

C#18477

REGULAR ARBITRATION PANEL  
WESTERN REGION

In the Matter of Arbitration	)	CASE NO: F90N-4F-D 95063343
Between	)	GTS NO: 31102
UNITED STATES POSTAL SERVICE	)	GRIEVANT: GUS CALDERON
NORTHY HOLLYWOD, CALIFORNIA	)	DATE OF HEARING: 02/11, 12/98
And	)	DATE OF BRIEFS: 03/17/98
NATIONAL ASSOCIATION OF LETTER	)	HEARING LOCATION:
CARRIERS, AFL-CIO	)	NORTH HOLLYWOOD, CALIFORNIA

ARBITRATOR'S  
DECISION AND AWARD

BEFORE: CLAUDE D. AMES, ARBITRATOR

APPEARANCES: For the Employer:  
Raymond Aguillard, Senior Labor Relations Specialist  
13031 W. Jefferson Boulevard  
Inglewood, CA 90311

For the Union:  
Manuel L. Peralta, Jr., Regional Administrative Assistant  
3636 Westminster Avenue, #A  
Santa Ana, CA 92703

AWARD: The Postal Service lacked just cause to remove Grievant based on inability to meet requirements of the City Carrier position. The Union's grievance is sustained with appropriate remedies contained herein.

DATE OF AWARD: June 25, 1998

Claude D. Ames  
CLAUDE D. AMES, Arbitrator

I.

INTRODUCTION

This arbitration proceeding came on regularly for hearing pursuant to the then current 1990/1994 Collective Bargaining Agreement ("CBA") between the parties, UNITED STATES POSTAL SERVICE (hereinafter "Employer" or "Agency") and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, LOCAL BRANCH NO. 2902, NORTH HOLLYWOOD, CALIFORNIA (hereinafter "Union"). Western Regional Panel Member Claude D. Ames was selected to hear the above-referenced grievance. Hearings were held on February 11-12, 1998, in a conference room at the postal facility located at 7053 Laurel Canyon Boulevard, North Hollywood, CA. Raymond Aguillard, Senior Labor Relations Specialist, appeared on behalf of the United States Postal Service. Manuel L. Peralta, Jr., Regional Administrative Assistant, represented Augusto Calderon (hereinafter "Grievant") and the National Association of Letter Carriers, AFL-CIO.

In the instant case, the Union is appealing the Notice of Removal of Grievant's employment effective March 1995 based upon his alleged physical inability to meet the requirements of a City Carrier's job due to chronic asthma. The Agency's decision to terminate the Grievant for his alleged "inability to meet the requirements of the job" was based in part on a copy of a medical report by Dr. Ken C. Wong, a pulmonary specialist, who recommended that the Grievant's duties be "restricted to more sedentary work and avoid assignments which require a lot of walking and climbing of stairs." Based upon this report, the Agency concluded that the Grievant was "medically incapable of performing his full duties as a letter carrier" and issued a Notice of Removal. The Union contends that Grievant is able to perform most of his regular job assignment and could easily be accommodated by the Agency exchanging his last two hours of walking with router duties. The Union has objected

to the Agency's interpretation of Dr. Wong's medical report and maintains that the Grievant is physically able to perform the City Carrier job position with accommodations based upon his medical condition.

The arbitration hearing proceeded in an orderly manner and the parties were given a full and fair opportunity for the examination and cross-examination of witnesses, production of documents and arguments. All witnesses appearing for examination were duly sworn under oath by the Arbitrator. The parties stipulated that the matter was properly before the Arbitrator with no issues of procedural or substantive arbitrability to be resolved. Pursuant to the parties' Settlement Agreement Grievance, Case No. F90N-4F-C-95063354 (Option Letters); F94N-4F-C-98000942 - F94N-4F-C-96044053 (Attempts to Bid) and F94N-4F-C97046874 (Health Benefits), arising out of the Grievant's removal, are hereby incorporated by reference and consolidated in the instant case for binding and final resolution by the Arbitrator. The parties elected to present written post-hearing and responding briefs to the Arbitrator in lieu of oral closing arguments. The arbitration hearing was officially closed on 3/20/98 after receipt of the parties' initial briefs and responding brief from the Union.

## II.

### ISSUES PRESENTED

The parties mutually stipulated that the issue for resolution before the Arbitrator is as follows:

Did the USPS have just cause to issue Grievant a Notice of Removal for physical inability to meet job requirements of a City Carrier position due to chronic asthma?

If not, what shall the appropriate remedy be?

### III.

#### RELEVANT CONTRACT PROVISIONS AND REGULATIONS

##### ARTICLE 2 - NON-DISCRIMINATION AND CIVIL RIGHTS

###### Section 1. Statement of Principle

...In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

##### ARTICLE 13 - ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

###### Section 4. General Policy Procedures

G. The following procedures are the exclusive procedures for resolving a disagreement between the employee's physician and physician designated by the USPS concerning the medical condition of an employee who is on light duty assignment. These procedures shall not apply to cases where the employee's medical condition arose out of an occupation illness or injury. On request of the Union, a third physician will be selected from a list of five Board Certified Specialists in the medical field for the conditioning question, the list to be supplied by the local Medical Society. The physician will be selected by the alternate striking of names from the list by the Union and the Employer. The Employer will supply the selected physician with all relevant facts including job description and occupational physical requirements. The position of the third physician will be final as to the employee's medical condition and occupational limitations if any. Any other issues relating to the employee's entitlement to light duty assignments shall be resolved through the grievance-arbitration procedure. The cost of the service of the third physician shall be shared by the Union and the Employer.

##### ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

###### Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

## 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 contained in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

## IV.

### PRELIMINARY STATEMENT

This case was originally scheduled for hearing on several prior occasions before finally being heard by the Arbitrator on February 11-12, 1998. At issue is the Agency's Notice of Removal of Grievant for his alleged physical inability to perform City Carrier job duties, due to chronic asthma. Prior to taking testimony, the Agency raised an arbitrability issue objecting to the Union's substantive reliance on the Family Medical Leave Act ("FMLA"), Rehabilitation Act and Americans with Disabilities Act, as affirmative defenses to Grievant's removal. The Agency requested a preliminary ruling by the Arbitrator regarding the applicability of these federal statutes in the instant case and as affirmative defenses to the Grievant's removal. The Arbitrator ruled in relevant part as follows:

"...The Union may argue the applicability of the Family Medical Leave Act, Rehabilitation Act and Americans with Disabilities Act, set forth in the ELM and incorporated into the Collective Bargaining Agreement pursuant to Article 19 (Handbooks and Manuals), as a bar to the Postal Service removal of the Grievant Gus Calderon on the charge of physical inability to meet the requirements of the job..."

Following the Arbitrator's preliminary ruling, the Agency declared the issue interpretative and advised both the Union and Arbitrator that the grievance was being referred to Step 4 of the parties' grievance-arbitration procedure. Thereafter, the grievance was appealed to Step 4 and denied. It was then appealed to the national arbitration level. On October 16, 1997, the national parties settled the

"interpretative dispute" in part as follows:

"...In a disciplinary hearing involving just cause, the union may argue as an affirmative defense that management's actions were inconsistent with the Family and Medical Leave Act..."

The grievance was then subsequently remanded by the national parties for rescheduling before the Arbitrator. However, during the interim period between filing of the instant case and date of hearing, the Union filed several companion grievances arising out of Case No. F90N-4F-D95063343. The parties agreed during pre-arbitration settlement to consolidate all grievances and incorporate those issues, arguments and defenses into the instant case.

On February 11, 1998, the parties stipulated as follows:

1. In accordance with H7N-1N-C-20699, (Joint Exhibit No. 9, pages 2 and 3), the grievant requested that copies of all permanent job bids be sent to his home to bid on.
2. F90N-4F-C 95063354, as addressed in Joint Exhibit No. 3, is resolved through the March 18, 1996, pre-arbitration settlement which brings the issue into the Removal grievance currently before the arbitrator.
3. The arbitrator is requested to issue one decision under title of USPS Regional No. F90N-4F-D 95063343. Said decision shall include the arbitrator's ruling on the issues previously contained in the following regional grievances: F90N-4F-C 95063354 (Joint Exhibit No. 3); F94N-4F-C 98000942 (Joint Exhibit No. 9); F94N-4F-C 96044053 (Joint Exhibit No. 9); and F94N-4F-C 97046874 (Joint Exhibit No. 12).
4. The grievant's route was posted while his Removal grievance was pending and warded to carrier William Magtos on 4/1/95, Job No. 524.

The above-referenced stipulations were entered into by USPS representative Raymond Aguiard and NALC representative Manuel Peralta, Jr.

V.

STATEMENT OF FACTS

On March 1, 1995, the Grievant received a third Notice of Removal for his "inability to meet the requirements of the job". The first two such notices were subsequently rescinded. The first notice of removal was issued on January 26, 1995 and rescinded on February 10, 1995 through the parties' grievance process. The second removal notice was issued on February 13, 1995, and was unilaterally rescinded by the Agency before it was grieved. The Grievant is a 10-year employee with the Postal Service employed in the position as City Carrier with bid route 524 at the North Hollywood Post Office. His date of employment is January 1985. By all accounts, the Grievant suffers from chronic asthma which was a pre-existing condition prior to his employment with the Postal Service. The testimony given indicates that although the Grievant suffers from chronic asthma, it did not affect his work ability in carrying the mail until July 1993. At that time, according to the Union whether due to poor air quality at North Hollywood and/or accumulative worsening of his condition due to working outdoors, the Grievant was restricted to light duty by his physician, Dr. Morton Merchey, Kaiser Permanente-Southern California. The Grievant was initially diagnosed as having chronic asthma which inhibited his ability to perform duties requiring extensive aerobic exercise. Due to this condition, Dr. Merchey limited the Grievant's outside work to 3 hrs. per day of business and apartment delivery and 3-5 hrs. casing mail for the last 21 months. Consistent with these medical restrictions, the Grievant was provided temporary light duty by the North Hollywood Post Office for his condition.

The Grievant's condition did not appear to improve which greatly concerned the Agency who continued to extend temporary light duty assignments to the Grievant based upon his doctor's medical

restriction. On or about 3/12/94 and 5/6/94, the Grievant was instructed to undergo a fitness-for-duty examination ("FFDE") by Dr. Aaron E. Ifekwunigwe. In a FFDE report dated 6/8/94, Dr. Ifekwunigwe determined that the Grievant was medically capable of performing all of the duties of a City Carrier position on a progressive time schedule. This report was reviewed by Dr. Ghaleb, the Agency's Van Nuys District Medical Officer. On or about 7/27/94, Gerald Klein, Manager of Post Office Operations, informed the Grievant that as a result of a FFDE and the recommendations of Dr. Ghaleb he could return to work on a full-time schedule including working 4 hrs. per day on street duties. Street duties were to be increased one hour every two days until the Grievant was back to his normal full-time duties. The dispute leading to the Grievant's removal, according to the Agency, culminated when the Grievant continued to suffer from his asthmatic condition and presented medical documentation from his treating physician, which was inconsistent with the medical FFDE results of Dr. Ifekwunigwe and the Agency's medical officer.

The Grievant was notified by Postmaster Herbert on 9/22/94 that his asthmatic condition would be considered permanent and stationary by the Postal Service. The Grievant was also informed by Postmaster Herbert that the post office had no permanent light duty work available within his medical restriction at the North Hollywood Post Office. The option letter was subsequently grieved by the Union and mutually settled by the parties at Step 2. Pursuant to the parties' settlement, the grievance was rescinded and the parties agreed to have the Grievant undergo a FFDE by a Board Certified physician selected in accordance with Article 13, Section 4-G (Assignment of Ill or Injured Regular Workforce Employees). Dr. Ken C. Wong, Board Certified in Internal Medicine and Pulmonary Disease, was selected by the parties to evaluate the Grievant and issue two reports regarding his condition. The first report on 10/28/94 concluded that additional testing was necessary

but "hopefully with a comprehensive treatment program, the Grievant's asthma would be under much better control in which he could return to a fully functioning and productive life". The second report dated 1/4/95 revealed that the Grievant underwent a pulmonary function test on 12/13/94 which demonstrated he had a decrease of about 35% of his total lung capacity. Dr. Wong concluded that the patient has "mild to moderate physiological impairment which can account for his inability to carry out his duty requiring moderate exercise". Dr. Wong recommended that the Grievant's duty be "restricted to more sedentary work and avoid assignments which require a lot of walking and climbing stairs". As a result of Dr. Wong's medical report of January 1995, the Agency renewed its initial effort to remove the Grievant by a Notice of Removal dated February 27, 1995. The Agency interpreted Dr. Wong's medical report, along with the reports of Dr. Ifekwunigwe and the Grievant's physician Dr. Merchey, as confirmation that he was medically incapable of performing his full duties as a letter carrier, thus unable to physically perform the City Carrier job position.

The Union maintains that the Grievant is physically able to perform the job functions of a City Carrier within reasonable accommodations as suggested by Dr. Wong and concurred in a subsequent letter submitted to the Postal Service by the Grievant's physician Dr. Merchey. After a review of Dr. Wong's pulmonary test results, Dr. Merchey submitted a letter to the Union dated 5/3/95, in which he concludes that "Mr. Calderon may work eight hours per day, stand eight hours per day, but should be limited to no more than eight hours of outdoor work. He further states that this outdoor work should be limited to business and apartment delivery where there is minimal aerobic walking and exposure to vegetation. He has no lifting restrictions. He may perform indoor work for eight hours, if needed. This patient may stand up to eight hours a day while working."

The Agency viewed Dr. Merchey's letter with certain askance, since it was totally inconsistent

with his original diagnoses and medical restrictions for the Grievant during approximately two years of medical treatment. Former Postmaster Dale Herbert testified that Grievant was accommodated with temporary light duty assignments for approximately two (2) years. There was simply no permanent light duty work available for the Grievant at the North Hollywood station. As such, the Agency had no choice but to remove him for inability to perform the job. The Union now appeals the Grievant's removal to arbitration for final and binding resolution.

## VI.

### POSITION OF THE PARTIES

#### Employer's Position:

The Postal Service is not unsympathetic towards ill or injured employees and have made every attempt to accommodate employees and afford them time to recover sufficiently and to return to work as a fully productive employee. But there comes a point when the Agency has to draw the line. At no time did the Postal Service limit the amount of time that the Grievant remained on, or could have remained on light duty. The whole purpose of the fitness-for-duty examinations was to determine if the Grievant could continue performing the full duties of his carrier position. When it was determined that he could not, the Postal Service then gave the Grievant his options which included disability retirement, in-service transfer to another post office, craft assignments, or resignation. There is nothing in the contract precluding Management from removing someone who is physically unable to perform the full duties of their position. Nor is there anything in the contract calling for Management to restructure a job in order to accommodate someone with permanent light duty.

The contract is clear. There is no postal requirement to permanently accommodate an

employee requesting light duty, where it is unavailable, which in essence is what the Union is arguing. The National Agreement, at Article 13, Section 2.C, states that the installation heads "shall show the greatest consideration" to those employees requesting permanent reassignment to a light duty position. There are numerous arbitrators supporting Management's actions and position, including Arbitrators Ordman, Case No. E7C-2N-D 17294 and Foster, Case No. S1T-3T-D 869, holding: "On settled authority, there is nothing in the National Agreement which prohibits the removal of an employee who suffers an injury and is unable to perform his or her job. There is even less justification to challenge that removal where, as here, the injury is not job related." Further, "the principle is well established that Management may justify removal on the ground of physical disability of such a kind and agree as to make the employee's continued employment in any job which he or she is qualified to fill and which is available to be assigned to him unduly hazardous to his health or detrimental to otrs." With respect to the Union's argument that the Grievant should be assigned to light duty or trained for another job, it should first be noted that the Grievant did not meet the requirements of Article 13, Section 2B.1, for permanent reassignment. Moreover, the Employer is under no expressed or implied obligation to create a job that Grievant could perform or train him for an alternative position. See Case No. S1T-3T-D 869.

The Postal Service has accommodated the Grievant for nearly two years with light duty in the hope that he would return to his full duties as a City Carrier. However, that did not occur and Management had no alternative but to remove him due to physical inability to perform his duties. Therefore, the Grievant 's removal was for just cause.

Union's Position:

The Postal Service has unilaterally altered the Grievant's terms and conditions of employment by requiring the Grievant to choose from three unacceptable choices or face removal. When the Agency issued the Grievant the options contained in his Notice of Removal, they placed him in a Catch 22 situation. The Grievant was placed on notice that he had three options open to him. He could opt for reassignment to another craft only in another city and not at the North Hollywood Post Office. He could opt for resignation from the post office. He could also opt for disability retirement. The options given to him stripped the Grievant of all rights afforded under the Collective Bargaining Agreement pursuant to Articles 13 and 2, which protects him under the National Rehabilitation Act. The Postal Service, in essence, has placed the Grievant in a no-win situation. The Service has placed him in a limited-option situation which could only result in either the Grievant working outside of the carrier craft, contrary to his wishes, or giving up his rights to protest the Employer's refusal to accommodate him in his craft at North Hollywood, CA.

By virtue of the action undertaken by the Postal Service, the Grievant has been placed in a unilateral condition of employment. Such a condition of employment was neither negotiated with the Union or agreed to, and violates Articles 5 and 19 of the National Agreement. In the instant case, had the Grievant opted to request an Article 13 reassignment to another installation, it would have severely hampered his right to challenge the Employer's refusal to continue to grant him temporary light duty in the carrier craft. The Grievant would also have hampered his ability to challenge the Employer's refusal to grant him a permanent light duty assignment in the letter carrier craft or another craft at the North Hollywood Post Office. He further would have severely hampered his ability to challenge the Employer's refusal to reasonably accommodate him in accordance with the

Rehabilitation Act of Congress. The Postal Service has clearly failed to demonstrate that it has reasonably accommodated the Grievant with a permanent position. As such, the Postal Service lacked just cause to issue the Grievant a Notice of Removal.

## VII.

### DECISION

There appears to be no greater area of differing contractual interpretation between the parties today than the applicability and implementation of temporary/permanent light duty assignments. By the very nature of the injuries incurred, either a pre-existing condition prior to employment or an injury incurred off the job, light duty employees occupy a unique position within the Postal Service. Unlike limited duty assignments given to postal employees who sustain on-the-job injuries while performing work-related duties, the Postal Service is not contractually obligated to do so for light duties. Although under no contractual obligation to treat these two groups of injured employees similarly, the Postal Service, nevertheless, does have the statutory responsibility to reasonably accommodate, where reasonably possible, the employee's long-term or permanent injury. Under the Rehabilitation Act of Congress (Article I, Section 2 of CBA), the Postal Service is required to make reasonable accommodations to known physical and mental limitations of qualified handicapped employees unless the accommodation would impose an undue hardship on postal operations to which handicapped employees are assigned.

The Postal Service has developed several factors to be considered when determining whether undue hardship exist to accommodate light duty assignments for employees. These are:

1. The overall size of the operation with respect to the number of employees, number of type of facilities and size of budget.

2. The type of operation, including composition and structure of the workforce; and
3. The nature and cost of accommodation.

There is no dispute between the parties that the Grievant's chronic asthma condition pre-existed prior to his employment with the Postal Service. The Union has acknowledged that the Grievant had this pre-existing condition ever since childhood in its post-hearing brief. What is disputed and vigorously argued by the Agency, is the Grievant's alleged failure to properly disclose his chronic asthmatic condition on Postal Service Medical Assessment Form 2485 during his pre-employment evaluation. According to the Agency's argument, Grievant falsified his answer to Question 13 on Form 2485 by answering "No" to a series of medical inquiries regarding asthma, recurring or chronic bronchitis and shortness of breath. "The falsified application was not detected by postal authorities until the Grievant had been removed and a grievance filed on his removal." To point out the seriousness of its charges, the Postal Service states in its post-hearing brief, "that the Grievant may be faced with a possibility of another removal, if returned to his position." The Union responds by stating that Grievant first "suffered from asthma in July 1993, several years after carrying mail ... and not at the time of his application for employment." The Union argues that "during the Grievant's pre-employment physical, he was examined by a medical official who did not detect any "asthmatic condition". According to the Union, "this again proves that the Employer's claim is in fact false".

The final resolution of the issues involving whether Grievant did or did not falsify Form 2485 or notify Management of his pre-existing asthmatic condition must await another time and forum. As both parties have previously acknowledged, Grievant's removal was based on his alleged physical inability to perform the City Carrier position and not falsification of Medical Assessment Form 2485.

The latter issue is ancillary to the proceeding currently before the Arbitrator and has no bearing on resolution of the instant case. As such, it is not properly before the Arbitrator and will not be addressed.

Notwithstanding whether Grievant initially notified the Postal Service of his pre-existing asthmatic condition at the time of employment or later during 1993, the undisputed facts as determined by Dr. Wong's medical report are as follows: 1) Grievant's pulmonary function test demonstrated a 35% decrease of total lung capacity; 2) the result is comparable with restrictive lung disease which is not the typical pattern of asthma; and 3) that Grievant's duty be restricted to more sedentary work and avoid assignments which require a lot of walking and climbing of stairs. Unfortunately, the medical findings submitted by Dr. Wong, a Board Certified Specialist selected by the parties pursuant to Article 13, Section 4-G of the National Agreement, are inconclusive. As stated by the Agency, "The doctor did not conclusively state that Grievant could not perform the duties ... neither did he conclusively state that he could." Similarly, the Union interpreted Dr. Wong's report as not precluding Grievant from delivering mail or being a letter carrier. In fact, both interpretations are correct as acknowledged by Dr. Wong himself during extensive examination at the hearing. However, the Union maintains that Dr. Wong was unable to determine Grievant's fitness for duty because he lacks specific knowledge of letter carrier duties. According to the Union's argument, Management who had the responsibility to submit relevant carrier job description information to Dr. Wong, failed to provide him with a letter carrier job description. At the hearing, Dr. Wong was asked to observe a carrier casing mail and router duties to determine whether the Grievant was restricted from these duties as interpreted by Management. Dr. Wong concluded that casing mail (standing) and router duties were within the Grievant's medical limitations. This was the

similar conclusion apparently arrived at by Grievant's physician Dr. Merchey, who after reviewing Dr. Wong's report, released Grievant for full duty with cautionary restrictions in a letter to the Union on 5/3/95.

Unfortunately, the Van Nuys medical director and North Hollywood postmaster chose to narrowly interpret Dr. Wong's medical findings and use it as a basis for the Grievant's instant removal. The Agency's action was problematic because Dr. Wong's medical report was inconclusive. There existed no operational necessity to immediately remove Grievant from his temporary light duty assignment, in the absence of clear medical findings of inability to perform the job. With the exception of determining that Grievant had a 35% decrease in lung capacity, Dr. Wong clearly states in his report that additional testing is required and necessary in order to determine the physical limitations of the Grievant to perform letter carrier duties. Dr. Wong's report recommended that further testing be performed on the Grievant to determine what his exact physical and medical limitations were. The evidence record is undisputed that the Grievant did not undergo further testing, as suggested by Dr. Wong, to determine the clear extent of any physical or medical limitation on his ability to perform the City Carrier job duties prior to being issued a Notice of Removal. Not only was North Hollywood's removal action in violation of Grievant's conditions of employment as set forth in the CBA, but it directly conflicts with Article 5 of the Agreement, which prohibits Management from engaging in certain unilateral acts, where clear procedural safeguards are established to prevent an employee's arbitrary removal.

After a careful review and analysis of the medical reports submitted by Drs. Merchey, Ifekwunigwe and Wong, the Arbitrator finds little or no basis to justify or sustain the Agency's position that the Grievant was removed due to his physical inability to perform the City Carrier job

duties. Although the Agency relies upon Dr. Wong's medical findings in its Notice of Removal that Grievant is incapable of physically performing the duties, it is a narrow interpretation analogous to putting a round peg in a square hole, merely for the purpose of justification. The evidence record does not support this position.

The actions of the Van Nuys/North Hollywood Post Office were precipitous and initiated with great haste without regard to the consequences of its action nor lack of medical document in support of its position. It would appear, based upon the number of removal notices previously issued to the Grievant, along with the available options to the Grievant contained in the instant case and Case No. F90N-4F-C 95063354, that the Agency was in clear violation of the standards set forth in Article 13, prescribing the assignment of duties for ill or injured regular workforce employees. As a ten-year employee, the Grievant was entitled to and granted available temporary light duty assignments prior to his fitness-for-duty examinations performed by Dr. Ifekwunigwe and Dr. Wong. The Agency comes forth with insufficient evidence that light duty work was no longer available for Grievant at the North Hollywood Post Office, or that his permanent status was given "careful attention by the installation head". Although the record is unclear as to whether Grievant initiated a request for permanent light duty status, what is clear is that Management unilaterally interpreted Grievant's continued temporary light duty as a request for permanent status, which it denied to justify removal. In fairness and equity to a postal employee who has been granted temporary light duty, Management is required to exercise good faith, in the absence of clear medical/physical evidence of inability to perform the job, to continue the employee in that temporary position until fully recovered or the unavailability of light duty assignments. Pursuant to the parties' Agreement as expressed in Article 13 of the National Agreement, the Postal Service is under an existing duty to exercise good faith in

determining whether or not ill or injured employees may be reassigned to temporary or permanent light duty status.

Notwithstanding the Union's argument that the Postal Service violated the Rehabilitation Act, Family Medical Leave Act and Americans with Disabilities Act in its treatment of the Grievant, it is suffice that all of these federal statutes are binding upon the Employer and benefit postal employees, as incorporated by reference in the National Agreement pursuant to Article 19 (Handbooks and Manuals). However, the Arbitrator need not for the purposes of resolving this initial dispute, determine whether the Grievant is or is not a qualified handicap under the provisions of the Rehabilitation Act, since there are other contractual violations from which to chose. Although the Grievant clearly has a medically diagnosed asthmatic condition, there is inconclusive evidence to bestow a designation of "qualified" handicapped employee based upon the fitness-for-duty reports of Dr. Wong and Dr. Ifekwunigwe as to whether his chronic condition would substantially impair one or more of the Grievant's life activities. Suffice for this proceeding is the fact that the condition can be properly managed with medication. Therefore, designation of qualified handicapped status is not necessary for resolution of the instant grievance. The evidence record clearly supports the Union's position that Management violated the Collective Bargaining Agreement when it removed the Grievant based upon inconclusive medical findings and improperly advised him of his options when, in fact, work was available at the North Hollywood Post Office for Grievant to continue his temporary light duty assignment. Therefore, for the reasons stated above, the Arbitrator finds that the Van Nuys/North Hollywood Post Office violated the Agreement by improperly issuing Grievant a Notice of Removal based upon an alleged inability to perform City Carrier job duties. The Union's grievance is sustained.

## AWARD

The Postal Service lacked just cause to remove Grievant based on inability to meet requirements of the City Carrier position. The Union's grievance is sustained with appropriate remedies contained herein.

## REMEDY

In determining an appropriate remedy, the focus is not on penalizing the Employer, but rather making the Grievant financially whole by placing him in the same position that he would have been in, absence his improper removal. However, at issue here is not only financial (back pay) compensation, but consolidated grievances (Case No. F90N-4F-C 95063354; F94N-4F-C 98000942; F94N-4F-C 96044053; and F94N-4F-C 97046874), involving issues of options, bids and health benefits, which the parties submitted in their stipulation as appropriate matters for the Arbitrator's determination. Accordingly, based upon the facts presented and entire evidence record, the Arbitrator rules as follows:

1. The Notice of Removal is hereby rescinded, including the "options" contained therein, and shall be removed from the Grievant's personnel files.
2. The Grievant is made whole for all lost wages, fringe benefits and seniority rights, including interest on all back pay, less the amounts of income, compensation, or benefits received during the period of removal.
3. The Grievant's health care benefits coverage is hereby restored retroactively to the date upon which the Grievant was improperly removed.
4. The Grievant is reinstated to his City Carrier position and granted permanent light duty assignment consistent with the cautionary medical limitations of Dr. Morton Merchey as contained in his letter of 5/3/95.
5. The Employer is directed to create a full-time light duty assignment to accommodate the Grievant's limitations within the Letter Carrier Craft or another craft at the North Hollywood Post Office.

6. The Arbitrator's ruling constitute a final and binding resolution of all stipulated grievances presented.

IT IS SO ORDERED.

Dated: June 25, 1998

Claude D. Ames  
CLAUDE D. AMES, Arbitrator

# J. 3 Cover

## PRE-ARBITRATION SETTLEMENT

Dale P. Hart  
National Business Agent, NALC  
3636 Westminster, Suite "A"  
Santa Ana, CA 92703

March 11, 1996

RE: F90N-4F-C-95063354  
N. HOLLYWOOD  
CALDERON

Dear Mr. Hart:

This is to confirm the pre-arbitration discussions on grievance # F90N-4F-C-95063354, concerning the union's objection to the February 22, 1995, letter from the Postmaster, describing the options of resigning, seeking a transfer or applying for a disability retirement.

The undersigned mutually agree to the following pre-arbitration settlement of the above-captioned case:

All facts, arguments and documentation in the instant case are hereby carried forward into the record of the grievance pertaining to the removal of the grievant. These facts and arguments shall be entertained by the Arbitrator in the presentation of case #F90N-4F-D-95063343.

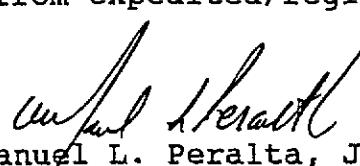
This agreement constitutes a full and final settlement of all issues relating to the above referenced grievance.

A copy of this agreement may be submitted to any applicable agency or proceeding to prove the settlement of this grievance, but it cannot be cited by the parties or others as a precedent in other cases.

Please sign in the space provided keep a copy for your records and return the original to this office to acknowledge agreement with the settlement defined above and thereby withdrawing grievance number F90N-4F-C-95063354 from expedited/regional arbitration.

  
Ray Aguillard  
Labor Relations Specialist  
USPS Pacific Area

Date: 3/18/96

  
Manuel L. Peralta, Jr.  
Regional Administrative  
Assistant, NALC

3/11/96

cc: Pacific Area Manager, Labor Relations  
District Manager Customer Services  
Postmaster:  
Labor Relations Executive  
Regional Union Official  
Date distributed: MAR 21 1996

J.9

PRE-ARBITRATION SETTLEMENT

Dale P. Hart  
National Business Agent, NALC  
3636 Westminster, Suite "A"  
Santa Ana, CA 92703

RE: F94N-4F-D-98000942  
(7TV95CLCA/GTS#44987)  
F94N-4F-C-96044053  
(5TV216CLCA/GTS#34390)  
NORTH HOLLYWOOD  
GUS CALDERON

Dear Mr. Hart:

This is to confirm the pre-arbitration discussions on grievance #F94N-4F-D-98000942 & F94N-4F-C-96044053, concerning the grievant's attempt to bid while his removal grievance is pending.

The undersigned mutually agree to the following pre-arbitration settlement of the above-captioned case:

In accordance with the October 6, 1987, Step 4 decision in case #H7N-1C-20699 (MRS#947), a letter carrier is entitled to bid while serving a suspension or while their removal grievance is pending in the grievance-arbitration procedure.

The grievant, in the above referenced cases has his removal grievance (F90N-4F-D-95063343) pending arbitration. The arguments regarding the grievant's attempt to bid and the refusal to accept the bid are referenced in the removal grievance and shall be argued there.

Regional case #F94N-4F-D-98000942 & F94N-4F-C-96044053, are therefore closed with the understanding that the arguments relating to them are to be made in the removal grievance.

This agreement constitutes a full and final settlement of all issues relating to the above referenced grievance.

Please sign in the space provided keep a copy for your records and return the original to this office to acknowledge agreement with the settlement defined above and thereby withdrawing grievance number #F94N-4F-D-98000942 & F94N-4F-C-96044053, expedited/regional arbitration.



Ray Aguillard  
Labor Relations Specialist  
USPS Pacific Area



Manuel L. Peralta, Jr.  
Regional Administrative  
Assistant, NALC

Date: 02/06/98

21/6/98

cc: Pacific Area Manager, Labor Relations  
District Manager Customer Services  
Postmaster:  
Labor Relations Executive  
Regional Union Official  
Date distributed: / /



M-00947

UNITED STATES POSTAL SERVICE  
Labor Relations Department  
475 L'Enfant Plaza, SW  
Washington, DC 20260-4100

Mr. Vincent R. Sombrotto  
President  
National Association of Letter  
Carriers, AFL-CIO  
100 Indiana Avenue, N.W.  
Washington, DC 20001-2197

Re: Class Action  
Red Bank, NJ 07701  
H7N-1N-C 20699

Dear Mr. Sombrotto:

Recently, a meeting was held with the NALC Director of City Delivery, Brian Farris, to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether management violated the National Agreement by refusing to send bidding notices to employees in non-pay status.

After reviewing this matter, we mutually agreed that no national interpretive issue is fairly presented in this case. We agreed that this issue falls squarely within the purview of Article 41.1.B.1., of the National Agreement. We further agreed:

- 1) Article 41, Section 1.B.1 of the National Agreement applies to letter carriers who have been suspended or removed. Notices inviting bids shall be sent to such letter carriers provided they submit request per that provision.
- 2) During the pendency of the grievance of a letter carrier who has been suspended or removed, management shall accept and honor the bid of such letter carrier for letter carrier craft duty assignments, and to such other assignments to which a letter carrier is entitled to bid.

Accordingly, we agreed to remand this case to the parties at Step 3 for application of the above agreement.

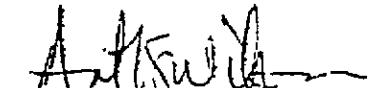
VINCENT R. SOMBROTTA

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Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,



Arthur S. Wilkinson  
Grievance & Arbitration  
Division



Vincent R. Sombrotto  
President  
National Association of Letter  
Carriers, AFL-CIO

10-6-87

DATE

RECEIVED

SEP 20 1959

CONTRACT ADMINISTRATION UNIT  
NALC, WASHINGTON, D.C.