

C# 09443

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) **GRIEVANT:**
) Douglas A. Vaughn
)
 -Between-) **POST OFFICE:**
) San Diego, California
 UNITED STATES POSTAL SERVICE)
) **CASE NO:** W7N-5L-C 14886
 -And-)
) **NALC GTS NO:** 13900
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO)
)

BEFORE: CARL B.A. LANGE III, Arbitrator

APPEARANCES:

For the U.S. Postal Service: THOMAS R. AVEY
Labor Relations Assistant
2535 Midway Drive
San Diego, CA 92199-9401

For the Union: THOMAS H. YOUNG, JR.
Regional Administrative Assistant
3636 Westminster Avenue, Suite A
Santa Ana, CA 92703-1445

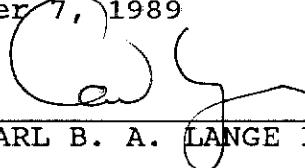
Place of Hearing: 2535 Midway Drive
San Diego, California

Date of Hearing: November 8, 1989

AWARD:

The Service violated Article 19 of the National Agreement, specifically Section 546.141 of the "Employee and Labor Relations Manual," when it assigned the Grievant to zone 92121 while he was on limited duty status. The Grievant shall receive compensation as set forth herein.

Date of Award: December 7, 1989


CARL B. A. LANGE III

BACKGROUND
(Vaughn - 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 zone 92102 (George Washington) to zone 92121 (Sorrento Valley) while he was on limited duty status. A Step 2 grievance was filed on October 3, 1988, alleging a violation of Articles 3, 8, and 19 of the National Agreement by the manner in which the Employee's scheduled day off at Sorrento Valley had been modified. During the processing of the grievance, the schedule problem was resolved. However, it became apparent to the Union that the Employee had a right to remain at the George Washington installation. Subsequently, the claimed violation was modified to encompass the transfer to Sorrento Valley itself. The grievance was processed to arbitration pursuant to the terms of the National Agreement.

The evidentiary hearing commenced on November 8, 1989, at the postal facility located at 2535 Midway Drive, San Diego, California. The Service was represented by Tom Avey, Labor Relations Assistant. The NALC was represented by Tom Young, Regional Administrative Assistant. 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 were unable to agree upon a statement of the issue to be determined. The Union's position was that the issue should be set forth as:

"Did the USPS violate Article 19, specifically the ELM 546.141 in regard to the scheduling of limited duty carrier, D. Vaughn, while he was assigned to work zone 92121?"

The Service argued that the issue should be stated as:

"Did the USPS violate Article 19, specifically the ELM 546.141(d) in regard to the scheduling of limited duty carrier, D. Vaughn, while he was assigned to work zone 92121?"

Based upon a review of the evidence and testimony in this matter, the Arbitrator is of the opinion that the facts of this

case require a determination as to the actual reason for the assignment to zone 92121. Thus, the issue should be stated as:

"Did the Service violate Article 19 of the National Agreement, specifically section 546.141 of the 'Employee and Labor Relations Manual,' when it assigned the Grievant to zone 92121 while he was on limited duty status?

"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. Douglas Vaughn ("Grievant" or "Employee") was present at the hearing and testified on his 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 8, 1989, at the close of the hearing.

The parties stipulated certain facts into the record of this matter. These stipulations are germane to a determination of an appropriate Remedy in this matter as follows:

"1. D. Vaughn had a bid position as a relief carrier in zone 92102 with rotating non-scheduled days and a work schedule of 10:00 a.m. to 6:30 p.m.

"2. D. Vaughn had been on limited duty from October 1986 to the present. He arrived in zone 92121 on 6-6-88 to perform limited duty in this station.

"3. From 6-6-88 until 7-16-88, he was allowed to work 0700 hours to 1530 hours by mutual agreement. This period of time is not part of this grievance appeal's corrective action request.

"4. D. Vaughn returned to zone 92102 on 7-28-89 to perform a limited duty assignment. Upon his arrival, he requested and was granted a permanent schedule which coincided with Route 0215 - his wife's schedule."

• 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 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 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.

..."

Relevant Provisions of Handbooks and Manuals

The Service's Manual entitled "Employee and Labor Relations Manual ("ELM") provides, at Sections 434.6 (Jt. Exhibit 2 pp.9,10) and 546 (Jt. Exhibit 2 pp.23,24) as follows:

"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.

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546.3 OWCP Referrals

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".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.

..."

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.

Limited duty assignment guidelines contained in the ELM, as set forth above, substantially limit 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. Section 546.141 creates certain rights and expectations for those employees who have suffered on-the-job injuries.

A detailed analysis of each party's contentions in this matter is not required. The language of section 546.141, as cited above, is clear and unambiguous. Management at a local installation is required to make substantial accommodations for employees who suffer on-the-job injuries. The accommodations must be attempted in the precise order and progression set forth in the ELM, including 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 (section 546.141c). Only when the local installation is unable to make the accommodations set forth in 546.141a-c is an assignment to another facility sanctioned as a last resort. Any accommodation must be such as to "minimize any adverse or disruptive impact on the employee." Finally, since the employee is entitled to his or her regular pay regardless of how much work is actually performed, "make-work" is an acceptable and often utilized aspect of any limited duty assignment.

In order to successfully withstand an employee's challenge to his or her limited duty assignment, the Service must make a showing that it has gone through the progression set out in the ELM and has been unable to make a successful accommodation at each step. The showing may be made by way of documents, testimony, or other relevant or admissible evidence. At the hearing, the Service offered no evidence, in any format, regarding the unavailability of work at the George Washington station.

The Service argued that since it had raised the unavailability of work issue, the burden of proof shifted to the Union to show that, in fact, work was available. The Service's argument is without merit. The burden to prove the availability of work shifts to the Union after the Service has made an acceptable showing that it has attempted to satisfy each step in section 546.141. Only at that point may the Service allege that no work is available. The simple assertion that the progression was followed, or, as in this case, that "there was no work available" (Jt. Exhibit 2, pp.2,4) is insufficient to shift the burden of proof to the Union.

The only evidence regarding the availability of work at the George Washington station came from the Grievant. His limited duty status had been accommodated at George Washington since October 1986. He testified that the duties he was performing at George Washington in June 1988, when he was moved to Sorrento Valley were the same duties that he performed when he was finally moved back to George Washington in July 1989. His testimony was credible and was allowed to stand unrebutted. Actually, the Service's sole witness, the Sorrento Valley Superintendent, testified that she had requested a light/limited duty employee for phone answering, handling miscellaneous paperwork, case labeling, driving, and other duties. Shortly after her request, the Grievant was assigned to her station. The Arbitrator is constrained to conclude that the Grievant was assigned to Sorrento Valley because Sorrento Valley requested a light/limited duty worker, and not for the reason sanctioned by the ELM.

It is clear in the record of this matter that the Grievant was assigned to Sorrento Valley not because there was no available work at George Washington but because Sorrento Valley needed a body. Unfortunately for the Service's position, the only way that a limited duty employee could appropriately be considered for assignment to Sorrento Valley would be if each of the conditions precedent to section 546.141d were met and there truly was no work available at the Employee's regular work facility. Such was not the case. Thus, the Service violated the provisions of section 546.141 when it assigned the Grievant to zone 92121.

The Remedy

Based upon the record in this matter, the Grievant is entitled to out-of-schedule pay for each day worked in zone 92121 that was not substantially equivalent to his previous schedule in zone 92102 for the period from July 17, 1988, through July 27, 1989. The Arbitrator is not convinced at this point that an Award of mileage and/or travel time is either required or appropriate.

AWARD

The Service violated Article 19 of the National Agreement, specifically Section 546.141 of the "Employee and Labor Relations Manual," when it assigned the Grievant to zone 92121 while he was on limited duty status. The Grievant shall receive compensation as set forth herein.

Respectfully submitted,


CARL B. A. LANGE III