

C#09589

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT:
) Lisa A. Brief
)
) -Between-) POST OFFICE:
) UNITED STATES POSTAL SERVICE) Long Beach, California
)
) -And-) CASE NO: W4N-5C-C 43784
) NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO) NALC GTS NO: 12779
)
)

BEFORE: CARL B.A. LANGE III, Arbitrator

APPEARANCES:

For the U.S. Postal Service: J. CARSON MOORE
Regional Labor Relations Executive
13031 West Jefferson Boulevard
Inglewood, CA 90311-9203

For the Union: JEANNIE JOHNSON
Vice President, Branch 1100
3636 Westminster Avenue, Suite B
Santa Ana, CA 92703-1489

Place of Hearing: 2500 Miramar
Long Beach, California

Date of Hearing: November 7, 1989

AWARD:

The Service violated the National Agreement when it assigned the Grievant to the Long Beach General Mail Facility while she was on limited duty status. The Grievant shall receive compensation as set forth herein.

Date of Award: December 20, 1989

CARL B. A. LANGE III

BACKGROUND
(Brief - Limited Duty)

Pursuant to the National Collective Bargaining Agreement ("National Agreement") between the UNITED STATES POSTAL SERVICE ("Service" or "Employer") and the NATIONAL ASSOCIATION OF LETTER CARRIERS ("NALC" or "Union"), the undersigned was selected from the Western Region Regular Arbitration Panel to serve as the Arbitrator in this matter.

This matter arises as a result of the Service's assignment of the Employee from Pacific Station in Long Beach, California to the Long Beach General Mail Facility ("GMF") while she was on limited duty status. A Step 2 grievance was filed on February 19, 1987, alleging a violation of Articles 3, 8, and 19 of the National Agreement. The grievance protested the change of work location, work hours, and work duties. The grievance was processed to arbitration pursuant to the terms of the National Agreement.

The evidentiary hearing commenced on October 12, 1989, at the postal facility located at 2500 Miramar, Long Beach, California. A second hearing day was needed in order to complete the case presentation. The continued hearing reconvened on November 7, 1989. The Service was represented by Carson Moore, Regional Labor Relations Executive. The NALC was represented by Jeannie Johnson, Vice President, Branch 1100. The parties agreed that there were no issues of substantive arbitrability to be resolved and that the matter was properly before the Arbitrator.

The parties agreed that the issue should be set forth as:

"Did the Service violate Articles 3, 8, or 19 of the National Agreement in the involuntary assignment of the Grievant to a limited duty position outside of her regular tour of duty, craft, and work location on February 6, 1987?"

"If so, what is the appropriate Remedy?"

Additionally, the Union requested that the Arbitrator rule on the issue of its contention that the Service improperly withheld certain relevant information that had been requested by the Union. That issue would be stated as:

"Did the Service violate Articles 15 or 31 of the National Agreement by its refusal to provide certain documentation during the processing of this grievance?"

"If so, what is the appropriate remedy?"

During the course of the hearing, the parties were afforded a full and complete opportunity to be heard, to call, examine, and cross-examine witnesses, to develop arguments, and to present relevant evidence. Witnesses appearing before the Arbitrator were duly sworn. Lisa Brief ("Grievant" or "Employee") was present at the hearing and testified on her own behalf. An official transcript of the hearing was not made. The parties made closing arguments on the record. The matter was deemed submitted for decision as of November 7, 1989, at the close of the hearing.

At the commencement of the hearing, the parties stipulated certain facts into the record of this matter. The stipulations are as follows:

"1. The Employee's position was a regular Letter Carrier.

"2. Prior to February 6, 1987, the Employee held an assigned bid position as a Reserve Letter Carrier at Pacific Station.

"3. The Employee originally was assigned to Pacific Station on September 9, 1986, while she was on limited duty status.

"4. When the Employee was originally assigned to Pacific Station she was assigned available work that was within her medical limitations.

"5. At Pacific Station, the Employee's regular hours in her bid position were 7:30 a.m. to 4:00 p.m.

"6. In February 1987, the Employee was reassigned to the Long Beach G.M.F. on Tour 3, with regular work hours from 7:30 p.m. to 4:00 a.m.

"7. On June 9, 1987, the Employee was assigned to duties in the Express Mail Marketing section on Tour 2, with regular work hours from 8:00 a.m. to 4:30 p.m.

"8. On July 7, 1987, the Employee had surgery for the condition that required her to be on limited duty status.

"9. On October 26, 1987, the Employee returned to work at the Long Beach G.M.F. on limited duty status.

"10. On October 30, 1987, while still on limited duty status, the Employee was assigned to work at the Vehicle Maintenance Facility ("VMF") from 8:00 a.m. to noon. From 1:00 p.m. to 5:00 p.m. she reported to the Long Beach GMF for assignment.

"11. In January 1988, the Employee assumed a bid position at the Spring Carrier Annex, while still on limited duty status, with work hours from 6:40 a.m. to 3:10 p.m. She remained in the position through August 1988 when she was taken off of limited duty status.

Relevant Provisions of the Collective Bargaining Agreement

The Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO, and the National Association of Letter Carriers, AFL-CIO (Jt. Exhibit 1) provides:

"ARTICLE 2

"NON-DISCRIMINATION AND CIVIL RIGHTS

"Section 1. Statement of Principle

"The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions 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.

"[see Memo, page 183]

"Section 2. Committees

"There are established at the national and regional levels Joint Committees on Human Rights. The committees will be composed of a representative of each Union and responsible management officials. The committees may develop affirmative action proposals on all matters affecting minority groups. The committees will also be advised of the plan for site selection for facilities planned for national postal mail networks and major metropolitan areas, and review availability of adequate housing and public transportation. The committees shall meet as required at mutually agreeable times.

(Note: This text is reproduced from the 1987-1990 National Agreement even though the grievance arose under the 1984-1987 National Agreement. There are neither procedural nor substantive differences in the texts of the two Agreements that have any bearing on the disputed issues in this matter.)

"Section 3. Grievances

"Grievances arising under this Article may be filed at Step 2 of the grievance procedure within fourteen (14) days of when the employee or the Union has first learned or may reasonably have been expected to have learned of the alleged discrimination, unless filed directly at the national level, in which case the provisions of this Agreement for initiating grievances at that level shall apply.

"ARTICLE 3

"MANAGEMENT RIGHTS

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

"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;

"E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

"F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

...

"ARTICLE 8

"HOURS OF WORK

"Section 1. Work Week

"The work week for full-time regulars shall be forty (40) hours per week, eight (8) hours per day within ten (10) consecutive hours provided, however, that in all offices with more than 100 full-time employees in the bargaining units the normal work week for full-time regular employees will be forty hours per week, eight hours per day within nine (9) consecutive hours. Shorter work weeks will, however, exist as needed for part-time regulars.

...

"Section 2. Work Schedules

"A. The employee's service week shall be a calendar week beginning at 12:01 a.m. Saturday and ending at 12 midnight the following Friday.

"B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

"C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

"Section 3. Exceptions

"The above shall not apply to part-time employees.

"Part-time employees will be scheduled in accordance with the above rules, except they may be scheduled for less than eight (8) hours per service day and less than forty (40) hours per normal work week.

"Section 4. Overtime Work

"A. Overtime pay is to be paid at the rate of one and one-half (1 1/2) times the base hourly straight time rate.

"B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

"C. Penalty overtime pay is to be paid at the rate of two (2) times the base hourly straight time rate. Penalty overtime pay will not be paid for any hours worked in the month of December.

"D. Penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F.

"E. Excluding December, part-time flexible employees will receive penalty overtime pay for all work in excess of ten (10) hours in a service day or fifty-six (56) hours in a service week.

"F. Wherever two or more overtime or premium rates may appear applicable to the same hour or hours worked by an employee, there shall be no pyramiding or adding together of such overtime or premium rates and only the higher of the employee's applicable rates shall apply.

"Section 5. Overtime Assignments

"When needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:

"A. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an 'Overtime Desired' list.

"B. Lists will be established by craft, section, or tour in accordance with Article 30, Local Implementation.

"C.1.a. Except in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis.

"b. Those absent or on leave shall be passed over.

"2.a. Only in the Letter Carrier Craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected from the list.

"b. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list.

"c. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly.

"d. Recourse to the "Overtime Desired" list is not necessary in the case of a letter carrier working on the employee's own route on one of the employee's regularly scheduled days.

"D. If the voluntary 'Overtime Desired' list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

"E. Exceptions to C and D above if requested by the employee may be approved by local management in exceptional cases based on equity (e.g., anniversaries, birthdays, illness, deaths).

"F. Excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day,

over eight (8) hours on a non-scheduled day, or over six (6) days in a service week.

"G. Full-time employees not on the 'Overtime Desired' list may be required to work overtime only if all available employees on the 'Overtime Desired' list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the 'Overtime Desired' list:

"1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and

"2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

"However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment.

...

"Section 6. Sunday Premium Payment

"Each employee whose regular work schedule includes a period of service, any part of which is within the period commencing at midnight Saturday and ending at midnight Sunday, shall be paid extra compensation at the rate of 25 percent of the employee's base hourly rate of compensation for each hour of work performed during that period of service. An employee's regularly scheduled reporting time shall not be changed on Saturday or Sunday solely to avoid the payment of Sunday premium payment.

"Section 7. Night Shift Differential

"For time worked between the hours of 6:00 p.m. and 6:00 a.m. employees shall be paid additional compensation at the rate of ten percent (10%) of the base hourly straight-time rate.

"Section 8. Guarantees

"A. An employee called in outside the employee's regular work schedule shall be guaranteed a minimum of four (4) consecutive hours of work or pay in lieu thereof where less than four (4) hours of work is available. Such guaranteed minimum shall not apply to an employee called in who continues working on into the employee's regularly scheduled shift.

"B. When a full-time regular employee is called in on the employee's non-scheduled day, the employee will be guaranteed eight hours work or pay in lieu thereof.

"C. The Employer will guarantee all employees at least four (4) hours work or pay on any day they are requested or scheduled to work in a post office or facility with 200 or more man years of employment per year. All employees at other post offices and facilities will be guaranteed two (2) hours work or pay when requested or scheduled to work.

...

"Section 9. Wash-Up Time

"Installation heads shall grant reasonable wash-up time to those employees who perform dirty work or work with toxic materials. The amount of wash-up time granted each employee shall be subject to the grievance procedure.

"ARTICLE 15

"GRIEVANCE-ARBITRATION PROCEDURE

"Section 1. Definition

"A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

"Section 2. Grievance Procedure - Steps

"Step 1:

"(a) 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. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or Union representative. . . .

"(b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

"(c) If no resolution is reached as a result of such discussion, the supervisor shall render a decision orally stating the reasons for the decision. The supervisor's decision should be stated during the discussion, if possible, but in no event shall it be given to the Union representative (or the grievant, if no Union representative was requested) later than five (5) days thereafter unless the parties agree to extend the five (5) day period. . . .

"(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:

- "1. Detailed statement of facts;
- "2. Contentions of the grievant;
- "3. Particular contractual provisions involved; and
- "4. Remedy sought.

"Step 2:

"(a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Step 2 official, and shall so notify the Union Step 1 representative.

"(b) Any grievance initiated at Step 2, pursuant to Article 2 or 14 of this Agreement, must be filed within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

"(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

"(d) At the meeting the Union representative shall make a full and detailed statement of

facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

"(e) Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form, but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems.

"(f) Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, the contractual provisions involved, and (3) the detailed reasons for denial of the grievance.

"(g) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. Any such statement must be included in the file as part of the grievance record in the case. The filing of such corrections or additions shall not affect the time limits for appeal to Step 3.

"(h) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed, (3) the Union corrections or additions to the Step 2 decision.

"Step 3:

"(a) Any appeal from an adverse decision in Step 2 shall be in writing to the Regional Director for Human Resources, with a copy to the Employer's Step 2 representative, and shall specify the reasons for the appeal.

"(b) The grievant shall be represented at the Employer's Regional Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any case where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. In such event, the parties' representatives at Step 2 shall meet within seven (7) days after the grievance is returned to Step 2. Thereafter, the time limits and procedures applicable to Step 2 grievances shall apply.

"(c) The Employer's written Step 3 decision on the grievance shall be provided to the Union's Step 3 representative within fifteen (15) days after the parties have met in Step 3, unless the parties agree to extend the fifteen (15) day period. Such decision shall

state the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2. Such decision also shall state whether the Employer's Step 3 representative believes that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

"(d) The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

...

"Section 3. Grievance Procedure - General

"A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

"B. The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

"C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move

the grievance to the next step of the grievance-arbitration procedure.

...

"Section 4. Arbitration

"A. General Provisions

...

"5. Arbitration hearings normally will be held during working hours where practical. Employees whose attendance as witnesses is required at hearings during their regular working hours shall be on Employer time when appearing at the hearing, provided the time spent as a witness is part of the employee's regular working hours.

"6. All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. . . .

...

"9. In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

..."

"ARTICLE 19
"HANDBOOKS AND MANUALS

"Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

..."

"ARTICLE 31

"UNION-MANAGEMENT COOPERATION

"Section 1. Membership Solicitation

"The Unions may, through employees employed by the Employer, solicit employees for membership in the Unions and receive Union dues from employees in non-work areas of the Employer's premises, provided such activity is carried out in a manner which does not interfere with the orderly conduct of the Employer's operation.

"Section 2. Computer Tapes

"The Employer shall, on an accounting period basis, provide each Union at its national headquarters with a computer tape containing information as set forth in the Memorandum of Understanding regarding Article 31.

...

"Section 3. Information

"The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

"Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee. All other requests for information shall be directed by the National President of the Union to the Senior Assistant Postmaster General for Human Resources.

"Nothing herein shall waive any rights the Union or Unions may have to obtain information under the National Labor Relations Act, as amended."

Relevant Provisions of Handbooks and Manuals

The Service's Manual entitled "Employee and Labor Relations Manual ("ELM") provides, at Sections 434 (Jt. Exhibit 5) and 546 (Jt. Exhibit 3) as follows:

"434 OVERTIME AND PREMIUM PAY

"434.6 Out of Schedule Premium

".61 Definition

".611 'Out of schedule premium' is paid to an eligible full-time bargaining unit employee for time worked outside of, and instead of, the employee's regularly scheduled workday or workweek when the employee is working on a temporary schedule at the request of management, provided that notice of the temporary schedule change is given to the employee by Wednesday of the preceding service week.

...

".62 Eligibility

".621 Exhibit 434.62 indicates those employees who are eligible to receive 'out of schedule premium' while working a qualifying temporary schedule within a bargaining unit or while detailed to a nonbargaining position. See exceptions in 434.622.

".622 Otherwise eligible employees are not entitled to 'out of schedule premium' under the following conditions:

"a. When detailed to a postmaster position as officer in charge.

"b. When detailed to a rural carrier position.

"c. When detailed to an ad hoc position, for which the employee applied and was selected, when the core responsibilities of the position require work on an irregular schedule.

"d. When detailed to either a bargaining unit or nonbargaining position in grade 19 and above.

"e. When attending a recognized training session which is a planned, prepared, and coordinated program or course.

"f. When assigned to light duty in accordance with the provisions of the collective bargaining agreement or as required by the Federal Employee Compensation Act, as amended.

"g. When allowed to make up time missed due to tardiness in reporting for duty.

"h. When in accord with and permitted by the terms of a bid.

"i. When a request for a schedule change is made by the employee for personal reasons and is agreed to by the employee's supervisor and shop steward or other collective bargaining representative.

...

"546 Reemployment of Employees Injured on Duty

"546.1 Law

".11 General. The USPS has legal responsibility to employees with job-related disabilities under 5 U.S.C. 8151 and the Office of Personnel Management's (OPM) regulations as outlined below.

...

.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.

...

546.3 OWCP Referrals

...

".32 Work Limitation Tolerances. The individual's physician of record, or other physician selected by the individual or OWCP, will furnish OWCP with a definitive medical summary, clearly documenting the medical limitations that will have to be accommodated. The OWCP District Medical Director evaluates

the work limitation tolerances, submitted by the physician of record, and upon concurrence, refers them to the USPS for consideration.

...."

The Union's Position

The Union claims that the February 1987 changes of work location, work duties, and work hours were made improperly in violation of Section 546.141 of the ELM. The Employee had been working productively at Pacific Station within her medical restrictions for the time that she had been on duty since September 1986. She had learned to use left-handed and had willingly assumed any other duties that were within her medical restrictions.

The Union points out that the changes were made shortly after the Office of Worker's Compensation Programs ("OWCP") had upheld the Employee's claim for continuation of pay ("COP") status due to an on-the-job injury. That determination had a direct financial impact on the Service. It meant not only that the Employee was entitled to back pay for time that she had been on Leave Without Pay status following her injury, but also that she would be entitled to continuation of her regular pay until a future determination of her medical status. During that same time period, the Employee had been designated as a Union Steward and was involved in the training and certification process for that position. Her Union activities and advocacy incurred the displeasure of Supervisor Fisher, who went so far as to complain directly to the Branch President.

Thus, the Union contends generally that the Service committed an inappropriate administrative action that violated the "pecking order" set forth in the ELM and that the assignment to the GMF was also based in part on retaliation for the Employee's successful COP claim, and in part on retaliation for the Employee's emerging activism on behalf of the Union. Finally, the Union argues that work was available at Pacific Station.

With regard to the Service's alleged failure to provide relevant information that had been requested during the processing of the instant grievance, the Union argues that the documents were needed in order to properly carry out its role as the Employee's representative. The Union asserts that the information regarding another employee would show that the Service could have accommodated the Grievant as it accommodated the other employee. Further, the information requested could or would support the Union's contention that work within the Grievant's medical restrictions that would have obviated the need to transfer the Grievant to the GMF was available, and continued to be available, at Pacific Station.

As a remedy, the Union requests that the Grievant receive out of schedule pay for all hours worked out of her regular bid schedule at Pacific Station, additional mileage for travel to the GMF, and child care expenses in excess of her regular monthly child care expenses due to the assignment to Tour 3 requiring additional babysitting services while the Grievant was on duty.

The Service's Position

Throughout the course of processing the instant grievance, during a time span commencing in early February 1987 and carrying through to a third and final Step 3 response in December 1988, the Service's contention has been simple and straightforward. In the Service's view, the duties assigned to the Grievant were consistent with her medical restrictions and management's actions were appropriate.

At the arbitration hearing, the Service expanded its contentions to include the assertion that available work within the Grievant's medical restrictions at Pacific Station had dried up and was no longer available. Thus, pursuant to the ELM, work was provided in another assignment at another location. Further, the Service challenged the Union's assertion that work was available at Pacific Station.

ANALYSIS AND CONCLUSIONS

The Service has, and retains, the right to direct its work force, to provide for efficient operations, and to determine the methods, means, and personnel through which its mission will be accomplished (Jt. Exhibit 1 at Article 3). The Service's rights are limited and regulated by provisions of the National Agreement and by local Memoranda of Understanding (MOU's) negotiated pursuant to Article 30. The various Postal Service Handbooks, Manuals, and Regulations also contain limitations and restrictions that are integrated with the National Agreement pursuant to Article 19.

Section 546.141 of the ELM, as set forth above, creates certain rights for an employee who has suffered a compensable on-the-job injury. The employee assumes a status and designation as a limited duty employee. Limited duty employees must be accorded special considerations in the assignment of work. The limited duty assignment guidelines contained in the ELM substantially constrain and regulate the Service's ability to assign an employee to work outside of the employee's craft, regular work hours, or regular assigned work facility.

Management at a local installation is required to make substantial on-site accommodations for employees who suffer on-the-job injuries. Any accommodation must be such as to "minimize any adverse or disruptive impact on the employee." Since the limited duty employee is entitled to regular pay regardless of how much or

how little work is actually performed, "make-work" is an acceptable and often utilized part of a limited duty assignment.

If major modifications to an employee's duties, work hours, and/or work location are deemed necessary by local management, the modifications must be made in the precise order and progression set forth in the ELM, beginning with on-site modification of regular work duties within the employee's craft (Section 546.141a), work across craft lines (Section 546.141b), and work in-craft or cross-craft during other than the employee's work hours (Sections 546.141c). Only when the local installation is unable to accommodate the employee's medical restrictions by implementing modifications set forth in Section 546.141a-c is an assignment to another postal facility sanctioned as a last resort by Section 546.141d. At that point, the progression with regard to craft duties, cross-craft duties, and modified work hours is reinstated for the new work location. The only way that this employee (or any other limited duty employee not already working at the GMF) could appropriately be considered for assignment to the GMF would be if each of the conditions precedent to Section 546.141d had been met, and, in fact, there was no work (including reasonable make-work) available at the employee's regular work location.

In order to successfully defend against an employee's challenge to a limited duty assignment, the Service must make at least a *prima facie* showing that it has attempted to implement the progression set out in the ELM and has been unable to make a successful accommodation at each step prior to the level of the modification of craft duties, non-craft duties, work hours, or work location that was finally implemented. The showing may be made by way of documents, testimony, or other relevant and admissible evidence. After the Service has made an acceptable showing that it has attempted to satisfy each step in the progression of Sections 546.141a-c, it may then allege that no work is available at the regular work location and that an assignment within the parameters of Section 546.141d is the only appropriate course of action. The burden to challenge the lack of available work at the employee's regular assigned work location then shifts to the Union. However, a bare assertion that there was no available work, without additional substantiation, is insufficient to demonstrate compliance with Section 546.141 and does not shift the burden of proof to the Union to demonstrate that work was available.

At the arbitration hearing, the Service attempted to show that it had complied with the ELM's requirements before assigning the Grievant to the GMF because no work was available within her medical restrictions at Pacific Station. According to the testimony, the work that had been available at Pacific Station had "dried up" and there was nothing for the Grievant to do. However, that testimony flies in the face of the written Step 2 Decisions of April 22, 1987, and November 17, 1988, as well as the Step 3 Decision of December 19, 1988. None of these Decisions, each of

which was rendered after a number of in-depth meetings and extended discussions, answered the Union's contentions either that the ELM's required progression was not followed or that work was available, or could be made available, at Pacific Station. In fact, none of the above-cited Decisions so much as contained the allegation that work was not available or that available work had dried up.

The original Step 2 Decision of April 22, 1987 (Jt. Exhibit 2, p.26), states in pertinent part:

"Management contends that she was assigned to duties most consistent with her physical restrictions. It appears that the Grievant did not satisfy Article 13, Section 2B(1). Further by this Grievant's own request at the Pacific Station that she not be assigned specific tasks." [sic]

This Decision was issued following the Union's written Step 2 grievance, facts, and contentions (Jt. Exhibit 2, pp.27-31) that not only cite the ELM progression but also allege, *inter alia*, that work was available at Pacific Station. Although the Decision was issued in response to the Union's major contentions, it did not address them directly. Additionally, the Decision cites a provision of Article 13 in support of the Service's position. Article 13, entitled "**ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES**," does not apply to an employee who has suffered an on-the-job injury. Instead, it applies to an employee who has suffered a non-job related illness or an off-the-job injury but is still physically able to perform regular or slightly modified work duties for part or all of a regular workday. Such an employee may receive a "light duty" assignment as set forth in Article 13. A light duty assignment situation involves more management flexibility and discretion and fewer restrictions on management in the assignment of meaningful work than is the case in a limited duty assignment situation. Among other differences, a light duty employee is not guaranteed a full day's pay unless he or she works a full day, unlike a limited duty employee. Make-work is not a normal feature of a light duty assignment. And, a light duty employee is not eligible for or entitled to out-of-schedule pay if assigned light duty work occurs outside of the employee's regular work shift (see ELM Section 434.622, above). In sum, Article 13 does not apply to the instant matter.

The second Step 2 Decision (Jt. Exhibit 2, p.11), dated November 17, 1988, was issued following a March 1988 remand of the grievance from Step 3 (Jt. Exhibit 2, p.13). The Decision states in pertinent part:

"There is a conflict as to the issue before the undersigned. All through the grievance procedure up to and including the Step III

meetings, the issue has been 'the employee's contention that she be returned to the Letter Carrier Craft from her current position as a Clerk.'

"Investigation reveals that the Grievant was a limited duty employee and that by letter dated February 6, 1987, she was informed that she was assigned to the General Mail Facility to perform duties most consistent with her physical restrictions. These duties were not in the Letter Carrier Craft. The Grievant did not satisfy Article 13, Section 2B (1). Further by the Grievant's own request at Pacific Station she requested not to be assigned specific tasks.

"Management acted properly and in accordance with 546.141. She was provided with work consistent with her restrictions. In addition, the Union has requested she be returned to the Letter Carrier Craft. This was done when her medical condition improved and her restrictions changed. The issue is now moot."

Again, this Step 2 Decision followed a series of meetings and discussions between several Union and Service officials that spanned a period in excess of a year and one-half. During that time, the Union continually advanced contract issues and arguments related to both the required progression of Section 546.141 and the availability of work at Pacific Station. Additionally, the Union vigorously argued the inapplicability of Article 13. The Decision either missed or intentionally evaded the issues. The first paragraph reproduced above cited "a conflict as to the issue." There was no real "conflict as to the issue." The Grievant wanted to be returned to her Letter Carrier position from the Clerk position because the Service violated the ELM when it assigned her out of Pacific Station. That was the issue. The subsequent paragraph recounted the original Step 2 Decision. It was an unacceptable and inappropriate response the first time and, for the reasons set forth in the preceding discussion of the original Step 2 Decision, the same conclusion applies. The third paragraph, for the first time, referred to Section 546.141. However, it simply asserted that the provisions of the ELM had been followed, without any indication of how they had been followed. As indicated above, an assertion alone, without acceptable supporting information, is not sufficient proof of compliance. The third paragraph also suggests that, since the Grievant had returned to the Letter Carrier Craft (the bid position at Spring Carrier Annex) and, by

that time, had been removed from limited duty status, the entire issue was moot.

Obviously the Union did not feel that the issue was moot. Its Step 3 Appeal (Jt. Exhibit 2, pp.5-9) in major part restated the substance of its arguments at Step 2. The Service's Step 3 Decision of December 19, 1988 (Jt. Exhibit 2, p.4), states in pertinent part:

"As discussed, at issue in this case is the employee's contention that she should be reimbursed on an out-of-schedule basis during the period of time she was assigned to work temporarily at non-carrier duties during hours which varied from her regular schedule.

"Based upon the documentation of record, it is disclosed that during the period in question, the employee was under medical restrictions which prevented her from performing her regular bid position. For such reason, and in accordance with established Postal Service regulations, the employee was assigned to perform duties compatible with her restrictions of record. Under such circumstances she was properly assigned and there is no out-of-schedule compensation owing."

The Step 3 Decision again sidesteps the basic issue of the improper assignment to the GMF, except to say that the assignment was "in accordance with established Postal Service regulations." The Decision then concludes that, since the assignment was proper, "there is no out-of-schedule compensation owing." It should be noted that the Step 2 Decision's reference to Section 546.141 was not carried over to the Step 3 Decision. Further, it should be noted that the statement regarding out-of-schedule compensation could have been correct - if this case had involved an Article 13 light duty assignment. However, the statement is not correct where the issue is a limited duty assignment.

In order for the Arbitrator to validate the Grievant's assignment from Pacific Station to the Long Beach GMF, he must be convinced that the Service adhered to both the letter and the spirit of the ELM. The Arbitrator certainly could have been convinced that the Service had acted properly if the Step 2 and Step 3 Decisions had made specific statements as to what local installation management did, or tried to do, at each of the required steps of Section 546.141. In fact, if the written Decisions had contained such information, the Union might even have been convinced to drop this grievance. Instead, however, the written Decisions were vague and general in nature, failed to

address the core issue of Section 546.141 in any substantive manner, and, moreover, cited and relied heavily upon Article 13 issues that were inapplicable to the instant matter. With that background, the testimony of the Grievant's supervisor and other officials directly responsible for the assignment to the GMF was self-serving and disingenuous at best. At worst, the testimony was pretextual or pure fabrication. The Arbitrator will not accept the proffered testimony as to how work for the Grievant dried up at Pacific Station, and how management diligently attempted to work through the required steps in Section 546.141 to find that the only available work in all of Long Beach for a Letter Carrier with a moderate to serious shoulder injury was on Tour 3 at the GMF, when none of that is reflected in the written grievance Decisions. Such rationalizations made at the hearing, but not in the documentation, are naturally suspect as having been developed after the fact in an attempt to cure an obvious mistake. Based upon the record of this matter, the Arbitrator concludes that the Grievant was assigned to the GMF in violation of Section 546.141 of the ELM.

Since a direct violation of the National Agreement has been found in this matter, it is the opinion of the Arbitrator that an in-depth review of the issue raised by the Union regarding improper withholding of relevant information in violation of Articles 15 and 31 would serve no useful purpose at this time.

The Remedy

Where it is possible to do so, Arbitrators attempt to provide a remedy for a contract violation. The appropriate remedy for a contract violation is based to a large extent upon the degree of management's culpability for the violation. An honest mistake or misreading of the Agreement, Manuals, Handbooks, or Regulations might call for a minimal remedy, whereas arbitrary, capricious, or discriminatory acts, clearly in violation of the Agreement often support a more substantial remedy. Remedies range from a simple declaration that a violation has occurred and a cease and desist order, through a partial or complete restitution for lost wages, or time, or both, and on to what would essentially be characterized as punitive damages, depending upon the impact and severity of the violation.

The Service failed to follow the mandatory progression contained in the ELM when it assigned the Grievant to the GMF. That failure violated the Grievant's basic job rights under the National Agreement. In addition to the improper assignment of work location, the assignment to Tour 3 at the GMF had a substantially adverse and disruptive impact on the Grievant. Working nights instead of days not only reduced the amount of time that she could spend with her children, it also required an additional expenditure of money for extra child care.

Based upon the record in this matter, the Arbitrator is of the opinion that the Grievant is entitled to out-of-schedule pay for each day worked in the Long Beach GMF for the period from February 7, 1987, through January 1988 when she assumed the bid position at Spring Carrier Annex. Further the Grievant shall be reimbursed for verifiable excess expenses of child care for the period she was assigned to Tour 3 at the GMF. The Arbitrator is of the opinion that an award of mileage for travel to the GMF is neither required nor warranted in this matter.

AWARD

The Service violated the National Agreement when it assigned the Grievant to the Long Beach General Mail Facility while she was on limited duty status. The Grievant shall receive compensation as set forth above.

Respectfully submitted,

CARL B. A. LANGE III