C-30147

REGULAR ARBITRATION PANEL

| | | | |
|---|---|---|---|
| In the Matter of Arbitration<br>between<br>UNITED STATES POSTAL SERVICE<br>and<br>NATIONAL ASSOCIATION OF LETTER CARRIERS | | Grievant: | Donna Gloster |
| | | Post Office: | Denver, CO |
| | | USPS Case No: | E06N-4E-C 11291454 |
| | | NALC Case No: | 05-27-11-CH-JA-A |

BEFORE: Jonathan S. Monat, Ph.D., Arbitrator

For the U.S. Postal Service: Nels Truelson

For the Union: Jeffrey Fultz

Place of Hearing: Denver PD&C

Date of Hearing: December 14, 2011

Date of Award: March 2, 2012

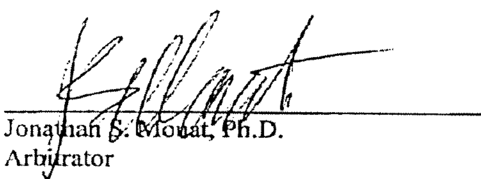
Relevant Contract Provision: Article 13

Contract Year: 2006-2011

Type of Grievance: Contract

**Award Summary:**

The grievance is sustained. The remedy shall be as stated on page 13 of this decision.



Jonathan S. Monat, Ph.D.
Arbitrator

RECEIVED

MAR 12 2012

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

## INTRODUCTION

A hearing was held at the Denver PD&C Labor Relations Conference Room on December 14, 2011. The parties agreed that the matter was properly before the Arbitrator for a final and binding decision under the terms of the National Agreement (NA)(J1). All evidence and testimony were admitted under oath duly administered by the Arbitrator. The hearing proceeded in an orderly manner. The advocates had a full and fair opportunity to present their cases, examine and cross-examine witnesses, and make oral and written arguments. Each party presented two witnesses. The Union called Mike Sullivan, Formal A Representative and the Grievant, Donna Gloster. The Postal Service called Christopher Stroup, Station Manager, and David Sims, Formal A Representative and detailed as HR Coordinator in Denver.

The Moving Papers were admitted (J2:1-851). In lieu of oral closing arguments, the advocates agreed to file written post-hearing briefs postmarked no later than a January 27, 2012. The post-hearing briefs were received by the Arbitrator on January 31, 2012, at which time the hearing was closed. The Arbitrator will not reproduce entire sections of the NA; rather pertinent sections will be quoted as essential and appropriate to the discussion.

The hearing was transcribed at the request of the Postal Service with proper notice to and no objection. The Union did not want a copy of the transcript and nor would it pay the cost of a copy of the transcript. An objection was raised to the recording of the hearing by a transcriptionist by the Union advocate. Also, he objected to a copy being sent to the Arbitrator on the grounds of ex-parte communication. After some discussion, the Union agreed to the distribution of the transcript provided it received a copy at no cost when the post-hearing briefs were cross-mailed by the Arbitrator.

## ISSUES

The parties were unable to agree upon the issue to be decided by the Arbitrator. The Step B Team was unable to decide upon an issue, as well. The advocates authorized the Arbitrator to frame the issue based upon the Step B Impasse Decision. The proposed issues are as follows.

The Union offered the issues as: "Did the Postal Service violate the National Agreement including ELM 546 when they withdrew limited duty work from the grievant and then failed to search for and provide limited duty work to the grievant? Is, what is the appropriate remedy?"

The Postal Service framed the issue as: "Did the Postal Service properly apply ELM 546 by conducting a daily search and finding only limited work for the Grievant? If so, what is the appropriate remedy?"

After a thorough reading of the file, the Arbitrator concludes that the Union's statement of the issue is the most germane although both statements of the issue are very similar in substance.

## BACKGROUND

The Step B Impasse Decision contains a number of undisputed facts submitted by the Formal Step A advocates (J2:2). The Grievant is a Part-Time Regular (PTR) collector working six hours a day who sustained an on-the-job injury on May 19, 1997. Management provided six hours of Limited Duty work to her. On April 2, 2010, the Grievant was issued a new Modified Job Assignment (MJA) that provided two hours of work per day. She was told the Postal Service was unable to identify any available work within her medical restriction to provide her a full days work. She was required to complete Form 3971 for the remainder of her work days. The Formal A parties agreed to "Undisputed Facts" including that the Grievant worked six hours per day. She signed the April 2, 2010, MJA under protest and filed an NRP grievance which was settled. She continued under the same job offer until May 26, 2011, when her hours were cut. Her current MJA is the same, collections, but she is not allowed to work six hours. She is allowed to work only two hours per day. The Step B Team received the grievance on August 18, 2011. The case was impassed by the Step B Team on September 1, 2011, after which the Union moved the dispute to arbitration.

POSITION OF THE NALC

The Union reviewed the pertinent history of ELM 540. In brief, prior to 1979 ELM 546.21 provided that the Service was required to restore injured workers only to "established jobs" and "productive employment" within medical limitations. However, these requirements were removed in the 1979 version of ELM 540. The basic language has not changed since 1979. The Postal Service must (not may) "make every effort" to find work consistent with 5CFR 353.301(d). This included a variety of craft and cross-craft assignments that included parts of other assignments. The revision of ELM 540 included ELM 546.142 "pecking order" memorialized and affirmed in the JCAM. Numerous National arbitration decisions have held that jobs for injured employees need not be operationally necessary or be a preexisting duty assignment. The 1979 ELM sections have not changed in 30 years of application.

Furthermore, the burden of proof is a shifting as discussed in the Union's review of a series of National and Regional arbitration decisions.[1] The Union must show that the grievant has an accepted claim and appropriate medical restrictions to allow the employee to work. The Postal Service must then show that it followed the pecking order (ELM 546.142) with documented evidence that it was unable to find work within 50 miles of the employee's home facility. The Service may allege there is no work available but a "bare assertion" is insufficient. If sufficient, the burden shifts back to the Union to show that work was available. In both cases, the evidence must be substantiated. The NRP is not intended to conflict with ELM 546, the language "necessary work" is not relevant. The Postal Service must follow ELM 546 by making every effort to assign the grievant to limited duty within medical restrictions (ELM 546.141) and following the pecking order.

The Grievant in the instant case had an accepted claim and was given restrictions allowing her to work a six-hour day. With the burden of proof shifted to management, it failed to provide persuasive evi-

---

[1] This arbitrator will not cite these decisions. The case numbers and arguments of the Union represent the salient points from each of these cases and are cited in the Union's post-hearing brief (88 pages) which both parties possess.

dence that it tried to place the Grievant at each level of the pecking order about which she was ultimately placed. There is no documentation to show that Manager Stroup conducted a search within 50 miles of the Denver Post Office. PAW sheets are included only up to May 28, 2011. There are no PAW sheets in the file for any days after May 28th. There is no documentation that shows management actually made the searches. The lack of documentation means that management has failed in meeting its burden of proof. It made claims of no work available even though it failed to complete the pecking order.

The Union objects to several documents and arguments by the Postal Service as new evidence. Included is an argument made for the first time at arbitration that the Union withdrew a prior case over the Grievant's limited duty job assignment on April 2, 2010. Second, the Moving Papers contained no documents about Mr. Stroup's search efforts. USPS Formal A representative David Sims confirmed this fact in his testimony. The Agency failed to address the perceived "severe restrictions" of the Grievant or its Formal A argument that cross-craft work was a contractual violation. The Grievant's restrictions had not worsened. Furthermore, management unilaterally classified work as non-productive or make work including work the Grievant could have performed within her restrictions within her facility.

This case is about whether or not the requirements of ELM 546 have been met by the Agency. The parties agreed at the National Level have agreed that the legal obligations of ELM 546.142 have not changed since 1979 (M-1706). The procedure for assigning injured employees is well-established. The obligation is ongoing and requires that the Agency make every effort to find work on a continuous basis. The positions need not be bid positions but available work, not make work. The Grievant was found two hours of work at her home office so management stopped looking. In doing so, management failed to make every effort in applying the pecking order to find available work for the Grievant. The Union has shown the work still exists and is being performed by other employees. Agency witness Sims confirmed all the undisputed facts in Union Formal A representative Sullivan's testimony.

The USPS violated the Grievant's rights and protections with the EL-307, a manual which gives

employees the same rights as other handicapped individuals under the Rehabilitation Action of 1973 (see 5CFR 353.01). Under the Rehabilitation Act, the Postal Service is required to modify jobs to allow a qualified person with a disability to perform the essential functions of a job. The NA, Article 21.4 provides for reasonable accommodation which falls within EL-307. A rehab assignment would not have existed, but for legal, contractual and regulatory obligation to find work for the injured employee. Management failed to address the Grievant's restrictions in the alleged search for work. Yet the Service admitted it had legal and contrac-tual obligations to make every effort to find injured employees work. It recognized the NRP did not change its obligation to limited duty employees and that it did not develop new criteria for assigning limited duty work. In order to reach no work available, the Service changed the criteria, eliminating duties previously offered the Grievant contrary to M-1706.

Hence, the Union concludes that the Service has unilaterally redefined a provision in the ELM that has been applied by the parties since 1979. In spite of management's claim that no work exists for the Grievant in Denver, the Union argued it established that there was adequate, tangible work she could perform. The work remains available as the Grievant and Manager Sims testified. Had the proper search been performed, it would have been known if work had been available. There is no Agency evidence to support any claim that no work was available or that it followed the pecking order. Economic factors do not give management *carte blanche* to ignore its contractual obligations to injured employees as a means to achieve greater efficiency.

The remedy requested includes making the Grievant whole for all lost wages, leaves, TSP benefits and overtime. Also, the Grievant should be restored immediately to full limited duty as she worked prior to implementation of NRP, a six-hour shift. Such a remedy is not undue enrichment and no such arguments were advanced by the Agency.

POSITION OF THE USPS

The Grievant had accepted and signed in protest a MJA for two hours a day on April 2, 2011. Capitol Station Manager Stroup had been informed that these duties were already performed by others as part of their full-time jobs, and that the additional work for her had disappeared. Manager Stroup did search elsewhere for work at Capitol and elsewhere using the Web ESP program, a search protocol that allows local management to search for available work a within 50 miles radius. Most of the work found was not within the Grievant's medical restrictions. There was limited casing work to perform beyond two hours. However, for the period April-May 2011 assisting on route inspections gave her up to a total of six hours per day. Her hours were reduced back to two hours of casing per day at the end of May 2011. The Union grieved the withdrawal of work.

The Union complained about the failure of management to use the Priority for Assignment Worksheets (PAWs). However, those sheets were no longer in use when this grievance arose. The last four items on the PAWs have been superseded by the WebESP search process. It is management's position that, when available within her medical restrictions, the Grievant was provided work. The arguments advanced by the Union throughout the grievance are essentially irrelevant since the NRP was no longer in use. Furthermore, the Grievant was never sent home without any work. The Union's arguments bear no relationship to the present case but are the standard arguments the Union has made in all NRP cases.

Management followed the pecking order properly. Manager Stroup reviewed the WebESP data daily provided WebESP sheets to show a consistent search for work. The drop in hours from 6 to 2 per day was a daily variation over time that demonstrated management's good faith efforts to actively look and find work for her. Though taking sick and annual leave in June and July 2011, her work hours remained confining to casing duties because of her severe restrictions. Her work hours increased in August and September, first on an auxiliary route and then route inspections. At times she was allowed to deliver express mail.

The grievance was impassed at Step B the WebESP sheets that were stated to be attached at Formal Step A did not get included in the grievance file sent up to Step B, a fact not noted by either party. Manager Sims testified that he included WebESP sheets in the file at Formal A. The Union steward, Mike Sullivan, did not conduct any interviews with Manager Stroup. Had this been done, he would have discovered that Mr. Stroup had found clerk work for the Grievant and did not limit the search to only carrier work. Nor did he reference any worksheets within the relevant time period. Worksheets were done for the first four steps of the pecking order but the second four steps were now covered by WebESP.

The Postal Service argued it has shown that management properly maintained an ongoing search for work for the Grievant in full conformity with ELM 546.142. Manager Stroup testified that he conducted searches every day within and outside the facility trying to find more work for the Grievant. He stated that looked for craft and clerk work inside and outside Capitol Hill. He found four extra hours of clerk work at the GMF. Over the course of the year, there were fluctuations in the Grievant's daily hours from one to seven hours.

Although not entered into evidence, Mr. Stroup testified that he conducted WebESP searches on a daily basis. PAW sheets in the file showed that he conducted daily searches for steps 1-4 daily within the facility. There was no artificial restriction based upon NRP concepts such as "necessary work," only available work. The Service's Formal A representative, David Sims, testified that Mr. Stroup did include WebESP sheets in the Formal A file and that the entire file was shared with the Union. Mr. Sims did not remember how many WebESP sheets were in the file but he did recall he gave the Union the whole file that he had. This case is not about the legitimacy of the job or the withdrawal of any work. It is about the good faith efforts by Mr. Stroup in an environment where the available hours fluctuated. There is no guarantee that work will be found every day on every search. Had the Union been permitted the WebESP sheets to be entered, the facts would have been substantiated.

ARBITRATOR'S FINDINGS AND DISCUSSION

The Arbitrator has studied the entire record including examination and cross-examination of both witnesses, Moving Papers, NA and JCAM, other arbitration decisions and the post-hearing briefs of the parties. The Union has the burden of proving a contract violation by a preponderance of the evidence. The discussion below reflects the Arbitrator's review and analysis of the complete record, and addresses the compelling reasons on which the decision is based. Although not discussed directly in this opinion in the interest of conciseness, all arguments made by the parties in oral argument and post-hearing briefs as well as the voluminous documentary evidence have been considered.

This case, like many limited duty cases, arose within the context of well-known and acknowledged economic realities facing the USPS. Mail volumes are down significantly, much of the manual clerk craft work has been replaced by technology, annual losses have been staggering and there is a continuing reduction in force. But at the same time, the Postal Service has continuing obligations specified in the NA and ELM 546 to employees who have been injured on the job with valid OWCP-accepted claims. The work environment with less work available has employees in both crafts competing for the remaining work that does exist.

Providing limited duty work assignments has become more difficult. ELM 546.141 and 546.142 as well EL-505 requires that limited duty employees be provided "adequate" and/or "tangible" work. The work available must be "adequate" or "tangible" work within an employee's medical restrictions, not "make work." The limited duty assignment shall not be made to the detriment of a full-time regular employee on a scheduled assignment or give a reassigned PTF preference over other part-time employees cult task than ever, placing greater emphasis on the search for "adequate" and/or tangible work. It is well-established by National arbitral precedent and Regional arbitration awards, including several by this arbitrator, that the obligation to "make every effort" provide limited duty employees with work is ongoing and may consist of tasks cobbled together from various sources. There is no requirement that the

work be part of a funded bid position.

For all the rhetoric argued in this case, the issue is a straight-forward matter. Did the Postal Service withdraw limited duty work from the Grievant in violation of the NA and did it fail to conduct a search for and provide limited duty work? It is not about WebESP, the computer-based program management uses now to search for work outside the home facility at steps 5-8 of the pecking order. WebESP is another way to conduct a search for available work and is still subject to the requirements and standards imposed by ELM 546.141 and 546.142, as well as subsequent National and Regional arbitration awards. It remains that a search must take place daily to find or attempt to find sufficient tangible work to fill out a LDA. The assertion that a search was conducted must be supported by substantial documentation.

The Grievant has been employed by the Postal Service since November 23, 1985. She suffered an on-the-job injury on May 19, 1997. Her claim was accepted by OWCP and she has been working in limited duty assignments since her claim was accepted. The Grievant was given a limited duty job offer (LDA) signed by her under "duress and pressure" on March 31, 2010 that provided two hours of casing (J2:28). On occasion, she was assigned additional work at the GMF. A grievance was filed to restore her six hour LDA and was resolved in the Grievant's favor. This set of facts is sufficient to sustain the Union's *prima facie* burden of proof. On May 26, 2011, the undisputed facts show that her hours were cut based upon NRP and she was not allowed to work six hours a day until she was restored to six days after a grievance settlement was resolved in the Grievant's favor.

At the end of March 2011, her manager informed the Grievant that the duties she had been given at the GMF were no longer available because they were part of various full-time jobs. The Service argued that the NRP ended in January 2011. However, there are many documents in the case file that refer specifically to NRP. For example, on one DOL Time Analysis Form (TAF) dated April 23, 2011 (J2:59), the Grievant was sent home by the NRP on at least five days and required to use sick leave. Similarly, on March 30, 2011, and April 4 & 5, 2011, the Grievant was given a partial day letter in which there is spe-

cific reference is made to NRP and the search for necessary tasks (J2:60, 64, 67). Accompanying Forms 3971 referenced NRP, as well. TAC sheets supported the use of sick leave on these days. Without referencing every instance, there are many more similar examples in the file referencing NRP within the relevant time period (including but not limited to J2:211, 212, 213). The record does show that the parties resolved the NRP-related matters in a separate grievance settlement. These matters are not part of the instant grievance but serve as useful and important background. The issues remaining covering the period late May 2010 to the date she was restored to six hours per day.

From the middle of May 2011, the Partial Day Letters deleted all references to the NRP, addressing only the requirements of ELM 5546.542 (J2:300ff). The NRP PAW sheets included in the file predated the changes made in May 2011. These sheets were dated backwards from March 3, 2011 (J2:306-702). From May 2011 the PAW sheets use the term "adequate work" as opposed to "necessary work." However, these sheets only establish that Mr. Stroup conducted a search within the station and only up to step 4. There is no evidence that he conducted a search outside the facility at steps 5-8.

There was testi-mony from HR Manager Sims that the WebESP printouts were included in the file at Formal A when he signed off on the file's contents. He does not know what happened to those pages. However, he was emphatic that they were missing through no fault of the Union. There is no listing for these documents on Branch 47's Formal Step A Attachment listing. (J2:3-4). The Step B Team made its impasse decision based upon a file that did not include the WebESP documentation. The NA, Article 15.2.(c) and (d) requires that all necessary facts and information be provided by each party at Formal Step A. It is the parties' responsibility to assure that all the necessary documentation be included in the file when it goes forward. If the material is not in the file, an attempt to introduce it at Step B or at arbitration is an attempt to bring in new evidence.

It is well-established through many arbitration decisions that "the mere assertion" that a search was made as required by ELM 546.142 is insufficient proof of said search. While Mr. Stroup gave what

appeared to be credible testimony, still it amounted to mere assertions. He was able to account for some of his assertions that he found her some work on occasion at the GMF through TAC sheets. There was nothing to show documentation of his actual search, a strict requirement going based upon a National Arbitration decision noted earlier whether the old phone method or new WebESP method was used. There is no documentation to show that the search was conducted within the 50-mile radius although there are several pages in the file which list the stations within 50 miles. There are some documents in the file entitled, "Modified Assignments Pilot - Initial Actions" lists employees by office who presumably are on an LDA. But there is no showing of what openings were by location or craft, or whether there were greater or fewer openings than LDA employees in any craft. There is no explanation or analysis of what these documents, singly or taken together, establish. Thus, the documents are given no weight in this decision.

The Grievant has been working six hours per day since September 2011. The work she performs is the same work she performed before May 27, 2011. Between May and September 2011 there is only Mr. Stoup's testimony that he was unable to find work for the Grievant. The previous mentioned Pilot documents show what appear to be limited duty work by station but do not show whether or not work was available. It only shows that some individuals were sent home on partial or full day letters. These documents do not account for a myriad of other factors such as overlapping casing opportunities, limited numbers of tours at a station (Capitol Hill has only one tour, for example) or the number of clerks on LDA who would have priority for clerk craft work over letter carriers on LDA.

Management contended that the Grievant's restrictions were so severe that she was restricted to two hours of casing and essentially sitting. However, the evidence shows that the Grievant worked with the same restrictions since 1997 until that LDA was withdrawn and replaced (J2:126-127). During that period she testified that she performed all the duties listed in LDA and is still capable of doing so. She was restored to the six hour assignment with the same limitations. As Arbitrator Axon wrote, the "Postal

Service has a heavy burden to demonstrate that it can no longer accommodate that employee." In the Axon decision, the employee had performed the work for two years. In the instant case, the Grievant had performed the work for over ten years before the LDA offer was withdrawn, thus making management's burden that much heavier that her restrictions were too severe to perform the work she had been performing for ten years. Mr Stroup did provide the Grievant other work intermittently at Capitol Hill and the GMF during the period the Grievant's 2-hour LDA was in effect. This suggests that work was available with or without reasonable accommodation as provided for in the Rehabilitation Act as incorporated in the NA, Article 21 and the ELM.

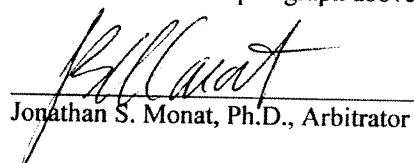
Therefore, having carefully considered the entire record except for the hearing transcript,[2] the Arbitrator finds that the Postal Service violated the National Agreement and ELM 546.142 when it withdrew limited duty work from the Grievant and then failed to search for and provide limited duty work to the grievant.

## Remedy

The Grievant shall be restored to her former six hour assignment for the period from May 27, 2011, the date the six hour LDA was withdrawn to the date she was returned to the six-hour assignment. She shall be made whole for this period of time including wages, all leaves and TSP. The parties shall meet to determine and agree upon the specific amounts involved. The Arbitrator shall retain jurisdiction for ninety (90) for the sole purpose of assisting the parties with the remedy and to assure its implementation.

## AWARD

The grievance is sustained. The remedy shall be as stated in the last paragraph above.



March 2, 2012

Jonathan S. Monat, Ph.D., Arbitrator

---

[2] The Arbitrator agreed at the hearing that he would not read the transcript in preparing findings and conclusions.