

C# 06766

IN THE MATTER OF THE ARBITRATION)
Between) Case No. E4N-2B-C 4499
UNITED STATES POSTAL SERVICE)
South Jersey Division) Date of Hearing: October 28, 1986
and)
NATIONAL ASSOCIATION OF LETTER CARRIERS)
Stratford New Jersey Branch)

BEFORE

PHILIP W. PARKINSON

Arbitrator

RECEIVED
JOHN W. O'SHEA
NALC

DEC 29 1986

Representing the Postal Service - John A. Higgins, Manager Labor Relations

Representing the NALC - William J. Revak, Local Business Agent

I. THE GRIEVANCE

The instant grievance was presented on July 31, 1985 at Step 1 of the grievance procedure on behalf of James J. Zackey, a Letter Carrier at the Stratford New Jersey Branch of the United States Postal Service (hereafter referred to as the "Postal Service"). The Step 1 decision denying the grievance was rendered on August 1, 1985 and the matter was appealed to Step 2, on behalf of Mr. Zackey, by the National Association of Letter Carriers (hereafter referred to as the "Union") on August 5, 1985. On the Standard Grievance form, the Union alleges a violation of Articles 3 and 13 and states that the grievant was denied his rights per Article 13 of the National Agreement¹ "and FECA regarding his work-related injury and assignment to another installation and craft as a result thereof." The Union also contends on the grievance form that the Postmaster "did not respond to grievant's written request as to why the inability to assign him work at Stratford rather than at MSC in another craft. The specific job offer made him by Mgt was not in accordance with provisions of E&LRM, nor was the number of Light Duty Assignments at Stratford defined." As the "Corrective Action Requested," the Union wants "Management to

1. AGREEMENT between United States Postal Service and American Postal Workers Union, AFL-CIO, National Association of Letter Carriers, AFL-CIO, 1984-1987 (hereafter referred to as the "Agreement").

follow the procedures and provisions outlined in the ELM and FECA with regard to reassigning him because of work-related injury." Also, "that grievant be re-assigned to Stratford for available work at that office commensurate with his ability to perform, etc."

The Step 2 grievance appeal was denied by letter dated September 4, 1985. The Postal Service's position was, in pertinent part, as follows:

Management takes the position that the grievance is untimely. The grievant accepted reassignment to the MSC on July 11 and became aware at that time he would not be reassigned within the Stratford Post Office. However, this grievance was not presented at Step 1 until July 31, 1985. Notwithstanding the above facts, the record of evidence indicates that on July 2, 1985 the grievant, accompanied by his local union president, William Revak, met with the Injury Compensation Supervisor, Myra Perry. The purpose of this was, in part, to discuss the grievant's proposed reassignment to the MSC. At this meeting, the grievant was informed that sufficient duties did not exist at the Stratford, NJ Post Office commensurate with the grievant's physical restrictions. For the grievant and the union to contend that the grievant's rights, in accordance with Article 13, were violated is totally without merit. Both the grievant and his union representatives were fully aware of the grievant's employment status when the grievant voluntarily accepted reassignment to the MSC South Jersey on July 11, 1985.

Thereafter, the Union appealed the case to Step 3, alleging that the Postal Service violated Articles 2, 3 and 13 of the Agreement and noting as its reasons, the following:

Grievant, a FT Letter Carrier injured in the performance of his duties and permanently unable to resume street duty requested in writing permanent assignment to available inside work at his office of employment which was not responded to and refused in writing indicating the reasons for the inability to assign him inside duties at his own office.

Subsequently, the grievant was assigned to another craft for duty at the MSC at hours outside his normal schedule while at the same time there is available inside work at his own office being performed by another injured carrier and PTF employees.

In its appeal, the requested corrective action is "That grievant be assigned to his own office to a position that can be established out of the part-time hours being used at that office by PTF's and the injured carrier now being accommodated [sic] such assignments that this injured duty can perform."

The case was thereafter discussed at Step 3 on October 8, 1985 and the Postal Service denied the appeal by letter dated November 5, 1985. This letter states, in relevant part, that:

Investigation into this matter revealed the grievant voluntarily accepted a reassignment to the MSC South Jersey installation as a clerk. His subsequent

request to return to Stratford was not considered favorably and the Union's position is not supported.

It was mutually agreed that this grievance does not involve any interpretive issue(s) pertaining to the National Agreement or any supplement thereto which may be of general application. Therefore, this case may be appealed directly to regional arbitration in accordance with the provisions of Article 15 of the National Agreement, if the union so decides.

The matter was appealed to arbitration and the undersigned was assigned to hear the case on October 28, 1986. At the hearing, which was held at the Postal Service's Bellmawr, New Jersey facility, the parties were afforded full opportunity to present evidence, both written and oral, as well as witnesses and to argue their respective positions. Neither party presented witnesses. At the conclusion of the hearing, the record was closed.

II. BACKGROUND

The following memorandum was issued to Mr. Zackey by the SC Manager, Mr. J. F. Burkey, of the MSC, South Jersey facility:

UNITED STATES POST OFFICE

INJURY COMPENSATION CONTROL OFFICE
MSC SOUTH JERSEY, NEW JERSEY 08031-9487

Date: 07-02-85

OUR REF: ICOO:MEPerry:rf

SUBJECT: Reemployment Offer

A review of your previous history and the results of your physical examination have been positive. We are offering you

reemployment in the following position.

<u>DISTRIBUTION CLERK</u>	<u>5</u>	<u>12</u>	<u>\$25,221 ANNUALLY</u>
TITLE	GRADE	STEP	SALARY

<u>3</u>	<u>5:30 pm to 2:00 am</u>	<u>MONDAY and TUESDAY</u>
TOUR	HOURS of WORK	DAYS OFF

All assigned duties will be in strict compliance with your medical restrictions. If you refuse to accept the position, we will so advise the Office of Workers' Compensation Programs, OWCP, for whatever action they deem necessary.

At the bottom of the memorandum, the following was typed for Mr. Zackey's signature:

"I accept your Reemployment Offer: I reject your Reemployment Offer"

Mr. Zackey signed the letter on July 11, 1985 under the phrase "I accept your Reemployment Offer" but added the following comments: "This Agreement signed under duress until it can be properly resolved under the Grievance Procedure of the National Agreement. (See Enclosed Letter)"

A letter dated July 9, 1985 was sent by Mr. Zackey to Mr. Burkey. This letter states:

After careful consideration of the options for Reemployment offered to me by the ICOO, I've come to

the conclusion that I was never really offered any type of option whatsoever. In reality, I believe nothing more than an ultimatum was issued to me by the ICOO. The choices being; Accepting the position offered, knowing my present physical limitations, I would not be able to perform the tasks required of this position without risking further injury to myself and possibly jeopardize the safety of others working closely around me. My other choice would be starvation. My personal feelings are that the ICOO did not offer me a choice at all.

Besides showing no consideration for my physical well-being, the Reemployment offer in my opinion, was made in total disregard of my mental well-being as well, by totally ignoring the adverse emotional affects this offer imposes on me.

It is my contention that the ICOO offer for reemployment is not only a gross infringement of my rights allegedly afforded me under both the National Agreement and the ELRM, but also a dereliction of their own duties as required under these same above mentioned Agreements.

In conclusion, it would be greatly appreciated if we could meet and discuss this situation in order to try to come up with some type of amicable resolution.

Then on July 24, 1985, the grievant was issued the following letter by Mrs. Elma J. DiMona, the Employment Officer for the South Jersey MSC:

This is to advise that you will be reassigned under the joint United States Postal Service/Department of Labor Rehabilitation Program as a Distribution Clerk, Level PS-5.

Your effective date of reassignment will be August 3, 1985. You are to report at 5:30 PM on August 3, 1985 to the Tour III Superintendent for your duty

assignment. Your tour of duty will be 5:30 PM to 2:00 AM. Drop days will be assigned by the Tour Superintendent.

If you have any questions, feel free to contact the undersigned.

Mr. Zackey then sent a letter on July 30, 1985 to the Postmaster at the Stratford, New Jersey Post Office, Mr. Raymond Goss. The subject of the letter was a "Request for Permanent Light Duty Assignment."

Mr. Zackey's letter states:

My reason for submitting this letter is to request a permanent reassignment to a light duty position in the Stratford P.O.. As you know, this is the same facility that I've been assigned to for the last 7½ years. The necessity of this request arose due to an injury I sustained while in performance of my assigned duties on the date of January 14, 1982 and the physical problems that I'm still experiencing and possibly may never overcome, as a result of this injury.

It would be immensely appreciated if we could meet in the very near future. This will allow us to specifically discuss the many possible duties that can be assigned to accommodate and benefit all parties concerned or affected by this requested position.

The grievant did not receive a reply from Mr. Goss.

Prior to the date of the grievant's reassignment to the South Jersey MSC facility, his physician completed the U. S.

Department of Labor's (OWCP) "Work Restriction Evaluation" Form. In the "Recovery Degree" portion of this form, the physician stated that Mr. Zackey could work eight hours a day,² that he would not need "vocational rehabilitation services such as testing, counseling, training, or placement to return to work" and that he has reached his "maximum improvement."

III. POSITION OF THE PARTIES

A. UNION

The Union argues that the installation head at Stratford, N.J., did not show the greatest consideration, give careful attention to or reassign the grievant to the extent possible within the employee's office as evidenced by the fact that the said installation head did not respond to the grievant's request in writing for reassignment to his office and state the reasons for his inability to do so. They further contend that additionally, and subsequent to the grievant's request another disabled employee was assigned to the employee's facility at Stratford to a position created to meet her disabled condition.

2. This would be subject to the other portions of the form, i.e., "Activity Type" where, for example, it states, among other things, that he would have lifting restrictions of 10-20 lbs., would have no hand restrictions, but could not squat, climb or kneel, etc.

As to the timeliness issue of the grievance raised at Step 2 of the grievance procedure, a Step 1 grievance with relation to the grievant's reassignment to the MSC in a different craft was, according to the Union, initiated within 14 days of the grievant's receipt of a notice advising him of his reassignment on July 24, 1985.

The Union requests that the grievant be reassigned to his former place of employment, the Stratford, N.J., post office, to a position that he can be accommodated for commensurate with his documented medical limitations as provided for in Article 13 of the National Agreement.

B. POSTAL SERVICE

The Postal Service avers that the grievance is untimely filed. The grievant had notification of his reassignment by Mr. Burkey's letter of July 2, 1985. The employee signed his acceptance of the offer on July 11, 1985. Even if one were to start with July 11th for purposes of the timeliness claim, such would constitute the lapse of some 20 days when the grievance was filed on July 31st. As to the merits, the grievant's letter was sent to the Postmaster on July 30, 1985, some 19 days after he had already accepted the assignment to the MSC. Therefore, there was no obligation to respond.

The Postal Service also notes that the Union provided no documentation or evidence of a violation of Articles 2 or 3 of the Agreement, and consequently it will not address such charges.

As to the other employee who was assigned to the Stratford Post Office, the Postal Service argues that such employee was assigned well after the grievant accepted an assignment to the MSC. Furthermore, that employee, unlike Mr. Zackey, had not reached her maximum improvement under the Work Restriction Evaluation as completed by her physician. Therefore, the Postal Service argues that the Union offered no evidence of the grievant's improvement or qualifications to work any of the positions at the Stratford Post Office. Finally, the Postal Service argues that the assignment was proper for all these reasons, including the requirements set forth at Section 546.141 (c) and (d) of the Employee & Labor Relations Manual.

IV. PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE 13 - ASSIGNMENT OF ILL OR INJURED REGULAR WORK FORCE EMPLOYEES

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

ARTICLE 19 - HANDBOOKS AND MANUALS

EMPLOYEE & LABOR RELATIONS MANUAL

546 Reemployment of Employees Injured on Duty
.14 Disability Partially Overcome
.141 Current Employees

V. OPINION

The first issue that must be determined is whether the grievance was timely filed. Article 15 contemplates that an employee or Union must initiate discussion (employees) or a grievance (Union) within fourteen (14) days of the date on which the employer or the Union first learned or may reasonably have been expected to have learned of its cause. In the instant case, Mr. Zackey learned of an offer to the Distribution Clerk position at the MSC by letter dated July 2, 1985. He accepted it on July 11, 1985 alleging "duress" and also indicated that it should properly be resolved under the grievance procedure. At the same time the acceptance was accompanied by a letter to the MSC manager dated July 9, 1985 which stated, inter alia, "In conclusion it would be greatly appreciated if we could meet and discuss this situation in order to try to come up with some type of amicable resolution." (See supra, p. 5 for complete letter content) The employee therefore made a clear effort to discuss the offer with the person making it (albeit was not his immediate supervisor). There was no record evidence that the Postal Service ever complied or made an effort to comply with this discussion request. A reasonable period to respond or to implement a discussion must be contemplated once a discussion request has been made by an employee and, if such exceeds the fourteen day period, the employee should not be precluded on the

basis of timeliness from filing his protest because the Postal Service chose not to discuss or respond to his request within a reasonable period of time. The point is that the grievant initiated a request for discussion of his aggrieved status within the fourteen day period. Since there is no record evidence of the Postal Service responding, therefore, in effect, it brought the matter outside the Agreement time limits, and the Postal Service would be estopped from claiming an untimely filing. At any rate, considerable weight must be given to the fact of the specific finalization of Mr. Zackey's appointment by letter of July 24, 1985 from the Employment Officer of the South Jersey MSC. It was at this point in time that the matter was "carved in stone" and the time limit for presenting a grievance could commence. Finally, one other point should be made regarding timeliness. In the Postal Service's response to the Step 3 appeal, unlike the Step 2 response, no defense of timeliness was made. Therefore, for all these reasons, when the grievance was presented at Step 1 on July 31, 1985, I find that it was not untimely filed per the spirit and intent of Article 15 of the Agreement.

As to the merits of the case, the grievance files indicate that on "July 2, 1985 the grievant, accompanied by his local union president, William Revak, met with the Injury Compensation Supervisor,

Myra Perry. The purpose of this was, in part, to discuss the grievant's proposed reassignment to the MSC. At this meeting, the grievant was informed that sufficient duties did not exist at the Stratford NJ Post Office commensurate with the grievant's physical restrictions." Subsequent to this, on July 11th the grievant accepted the offer at the MSC, albeit he claimed it was under duress and that he intended to file a grievance. Consequently, at this point in time, there would appear to be no obligation on the part of the installation head, per Article 13(2)C, to notify Mr. Zackey in writing stating the reasons for the inability to reassign him to the Stratford facility. An oral explanation had been afforded him by the Compensation Supervisor and he accepted the appointment. Although he made a formal letter request to the Stratford Postmaster regarding questions as to his reassignment to the MSC, such letter was submitted on July 30 and the grievance was presented the next day, i.e., July 31, 1985. Concededly the Postmaster might have responded to the July 30th letter, however, because the matter was almost immediately thereafter placed in the grievance procedure process, the Postmaster could be contractually excused from a reply inasmuch as the Postal Service's formal response was obligatory under the grievance procedure. Had the

request been made at an earlier date, such as subsequent to the July 2 meeting, then the argument that a response was contractually obligatory would be more persuasive. However, inasmuch as the grievant accepted the assignment and then made the request to the Stratford Postmaster almost coincidental with the filing of a grievance, a mandatory reply by the Postmaster would not be obligatory, not only because the employee had accepted the assignment, but also because the response to the grievance would be tantamount to a response to the grievant's request. The procedure used by the grievant was in contrast to that of the other employee, (T. Butler) cited by the Union, who was given a light duty assignment at the Stratford facility. In the latter case, the record indicates that she first made a written request to the Postmaster, who then sent her a written response on January 17, 1986 explaining why he could not give her a light duty assignment. She then presented a grievance on January 23, 1986 that ultimately resulted in such work for her at Stratford. Procedurally, therefore, the situations differ considerably and are readily distinguishable.

At the time of grievant's reassignment to the MSC there is no evidence of record that would lead this arbitrator to conclude that the Stratford facility had available work within the parameters of

grievant's medical work restriction evaluation. However, a serious doubt was created when some six months subsequent to Mr. Zackey's grievance for light duty assignment at Stratford, another employee was given light duty work at such facility. There was no reasonable explanation given as to why such work was not available in July 1985 and then became available in January 1986 for Ms. Butler. To this end, it is noted that the medical work restriction evaluation of the grievant herein appears to be more limited than that of Ms. Butler. Therefore, in the event that the work Ms. Butler is performing or was performing per her light duty assignment at Stratford in January 1986 was available in July 1985 and would not have conflicted with Mr. Zackey's medical work restrictions, then there is every indication that the Postal Service did not comply with Section 546.141 of the Employee & Labor Relations Manual. The grievance is therefore remanded to the parties to determine whether the light duty assignment given Ms. Butler is still available and if Mr. Zackey's medical restrictions would allow him to perform such light duties. If this is the case and Mr. Zackey is still under these medical restrictions, then he shall be entitled to be transferred to the Stratford facility.

Ms. Butler would then be reassigned or retained at Stratford depending on the available work at the facility, her medical condition as of this date, her work status, etc. However, the Postal Service would not be obligated to create an additional light duty assignment at Stratford in the event Mr. Zackey is transferred there for light duty work pursuant to the guidelines of this Award.

AWARD

The grievance is granted to the extent set forth in this OPINION. This arbitrator shall retain jurisdiction of this matter in the event there is a dispute or problem with the implementation of this decision.


Philip W. Parkinson

Philip W. Parkinson

Washington, Pennsylvania

December 24, 1986