

C# 09596

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION
Between
UNITED STATES POSTAL SERVICE
And
NATIONAL ASSOCIATION OF LETTER CARRIERS

GRIEVANT:
Glenda L. Wood
POST OFFICE:
Arlington, TX
CASE NUMBER:
S7N-3A-C-8643

BEFORE: P. M. WILLIAMS, ARBITRATOR, SOUTHERN REGION

APPEARANCES:

FOR THE POSTAL SERVICE:
Oscar Ochoa, Labor Relations Representative

FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS:
Alex J. Alcorta, Local Business Agent

PLACE OF HEARING:
Main Post Office, Arlington, TX

DATE OF HEARING:
October 27, 1989

DECISION AND AWARD

BACKGROUND:

The grievant was employed as a full time regular letter carrier and assigned to the Park Plaza Station, Arlington. Her craft seniority date is June 23, 1983.

On August 15, 1986 she sustained an on-the-job injury. She was diagnosed as having a "herniated lumbar disc" and for a period of time she was 100% disabled. On or about February 5, 1987 she was released to return to "light work" by Doctor Schuima. Thereafter she served as the delivery person for Zone 10, answered the telephone at the station, worked on route books and with forms 3971 and 3972; assisted in other paper work and for approximately a year prior to being assigned to the clerk craft her duties consisted mainly of changing the locks on NDCBU units.

By letter dated January 28, 1988 the OWCP advised her, in part, as follows:

"*** Your employing agency has informed us that an offer of work has been made to you which is consistent with the physical limitations imposed by your injury and is located within your commuting areas...

"We have reviewed this offer of employment and have compared it with the medical evidence concerning your ability to work, and we have found the offer to be suitable..."

RECEIVED
JAN 02 90
JOE Z. ROMERO
NATIONAL BUSINESS AGENT
DALLAS
DALLAS REGION #10

"If you refuse this employment, or fail to report for work as scheduled, without reasonable cause, your compensation benefits for wage loss or Schedule Award will be terminated..."

Under date of January 7, 1988, but apparently mailed on the 29th, the Employer addressed a letter to her which, in part, stated as follows:

"Recent medical evidence received by this office and that of the Office of Worker's Compensation Programs in Dallas, Texas has established your eligibility for permanent limited duty work. The limited duty work must be in relation to your physical limitations.

"This letter is for the purpose of providing you with the option of working in a permanent limited duty capacity for the U. S. Postal Service.

"We are offering you the following limited duty position.

Position Title: Distribution Clerk - Permanent Limited Duty
Duty Station: Main Office, Arlington, Texas
Pay Location: 032
Duty Hours: 0000 - 0830
Off Days: Friday and Saturday
Salary: \$26,080 - Level 5 - Step H
Scheme: D Scheme

"The limited duty work assigned to you would involve the following duties and limitations:

Responsibility

The distribution of U. S. mails into a Postal Service specially built modified mail case.

Physical Aspects (Yes)

This modified work assignment fits your physical limitations. A straight back chair (feet on the floor) is provided. Walking will be done without load. The assignment requires simple grasping and fine manipulation.

A four inch handful of letter mail will be secured from a tray of mail resting at case height with the left hand and individually separated into appropriate distribution case holdout. The employee must use hands for repetitive fine manipulation and simple grasping.

When a holdout in the distribution case becomes full of mail, approximately six inches, the employee will be required to pull the mail out of the holdout, place a rubber band around it, and place the mail in a tray or container a short distance away (can require some walking)."

Physical Limitations Not Required"

"Provisions implemented in the use of this modified case are designed to fully restrict you from the following. You will not be required to:

(1) Lift in excess of 20 pounds.

"The limited duty work will be maintained unless conditions should compel changes in the future...

"The limited duty position of Distribution Clerk - Permanent Limited Duty is tailored to meet your physical limitations...

"The limited duty assignment is being offered in line with the Postal Service's good faith effort to help injured employees understand that this agency is interested in providing employment which would be beneficial to those who might need financial assistance. It is also a cooperative effort in line with Article 13 of the National Agreement.

"If you prefer not to accept this position, we will so advise the Office of Worker's Compensation Programs (OWCP), for whatever action they deem necessary.

"Please complete the bottom portion of the letter and return it in the enclosed envelope. If we do not receive your reply within fourteen (14) days of your receipt of this letter, we will notify the Office of Worker's Compensation Programs about your failure to reply to our job offer.

"Should you have any questions relating to this subject prior to making a decision, you may contact our Injury Compensation Office by calling ...

"Mary W. Mindrup
"Postmaster
"U. S. Postal Service
"300 East South Street
"Arlington, TX 76010-9998

"Attachments

"I accept your position offer: (IN PROTEST PLEASE SEE ATTACHED MEMO)*

signed: Glenda L. Wood
Name

February 12, 1988
Date

I do not accept your position offer:

Name

Date

The Memo which is referred to above was returned along with the signed copy of the Postmaster's letter by the grievant. In part the latter's Memo stated as follows:

*This was filled in by the grievant and signed by her on 2/12/88.

**** It is my understanding that my failure to accept the attached permanent limited duty position offer will result in my involuntary separation from the Postal Service. Therefore, I, Glenda L. Wood, do hereby accept your offer. However, please be advised that my acceptance of this position is in protest.

"I would like to bring your attention a few guidelines regarding re-assignments, which it would appear, you have overlooked:

1. The message from the Postmaster General in the 12-17-87 Postal Bulletin states: 'It is the policy of the United States Postal Service to provide equal opportunities to all individuals in all matters of employment, including recruitment, hiring, promotion, transfer, reassignment, training job security, benefits and separation.'
2. Article 13.4 of the National Agreement states:
(Deleted - to be quoted later.)
3. Section 546.141 of the Employee & Labor Relations Manual states:
(Deleted - to be quoted later.)
4. Item 17 of the Local Memorandum of Understanding states:

"The number of light duty assignments with the letter carrier craft to be reserved for temporary or permanent light duty assignments shall include, but are not limited to: updating carrier route book, casing and routing of mail for delivery, relabeling of carrier cases, special delivery service, making collections, auxillary routes, etc."

"In comparing the attached position offer with the guidelines listed above, I find it difficult to understand how my assignment to Distribution Clerk with reporting hours of 0000-0850 can honestly be justified. I have been doing the same job, NDCBU Lock Changer, for over a year now. How can that not be considered a full time position? The Special Delivery Union now has two PTF's getting 40 hours per week, and another limited duty employee with a 15 pound weight restriction who also is getting 40 hours per week. Tish Pingleton's limited duty assignment, which was a full time position, has now been vacated and is currently being filled with more than one employee. (Emphasis hers.)

"In reviewing previous permanent limited duty assignments awarded to other city carriers in Arlington, such drastic changes have not been forced upon the limited duty employees. Specifically, (4 names deleted as being unnecessary) were not required to learn schemes, work mid-nights or change their reporting times more than a couple of hours from their original reporting times. They also had some input as to what responsibilities their job description consisted of..."

On February 16, 1988 the Postmaster sent her a letter stating:

**** You will be assigned to your permanent limited duty job effective February 20, 1988. Your off days will be Saturday/Friday and your hours will be 0000-0830. You will report for duty on Saturday night February 20 (for Sunday) at 12:00 midnight to the Tour Supervisor at the Main Office..."

The Contentions segment of the Appeal to Step 2 form stated as follows:

**** Mgmt. has violated both the National and Local Agreement, plus a National Arb. Award stating Mgmt. can not arb. reassign a carrier to the clerk craft. Mgmt. has exceeded their rights under Article 3 of the Nat. Agreement, this Union further contends that MGMT. did not create this limited duty position for this grievant but already existed. Further past carriers in this city have never been reqd. to have their hrs. differ as severely and to the extreme as this grievant is being required to do."

The Action Requested segment of the form stated as follows:

**** That the position this grievant has been performing for the past 12 months be converted to a limited duty position (permanent) as per discussed with Customer Service Mgr. B. Black, the grievant and a Union official. This action to occur immediately. All attached documentation becomes a part of this grievance at all steps and levels.

In part the Step 2 decision letter stated as follows:

**** The grievance appeal is denied. As I understand the relevant facts of the grievance, the grievant was offered a permanent limited duty assignment with hours and day off different than her bid assignment.

"The Union contends a violation of Articles 2, 3, 4, 5, 13, 15 and 19 of the National Agreement. They further imply the grievant has been working in a position for more than a year and so should be awarded that position permanently.

"There is no violation of the National Agreement. The temporary position the grievant has been working, is an ad hoc position modified to meet her physical limitations. Furthermore, the union has failed to provide documentation to support their allegation that the grievant is being placed in an assignment that already existed..."

An appeal to Step 3 was timely made. In denying the grievance the decision maker stated the following:

**** There is no violation of the National Agreement demonstrated. The grievant was offered a permanent limited duty assignment per the provisions of the E&LR Manual, which she accepted..."

The Request For Arbitration form was dated April 19, 1988. My assignment to serve as Arbitrator of the dispute was dated July 21, 1989, with the hearing date for it and 3 others set for September 14th. When the hearing convened the Union requested that the matter be postponed because of the grievant's then condition, healthwise. The Employer did not object. The hearing was continued to a date to be set by the regional office. On September 15th the hearing was rescheduled for October 27th.

All interested parties appeared at the hearing where they were given an opportunity to present such evidence, through exhibits and the testimony of witnesses, as was deemed appropriate by each to the matter at hand. The grievant appeared and testified on her own behalf. All witnesses were placed under oath and were cross-examined by the opposing party. At the conclusion of the evidentiary portion of the hearing the Employer's representative requested permission to file a post hearing brief in lieu of making a closing argument. The Union's representative agreed that the briefs would be postmarked not later than November 27, 1989. The briefs were received with timely postmarks and the record is declared closed.

POSITION OF THE PARTIES:

National Association of Letter Carriers (Union):

The Union contended that in transferring the grievant to the Clerk Craft and assigning her to duties on Tour 1 (0000-0830 hours) the Employer had violated Article 13 of the National Agreement (NA), §546.141 of the Employee & Labor Relations Manual (ELM), and Item 17 of the Local Memorandum of Understanding (LMU). It also contended that adequate work in the Letter Carrier Craft was available within her physical limitations for her to have been provided with a position in her craft and at the hours of her prior assignment. It requested that the grievance be sustained.

United States Postal Service (Employer):

In his post hearing brief the Employer's representative contended the Union had failed to prove a violation of the provisions of the NA because it had not shown the following:

- (1) Documentation specific enough to show that a request for light duty was submitted by the grievant.
- (2) Documentation to support and show that the duties that the grievant was performing actually still existed. The Union must show that those duties were still being performed and that the grievant had been replaced with another permanently injured employee.
- (3) The Union must demonstrate that the assignment the grievant was performing was a position that had been bargained for and was per the LMU.
- (4) Documentation to show which employees performed the assignment.
- (5) Documentation to show that the employees assigned to the grievant's previous assignment actually performed duties as described in Item 17 of the LMU. The duties described in the LMU are as follows: updating carrier route books, casing and routing of mail for delivery, relabeling of carrier cases, special delivery service, making collections, making "mark-ups", auxilliary routes, etc."
- (6) Documentation to support the allegation that the duties which the grievant was actually performing (duties which required her to change locks) were part of the permanent light duties negotiated by the Union.

It was further contended that the position in question was clearly a position created by management to accommodate an employee with specific medical restrictions. And it was said the position was never bargained for by the Union, thus it was only logical to conclude that the position in question remained only as it deemed necessary. It was also said that it would be highly improper for the Arbitrator to award to the Union benefits which were never granted through the negotiations procedure. It requested that the grievance be denied.

STIPULATED ISSUE: Whether the Postal Service violated Article 13 of the National Agreement when the grievant was reassigned outside of the carrier craft, and if so, what is the appropriate remedy?

OPINION:

The following provisions of Article 13 of the NA either have been cited by one or both of the parties, or are deemed by me to apply to this matter, to-wit:

"Section 1 B.

"The U. S. Postal Service and the Unions recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within the installation, after local negotiations...

"Section 2 B. Permanent Reassignment

1. Any ill or injured full-time regular or part-time flexible employee having a minimum of five years of postal service, or any full-time or part-time flexible employee who sustained injury on duty, regardless of years of service, while performing the assigned duties can submit a voluntary request for permanent reassignment to light duty or other assignment to the installation head if the employee is permanently unable to perform all or part of the assigned duties. The request shall be accompanied by a medical certificate from the United States Public Health Service or a physician designated by the installation head giving full evidence of the physical condition of the employee, the need for reassignment, and the ability of the employee to perform other duties. A certificate from the employee's personal physician will not be acceptable.

2. *** Any other issues relating to the employee's entitlement to a light duty assignment shall be resolved through the grievance-arbitration procedure...

"Section 3. Local Implementation

"Due to varied size installations and conditions within installations, the following important items having a direct bearing on these re-assignment procedures (establishment of light duty assignments) should be determined by local negotiations."

"A. Through local negotiations, each office will establish the assignments that are to be considered light duty within each craft represented in the office. These negotiations should explore ways and means to make adjustments in normal assignments, to convert them to light duty assignments without seriously affecting the production of the assignment...

C. Number of Light Duty Assignments. The number of assignments within each craft that may be reserved for temporary or permanent light duty assignments, consistent with good business practices, shall be determined by past experience as to the number of reassignments that can be expected during each year, and the method used in reserving these assignments to insure that no assigned full-time regular employee will be adversely affected, will be defined through local negotiations. The light duty employee's tour hours, work location and basic work week shall be those of the light duty assignment and the needs of the service, whether or not the same as for the employee's previous duty assignment.

"Section 4. General Policy Procedures

A. Every effort shall be made to reassign the concerned employee within the employee's craft or occupational group, even if such assignment reduces the number of hours of work for the supplemental work force. After all efforts are exhausted in this area, consideration will be given to reassignment to another craft or occupational group within the same installation...

D. The reassignment of a full-time regular or part-time flexible employee under the provisions of this Article to an agreed-upon light duty temporary or permanent or other assignment within the office, such as type of assignment, area of assignment, hours of duty, etc., will be the decision of the installation head who will be guided by the examining physician's report, employee's ability to reach the place of employment and ability to perform the duties involved.

E. An additional full-time regular position can be authorized within the craft or occupational group to which the employee is being re-assigned, if the additional position can be established out of the part-time hours being used in that operation without increasing the overall hour usage. If this cannot be accomplished, then consideration will be given to reassignment to an existing vacancy...

K. When a part-time flexible on temporary light duty is declared recovered, the employee's detail to light duty shall be terminated..."

The following provisions of the ELM either have been cited by one or both parties, or are deemed by me to apply to this matter, to-wit:

"546 Reemployment of Employees Injured on Duty

"546.1 Law

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

"546.14 Disability Partially Overcome

"546.141 Obligation. When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the USPS should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

(1) To the extent that there is adequate work available within the employee's work limitation tolerances; within the employee's craft; in the work facility to which the employee is regularly assigned; and during the hours when the employee regularly works; that work constitutes the limited duty to which the employee is assigned.

(2) If adequate duties are not available within the employee's work limitation in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility."

(3) If adequate work is not available at the facility within the employee's regular hours of duty work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts 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.

(4) An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort 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 the employee is normally assigned...

"546.2 Collective-Bargaining Agreements

"546.21 Compliance. Reemployment under this section will be in compliance with applicable collective-bargaining agreements. Individuals so re-employed will receive all appropriate rights and protection under the applicable collective-bargaining agreement...

"546.6 Reemployment Procedures

"546.611 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 degree of sophistication of these parties makes it unnecessary that Article 19 of the NA be quoted, therefore I will not do so. Suffice to say that in matters directly relating to wages, hours or working conditions, the ELM is to give way to the NA if a conflict exists between the terms of the two. Necessarily therefore, if the ELM speaks

to a subject that is neither stated nor to be implied from the NA it may not be said that a conflict exists between them, and if that is the situation, the ELM's terms are effective insofar as the relationship of the parties is concerned.

At the hearing I requested that in their briefs the parties discuss their view of a light duty assignment vis a vis a limited duty assignment. I told them that while I tended to agree with Arbitrator Richard Mittenthal's view of there being a "distinction without a difference" between the two, I nevertheless wanted to be furnished with their thoughts if such differed from mine. I also said I was not sure that I could agree with the Employer's position that because the grievant had not initiated a request for light duty she had no standing to complain about her reassignment. More will be said about this in a moment. First however I would like to discuss what the Employer's brief had to say on the subject of light duty versus limited duty. It was as follows:

**** The issue before the arbitrator is not new. The issue has previously been decided by several arbitrators. The most conclusive on the distinction between light duty and limited duty assignment was rendered by Arbitrator Linda DiLeone Klein. The arbitrator takes into consideration the previous decision mentioned in the hearing and analyzes their conclusion. Arbitrator DiLeone (sic) references Mittenthal's decision (H8N-5B-C-22251) wherein it was concluded that there was no distinction between light duty and limited duty.

"However, Arbitrator DiLeone (sic) references another case decided by Arbitrator Mittenthal (case H1C-4K-C-17373) wherein the same Arbitrator concludes that management has a greater obligation to injured employees under Chapter 540 than it does under the provisions of Article 13. Arbitrator DiLeone (sic) addresses the distinction between limited duty and light duty in her decision. The Arbitrator draws a distinction recognizing that an employee must voluntarily request light duty (see page 5 of DiLeone's award) per Article 13. The Arbitrator goes even further in her decision explaining clearly that light duty positions are bargained for by the Union (see page 7 of same award). The position in question in this instant grievance is clearly a position created by management to accommodate an employee with specific medical restrictions. The position was never bargained for by the Union. With this in mind then it is only logical to conclude that the position in question remains only as the Postal Service deems necessary. It would be highly improper for an Arbitrator to award to the Union benefits which were never granted through the negotiations procedure. The Union cannot seek to gain through the grievance procedure what it did not gain in negotiations. The Arbitrator is requested to deny the grievance in its entirety..."

Before proceeding it is to be noted that the primary issue before Ms. Klein (DiLeone) did not involve a limited duty assignment similar to the one here. Rather the situation facing her involved a complaint of several clerks who desired to bid for what seemed to them to be permanent and "premium positions" which the Employer had created for other (and junior) clerk craft employees because they were either too injured or too ill to work at their regular assignments.

At the outset of her Opinion Ms. Klein said as follows:

"The resolution of this grievance is based upon the fact that there is a distinction between the reassignment of an ill and injured person under Article 13 and the reemployment of an injured employee pursuant to Chapter 540 of the ELM.

"This Arbitrator is not saying that employees with job related injuries cannot be covered under Article 13 or that there is a difference in treatment between employees on light duty and those on limited duty. This has already been decided by Arbitrator Mittenthal in Case Number H8N-5B-C 22251, wherein he concluded that the difference between the terms light duty and limited duty is a 'distinction without a difference'. Arbitrator Mittenthal also stated that Article 13 refers to 'employees who through illness or injury are unable to perform their regularly assigned duties' and 'those words draw no distinction between on or off the job'. Arbitrator Mittenthal held that there are portions of Article 13 which apply to employees injured on the job and he held that injured employees on the job have right under Chapter 540, as well.

"The issue of differences between Article 13 and Chapter 540 arose in another case heard by Arbitrator Mittenthal. In Case Number H1C-4K-C 17373, he discussed the obligations of Management under Article 13 and Chapter 540, and this Arbitrator concludes from his decision that Management has a greater obligation to provide work for injured employees under Chapter 540 than it does under Article 13. Chapter 540 requires Management to make 'every effort' to assign an employee to 'limited duty' consistent with his/her medically defined limitations. Under Article 13, the ill or injured employee submits a request for light duty or other assignment and Management makes every effort to assign the ill or injured person within his/her craft, but Management need only give 'consideration to reassignment to another craft.'

"In the instant case, there was no evidence to demonstrate that any of the employees listed as being detailed to 'assignments' in the March 1984 letter had submitted voluntary requests for light duty assignments as provided in Article 13, therefore, the reassignment was not made under Article 13. The evidence establishes that they were reassigned pursuant to Chapter 540. Because these employees were not reassigned pursuant to Article 13, Management was not obligated to first consider assigning them to the negotiated areas listed in the Local Memo...

"The evidence establishes that the employees in question were offered jobs pursuant to Part 546.14 of the ELM. The jobs were created pursuant to Part 546.14 of the ELM. The jobs were 'created' for these employees consistent with their individual medical restrictions and physical limitations. The jobs did not exist as full time positions prior to being created for the afore-mentioned employees who had job related injuries. However, the positions were not the newly created assignments referenced in Article 37, Section 3, A.1..."

As has been noted earlier I agree with Mr. Mittenthal's observation of there being a distinction without a difference between light

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duty and limited duty assignments. I also agree with his observation that "employees who through illness or injury are unable to perform their regularly assigned duties draws no direct distinction between injury on or off the job." And I likewise agree that Article 13 and Part 540 of the ELM as well apply to employees injured on the job. But I am unable to agree that more relief comes to the job injured employee from Part 540 than does from Article 13, if Ms. Klein's attribution to Mr. Mittenthal's awards is indeed a proper one.

My departure from what Ms. Klein attributes to Mr. Mittenthal and to what she has concluded in the above quoted opinion is because I read Article 13 slightly differently than apparently do Mr. Mittenthal and Ms. Klein insofar as Section 2 A & B and Section 4 A are concerned. I quickly add that I was not provided with a copies of the Mittenthal awards that are cited by Ms. Klein and I do not have copies of them in my library, consequently such are not readily available for study. I thus am not prepared to definitely say that my interpretation of the two mentioned Sections substantially differs from my good friend, Mr. Mittenthal. I am prepared to say however that I am in basic disagreement with the notion suggested by Ms. Klein of more benefits being derived from Part 540 of the ELM than are forthcoming to the employee from the NA. Having made those observations I will proceed and explain why I differ.

It seems to me that the mid-portion of Section 2 B, i.e., "or any full-time regular or part-time flexible employee who sustained injury on duty, regardless of years of service, while performing the assigned duties" is put there for a specific and limited purpose, albeit true that it tends add a bit of confusion concerning the parties intent. But it is to be emphasized that the words which are used blend perfectly with the general theme of the section which is to the effect that employees may voluntarily initiate requests for light duty or other assignments. If my analysis is incorrect the inescapable question that necessarily arises is: If the job injured employee is required to complete and submit a number of the forms that are listed in §541.3 of the ELM in order that the Employer will be advised of an on-the-job injury and its extent, including the prognosis and report of physical limitations, and if the Employer is obligated by law to provide a permanent duty assignment that is within the employee's work limitation tolerances whenever the injury will not likely improve, why would the parties feel a need to also place on the employee the additional burden of having to initiate a request for a permanent light (limited) duty or other assignment when in due course one will automatically be assigned?

I believe the answer is that they did not intend to mandate the employee into making such a request. Rather they intended to provide him or her with an option in that regard and they carefully chose the words so such would fit perfectly into the subject of the caption of Section 2, i.e., "Employee's Request for Reassignment" as well as into the content of the Section's terms. I do not think it far fetched to believe therefore that the words were intended to apply to employees who wished to notify the Employer that they were available for a permanent light (limited) duty assignment before either the OWCP or the Employer took the step(s) to require that they give up their former assignment and accept either a light (limited) duty or other assignment.

That is to say I believe the words provide for a voluntary request being made for permanent light (limited) duty or other assignments even though the Employer or the OWCP, or both, might be involved in a process that would accomplish essentially the same thing. Moreover, I do not believe the words were intended to mandate employees to initiate an action that they and everyone else knew would accomplish no worthwhile purpose, and would also be duplicitous. Yet this is what the representative of the Employer would have me believe is what the parties intended.

I am unable to agree with his premise because I find the words to be permissive in nature. I also find them to be illustrative of the parties intent that the provisions of Article 13 are inclusive of both job related and non-job related disabilities, which necessarily means that in instances where the disability is non-job connected and the employee does not have five years or more service the Employer has discretion to act on the request, whereas the same is not true for employees with five or more years service or when the disability is job connected. Rather the Employer is required to act according to what the NA language provides and/or what is contained in Part 540 of the ELM, if the latter is not in conflict with the former. Which brings up one of the stronger reasons for my being in basic disagreement with the position which Ms. Klein has taken. To explain.

Earlier I noted that Article 19 was well known to the parties and did not need quoting. I haven't changed my mind on that score, but it is important to recall that there it is said that "handbooks, manuals and published regulations... shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement..."

Here, and in Ms. Klein's case as well, no dispute existed over the provisions of either Article 19 or Part 540 of the ELM. It is correct to say therefore that in neither situation ought the dispute be resolved on the basis of semantics. Rather in each case the dispute ought be tested against what the NA provides. The reason this is true is because it is the NA, and only the NA that the arbitrator is called upon to interpret, moreover, it is his only source of power (authority) for purposes of rendering a decision. The pressing question, or so it seems to me, therefore is: In matters relating to wages, hours and working conditions of bargaining unit members did the parties at the National level intend that relevant and non-conflicting parts of the ELM (and/or other handbooks, manuals and published regulations) are to be deemed as included within the four corners of the NA for purposes of an arbitrator interpreting such parts and rendering an enforceable award?

I am persuaded by the language of Article 19 that the parties did so intend at least insofar as benefits to the bargaining unit employees were concerned, therefore, in my opinion, it is incorrect to say that Part 540 of the ELM provides more relief for certain employees than does the NA. I realize the point is a fine one however I believe it is a major one and I have described it to better illustrate how and why I take issue with Ms. Klein's finding that the clause, "consideration will be given to reassignment to another craft or occupational group within the same installation." (See Article 13, Section 4 A) means that

"Management need only give consideration to reassignment to another craft.", implying, as she suggests Mr. Mittenthal did, that any re-assignment to another craft or occupational group was discretionary on the part of the Employer. I am unable to agree with her premise except in a situation where the disability is non-job related or the employee has less than five years service, which was not the situation presented to her. It seems to me that both the NA and the ELM are quite clear on that point. To briefly explain.

I believe the effect of Section 4 A (See page 8) is to summarize the thrust of §546.141 of the ELM, which states, inter alia, that "The following considerations must be made (emphasis mine) in effecting such limited duty assignments...", and in the following 4 numerical paragraphs it goes on to list what those "considerations" are to be (See page 9). I also believe that the provisions of the 4 paragraphs are mandatory and that the Employer is to sequentially apply them, thus I am unable to agree that Management has the latitude and/or discretion that is suggested by Ms. Klein. I say this because it seems to me that §546.141 makes it quite clear that only when there simply is no work available at the facility in the employee's craft may the employee be assigned to another craft or reassigned elsewhere. The consideration of a craft reassignment therefore is not discretionary, as she implies, rather it is obligatory and tends to be the means for the Employer to to avoid continuing the payment of OWCP benefits that ultimately will be charged back to it, the consequence of which would be the payment of wages for work that was not performed, which is an undesirable result when the reason behind the charge back can be eliminated.

Having said all of the above I will also say, in summary, that I find no support for concluding that the grievant has an obligation to apply for a limited duty assignment. I therefore find no merit to the Employer's contention that she did have such a duty. I will now turn to a discussion of the other contentions of the Employer and to its notion that either she or the Union, or both, have the burden of documenting more than a few matters that are peculiarly known only to it.

What is about to be said should not be understood to mean I am saying that I believe this employee (or one similarly situated) has no burden to establish her claim. She very definitely does. It is to say however that I am not persuaded she has the burden of showing such things as the Employer claims she must, e.g., that the duties she was performing still exist, or that what she was doing was listed in the LMU, or that she should name the employees who had performed those duties earlier. It seems to me proof of those matters is irrelevant in this situation because no dispute exists about the fact that she received an on-the-job injury which resulted in her being permanently, partially disabled, and the combination of the two circumstances qualify her for a limited (light) duty or other assignment. The question simply is: Did she get from the Employer what she is entitled to receive? She says she did not, the Employer however claims otherwise. The case then is to turn on whether she or the Employer is correct: it will not turn on whether she provided "documentation" of the type mentioned by the Employer.

This discussion is much longer than I would have liked, thus I feel a need to urge the obviously tired reader to bear with me a little

longer while I conclude with a brief discussion of what I hope will tend to put to rest what I believe is a perplexing but nevertheless often arising problem for the parties, i.e., what is the Employer's duty toward providing a limited (light) duty or other assignment to a permanently disabled employee in his or her craft before it may reassign the employee to another craft or to another facility?

Article 13, §1B (See page 7) establishes the fact that the parties agree that certain disabled employees will be reassigned to temporary or permanent light duty or other assignments, and I believe it imposes upon the installation head the responsibility for implementing that portion of their local agreement. Immediately below this statement, in §3, is a brief statement concerning why local negotiations are more practical than ones at the National level, saying also that "each office will establish the assignments that are to be considered light duty"; §3 concludes by providing that the number of assignments shall also be determined locally.

Item 17 of the LMU is quoted in the grievant's memo to the Postmaster (See page 4). A reading of it is convincing that at this facility, for reasons unexplained, the parties for whatever reason did not see fit to comport to the terms of Article 13, §3 insofar as their LMU provisions are concerned. That is to say they neither established what would be deemed a light duty assignment, nor set the number of them. They did however give an indication concerning what were to be some of the duties that would be a part of such an assignment, ending Item 17 however with, "etc.", which hardly makes for their LMU being definitive on the subject at hand.

Contrary to what the Employer urges me to do I am not inclined to find that the failure of the local parties to successfully negotiate, and thereafter reduce to writing in an LMU, everything that §3 seems to direct that they do ought to discombobulate the position the Union asserts here. I say this because I believe the ultimate responsibility for the accomplishment of the chore of describing the duties thereof, as well as establishing the number of light (limited) duty assignments is put squarely on the shoulders of the installation head. Moreover, with §3 containing that sort of directive it seems to me that at the very least no less than one such assignment should have been created in the LMU for the letter carrier craft. I also believe that in the absence of the LMU containing what the NA requires, the trier of fact of a dispute that embraces such a failure must to look to what seems to have been the agreement (acceptance) of the parties in the past regarding light (limited) duty assignments, and to then apply what appears to have been their tacit agreement on such matters to the terms of the NA and to Part 540 of the ELM, in order to determine whether their prior resolution of these kinds of assignments fits into the mold that those 2 documents have created for such cases as this.

At the hearing the grievant's memo (See page 4) was presented as a joint exhibit. When I became aware of that fact and of the memo's content I informed the representative of the Employer that because it was a joint exhibit I was inclined to accept what was stated therein as being a factual recitation of the events and circumstances that were described. I also advised him that if he was in basic disagreement with anything she had said, exclusive of her conclusions, he should cross-

examine her concerning all or any part of what she said in the memo. It is to be noted that in his cross-examination he did not see fit to inquire about memo's content. Under the circumstances therefore her statements are accepted as being a factual recitation of the work assignments that she had been given while she was in a temporary light duty status, as well as what she implied other employees had done and were doing on their assignments that she was capable of doing.

The Employer's only witness at the hearing was the number two person at the installation. He had been involved in her reassignment. In answering the question, "What do you take into consideration?", he responded: "Limitations of the employee." In answering the very next question, i.e., "How do you determine the different assignment pattern?", his response was: "If the employee cannot meet the requirements of a letter carrier then they are transferred over to a clerk, handling a limited duty case on the night shift."

It was also his testimony that the duty of changing the NDCBU locks was no longer a single assignment. He agreed that she had worked the assignment for approximately a year before she was reassigned. He referred to it as being an "ad hoc sssignment", saying too, that it was not always designated as a letter carrier craft assignment but rather sometimes other crafts did it, naming the maintenance craft at other installations as an example, but not naming any installation however. On cross-examination he conceded that the work of changing the locks continued to be performed, indicating also that it was now assigned to letter carriers at the stations which served the apartments where the NDCBU boxes were installed.

He further said that when Carrier Pingleton took disability retirement the duties which she had been performing were assigned to other letter carrier employees, adding that her specific job assignment had been abolished at her retirement.

He gave no hint as to the number, if any, of letter carriers who were assigned to either temporary or permanent light duty when the grievant was reassigned to the clerk craft. (Union exhibits show that at least 4 letter carriers had been permanently reassigned to the clerk craft, none however were required to work between 0000 and 0830 hours.) He was not questioned by the Employer concerning how many, if any, temporary light (limited) duty assignments existed for letter carrier employees or those in other crafts. Neither did he say that he had made inquiry at nearby facilities to determine whether light duty assignment might be available for her to be reassigned there.

According to him authority for reassigning her to the clerk craft was contained in §546.141 (2) of the ELM (See page 9) because he and two other local officials had determined that no letter carrier work was available that she was able to perform with her physical limitations, which consisted of the following: light lifting (20# or less); 1 hour of walking and 1 hour of standing; 4 hours of sitting; no stooping, kneeling or repeated bending; and 1 hour of climbing. Her partial restrictions related mainly to pushing/pulling and carrying, and operating a motor vehicle. She had no restrictions in lifting up to 10#, or in reaching or working above shoulder level.

Based on his overall testimony I gained the impression he was of the opinion that as long as he and other officials at the installation could say to an arbitrator that what she doing before her reassignment was not being done exclusively within the facility any longer, and neither was the work that Ms. Pingleton was doing when she took disability retirement (her duties were divided among several carrier employees), the Employer ought to be able to successfully claim that no letter carrier work existed at the facility that she was capable of performing, in which case it was proper to assign her to clerk craft duties that were within her capability to perform.

I am unable to agree with the premise just stated because I am unable to agree that the Employer is able to avoid its commitment to the Union in matters such as this by the subterfuge of simply saying that work is not there that can be done by her. I believe, and I think anyone with even limited knowledge of this industry would agree, that work of the kind that is listed in Item 17 of the current LMU is always present and available unless it has been assigned to others who are disabled. Moreover, I am unable to agree that because the work she and Ms. Pingleton formerly performed is now being done by others (including per the record, PTF's), that that circumstance automatically makes it unavailable to her, which is what the Employer claims.

I will resist the temptation to say more on this subject. Suffice to say I believe that in making their decision the officials involved seemed unconcerned about the fact that her new assignment was not reasonably within her regular duties (she was told that she must learn a scheme and if she did not she would be terminated), or that her tour started at midnight rather than at about 0700 hours. Moreover, as a result of what they did one it would appear that they were oblivious to the Employer's duty to sequentially review and apply the terms of ¶s 1, 2, 3 or 4 of §546.141 of the ELM before her reassignment to the clerk craft was contemplated and certainly before it was carried out. More will be said about this in a moment.

I also gained the impression from what he said that either he did not know that "every effort shall be made to reassign the concerned employee within the employee's craft", (See Article 13, §4 A), or if he did know that he apparently failed to realize the nature of the commitment the Employer made by including it in the NA. It seems to me that its clear implication is that its officials will exercise the utmost of good faith before making reassignments to other crafts when a job related disability is involved and work in the employee's craft is not locally available. I think the requisite good faith on that score is wholly lacking in this case.

I gained the further impression that in making his decision he was merely pursuing what he believed was a course of action that had been established by management before he came on the scene, thus, as he said, (which is what happened), "If the employee cannot meet the requirements of a letter carrier then they are transferred over to a clerk, handling a limited duty case on the night shift."

I was very much amazed by his testimony because it convinced me that local officials must have had a total lack of concern for the thrust of Article 13 and Part 540 of the ELM, otherwise a much different result would have been achieved in this matter.

Because of the size of the City of Arlington, Texas and the number of letter carrier employees who are assigned there I am unable to accept his testimony as tending to be conclusive of the fact that no work was available in her craft when she was reassigned to the clerk craft. It has been my experience that in the great majority of situations where an employee has suffered a job related disability the Employer has had no difficulty in accommodating the person in his or her own craft. Moreover, about the only exceptions of which I am aware has been situations that have arisen at small post offices where the flexibility in job assignments is limited. However, in most if not all of those situations the employee is generally reassigned to a nearby facility, (See §546.141 (4) of the ELM), which, per the record, was not even considered as an option by the decision makers in this case.

I of the opinion, and so find, that in making the decision to reassign the grievant to the clerk craft the Employer's officials did not give proper consideration to providing her with an assignment in her craft from among the duties that are listed in Item 17 of the LMU, most of which, if not all of which, she testified she had performed after her injury and before being assigned full time to changing the NDCBU locks.

I also am of the opinion, and so find, that the so-called "ad hoc assignment" referred to by the Employer's witness, is, for purposes of this case, to be included among the permanent limited duty assignments contemplated by Item 17 of the LMU because that job was created for her by the Employer with the concurrence of the Union. The Employer therefore was not free to arbitrarily and without substantial reason reassign the work elsewhere, which is what happened.

I am of the further opinion, and so find, that having not selected from among the duties that are listed in Item 17 work that she could perform and thereby effectively create another permanent limited (light) duty assignment for her to replace the job that she was doing, the Employer acted arbitrarily and contrary to the provisions of Article 13 and Part 540 of the ELM, and Item 17 of the LMU by transferring out of the station the work of changing the NDCBU locks. I find its decision in that regard flawed, and in violation of the NA. I also find the transfer to be an obvious effort on its part to avoid having to meet its obligation of providing her with an assignment in her craft.

Under the circumstances, some of which have been discussed and some not, her reassignment to the clerk craft effective February 16, 1988 should be, and the same hereby is, rescinded. The Employer shall be required to reinstate her to the letter carrier craft in a permanent limited (light) duty assignment, without loss of seniority. Her assignment back into the letter carrier craft shall be to duties that are in keeping with her current physical limitations. If she is physically able to return to the assignment of changing all of the NDCBU locks of the installation and wishes to do so, the Employer shall re-establish the assignment and she shall be reassigned to perform that duty; otherwise her assignment shall be to duties that are selected (with her concurrence) from among the categories that are listed in Item 17 of the LMU.

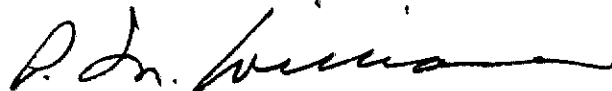
In conclusion and summary it is to be said the Employer violated Article 13 of the NA when the grievant was reassigned outside of the carrier craft. The remedy for its violation is stated in the preceding paragraph. The grievance did not seek compensation thus none is to be awarded. However, it is to be noted that because the Employer acted arbitrarily in the manner in which she was reassigned to the clerk craft and she has been required to work at hours that were much different and less desirable than her regular hours it is appropriate that she be awarded some choice in the matter of her job assignment after she is reinstated in the letter carrier craft.

On the basis of the entire record in this case, which includes a post hearing brief from each party, the undersigned makes the following

AWARD

The grievance is sustained in accordance with the opinion expressed above. The grievant shall be reinstated to the letter carrier craft immediately upon receipt of this award by either party. Her duty assignment shall be in accordance with what is provided above.

IT IS SO ORDERED.



P. M. Williams
Arbitrator

Dated at Oklahoma City, Oklahoma
this 29th day of December, 1989.

Richard Mittenthal, Esq.
30100 Telegraph Road, Suite 302
Bingham Farms, MI 48025-4517

Nicholas H. Zumas, Esq.
1140 Connecticut Avenue, NW, Suite 1205
Washington, DC 20036-2078


Gentlemen:


Listed below are the date, time, and location of the grievance case the parties have agreed to arbitrate before you:


<u>Date and Time</u>	<u>Case Number</u>	<u>Location</u>
01-28-94 8:00 a.m.	H7N-NA-C 42 Continuation	Room 1P629 USPS Headquarters 475 L'Enfant Plaza, SW Washington, DC 20260-4120

This scheduling letter does not constitute a waiver by either party of any issue of arbitrability or timeliness as it relates to the appeal and certification requirements of Article 15 of the Agreement; it is for the sole purpose of bringing this case before an arbitrator.

Sincerely,


Anthony J. Vegliante
Manager
Grievance and Arbitration


Lawrence G. Hutchins
Vice President
National Association of Letter
Carriers, AFL-CIO


William R. Brown, Jr.
President
National Rural Letter
Carriers' Association

cc: Mr. Neill, APWU
Mr. Quinn, MH