C#09406

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: Patti Montelongo POST OFFICE: Oxnard, CA CASE NO: W7N-5T-C-12431 (Patti Montelongo - Limited Duty Assignment)

BEFORE: David Goodman ARBITRATOR

APPEARANCES:

For the U.S. Postal Service	Charles Baker, Labor Relations Representative, U.P. Postal Service, Management Sectional Center, Santa Barbara, CA 93102-9994
For the Union	Thomas Young, Regional Administrative Assistant, 3636 Westminster Avenue #A, Santa Ana, CA 92703-1445
Place of Hearing:	Post Office, Oxnard, California
Date of Hearing	September 21, 1989

AWARD: The grievance is sustained in its entirety. The Postal Service violated Section 546.141 of the Manual in changing Grievant's schedule when adequate work was available for Grievant to perform at the work facility to which she was regularly assigned. Grievant is entitled to out-of-schedule pay and shall be paid one-half times her hourly rate for all hours worked from November 12, 1988 through December 24, 1988.

Date of Award: October 4, 1989

This matter came on for hearing on September 21, 1989 in Oxnard, California before Arbitrator David Goodman. The United States Postal Service (hereinafter the "Employer" or "Postal Service") was represented by Charles Baker, Labor Relations Representative, and the National Association of Letter Carriers (hereinafter the "Union") was represented by Thomas Young, Regional Administrative Assistant. The parties stipulated that all steps in the grievance procedures had been complied with in a timely manner and this matter was properly before the Arbitrator for a final and binding Award.

PROVISIONS OF THE MANUAL

546 Reemployment of Employees Injured on Duty

.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 regularly schedule, and as

near as possible to the regular work facility to which normally assigned.

STATEMENT OF FACTS

The Grievant, Patti Montelongo, has been employed as a full-time letter carrier at the Saviers Station in Oxnard, California since October 26, 1987. In October 1988 she incurred an on-the-job injury to her right arm and shoulder and, consistent with a medical examination and documentation, she was required to wear a sling on her right arm. Placed on limited duty, she returned to work on October 19, 1988, performing duties in the letter carrier craft and working her regular shift from 7:00 a.m. to 3:30 p.m. Specific duties included throwing and routing flats and working with "forwards" on different routes; she did not case or carry her route. Grievant testified that these tasks provided her with eight hours of work each day, and not once did any supervisor or other management official indicate that there was an insufficient amount of work to perform.

On November 9, 1988, Douglas Fenton, Manager of Customer Services of the Oxnard facility (which includes the Oxnard and Saviers Stations and an office in the federal building), issued Grievant a notice of "Change of Schedule" effective "November 12, 1988 and until further notice," assigning her to the mail processing section at the Oxnard Station. Her tour of duty was from 6:00 p.m. to 2:30 a.m., with her regularly scheduled days off. Grievant's assignment included facing mail at the facing table and sorting SCF and outgoing mail (Joint Exhibit 2E). Soon thereafter, the local Union president contacted Fenton to dispute

the change in Grievant's schedule. Fenton reconsidered but held fast to his decision (Joint Exhibits 2C and 2F).

Grievant worked the new schedule from November 12 through December 24 when Fenton telephoned her at home and offered two options: (1) take the next work day off from work, report to the Saviers Station and resume her regular schedule, or (2) remain at Oxnard and continue with her assigned schedule and duties. Grievant chose the former and performed the same task at Saviers that she had performed prior to the November 9 notice. She was released from limited duty approximately one month later and resumed her normal duties.

Grievant testified that the change in schedule caused her considerable hardship. She is a mother with four children, including a three-year-old and a one-year-old at the time, and because of the change in schedule and her need to sleep after the Oxnard shift, she was unable to care for her children during the morning hours. Grievant also said that since she had to park two blocks from her home, she feared a confrontation during the two-block walk in the middle of the night. Grievant admitted that she never complained about either problem while working the 6:00 p.m. to 2:30 a.m. shift.

Fenton defended Grievant's assignment, testifying that she could not perform the duties of a letter carrier as described in the "Key Position Descriptions" (Employer Exhibit 1) as she could not route flats or case mail efficiently with one hand. Fenton also justified the change in schedule based on operation needs. In November there was a full complement of employees at Saviers, including part-time flexibles (PTFs) and hence Grievant's services were not needed there. On the other hand, at

Oxnard where mail processing occurs and where there is increased volume before the Christmas season, it was more practical to have Grievant assist with mail processing and distribution. According to Fenton, Grievant never complained that her distribution duties were in conflict with her medical restrictions.

On cross-examination, Fenton said he knew that Grievant was throwing and routing flats and forwarding mail at Saviers and admitted that the work did not "disappear" at Saviers on November 9. He also admitted that the same work was available when Grievant returned to Saviers shortly after December 24. During her absence PTFs performed the same work, and Fenton estimated that there were about ten PTFs who worked approximately 30 hours each week. In this regard it is important to note that PTFs are guaranteed four hours of work only if they are called to work.

Opining that Grievant is not entitled to out-of-schedule pay, Fenton explained that they were making work for Grievant at Saviers since they were obligated to do so when an injury is job related. Fenton added that while "there's nothing wrong with making work" for someone on limited duty, Grievant's services were needed at Oxnard. As for the possibility of sending PTFs to Oxnard and leaving Grievant at Saviers, Fenton said this could have been done, but the result would have been a grievance from APWU, since distribution work is within the jurisdiction of that union.

ISSUE

The parties were unable to stipulate to an appropriate issue and therefore the following is adapted by the Arbitrator: Did the Postal Service violate Section 546.141 of the Employee and Labor Relations Manual

when it changed Grievant's work schedule and assignment? If so, is Grievant entitled to out-of-schedule pay for her work assignment from November 12, 1988 to December 24, 1988?

POSITIONS OF THE PARTIES

The Union relies exclusively on an October 26, 1979 Settlement Agreement between its President and the Postal Service (Jt. 4) as well as Section 546.141 of the Employee and Labor Relations Manual (hereinafter the "Manual") in its contention that Grievant's rights were violated when her schedule and job assignment were changed effective November 12, 1988. Maintaining that the Manual, which incorporates the Settlement Agreement, provides a "pecking order" which must be followed in limited duty assignments, the Union argues that adequate work was available at Saviers within Grievant's limitations and her craft, during the hours that Grievant regularly worked. Cited in support is the fact that Grievant performed eight hours of work on her normal schedule before the change, that PTFs performed this work after the change, and that Grievant performed the exact same work upon her return to Saviers. Hence, since, there was adequate work within her medical limitation and within her regular tour of duty, the Employer was foreclosed from assigning her to work outside her regular schedule and outside of her craft.

Anticipating an Employer argument concerning Section 434.622(f) of the Manual that Grievant is not entitled to "out-of-schedule premium," the Union posits that paragraph (f) is not applicable because the assignment was not ". . . according to the provisions of the collective bargaining agreement . . ." It cites arbitral authority for the proposition that

out-of-schedule pay is an appropriate remedy under such circumstances, and therefore asks that the grievance be sustained and Grievant be properly compensated at one-half times her normal rate of pay to remedy the violation.

The Postal Service maintains that the change of schedule was within the bounds of the Agreement and the Manual. Contending that the Union is "grasping at straws," the Postal Service asserts that Grievant was treated in a reasonable manner as her arm was in a sling and she could not proficiently route and case flats with one hand. Although work was initially provided at Saviers, business needs and a full complement of carriers at that Station, led to the conclusion that Grievant could be best utilized at the Oxnard Station. In this regard, Counsel notes that Grievant worked at the same "facility" as that term is used in Section 546.141, and continued with her same days off. It also notes that at the end of the Christmas "rush" Grievant was given the opportunity to return to Saviers and the duties she performed before the change occurred.

The Postal Service also argues that it had the right and obligation to assess whether there was "adequate work." An employee does not enjoy an absolute right to retain her same job, at the same station and her same hours, when there is a legitimate and reasonable need for her services elsewhere. Here, supervision "made work" for Grievant, but it was not efficient to continue to do so, and accordingly Fenton's decision was fair and appropriate under the circumstances. It therefore asks that the grievance be denied in its entirety and no relief should be granted.

DISCUSSION AND CONCLUSION

For purposes of analysis it is important to keep in mind the distinction between light duty and limited duty assignments. Light duty assignments are available for noncompensable disabilities or injuries not suffered during the course of employment. As a general statement, if a light duty assignment cannot be procured consistent with the procedures found in the Agreement or the Manual, the employee is not entitled to any compensation for not working. Limited duty assignments are the result of compensable disabilities or injuries suffered during the course of employment, and as a general statement, if a limited duty assignment is not available, the employee will receive compensation even though no work is performed. No wonder then that Section 546.141 of the Manual directs that in limited duty situations management "must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances." Indeed this "every effort" requirement may even entail the need to make work for the employee where none exists. After all, this is certainly a preferred choice from management's perspective since the employee will receive compensation in any event. To the Postal Service's credit, whatever assignment is provided, the introductory paragraph to Section 546.141 recommends that the assignment "minimize any adverse or disruptive impact on the employee."

In every respect, Grievant's limited duty assignment at Saviers was consistent with these directives. It was within her medical limitation, and had no adverse or disruptive impact. Stated differently, the Postal Service recognized the special status afforded to someone like Grievant who had suffered an on-the-job injury. Equally important, there was no

need to create work in her behalf. It was available when the disability occurred, when Grievant was assigned to Oxnard, and when she returned to Saviers.

Turning to management's decision on November 9, the change in Grievant's assignment was decidedly inconsistent with Section 546.141. Initially, there is insufficient evidence to show a reasonable effort, much less "every effort" to provide an assignment with minimal adverse or disruptive impact. Unacceptable is the defense proffered by Fenton in his testimony and in his Step 2 answer (Joint Exhibit 2D), that there was a full complement of employees at Saviers and hence, Grievant's services were not needed at that location. The fact is that PTFs were called to work during Grievant's absence and performed the same work that Grievant had performed. This Arbitrator is unable to find a rational basis for providing hours of work and pay to those who are not guaranteed the same to the exclusion of someone who is guaranteed pay even if work is not provided. While not intending to establish a priority for those on limited duty over PTFs, the point is that work was available for Grievant at the Savier Station and surely Grievant could have worked side by side with PTFs even if it meant that fewer PTFs were needed.

Most significant, however, is that management failed to comply with the "pecking order" found in paragraphs a. through d. which the introductory paragraph to Section 546.141 says must be considered "in effecting such limited duty assignments." The first consideration is whether there is "adequate work" within the employee's work limitation; the employee's craft; the facility "to which the employee is regularly assigned"; and the employee's regular tour of duty. If there is adequate work consistent

with these parameters, then such work "shall constitute the limited duty to which the employee is assigned." The significance of "adequate" in describing the work and/or duties of a limited duty assignment, is underscored by its appearance in each of these four paragraphs. If further support for this conclusion is needed, it is found in paragraph d., which allows for an assignment outside of the facility to which the employee is regularly and normally assigned[1] only if adequate work cannot be found within the employee's work limitation. Not only has there been no showing that management made any effort to find other work (whether outside her craft or regularly scheduled hours) at Saviers, but it is plain to see that management either misconstrued or overlooked the intended meaning of the phrase "adequate work." Clearly "adequate" describes work which need not be the most efficient, economical or even the most practical. It is enough that the work is suitable, satisfactory or sufficient to occupy the employee's work day.

Beyond peradventure, the work performed by Grievant prior to the November 9 change in schedule was adequate in every respect. Not once did any management official ever complain that the work which Grievant performed was insufficient to occupy an eight-hour day, and once again the same work was performed by others after Grievant left Saviers and by Grievant upon her return to Saviers shortly after December 24, 1988. To avoid any misunderstanding, this Arbitrator is not suggesting that the Postal Service must close its eyes to the needs of its business and

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[1]For reasons which should be obvious from the language in these paragraphs, the Arbitrator rejects the Postal Service argument that "the facility" is the entire Oxnard facility embracing all of its separate offices and/or stations.

provide work which is wholly inefficient and impractical. That is not the circumstances presented here. Simply, Grievant performed work of her craft which contributed to the mail flow at the Saviers Station. Granted, with only one arm with which to work, she may not have been as proficient as others in performing her assigned tasks, but neither proficiency nor comparability are standards to be employed where limited duty assignments are concerned. For all of the reasons stated, the Arbitrator concludes that the Postal Service violated Section 546.141 of the Manual when it changed Grievant's schedule effective November 12, 1988.

Turning to the question of remedy, it is first noteworthy that even before Grievant's schedule change, the local Union president appealed to Fenton to allow Grievant to remain at Saviers, but Fenton would not change his mind. Thereafter, at each step of the grievance procedure the Union notified the Postal Service that out-of-schedule pay would be sought for this violation and hence, the requested remedy should come as no surprise.

The Union cites in support Case Nos. C8N-4J-C-12091 (Goldstein, 1981) and W4N-5T-C-33739 (Leventhal, 1987) which awarded out-of schedule pay when management failed to abide by the mandates in this Section of the Manual. For the reasons expressed by Arbitrator Goldstein, the undersigned finds that out-of-schedule pay is the only appropriate relief for the violation which occurred here:

> . . . no possible <u>future</u> remedy can make up for time worked out of craft, away from the normal work location, and outside normal tour hours, when such assignment clearly breaches the collective bargain between the parties. Moreover, an insufficient remedy of this grievance would be an instruction to the parties--and particularly the employer--not to breach the agreement in the future. Thus, the only reasonably appropriate remedy available in light of the

above fully-explicated fact is the premium pay requested by the Union herein. (Emphasis in the original, page 35).

Another point which needs mentioning is that the parties have not provided a remedy in the Agreement or the Manual for this type of violation, and since there is no provision which restricts or limits an arbitrator in formulating an appropriate remedy under these circumstances, out-of-schedule pay is a reasonable solution for this violation. Obviously, Grievant suffered considerable disruption in her personal life when her duty assignment was changed from 7:00 a.m. to 3:30 p.m. to 6:00 p.m. to 2:30 a.m., and an award without any relief except for an admonishment not to do it again seems a bit unjust, to say the least. For these reasons, out-of-schedule pay is ordered.

AWARD

Having considered all of the evidence and testimony presented, the grievance is sustained in its entirety. The Postal Service violated Section 546.141 of the Manual in changing Grievant's schedule when adequate work was available for Grievant to perform at the work facility to which she was regularly assigned. Grievant is entitled to out-of-schedule pay and shall be paid one-half times her hourly rate for all hours worked from November 12, 1988 through December 24, 1988.

Respectfully submitted,

DAVID GOODMAN, Arbitrator