

28705

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	GRIEVANT: Class Action
between)	POST OFFICE: Colorado Springs, CO
UNITED STATES POST OFFICE)	USPS Case No.: E06N-4E C 10001623
and)	NALC Case No.: SC-9-1352
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO)	

BEFORE: Jonathan S. Monat, PhD, Arbitrator

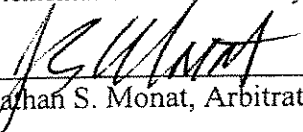
APR 05 2010

APPEARANCES:

For the U. S. Postal Service:	Shirley T. Pointer
For the Union:	Lyn Liberty
Place of Hearing:	Colorado Springs P & DC
Date of Hearing:	February 5, 2010
Date of Award:	April 1, 2010
Relevant Contract Provision:	Article 7
Contract Year:	2003-2006
Type of Grievance:	Contract

Award Summary:

Management violated the NA when it scheduled Bob Dibene outside his craft for one hour of casing mail on auxiliary route 1116 at Security Station. The remedy shall be as stated on the last page of this award. The Arbitrator retains jurisdiction for ninety (90) days to assist in the implementation of the remedy, if necessary.



Jonathan S. Monat, Arbitrator

STIPULATIONS AND ISSUE

The parties stipulated that the matter was properly before the Arbitrator for a final and binding decision under the National Agreement and JCAM (NA)(J1). Moving papers (J2)(1-331) were admitted. All evidence and testimony were admitted under oath duly administered by the Arbitrator. The parties agreed to submit post-hearing briefs postmarked February 19, 2010, with the hearing closed upon receipt on February 22, 2010.

The advocates stipulated the issue before the Arbitrator is that phrased by the Step B Team (J2:1)

“Did the Postal Service violate the National Agreement when carrier craft work was assigned to a clerk on limited duty? If so, what is the remedy?”

BACKGROUND

The Grievant has worked for the Postal Service for 26 years. He suffered work-related injuries while working as a letter carrier in 1998 and 2004 at Security Station. He underwent knee replacement for the first injury in 2001. His medical restrictions allowed him to work eight (8) hours per day, five days per week in the clerk craft until August 18, 2009, when the Grievant was restricted by his physician to four hours per day without changing his physical restrictions. On September 30, 2009, the Grievant received an “Offer of Modified Assignment” giving him one hour of casing on auxiliary route 1116. No clerk’s duties were identified in this offer. No other non-bid position work was found for the Grievant that was not actually part of managers and supervisors responsibilities according to the Postal Service.

The parties at the National Level signed an agreement in which it was agreed that the NRP did not change or redefine the Postal Service’s obligation to provide limited or rehabilitation assignments for injured employees, nor did it amend the ELM 546. It was agreed that the Postal Service had not developed new criteria for assigning limited duty. The requirements of ELM 546 and C.F.R., Part 353, will continue to be followed. The grievance settlement permitted the NRP assessment process to move forward. If work is found at an early level of the pecking order, the obligation was satisfied.

However, if there was a shortage of hours at the Grievant's facility, Management remained obligated to follow the pecking order on a daily basis to find enough hours to reach the number of hours to fulfill the employee's hours limitation.

PERTINENT 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;

ELM 546.14: Disability Partially Overcome

546.141 General

The procedures for current employees cover both limited duty and rehabilitation assignments. Limited duty assignments are provided to employees during the recovery process when the effects of the injury are considered temporary. A rehabilitation assignment is provided when the effects of the injury are considered permanent and/or the employee has reached maximum medical improvement.

546.142 Obligation

(This extended section specifies the pecking order which Management must follow when scheduling limited duty or rehabilitation employees.

POSITION OF THE NALC

Management unilaterally changed a past practice of providing limited duty work for an employee in his own craft when it was demonstrated that the work still exists. Management violated the "pecking order" set in ELM 546. The Postal Service is required to make every effort to minimize any adverse or disruptive impact on the employee. It must follow the pecking order as set forth in ELM 546.142. The

supervisor testified he was instructed by the NRP team to take the clerk work away from the Grievant and give him one hour of carrier craft work. Yet clerk work still exists today.

Management failed to prove that four hours of viable work does not exist within the clerk craft for the Grievant. According to ODL carrier Horne testified that carriers are waiting for mail and parcels while the Grievant was casing route 1116. There is more than enough clerk craft work which would ease the burden on clerks. Supervisor Schloemer testified that there was work for the Grievant until the NRP process took it away even though he performed that work for eight years.

The Grievant, a limited duty employee, was not accommodated in his craft before forcing him to work in the carrier craft. Both the Grievant and Horne testified to the failure to provide a platform and other accommodations to enable him to do clerk's work. Also, he was denied scheme training to work other areas of the clerk craft. Another employee, Lowery, has been accommodated for three years and is providing some accommodations the Grievant requested.

Management has unilaterally changed the long-standing practice of providing work in the clerk craft for limited duty employees based on the decision of an NRP representative. By taking clerk work away from the Grievant and assigning him to the carrier craft, work was taken away from ODL carriers in direct violation of the NA. There are Step 4 decisions in the case file that tell Management that the NRP does not change the pecking order of ELM 546. Undue harm has been caused to both carrier and clerk crafts.

Citing several arbitration decisions, the NALC argues adequate work is work that is suitable or sufficient to occupy an employee's work day. This work "may not be the most efficient, economical or even the most practical. It is enough that the work is suitable, satisfactory or sufficient to occupy the employees' work day." The work performed by the Grievant in this case was and is necessary to productivity in the unit as were the "little jobs" Management had him perform. A rehabilitation assignment was not a residual vacancy in the clerk craft, but a "position uniquely created to fit those restrictions" (Das)

provided for in ELM 546.222. Thus, the Service is in conflict with itself when it argues that NRP instructed that clerk work be taken from the Grievant because it is "make work" yet argued before Arbitrator Das that it has a Federal obligation to create a duty assignment for a limited duty employee.

The Union requests a "cease and desist" order and that the Grievant immediately be restored to his limited duty assignment in the clerk craft. The hours that the Grievant work in the carrier craft should be awarded to the ODL carriers at the overtime rate. Any employee demonstrating harm from working unwanted overtime should be compensated, as well.

POSITION OF THE USPS

The Postal argued that it complied with the relevant provisions of the ELM, 546.142. The pecking order was meticulously followed, ending at Step 2 of the NRP process. The Union failed to support its contention that adequate work was available. Management data showed that no adequate clerk duties were available to the Grievant and that there was adequate staffing in the box section, distribution and at the window. Some days the window was overstaffed while the manual distribution was done early. The Grievant's restrictions prevented him from performing those duties without accommodation. Work casing mail on an auxiliary route was found in his former craft that he could perform with no additional training and, with a platform, he could case without violating his medical restrictions.

The Union failed to establish that the previous duties remained. However, Management witnesses testified that the Grievant was performing "make work" on tasks that were given to him so he had something to do. The Union failed to show that Management did not follow the pecking order or that clerk work was consistently available within the Grievant's prescribed medical limitations. According to Arbitrator Levak, "adequate work" means "productive work," echoed by Arbitrator Snow who wrote that "the ELM does not require management to make work for an individual."

Citing Arbitrator Levak (F94N-4F-C 97100679), Management's Article 3 rights are significantly

restrained in assigning limited duty employees because of ELM 546.141 because it is required to make every effort to find work that is adequate, suitable and sufficient, given the e-mployee's medically-defined work limitations. However, the pecking order is rarely applied in a vacuum as the number of limited duty employees with various restrictions across crafts change. Thus, Management must "continuously balance the needs of all its light and limited duty employees against the production needs of the installation." In the instant case, testimony and documentation were provided that Management did follow the pecking order and found work for the Grievant in another craft in his facility.

Management fulfilled its burden of production by providing ample evidence to the Union within the Step B filing that the pecking order was followed. The failed to provide persuasive evidence that Management failed to follow the pecking order. Management does not have to prove a negative. Once Management demonstrated compliance with 546.142, the burden shifts to the Union to show work was available within the Grievant's restrictions.

Returning to the definition of "adequate work," Management argued, quoting Arbitrator Reeves, "adequate describes work which needs not be the most economical, or even the most practical. It is more than filling up a work day; it means adequately meeting the minimum job responsibilities required of a particular position." Having fully complied with the pecking order in the instant case, there can be no violation of the contract. The District NRP team reviewed the decision of the manager in finding work within the facility, but not within his craft, and determined that the pecking order had been followed.

Management claims the remedy requested by the Union is inappropriate since the Postal Service met its obligation under section 546.142 and found that there was no limited duty assignment within the Grievant's medical restrictions and craft. When a full four-hours of work could not be found, the Grievant was provided with the appropriate forms to pursue OWCP compensation. The grievance and the remedy should be denied.

ARBITRATOR'S FINDINGS AND OPINION

This grievance was filed as a class action rather than as an individual grievance on behalf of Bob Dibene. The Union objected to a member of the clerk craft being assigned to perform letter carrier craft work, allegedly taking hours away from letter carriers. The Grievant is working outside his craft because the National Reassessment Process (NRP) recommended that the duties he was performing in his limited duty assignment could be absorbed in eight-hour positions and/or be returned to the management positions from which they were delegated.

Once it was determined that there was no clerks work for Mr. Dibene, Management was required to follow the pecking order to find work for him. According to Management, the only work available for Dibene within his medical restrictions was in the letter carrier craft. In order to show a violation of the NA, the Union must prove that Management failed to follow the pecking order found in ELM 546.141. Apparently it is for these reasons that the NALC decided to take up Mr. Dibene's case so that he may return to the clerk craft and the casing work given to him can return to carriers.

The parties agreed at the National Level that the NRP did not change or redefine the Postal Service's obligation to provide limited duty or rehab work assignments, not did it amend ELM 546. Nor had the Postal Service developed new criteria for assigning limited duty. If sufficient work is found at the early stages of the pecking order, Management's obligation would be satisfied. However, if there was a shortage of hours at the employee's facility, the remainder of the pecking order must be followed to find enough hours to satisfy the employee's hours limitation.

The undisputed facts before the Arbitrator are that the Grievant, a 26-year Postal clerk, suffered on-the-job injuries in 1998 and 2004 with knee replacement surgery in 2001. Until August 18, 2009, the Grievant worked in a Modified Assignment in which he worked eight (8) hours a day, five (5) a week. At that time his physical restriction remained essentially the same but his physician reduced the number of hours he could work to four (4) hours per day, five days per week. On September 30, 2009, the Grievant

was given an "Offer of Modified Assignment" for one hour of casing mail on route 1116; however, no clerk work was included in this modified assignment. These facts suffice for two of the three elements that the Union must establish to meet the *prima facie* burden of proof.

The third element of the *prima facie* burden for the Union is to show that Management failed to follow the pecking order set forth in ELM 546.141. It is undisputed the Grievant had been performing all of the duties of his modified assignments within his medical restrictions in the clerk craft until September 30, 2009, when he was assigned to one hour of casing mail on auxiliary route 1116. He had been performing these clerk duties for eight years.

Witnesses for the Union, Horne, Lowery (APWU) and Collier, testified that the clerks work was still available. This work should have been provided to Dibene had Management followed the pecking order and had it provided him with accommodations similar to that received by others so situated. The Union argued that available clerks work included parcels, flats, letters accountable mail and second notices. Lowery, an APWU officer, testified that "there was no such as if it's a bid position, (Bob) can't do it." He should have been given clerk work first rather than carrier work. The Union submitted clock ring data to show a significant amount of overtime in the periods following September 30th (J2:13-39). This evidence and testimony is sufficient for the Union to have met its threshold burden of proof.

The burden shifts to Management to show that it made a good faith effort to place the employee at each level of the pecking order above the level the employee was ultimately placed (Arbitrator Snow as quoted by Arbitrator Levak). Based upon the unique facts and evidence in this case, this Arbitrator finds the Postal Service did not make a good faith effort to follow the pecking order. The ELM 546.141 states that Management "must make every effort toward assigning employees to limited duty consistent with the employee's medically defined work limitation tolerance" and in doing so "must minimize any adverse or disruptive impact on the employee." As this Arbitrator once wrote, "This is not a trivial obligation."

The Arbitrator finds that in this case every effort was not made to find Dibene sufficient hours to fill his physician-mandated four-hour day. Manager Travis Butler testified that he was able to find only one hour of out-of-craft work for Dibene at Security Station, a small office. According to his testimony and evidence in the form of NRP Phase 2 forms (49-78), Butler contacted only two other facilities (GMF and Cimarron when he was unable to find clerks work inside Security Station. According to the data in the record, the Grievant lived within minutes of Security. GMF is only about 7 minutes from his home and Cimarron is about 10 minutes.*¹ Mr. Dibene's commute drive time is limited to 30 minutes. There are several other facilities well within the Grievant's commute limitations that could have been checked for available, adequate clerks work (for example, Fort Carson, Stratton Meadows, Deerfield Hills among others). A good-faith effort requires contacting other facilities within Dibene's commuting limitations. Every effort was not made to find Dibene work through the pecking order.

The Formal A Management Representative and Manager Customer Service Support Mitchell White testified to and wrote in Management's Formal A contentions that "there was no "adequate/essential" work available at the Security Station during the time frame he was casing a route. At this point, application of ELM 546 during the availability of work, 8-9 am, was satisfied" (J2:5b). He states that there was no "necessary work" available" in the box, window or distribution sections at Security (J2:5a). The Arbitrator disagrees for several reasons.

Management's obligation was to follow the pecking order to find four hours of adequate work for Mr. Dibene. The record shows Management found only one hour of work outside the employee's craft at Security Station, contacted two other stations out of many possible stations and claimed the pecking order had been followed. The pecking order requires that Management make every effort to find work within the employee's limitations. Management's limited external searches do not meet this test. Rather

¹ The Arbitrator took Dibene's address and used Google maps to find the distances and driving times to Security, GMF and Cimarron. All four points are next to COS airport and within 5 miles or so of each other.

than follow the pecking to its logical extension, Management substituted criteria and findings from the NRP. This is a clear violation of the National Settlement (J2:102-103).

Second, Mr. White redefined and reinterpreted ELM 546 in violation of the National Settlement between the parties wherein the parties agreed that the Postal Service had not developed new criteria for assigning limited duty (J2:102-103). Mr. White used the terms "essential work," "tangible work" and "necessary work," neither of which can be found in the ELM although "tangible work" is found in HBK EL 505. These terms are the touchstone for management in all the NRP cases before this Arbitrator. The ELM, Sections 546.141 and 546.142, do not use these terms to define Management's obligations toward limited duty and rehab employees. Management is obligated to find adequate work within the employees' medical limitations. Essentially, as Arbitrator Levak stated, "adequate work" and "tangible work" mean "productive work," not "make work." Non-productive work is make work.

It is well-established by a line of arbitration decisions referenced by the parties that Management is not obligated to provide "make-work" assignments. Some arbitrators have used the term "productive work;" that is, it must be work based upon the production needs of the facilities. While Management may prioritize the work, the ELM 546 does not allow Management to exclude low priority work that meets production needs from consideration for limited duty and rehab assignments. The work must be "adequate" or "tangible," not high-priority. Neither Arbitrators Levak, Snow (National) or Lange, who wrote definitive decisions on ELM 546 used the terms "essential work" or "necessary work."

Management has further modified the criteria for establishing modified assignments by claiming that the work cannot come from bid assignments. According to Mr. White, any work not found in a bid position is make work. There is simply no language in ELM 546 that places such a restriction on limited duty and rehab assignments. To the contrary, such assignments are often cobbled together from elements of many positions and available work, depending on the facilities and their production needs. To exclude elements of existing bid positions is not the stated intent of ELM 546. Tasks primarily integrated and

delegated from management positions is not make work irrespective of the funding source. If it is work incidental to the production needs of the facilities, it is tangible work that Management has the authority to delegate such tasks under Article 3. It is not make work.

Management claimed that it had met its obligation under ELM 546 when it found the Grievant an hour of casing work outside his craft at Security Station. A perfunctory effort was made by Manager Butler to find work outside Security Station. Article 7 of the NA allows broad discretion to fill out full-time and part-time schedules including, in limited circumstances, cross-craft assignment. Management failed to meet its good faith obligation to make every effort to fill out the Grievant's four hour schedule. The least disruptive schedule may not necessarily be the schedule that limits the employee to his home office as claimed by Formal Step A Designee White (J2:5e). Management provided a fair amount of data from Security Station to show that work was not available. This evidence is not compelling in light of Management's failure to make every effort to find work for the Grievant through the pecking order.

It must be noted that Management is under no obligation to train an employee in order to accommodate his medical restrictions (HBK EL-505), (J2:163). EL-505 is clear that assignments across craft lines cannot be made to the detriment of PTFs. But the rehab employee is entitled to at least the number of work hours earned at the time of the injury, or by extension, at the time of his modified assignment. In this case, Mr. Dibene should be receiving four hours of work. Accommodation in the form of a platform for distributing mail within his limitations was apparently withheld from the Grievant, an accommodation given to other employees with similar limitations. Providing such an accommodation would not be an undue hardship. It appears that such an accommodation exists.

Thus, after careful consideration of the entire record including the Moving Papers, other arbitration decisions, testimony of witnesses, arguments of the parties and appropriate handbooks and manuals, the Arbitrator concludes that Management violated the NA when it scheduled Bob Dibene outside his craft for one hour of casing mail on auxiliary route 1116 at Security Station. This conclusion is based

upon the unique facts of this case, the production needs and operating necessities of the facilities in Colorado Springs, as well as the extreme economic conditions faced by the Postal Service.

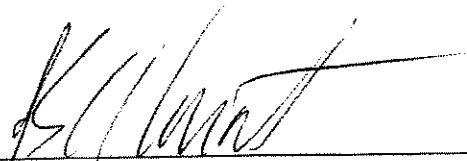
Remedy

The Postal Service failed to follow the pecking order when it assigned Bob Dibene to casing mail for one hour a day. The Grievant shall be restored to the four hour Modified Work Assignment in the clerk craft that he held prior to September 30, 2009. He shall be made whole for the hours of clerks work lost at his appropriate rate of pay, as well as for benefits including restoration of annual leave, sick leave and LWOP. The Union's request for the awarding of overtime pay to the ODL car-riers is granted consistent with Article 7.2 of the NA, to be determined by the parties. The Union's request for a monetary award for any clerk who could prove harm for having worked unwanted overtime is denied as it would be akin to unjust enrichment or double payment. Management is ordered to cease and desist violating the ELM Section 546 pecking order. It is further ordered to cease and desist substi-tuting the NRP criteria for the criteria specified in ELM 546.

AWARD

Management violated the NA when it scheduled Bob Dibene outside his craft for one hour of casing mail on auxiliary route 1116 at Security Station. The remedy shall be as stated in the last paragraph above. The Arbitrator retains jurisdiction for ninety (90) days to assist in the implementation of the remedy, if necessary.

April 1, 2010


Jonathan S. Monat, Ph.D.
Arbitrator