the Grievance Arbitration procedure on June 28, 1990. Based on information contained in the grievance file and your Step 2 presentation, it is my decision to deny the grievance.
>
> The grievant's Step was deferred in accordance with the performance determinations criteria set forth in Part 422.342 of the Employee and Labor Relations Manual. I find no violation of the agreement in this case.

422.34 Performance Determinations

422.341 Responsibility. Installation heads and their subordinate supervisors have joint responsibility for understanding the kind of work performance expected of employees. Supervisors must (a) keep informed of the deficiencies and proficiences of employees, and (b) provide appropriate commendation, counseling, or assistance on a continual basis-rather than only at the time of a step increase rating.

422.342 Criteria. Performance ratings are based on such job-related factors as reliability, work habits, quantity and quality of work performed, cooperation with other employees, and attendance. Criteria for the three categories of performance ratings follows:

a. Oustanding (O). Performance and achievement in terms of productive effort, proficiency, and significant contributions to the Postal Service which are well above the established norm. Note: An outstanding employee may be considered for a quality step increase or superior accomplishment award.

b. Satisfactory (S). Performance at an acceptable level involving such qualities as reliability, cooperation, and competence in meeting the normal requirements of a position. Note: This rating applies to the majority of employees whose performance may range from minimum to very good to above average in several respects of their work.

c. Unsatisfactory (U). Employees who repeatedly and/or continually fail to meet the essential requirements of their position involving such characteristics as lack of cooperation, poor attendance, and failure to produce acceptable work even after they have been counseled on deficiencies. Note: When an advance written notice of charges has been given to an employee on account of unsatisfactory service, any step increase otherwise normally due shall be withheld pending a final decision on the merits of the charges.

422.355 Withheld Increase. Employees whose step increase is withheld will receive a written advance notice from the installation head or her or his designee. Employees will recieve a copy of a Form 50 at a later date, confirming that the step increase was withheld. **Note: Withholding of a step increase should not be used as punishment for overt acts which should be handled under the disciplinary procedures.**

a. In cases of excessive LWOP, the revised effective date depends on the amound of LWOP. See 422.33 for deferral periods.

b. In cases of unsatisfactory performance, a 7-pay period re-determination period follows the date of withholding. During this period, the supervisor should encourage and assist the employee to overcome the deficiencies, provide needed training, consider reassignment to more suitable work, and/or other appropriate personnel action. The Minneapolis PDC includes the employee's name on a listing 45 days in advance of the revised effective date.

(1) If the employee's service is satisfactory at the end of the additional waiting period, the step increase is approved (see 423.35).

(2) If the employee's service is not satisfactory at the end of the additional waiting period, the step increase may be withheld for another re-determination period, or disciplinary measures under the collective bargaining agreement may be taken.

270 SPECIAL ROUTE INSPECTIONS

271 WHEN REQUIRED

Special route inspections may be required when one or more of the following conditions or circumstances is present:

a. Consistent use of overtime or auxiliary assistance.

b. Excessive undertime.

c. New construction or demolition which has resulted in an appreciable change in the route.

d. A simple adjustment to a route cannot be made.

e. A carrier requests a special inspection and it is warranted.

f. Carrier consistently leaves and/or returns late.

g. If over any 6 consecutive week period (where work performance is otherwise satisfactory) a route shows over 30 minutes of overtime or auxiliary assistance on each of 3 days or more in eachweek during this period, the regular carrier assigned to such route shall, upon request, receive a special mail count and inspection to be completed within 4 weeks of the request. The month of December must be

excluded from consideration when determining a 6 consecutive week period. However, if a period of overtime and/or auxiliary assistance begins in November and continues into January, then January is considered as a consecutive period even though December is omitted. A new 6 consecutive week period is not begun.

h. Mail shall not be curtailed for the sole purpose of avoiding the need for special mail counts and inspections.

272 MANNER IN WHICH CONDUCTED

When special inspections are made because of conditions mentioned in 271, they must be conducted in the same manner as the formal cound and inspection.

Position of the Parties:

The Union's Position:

The Union contended that the Employer, as evidenced by two disciplinary actions initiated against the grievant in relatively short order, harrassed the grievant during the entire period because he had introduced an EEO complaint. Following the grievant's "signing off" of that complaint the Employer, who described the grievant invidiously as "militant", not only began to put pressure upon him but also made matters unpleasant for him. Denial of the grievant's Step Increase, which was not justified on any objective basis, was further evidence of this harrassment. In fact, the citation of disciplinary action in the Letter of Denial by the Employer is contrary to Part. 422.355 of the N/A in the sense that the Step Increase denial in reality constituted further discipline against an employee deemed recalcitrant by the Employer. The Union contended that since the suspension was currently under adjudication it could not be cited for any purpose. It further contended that the charges against the grievant about excessive time were not only

invalid, but also improperly relied upon the DUVRS system of measurement of mail volume. It argued that in a Step 4 resolution of a grievance (H1N-3W-C-17704, June 17, 1983) Mr. Robert Eugene of the Service's Labor Relations Department had agreed with his Union counterpart (Joseph H. Thornton, Jr.) that:

> DUVRS evaluations should not be the basis for a discussion concerning the letter carrier's efficiency held pursuant to Article 16, Section 2. The efficiency of a letter carrier can be more appropriately determined by a mail count pursuant to 141.2, M-39 Handbook.

The Employer's use of DUVRS as a standard and its failure to conduct a mail count thus vitiated any Memphis management arguments regarding the grievant's inefficiency.

The Employer's Position:

The Employer contended that during the period the grievant was a thoroughly unsatisfactory, uncooperative, if not disgruntled employee. The same traits and behavioral patterns which led to his two disciplinary actions namely failure to follow instructions and failure to make a satisfactory effort are consistent with the hallmarks of at least two of the three essential characteristics of unsatisfactory performance cited in Part. 422.342 of the E/LM namely, lack of cooperation and failure to produce acceptable work. The employees complaints against the grievant regarding excessive use of time both at the office and in carrying his route were not based upon some rigid application of DUVRS statements but instead emanated from a comparison with the grievant's prior satisfactory results on the same route as well as with other carriers. The grievant had in fact

been given a commendation for excellent performance in 1986. If DUVRS measures were used at all they were used only in the most rough and approximative sense. There is no blanket agreement against citing DUVRS along side other contentions as one argument to provide proof of poor performance. A settlement of May 1, 1985 at the fourth step level by the Leslie Bayliss of the Employer's Labor Relations Department does not negate citation of Duvrs but merely states the method will not constitute the "sole" basis the argument of failure to reach minimum casing standards by an individual employee. Moreover, the Union at the 2nd and 3rd step levels had never argued that the Employer was harrassing the grievant. In the absence of any coherent argument or proof that unsubstantiated allegation was introduced at the arbitration hearing as a last desperate effort to rationalize or gloss over the grievant's unsatisfactory performance.

Opinion and Award:

Notwithstanding its argumentation, the Union was unable to establish that the grievant's work performance was satisfactory during the period after January 1990 when the grievant last received his Step Increase. In fact, a substantial amount of evidence, in addition to the never rebutted statement that the grievant was taking 2-3 times the norm to case his route, attests to the contrary. Uncontradicted and unrebuttled testimony cited in the two disciplinary statements and reiterated by Supervisor Ford testify not only to the grievant's poor work performance but also to the grievant's attitude. The grievant's indifferent attitude manifested itself in lack of concern about his performance. If ever there was a

case of "biting ones face" it displayed in the attitude of the grievant.

Arbitrators, including this one, have consistantly ruled that disciplinary action by itself does not automatically prove that the given employees' performance is unsatisfactory and in fact,when such discipline is the only evidence offered, have reversed Employer denials of Step Increases. On the other hand arbitrators have sustained step increase denials when the actions for which the employee was disciplined militate upon the grievant's performance. Notwithstanding, that the seven (7) day suspension is still in the grievance process and has not been yet adjudicated the prior Letter of Warning offers some support for the Service's position. The allegations in the Notice of Suspension were of the same genre and, although still subject to arbitral decision they, in conjunction with other unrebuttled testimony regarding the grievant's attitude, and certain responses regarding the grievant's unwillingness to attempt to improve his performance, all are supportive of the Employer's reasons for denial.

Were the Duvrs estimates of what is expected of the grievant, in terms of the number of hours required for a given mail volume, the sole or unitary basis upon which a determination adverse to the grievant was made, the grievant's position would have been sustained. However, such was not the case and the Duvrs was used, as evidenced by the original request for denial by Supervisor Ford, as a rough approximation rather than as a rigid fixed standard to be met daily. In addition other evidence, including the grievant's past performance, as well as other employees whose routes were roughly

similar, all were supportive of the fact that the grievant's performance was totally unsatisfactory over the sustained six month period.

The Union citing Section 270 contended that the Employer violated the Agreement by not conducting a proper route inspection. The argument made by the Union as well as its citation of Section 270 indicated that what was requested was a special route inspection which is not required to properly determine a given employee's efficiency for purposes of a Step Increase denial. According to the statement cited by the Employer in the Letter of Denial the efficiency of a letter carrier can be appropriately determined by a mail count pursuant to 141.2 M-39 Handbook. The requirements for a mail count are quite different and less exacting and protracted than those for a special route count. Accordingly to Supervisor Ford's unrebutted testimony not only were such conducted but also after each the grievant's efficiency was found wanting.

For all of the above cited reasons the grievance of Mr. Sylvester Taylor is hereby denied.

Award:

The grievance of Mr. Sylvester Taylor is denied. The Step Increase denial of July 14th is hereby affirmed.

Issue:

Did the Employer violate the N/A when it terminated the light duty assignment of Mr. John E. Peterson? If so, what is the appropriate remedy?

Facts in Case:

On April 17, 1990 the grievant received the following Notice of Proposed Denial of Continued Light Duty by Manager of Labor Relations Charles E. Isabel.

> This is advance written notice that I am proposing to terminate your light-duty assignment no sooner than thirty (30) calendar days from the date of your receipt of this proposal.
>
> Your light-duty records disclose that you have permanent medical restrictions of:
>
> > That you use a mask because of your asthma, and work in an area as free of pollutants as possible.
>
> You and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing, or both, before Walter E. Flanagan, Field Director, Human Resources. You may make an appointment with Mr. Flanagan by calling 521-2226, Monday through Friday, 8:30 a.m. - 4:30 p.m. You may also furnish affidavits or other written material to Mr. Flanagan, within 10 days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. After the expiration of the 10-day time limit for reply, all the facts in the case, including any reply you submit, will be given full consideration before a decision is rendered. You will receive a written decision from Walter E. Flanagan.

Following a Letter of Decision affirming the Notice the Union, on June 27, 1990 after a first step denial on June 21, 1990 formally grieved at the 2nd step appeal level. That appeal stated:

> Grievant John E. Peterson was issued a Letter of Decision denying his request for a light duty assignment. He contend management is in violation of the above article 13 of the National Agreement. Grievant's limitation have not changed during the last 5 years. During this time management has been able to afford grievant with light duty within his medical limitations. We contend this work is still available and grievant should be allowed to continue in this assignment.

On July 10, 1990 the Employer's designee, Turner Nix's 2nd step denial contended:

> We discussed the above captioned grievance at Step 2 of the Grievance Arbitration procedure on July 6, 1990. This grievance was filed at Step 1 on June 26, 1990, contesting a Letter of Decision, dated June 19, 1990.
>
> Article 15, Section 2, Step 1, (a) of the National Agreement states, "Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause...." (UNDERSCORING ADDED)
>
> The record reveals the grievant was issued a Notice of Proposed Denial of Continued Light Duty on April 17, 1990. Therefore, the employee first learned on that date and was required by the above noted contract language to file a grievance within 14 days of April 17, 1990 contesting the Notice of Proposed Denial of Continued Light Duty. The grievance was filed June 26, 1990, the seventieth day from the date that the grievant received the Notice of Proposed Denial of Continued Light Duty on April 17, 1990.
>
> It is my decision that this grievance, contesting the denial of the grievant's continued light duty, is untimely filed and not arbitrable under the provisions of the National Agreement. The grievance is denied.

Union President Gossett's response in his Letter of Corrections and Additions addressed to Mr. Nix was pointedly addressed to the basic issue of timeliness raised by the Employer's 2nd step designee. He argued:

> We contend management is in error. The lack of filing of a grievance to a proposed actions cannot be construed as a waiver of the Union right to file on the decision which is the final act of management's attempt to perfect an action. We contend until the decision is issued that we have in fact a continuing grievance.

The Employer's 3rd step appeal designee in denying the grievance reiterated the essence of the 2nd step denial but marginally addressed the substantive merits of the appeal.

> Based on information presented and contained in the grievance file, the grievance is denied. As indicated at Step 2, the grievance was untimely filed at Step 1. Further, the file contains no information to establish that work is available within the grievant's medical limitations.

The Timeliness Issue

Relevant Contract Provisions

Section 2: Grievance Procedure Steps

Step 1:

Any employee who feels aggrieved must discuss the grievance with the employees immediate supervisor within fourteen days of the date on which the Employer or the Union first learned, or may reasonably or may have been expected to have learned, of its cause.

Position of the Parties

The Union's Position:

The Union contended that the first time it became aware that the Notice to deny the grievant's light duty would actually be implemented was when the grievant received the Letter of Decision

from the Employer's Director of Human Resources Mr. W. Flanagan. The grievant was given assurance on April 21, 1990 by Mr. Flanagan as well as subsequently to the same effect by Irv Jenkins "that there was no problems and/or to go back to work and he would contact me later". Since the grievant was never informed officially that the terms of Notice of Denial would be carried out until he received Flanagan's Letter of Decision June 20th, that date represented the date in which the employee first learned of the "grievance's cause".

The Employer's Position:

The Employer contended that the Union never raised the issue of the grievant's conversation with Mr. Flanagan as providing a rationale for the NALC's failure to file a timely grievance after receipt on April 17th of the Notice of Denial. The Union in fact based its arguments upon Mr. Gossett's statement of Additions/Corrections to Nix's 2nd step denial. He had instead contended that the grievance was a continuing one until the Letter of Decision was received and the "fourteen day clock" begun ticking only on June 20th. That contention is not only a patently invalid one but also has been consistently rejected by a substantial number of Arbitrators. The Union, if it were uncertain about the finality of the Notice should either have asked for an extension of time to iniate its grievance until receipt of the Letter or filed a grievance within the contractual time parameters in case no settlement could be affectuated.

Opinion and Award:

The bulk of arbitral opinion, when issues of arbitrability are raised, is generally to resolve all doubts regarding arbitrability in favor of hearing the merits of the substantive issue. In short, as noted by such authorities such as Elkhours and Elkhours, arbitral practice has been to resolve all ambiguities regarding arbitrability in favor of the grievant especially when a fundamental contractual right is at issue. This is especially true when an employees continuing employment hangs in the balance.

Timeliness, however, is treated differently. Arbitrators regard the clearly stated time constraints as basic to fairness between the parties in processing grievances and are included to uphold those time constraints, unless conclusive evidence can be presented that the appeals could not have been iniated within the appropriate time constraints.

This arbitrator does not wish to enter into a long discussion of why these time constraints are crucial to any orderly or equitable grievance procedure and thus why arbitrators are likely to uphold them even when a given individual loses a right to a decision based on the substantive merits of his appeal. These time constraints, if there is any question of possible resolution can be waived and in most cases, if there is some reasonable chance of resolution. In other situations the parties agree to waive the time constraints to give them time to assess their positions. There is no stigma against an employee, especially one whose job is at stake, for introducing a grievance and if the matter is resolved either before the formal grievance procedure commences or during it the grievance can be

withdrawn. In fact, the purpose of the grievance procedure is to resolve issues and that procedure can only be set in motion by filing a grievance.

In short, the timely filing of this grievance would not have been antithetical to a favorable resolution of this grievance prior to the issuance of the Letter of Decision. The Union could also have requested, as it often has in such situations, a waiver of the time constraints. By failing to avail itself of its options under the N/A the Union therefore was forced to argue that the time clock started to tick only when the Letter of Decision has been issued. The inference which can be drawn from Union President Gossett's statement is that the Union feels it has the option of deciding whether it can introduce a grievance either until after a Notice or a Letter of Decision. In essence its (Union) position is that it can decide "when it first learned of its (the grievance) cause". Arbitrators have consistently rejected that position in favor of the position that the clock starts ticking with the issuance of a Notice. They have consistently rejected the argument that the Letter of Decision provides the proper point to first iniate a grievance.

In a similar grievance in which the Union waited until a Letter of Decision was issued by alleging that certain statements, if not implied promises made by the Employer's representative, at a meeting following the Notice of Discipline (similar to that between the grievant and Mr. Flanagan) constituted a waiver of the time limits, Arbitrator Harvey Letter ruled in the negative (W4C-5M-D-4430, December 30, 1985). He ruled that the grievance, which like this one was introduced after receipt of the Letter of Decision was untimely

filed and not properly before the arbitrator. In a similar case also involving a grievance appeal to a Letter of Decision over entitlement to light duty status Arbitrator Arnold Zack (Case #83-034, February 4, 1985) stated that the Notice and not the Letter was "the triggering event from which the 14 days is counted". He added, "the letter of decision which accured later merely confirmed that earlier notice". He therefore stated, "the grievance filed protesting the Letter of Decisions - Removal is not arbitrable".

The contents of the mandatory discussion between the grievant and W. Flanagan conducted under the terms of the Veterans Preference Act were not used as a basis for argument by the Union during the grievance procedure. However, rather than rejecting this line of argumentation out of hand on the basis of "surprise" the contrasting statements of the two protagonists under oath at the interrogatory were analyzed. The results of that discussion were sufficiently inconclusive to warrant reaching any firm conclusions about the statements cited by the grievant but denied by Flanagan that either the latter or subsequently Jenkins had promised to work something out which would restore the grievant to duty. No statement which either might have been deliberately designed to have induced the grievant not to have grieved the Notice in timely fashion, or could be construed as an implied waiver of the time constraint, was ever introduced.

In short, the grievance Mr. John Peterson, Jr. is not properly before the arbitrator.

Award:

The grievance of Mr. Peterson is hereby denied on the basis of its untimely introduction.

Issue:

The following issue was jointly framed by the parties:

> Did the Employer violate the National Agreement (N/A) when it terminated the light duty assignment of Anthony Thornton? If so, what is the appropriate remedy?

Facts in Case:

On June 19, 1990 the grievant, who was an FTR carrier on light duty, received the following Notice of Proposal Denial for Permanent Light Duty from Charles H. Isabel Manager of Labor Relations, Memphis Division. That letter read in its relevant parts:

> This is advance written notice that I am proposing to deny your request for a permanent light-duty assignment no sooner than thirty (30) calendar days from the date of your receipt of this proposal.
>
> Your light-duty records disclose that you have requested a permanent light-duty assignment because of the following medical restrictions:
>
> > No driving of any sort of vehicle - indoors. No ladder climbing. Routine full duties but not to include driving in any capacity. This condition is considered permanent.
>
> The Injury Compensation Office has surveyed the available work assignments and cannot at this time provide you with work within your medical restrictions. No such work is available or will conceivably be available for permanent light duty in the near future. Consequently, I have no choice but to propose to deny your request.
>
> You and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing, or both, before Walter E. Flanagan, Field Director, Human Resources. You may make an appointment with Mr. Flanagan by calling 521-2226, Monday through Friday, 8:30 a.m. - 4:30 p.m. You may also furnish affidavits or other written material to Mr. Flanagan, within 10 days from your receipt of this letter. You will

be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status.

After the expiration of the 10-day time limit for reply, all the facts in the case, including any reply you submit will be given full consideration before a decision is rendered. You will receive a written decision from Walter E. Flanagan.

On July 3, 1990 following a first step denial by the aforecited Isabel the Union grieved at the 2nd step appeal level. The Union, which requested that the grievant be granted permanent light duty, contended:

> We contend management is in violation of Article 13 of the National Agreement. Grievant has been afforded light duty. We contend light duty is still available for grievant and other injuryed employees needing such duty. Grievant is a disabled veteran.

After the issuance of the first 2nd step Letter of Denial issued on July 10th the Employer's 2nd step designee Tommy L. Nix issued the following decision responding to the first decision. Mr. Nix contended:

> We discussed the above captioned grievance at Step 2 of the Grievance Arbitration on July 6, 1990. The Step 2 decision datted July 10, 1990 is rescinded and the following decision is issued in lieu thereof.
>
> The issue in this grievance is the Proposed Denial of the grievant's light duty. The record shows that the grievant's physician, Bernard Abrasom, D.O., diagnosed his condition as permanent on April 19, 1990. The grievant is prohibited from climbing ladders and driving in any capacity. The grievant is a letter carrier who is required to drive in the performance of his duties. There are no positions available wherein the grievant could be assigned on a permanent basis. The grievance is denied.

The Union modified its contentions in its appeal to step 3.

Position of the Parties:

The essence of each party's position can easily be inferred from their respective statements. Those additional facts, arguments, and counterarguments when relevant to the arbitrator's decision will be delineated by him in the body of his Opinion. Accordingly in the interest of avoiding repetition only a bare bones summary of each party's major contention will be introduced at this point.

The Union's Position:

The Union through its articulate advocate contended that the Denial of Permanent Light Duty was on aspect of an attempt to remove the grievant, a disabled veteran with seventeen years of seniority in the Postal Service. At the time the grievant received the Notice of Denial from Mr. Isabel, he had already been issued a Notice of Proposal Removal on June 4th. The Employer, thus, issued the Notice of Denial because it could achieve therefrom the same result through the instant action as it could from the Notice of Proposed Removal which the Union also had grieved. The Union pointed out that the last day the grievant was given any light duty assignment (July 6) coincided with the conclusion of the grievant's mandated 30-day period granted under terms of the N/A.

The Union further contended that the grievant originally did not appply for permanent light duty. He was perfectly competent to drive safely but the Employer deferred to Dr. James at the Veterans Administrative Hosptial (V/A) whose February 13, 1990 Memorandum stated, "that, given the unpredictably nature of his (Thornton) seizures, he should not be driving". He (Thornton) requested a

temporary light duty assignment on May 18, but Dr. Bernard Abramson who had been treating him for seizure disorder since October 1987 in his Explanation of Prognosis stated, "the condition (seizure disorder) is considered permanent. Notwithstanding, the fact that the grievant explicitly requested a Temporary Light Duty Assignment the Employer chose to interpret that request as a Request for Permanent Light Duty, a request which it denied a month later.

However, the crux of the matter is that for at least four months the Employer found work within the grievant's limitations, which stated that he could not drive or climb, but when it decided to deny his request for light duty, it suddenly could not find any work. Notwithstanding Mr. Isabel's statement he presented no shred of evidence that the "Injury Compensation Office has surveyed all the available work assignments" and cannot find you work. Mr. Isobel only contended that no work at the grievant's work station existed but he was unaware of the existence of walking routes and/or segmentation assignments within the Memphis installations which the grievant could conceivably have filled within his restrictions.

The Employer therefore violated Article 13, Section 2.A which states, "Installation heads shall give employee consideration to full time regular or part time flexible employees requiring light duty and Section 4.A which states, "every effort shall be made to reassign the concerned employee within the employee's present craft or occupational group.... Part. 514.161 of the Employee and Labor Relations Manual (E/LR) speaks of "every reasonable effort".

"Every reasonable effort" requires a more far reaching effort . . . beyond the grievant's immediate work station while searching for a light duty assignment for the employee.

In short, the Employer looking for a way of Removing the e, employee, not only failed to make "every reasonable" effort but also made virtually no effort at all.

The Employer's Position:

The Employer exerted every effort in trying to find a suitable light duty assignment within the grievant's work restrictions. Although the grievant initially worked at a putting up routes at White Station, he ultimately did clerk work and distributed mail. There simply was not enough work to keep him occupied without assigning him to clerk duties and since these employments were being automated and the work force reduced he could not be permitted to cross craft lines without violating Section 4.C, which states: "The reassignment of a full time regular or part time flexible to a temporary or permanent shall not be made to the determent of any full time regular. For much of the time the grievant was on Temporary Light Duty, Management at the White Station had to "make work" for him.

Notwithstanding all of its argumentation the Union was unable to show any available position or assignment which the grievant could fill within his limitations.

For all these reasons the grievance should be denied.

Opinion and Award:

The timing of the Notice of Denial, its confluence with the Notice of Removal, and the relatively cavalier manner in which the Employer entertained the grievant's request of May 18th for Temporary Light Duty buttressed, the Union's contention that the Employer was intent upon removing the grievant at any cost. Ironically on May 21, the grievant received a letter from Safety Specialist Jimmy Williams stating your request for temporary light duty has been approved, "provided work is available". A similar statement was provided the grievant for the period of June 18, 1990 to July 18, 1990. In short, the Employer approved two requests for Temporary Light Duty at Front Street after it interpreted the grievant to be requesting Permanent Light Duty even though he had explicitly requested Temporary Light Duty. Notwithstanding the Employer's denial about the potential for a craft cross over the fact remains that the grievant had crossed crafts after June 18th when notice of the grievant's approval of temporary light duty was sent to "President APWU". These inconsistencies are sufficiently glaring to vitiate many of the able Employer advocates' arguments. The Employer in short found light duty for the grievant up to the date of separation and also allowed him to cross crafts. No proof of non-availability of work, even at the station to which he was assigned was offered other than a statement by the Employer witness that the work the grievant had been provided was "make work". Such a statement is routinely made by the Employer in cases of this genre.

Notwithstanding, these inconsistencies, the Employer's position would have been vindicated had it shown that it made a reasonable effort to find a light duty assignment for the grievant. It utterly failed to do so. Despite the statement, "the Injury Compensation office has surveyed the available work and cannot at this time find work for you," the Employer's witness (Isabel) could not show either a single letter sent to other Service installations or even a listing of telephone calls by the Memphis Injury Compensation office to them asking if an assignment could be found within the grievant's specific work restrictions. In other installations known to this arbitrator all relevant Service units in the jurisdiction are canvassed either by letter or phone. All the statements pertaining to the lack of a light duty assignment for the grievant made by Mr. Isabel used the immediate work station as a referent rather than all installations within the Memphis Division's jurisdiction. Countless arbitral decisions have stated that the area of survey is the entire locale and not the immediate work station.

The Employer witness was asked if there were any walking routes or segmentation positions within the Memphis and he stated under oath that he did not even know if these existed. These are assignments which do exist and which could have been filled by the grievant within his limitations.

In short, despite the assertions in the Notice of Denial the Employer violated Article 13 by failing to make "a reasonable effort" let alone "every effort" to find the grievant a suitable, light duty assignment.

Given that the iniating "cause" of the grievance was the Notice of Denial of a Permanent Light Duty Assignment this arbitrator in sustaining the grievance feels he should acceed to the Union's requested remedies, namely the grievant being accorded a permanent light duty assignment and back pay from the date of severance. However, several problems complicate the requested remedies. These are the fact that: 1) The grievant was removed effective July 8th and the matter is currently under arbitral review; 2) The grievant was not employed eight hours per day prior to removal and arbitrators have ruled there is no Employer obligation to provide eight hours per day for employees in Mr. Thornton's category; and 3) The grievant as attested to by the Notice of Removal had serious problems with alcohol, which he is unwilling to fully acknowledge, and combined with his "seizures" this creates some concern regarding his fitness for duty.

Accordingly any back pay will be kept in escrow pending the disposition of the removal action. For instance, if he is restored to duty without back pay, it is clear that the grievant is not entitled to back pay. Thus the grievant's back pay award under terms of this grievance could be reduced, if not entirely eliminated by any disciplinary suspension decided by the other arbitrator under terms of the Notice of Removal. The grievant will be restored to duty on a Permanent Light-Duty Assignment. However, that restoration to duty is provisional since the arbitral ruling on the Notice of Removal could result in the removal of the grievant. In that case the grievant's restoration to duty by this arbitrator would be inconsistent with the removal action ruling by the other arbitrator.

Award:

The grievant will be restored to duty on a Permanent Light Duty Assignment as expeditiously as possible after the receipt of this decision. However that restoration to duty is provisional and would be overturned if the grievant's Removal is subsequently affirmed by arbitral decision.

The grievant will be awarded back pay from July 8, 1990 to the date of his restoration to duty. Back pay will be computed at his hourly rate for the average number of hours Mr. Thornton was employed daily during the two months prior to his removal. That back pay will be placed in escrow pending final disposition of his June 4, 1990 removal action. If any disciplinary action eventuates from that action the compensation for the time lost due to that action will be deducted from the back pay held in escrow origining from the instant matter.

Upon the grievant's return to duty, under terms of this Award, he will be required to submit to a Fitness for Duty examination. If he is deemed fit for duty he must participate in an EAP program for one (1) year or until released from that program by the requisite EAP authorities. Failure to comply with the terms of his EAP program could subject him to further discipline.

Tallahassee, Florida
December 14, 1990

This is a certified true copy of Arbitration Award

Irvin Sobel, Arbitrator