C#16339

REGULAR ARBITRATION PANEL

In The Matter of Arbitration Between	GRIEVANT: Margaret Macelis
UNITED STATES POSTAL SERVICE	POST OFFICE Cherry Hill, NJ
and	CASE NO.: USPS:# C94N-4C-C96034716
NATIONAL ASSOCIATION OF LETTER CARRIERS	GTS:# 15266
AFL-CIO	

BEFORE: Thomas J. DiLauro, Arbitrator

APPEARANCES:

For the Postal Service: Richard M. Solomon, Sr. Labor Relations Specialist

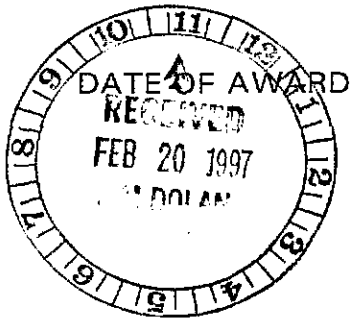
For The Union: Bill Lucini, NALC Regional Administrative Assistant

PLACE OF HEARING: Cherry Hill, NJ

DATE OF HEARING: January 31,1997

AWARD: The grievance is denied in part and sustained in part. The job offer made to the grievant is voidable by her on the basis of duress. She is to be reinstated to the letter carrier craft under the terms and conditions set forth in the last paragraph of the above opinion without backpay but with her seniority as a letter carrier restored to include the time she spent in the clerk craft. The arbitrator will retain jurisdiction in the event the parties are unable to resolve the above matter in an amicable manner.

DATE OF AWARD: FEB 19 1997



Thomas J. DiLauro

BACKGROUND:

By letter dated November 28, 1995, the grievant, Margaret Macelis, a letter carrier at the Cherry Hill, NJ facility with a craft seniority date of May 5, 1979, was informed by the Postal Service that it had been advised by the U.S. Department of Labor, Office of Workers' Compensation, that she had reached maximum recovery from her job related injury and that she was permanently disabled from performing the duties of a city carrier. The letter stated that a modified clerk position had been designed for her at the Cherry Hill Post Office. The position offered was as a part-time flexible (PTF) modified distribution clerk. The grievant was informed that, in accordance with the National Agreement, she would be junior to the junior part-time flexible in seniority with a guarantee of 40 hours of work per week except during a holiday week when she would only be paid for the hours she actually worked during that week.

The grievant was advised that the offer, if accepted, would become effective on January 6, 1996. If she refused to accept the position, she was to do so by December 15, 1995 and was to indicate her reasons for declining the position offer. She was told that her refusal to accept the position would be reported to the Office of Workers' Compensation Programs. The letter also informed the grievant that, if she believed the position was not a proper restoration, she could appeal to the Merit Systems Protection Board (MSPB) as outlined in 5 CFR Part 535.

On December 4, 1995, the grievant signed the aforecited letter along side the line which stated "I accept the Modified Distribution Clerk position." However, above that line, she wrote the following: "I have continued to be a productive and valued employee. Under protest I am accepting this offer. I feel that very little has been done to accommodate me or my disability."

The Union filed a grievance on behalf of Ms. Macelis. A Step 1 meeting was held on December 13, 1995 at which time the Union alleged that the terms of the job offer were a direct and gross violation of Articles 1, 13 and 19 of the National Agreement as well as the Employee and Labor Relations Manual, Section 422.24A and the Americans With Disabilities Act. The Union asked that the grievant be made whole and compensated for all out-of-schedule premiums, overtime, annual leave and any and all other benefits to which she is entitled. The grievance was denied on December 21, 1995.

It was appealed to Step 2 on January 9, 1996. Management contended that the Postmaster properly exercised his rights in accordance with Article 3. Section B through D of the National Agreement in determining that the grievant was no longer able to meet the physical requirements of her position due to a work related injury. It maintained that the job offer ultimately proposed to and accepted by the grievant was prepared by an Injury Compensation Specialist after consultation with the labor relations staff, the NALC and the APWU. The Postal Service claimed

that there was no violation of the National Agreement. By letter dated February 15, 1996, the Union, in its additions and corrections, emphatically denied that any Postal Service representative ever discussed the grievant's job proposal with any NALC representative.

The Step 3 appeal and hearing did not cause any change in the parties' position and it was appealed to arbitration on April 5, 1996. This arbitrator was selected by the parties to render a final and binding decision. A hearing was held on January 31, 1997 at which time the parties were given the opportunity to present testimony, exhibits and argument in support of their respective positions. The hearing was declared closed upon the completion of the parties' final oral arguments.

ISSUE:

Did the offer and protested acceptance of the proposed job offer contained in a letter dated November 28, 1995, constitute a legally binding agreement?

If not, did the Postal Service violate the provisions of the National Agreement, Handbooks or Manuals in assigning the grievant from the letter carrier craft to the clerk craft? If, so, what is the remedy?

CONTRACT PROVISIONS:

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.

ARTICLE 13 - ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

Section 1. Introduction

B. The U. S. Postal Service and the Union 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 4. General Policy Procedures

A. Every effort shall be made to reassign the concerned employee within the employee's present 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.

C. The reassignment of a full-time regular or part-time flexible employee to a temporary or permanent light duty or other assignment shall not be made to the detriment of any full-time regular on a scheduled assignment or give a reassigned part-time flexible preference over other part-time flexible employees.

D. The reassignment of a full-time regular or part-time flexible employee under the provisions of the 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 reassigned, 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.

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.

EMPLOYEE AND LABOR RELATIONS MANUAL

546.141 ***Obligation***.

When an employee has partially overcome the injury or disability, the USPS has the following obligation:

a. 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 tolerance. 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 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.

(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.

UNION POSITION:

The Union contended that the Postal Service violated Article 19 of the National Agreement, specifically, Section 546.141 of the Employee and Labor Relations Manual.

The grievant testified that she injured her spine while on the job on May 30, 1992. After being off for one week, she returned to light duty from June through September, 1992. After September, 1992, she resumed her regular full time duties on route 94 until August, 1994 when her back problems got so bad that she could not continue carrying the mail. She then performed limited duty work such as casing letters as a router, working on the address information system and filing Form 3575s and 1821s among other duties. She stated she was able to case 35 of the 90 routes in the Cherry Hill office or the bulk of the routes in the 08003 zone.

She stated that the job offer made to her in November, 1995 was made under the threat of losing her employment. She claimed the Postmaster intimidated her and repeatedly told her if she did not accept the job offer that she would be reported to the Office of Workers Compensation (OWC) as being uncooperative and would become unemployed. The grievant explained that she was the sole support of a young, fatherless son and had to care for her parents and, thus, could not take the chance that she would lose her job. She claimed that was the reason why she signed the job offer with her protest noting that very little was done to accommodate her or her disability. She noted that other disabled letter carriers and even carriers with DUIs were kept in the carrier craft even though they were unable to perform letter carrier duties.

Customer Service Supervisor Donna Harrington testified that she was the grievant's supervisor from June, 1993 through July, 1995 and knew

her when she worked as both a full-time regular and limited duty employee. She stated that the grievant was a very good employee who worked as a router, updated carrier route books, processing change of address cards and other duties while on limited duty. She explained that the grievant was familiar with and could case almost every route in the 08003 zone. Ms. Harrington claimed that work of such nature always existed at the Cherry Hill Post Office and it was work that needed to be done. She noted that management's attitude toward light duty and limited duty employees was to accommodate their disabilities and that it was never necessary to make work for them or for the grievant.

Local Union President Charles Margerum testified that the grievant's contractual rights were violated because there were letter carrier duties available to her within her limitations. Mr. Margerum contended that the letter carrier union was not consulted or asked anything about the grievant's rehabilitation or her offer until after the fact. He stated emphatically that the Union's concerns were not taken into consideration and that he never stated to the Postmaster that he was happy to have the grievant out of the craft. The Local Union President testified that the grievant and other letter carriers on limited duty were all provided with sufficient work. In the grievant's case, she cased mail as a router and performed work on the "red book", which was the 1821 form work prior to becoming known as the "red book." He claimed that a limited duty clerk,

an able bodied PTF clerk, an able bodied regular full-time clerk and regular full-time carrier have all performed work on the "red book."

The Union argued that the testimony and evidence was clear that the Postal Service violated the provisions of Article 19 of the National Agreement, which includes the provisions of Section 546.141 of the ELM. It claimed that at no time while working in a limited duty capacity, did anyone in management tell the grievant that there was not enough work for her to perform within her medical restrictions or that that they were dissatisfied with the quality of her work. Neither the Step 2 or 3 answers given by the Postal Service stated that there was not sufficient work for the grievant in the letter carrier craft within her medical restrictions. The Postal Service's only argument was that the grievant had reached her maximum medical improvement (MMI) which the Union did not contest. What the Union did contest is that management did not take into account that the grievant could remain in the letter carrier craft as a productive employee.

The grievant was restricted from standing or sitting for long periods of time and she could work within those restrictions in the carrier craft. She testified she cased mail as a router in the morning and performed red book and AIS work the rest of the day. She noted that three or four carriers at one time were able to work in a limited duty capacity and, at that same time, light duty employees and employees on DUI were accommodated with carrier work. She signed the job offer under protest

because she knew work was available in the carrier craft within her medical restrictions but, if she did not sign the offer, she might become unemployed. The Postal Service forced her to change her craft and lose her seniority, to change the hours she worked and to work holidays because she no longer received holiday pay as a PTF clerk.

The Union asked that the grievant be returned to the letter carrier craft and to pay her out-of-schedule pay and pay for all holidays for which she received no compensation.

POSTAL SERVICE POSITION:

The Postal Service contended that the Postmaster of the Cherry Hill Post Office properly determined, in accordance with the provisions of Article 3 B. through D., that the grievant was no longer able to meet the physical requirements of her position due to a work related injury and that his offer of a part-time flexible modified distribution clerk position, with a guarantee of 40 hours of work per week, was accepted by the grievant.

Postmaster Richard Lanzillotti testified that the job offer he made to the grievant was prepared by an injury compensation Specialist. He claimed he kept Local Union President Charles Margerum informed on an informal basis about the grievant's rehabilitation and the proposed job offer. He stated that Mr. Margerum commented that he was happy to have her out of the craft. The Postmaster stated he depended upon the injury compensation specialists to determine whether the grievant had reached

maximum medical improvement and the type of job she would be able to perform. He claimed that he followed the advice of the injury compensation specialists by signing the November 28, 1995 letter after they determined she could not perform the duties of a letter carrier. The letter contained the modified job offer which the grievant subsequently signed.

The Postmaster acknowledged that there were other letter carriers on limited duty who had not reached maximum medical improvement but he was informed that the grievant had. He determined she was unable to perform letter carrier duties within her medical restrictions. Mr. Lanzillotti admitted that the three to four carriers he had on limited duty were gainfully employed in casing mail and updating the red book among other miscellaneous duties. He stated that one employee has been on limited duty since 1990 and has been employed since that time in gainful work. The Postmaster also stated that it was possible that he might have rejected other proposed job offers made by the injury compensation specialists.

Injury Compensation Specialist Consultant Lynne Brown testified that, when it is determined that employees have reached maximum medical improvement and still cannot perform the duties of their regular jobs, attempts are then made to find jobs which such employees are physically and mentally able to perform. Both the grievant's doctor and the DOLs doctor determined the grievant had reached her MMI. She noted that the other employees working in a limited duty capacity had varying problems

and emphasized that each case depends upon an individual's injuries and the medical limitations of that individual.

Ms. Brown indicated that limited duty is a temporary accommodation for employees with on-the-job injuries who have not reached their MMI. When maximum medical improvement is reached, and an employee is unable to perform the employee's regular duties, the search for a new position within the employee's limitations is begun. She stated the search includes attempts to keep the new job as close to the employee's regular job as possible. Attempts are made to keep the employee in the same facility, craft, tour of duty, etc. The best case scenario is to have the employee return to their regular job even with modifications. Ms. Brown noted that, when a job offer is made, an employee cannot be forced to accept this offer. If the offer is rejected, it would be sent to the DOL to rule on the suitability of the offer. She contended that acceptance under protest is acceptance of the offer.

The Postal Service argued that the arbitration awards submitted by the Union involve employees who were moved involuntarily. In the instant case, the grievant signed the job offer and moved voluntarily to the modified position. She had the choice to accept or reject the job offer. If she had rejected the job offer, it would have been sent to the DOL to determine if the job was suitable. If it determined that the job was suitable, she would have had the right to appeal the determination and, if the appeal was denied, she would still have had the right to accept the job.

The Postal Service noted that not one shred of medical evidence was produced which shows she is capable of performing carrier work. Article 3 of the National Agreement states that management has the exclusive right to maintain the efficiency of the operations entrusted to it. When the grievant reached her MMI, and it was determined there was no work available in the letter carrier craft within the limitations of her medical restriction, management had the right to ask that the employee be rehabilitated to a position where she could be utilized efficiently and effectively. Arbitrator Snow's National Award gives the Postal Service the right to rehabilitate an employee by transferring them to another craft.

The Postmaster testified that there were not sufficient duties for the grievant to perform in the letter carrier craft within her medical limitations. The Postal Service argued that the job must be legitimate full-time position as if such job was a bid position. It noted that Ms. Brown's findings were not arbitrary or capricious. The job offers she proposed were within the parameters of her medical restrictions. The grievant accepted the job offer when she signed the letter dated November 28, 1995. The Postal Service asked that the grievance be denied and that the grievant be left in the position to which she was placed in a proper manner.

OPINION:

The advocates are to be commended for the well-prepared cases which they presented in a most persuasive manner in support of their respective positions.

As noted during the hearing, the threshold issue to be decided in this case is whether the job offer and acceptance of same under protest constituted a legally binding agreement. Contract law developed out of property law and appeared as we know it in the eighteenth century and is largely judge-made. Like other common law, contract law is found in thousands of cases written by judges over the years. Searching for common law principles in this mass of cases would be very difficult; therefore, a group of academicians and lawyers decided to organize and rationalize the common law and to restate it as it appeared in the case books. As a result, the Restatement of the Law of Contracts was published in 1932 and, in 1964, the Restatement (Second) of Contracts was published. (The Legal Environment of Business, Second Edition, the Dryden Press, [Daniel M. Warner, 1995]).

In these Restatements, the elements of a contract generally recognized as necessary for the creation of a valid contract are an offer, an acceptance, consideration, capacity, reality of consent, and legality. The elements of offer, acceptance, consideration, capacity and legality are all contained in the job offer made to the grievant on November 28, 1995 and

signed by her on December 4, 1995. The requirement of reality of consent requires that the parties have a "meeting of the minds" or they must knowingly agree to the same thing. Genuine agreement between the parties may be affected by several contract defenses which include matters that seriously disrupt the bargaining process such as fraud, mistake, duress, undue influence and unconscionability. Even though all the necessary elements of a contract are present, relief has been given by the courts if one of the enumerated defenses can be proven. (Business Law, Principles and Practices, Fourth Edition, Houghton Mifflin Company [Goldman and Sigesmond, 1996]).

In the instant case the defense of duress seems to be applicable. Duress simply means compulsion in which a person who is a victim of a threat is deprived of the freedom to decide voluntarily. Under modern law, threats include economic pressure if it is wrong. (Austin Instrument v. Local Group, 272 N.E. 2d 533 [NY 1971]). Such economic threats are usually grounds to void a contract. A voidable contract is a contract that fulfills all of the essential requirements of a contract but that binds only one party and not the other. The party who is not bound has the option of enforcing or voiding the contract.

The grievant's credible testimony was that she signed the agreement under protest because she was told by management on a number of occasions that, if she did not agree to the job offer, she could lose her job. Given the fact that she was the sole support of a fatherless son, she was in

no position to take the chance of losing her job if she refused the offer. Such matters as physical attributes, age, training, state of health, education, etc. have been used by the courts in determining whether the threat influenced the person to enter into the agreement. The grievant was faced with the full force and power of the United States Postal Service and the U.S. Department of Labor's Office of Workers' Compensation. The threat of the loss of her job was real and her action of signing the job offer under protest indicates that she thought she had no choice but to agree to the job offer. Thus, she signed under duress and, under recognized contract law, she is not bound by the agreement and she can void it. The fact that she filed the instant grievance is evidence that she opted to void the job offer she signed under duress on December 4, 1995.

The second issue to be decided is whether the Postal Service violated the provisions of the National Agreement, Handbooks or Manuals when it assigned the grievant from the letter carrier craft to the clerk craft. Under the provisions of Article 13, Section 1.B., the parties recognized their responsibility to aid and assist full-time regular or PTF employees who through illness or injury are unable to perform their regularly assigned duties. They agreed to provisions and conditions for reassignment to temporary or permanent light duty or other assignments. The responsibility to implement the provisions of the Agreement within an installation is the installation head. Section 4.A. of Article 13 directs that every effort shall be made to reassign the concerned employee within the employee's present

craft or occupational group, even if such assignment reduces the number of hours of work for the supplemental work force. Only after all efforts are exhausted in this area will consideration be given to reassignment to another craft or occupational group within the same installation.

As noted by Arbitrator P.M. Williams, in Case Number 57N-3A-C-8643, decided on December 29, 1989, the effect of the provisions of Article 13, Section 4.A. is to summarize the thrust of Section 546.141 of the ELM. It states that, when an employee has partially overcome the injury or disability, the USPS has the obligation to make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances. Also, in assigning such limited duty, the USPS should minimize any adverse or disruptive impact of the employee. Section 546.141 a. then lists four numerical paragraphs which lists the considerations that must be made in effecting such limited duty assignments.

Arbitrator Williams stated that the clear implication of the provisions of Article 13, Section 4.A. is that USPS 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. Arbitrator Neil N. Bernstein, in Case No. H1N-1J-C 23247 decided on August 7, 1987, noted that Section 546.14 of the ELM must be read to impose a continuing duty on the Service to always try and find

limited duty work for injured employees in their respective crafts, facilities and working hours.

In the instant case, the Postmaster contended that there was no letter carrier work available to the grievant within her medical limitations. However the grievant, the local union president and the grievant's immediate supervisor testified about the work available for a limited duty carrier. The grievant claimed that she was performing router work by casing mail for almost everyone of the 35 routes in the 08003 zone. Her claim was supported by her supervisor who stated that the grievant was a very good employee who also updated carrier route books, processed change of address cards and performed other types of work, all of which she claimed, unrefutted, was work that was always available and needed to be done at that facility. Local Union President Margerum testified that the "1821" work performed by the grievant is the same work being done today on the "red book." His unrebutted claim was that limited duty clerks, able bodied PTF clerks, able bodied regular full-time letter carriers all perform work on the "red book."

It would stand to reason that an office with 90 plus carrier routes and over a hundred plus mail carriers would have no difficulty in accommodating an employee with a job related disability. In fact, testimony established that this facility has accommodated a number of letter carriers with job related disabilities and that one employee has been performing limited duty activities since 1990.

This arbitrator is well aware that the Postal Service must operate as efficiently and effectively as possible in order to remain competitive. However, in pursuit of that goal, it must keep in mind that it has certain obligations, responsibilities and duties that it must meet under the terms of its collective bargaining agreement. One of those responsibilities is to aid and assist qualified employees who are unable to perform their regularly assigned duties. It also has the obligation and duty to make every effort to reassign such employees within their present craft or occupational group, even if such assignments reduce the number of hours of work for the supplemental work force.

The evidence presented at the hearing makes it clear that the installation head, in this case, the Postmaster, did not make "every effort" to fulfill that obligation and duty. In fact, he admitted that he left much of his responsibility in the hands of an injury compensation specialist to determine the grievant's ability to perform work within her work limitation tolerances. Since he failed to fulfill his responsibilities, obligations and duties under the collective bargaining agreement, the grievant is to be reinstated to the letter carrier craft in a limited duty capacity in keeping with her physical limitations. The Postmaster is directed to follow the provisions set forth in Article 13 of the National Agreement and Section 546.14 of the ELM in effecting the grievant's limited duty assignment, taking into consideration the language in the paragraphs (1) through (4) of Section 546.141 (a) of the ELM. If he is convinced that there is not

adequate work available within the employee's work limitation tolerance, he must do more than simply say that such work is not available that can be done by her, but must show that such work does not exist.

Based on the foregoing, the Postal Service did violate the terms of the National Agreement, Handbooks or Manuals and, consequently, the grievant is to be reinstated to the letter carrier craft to perform work within her physical limitations until such time that the Postal Service can determine and establish conclusively that such work does not exist at the Cherry Hill Post Office. Her reinstatement to the letter craft will be made without any backpay but her seniority as a letter carrier shall be restored to include the time she spent in the clerk craft.

AWARD:

The grievance is denied in part and sustained in part. The job offer made to the grievant is voidable by her on the basis of duress. She is to be reinstated to the letter carrier craft under the terms and conditions set forth in the last paragraph of the above opinion without backpay but with her seniority as a letter carrier restored to include the time she spent in the clerk craft. The arbitrator will retain jurisdiction in the event the parties are unable to resolve the above matter in an amicable manner.

Thomas J. DiLauro
Arbitrator
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