October 27, 2010

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CLERK OF THE BOARD

The Clerk of the Board
Merit System Protection Board
1615 M Street, NW.,
Washington, DC 20419

RE: ***Appellant's Petition for Review Form***
Ruby N. Turner vs. US Postal Service
Docket No.: SF-0353-10-0329-I-1

1. *Is this petition being filed on or before the decision finality date?*

   Yes.

2. *Have you been denied any procedures during your appeal to the MSPB to which you believe you were entitled? Examples of procedures include holding a hearing, submitting evidence, and calling witnesses. If so, what procedures were denied and why do you believe you were entitled to them? Did you raise this matter with the judge? Please describe how not having this procedure has harmed you.*

   Yes. I believe the procedure I was denied was the calling of witnesses. (Appellants Pre-hearing submissions dated 3/30/10) Yes, the issue was raised with the judge during our pre-conference hearing. I believe the appellant was entitled to have these witnesses testify to refute the Agency's testimony.

3. *Do you have any documents or evidence that are important to your appeal that were not filed with the judge before the record closed? If so, you should attach these documents and evidence. Explain why you did not submit these documents or evidence to the judge, and why it is important for the board to consider them. Explain why you believe that these documents or evidence should change the result in your case. (The Board will not normally consider documents or evidence which were not submitted to the judge unless you can show that the evidence did not exist before the record closed or that you could not have been reasonably expected to have found the evidence before the record closed.)*

   I am enclosing a copy of an Arbitration Settlement *(E06N-4E-C 09370199 / 555082909)* citing that the Agency is in violation of a number of laws, coded regulations and contractual provisions by unilaterally implementing the verbiage of "operationally necessary tasks/work and funded positions" which led to relieving the appellant of the duties she had been performing without incident. The Arbitration Award is dated "April 22, 2010" and was not available during

the previous MSPB Appeal process. But all arguments within the Arbitration award were raised during the hearing.

4. *Did the initial or addendum decision incorrectly decide any important facts that were presented to the judge? If so, describe what important facts were incorrectly decided or were not considered. Explain why that should change the result of your case.*

I believe the judge failed to consider the importance of ELM 546 and its verbiage ***(Appellant's Response to Acknowledgement Order, TAB #15);*** The Agency incorrectly assessed the appellant as an employee whose medical restrictions are permanent / Maximum Medical Improvement (MMI), under the NRP guidelines of the limited Duty Employees (Those with temporary medical restrictions) ***(Appellant's Response to Acknowledgement Order, TAB #6);*** The Agency offering no proof of Headquarters ever approving the OP&DC to begin assessing MMI employee's, such as the appellant, prior to/or on February 11, 2010; The Agency, specifically the San Francisco and Sacramento offering no proof of e-mails being sent to each of the Associated Offices in their district to conduct a work search; The Agency offering no proof that they sought any part-time (less than eight hours) of work for the Appellant; The Agency's repeated and continual usage of the terms "Complete Day No Work Available" and "Negative Response Required" when sending e-mails to conduct an alleged work search; The immediate responses of the managers at the Associated Offices ***(Appellant's Response to Acknowledgement Order, TAB #7);*** The fact that supervisors and mail handlers are performing clerk craft duties; After stating that they had no work for the Appellant in the section she was assigned to prior to being removed, the Agency offered modified assignments to other injured employee's in the same section ***(Appellant's Pre-hearing Submissions, Exhibit A, B, C, D1-2)***

Had the Judge considered the importance of the aforementioned and the lack of credible evidence presented by the Agency, the Appellant would have been returned to work.

5. *Did the initial or addendum decision apply the wrong law or apply the law incorrectly? If so, what law should be applied and how? For example, did the decision fail to properly consider a specific law or regulation or another case that has been decided by a court or by a Board? If you answer "Yes" your explanation should refer to the specific law, regulation, or case. Explain how application of the right laws should change the result of your case.*

Yes, 5 U S C 8151, OPM regulations and ELM 546.142. The ELM specifically states in pertinent parts that, when an employee has partially overcome the injury or disability, the Postal Service has the following obligation: "The Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance...To the extent that there is adequate work available within the employee's work limitation tolerances..." ***(Appellant's Pre-hearing Submissions)***

The Agency's unilateral language of "Operational Necessary Tasks / Work and Funded Positions" is in direct violation of these regulations as the regulations utilize the term "adequate work." Had the Agency abided by these regulations, the Appellant would still be at work.

6. *Are there any other reasons why the initial or addendum decision was wrong? If so, what are those reasons?*

Yes. The Judge failed to acknowledge that uninjured mail handler employee Barbera McCuller and clerk craft employee Maria Santos were performing work, eight hours a day, five days a week, that the Appellant is able to perform and that their performance of these duties are in violation of the Collective Bargaining Agreement (contract), article 7.

7. *What action (relief or remedy) do you want the Merit System Protection Board to order in this case? Why do you believe that you are entitled to this relief or remedy?*

Restoration, Reasonable Accommodation, Restore Leave, Not to be held accountable for any overpayments made by the USPS, OWCP and/or, EDD beginning February 11, 2010, reimbursement of all dental fees incurred beginning February 11, 2010, back pay for union dues and disability insurance.

We believe that the Appellant is entitled to this action as the Agency: Failed to assess me correctly under the guidelines of the NRP; Incorrectly utilized unilateral language when implementing NRP; Refused to allow me to continue to work in conjunction with my modified assignment when the work continued to exist after February 11, 2010; Improperly identifying sub-duties of a bid assignment as "make work"; Falsely stating that the sub-duties of scanning and PARS mail were being absorbed by the employee's with bid assignments in the respective sections; Utilizing mail handlers and supervisors to perform the work assigned to clerks; As the Appellant is on Leave Without Pay status

(LWOP), premiums/ deductions for dental coverage and union dues are no longer being paid. In as such, all dental costs must be paid out-of-pocket. Likewise, the union dues have to be paid.

Signature of Appellant's Non-Attorney Representative

10/27/10
Date

Ruby N. Turner, Appellant

[redacted]

Geraldine L. Manzo
Appellant's Non-Attorney Representative
7901 Oakport Street, Suite 2300
Oakland, California 94621
Telephone: (510) 325-0562
Fax: (510) 834-9902

ATTACHMENTS

Arbitration Award – E06N-4E-C 09370199 / 555082909 **Pages 1-36**

REGULAR ARBITRATION

In the Matter of the Arbitration	( )	
between	( )	Grievant: Craig Boyce
UNITED STATES POSTAL SERVICE	( )	Post Office: Main Post Office, Cheyenne, WY
and	( )	USPS No. E06N-4E-C 09370199
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	( )	NALC No. 555082909

BEFORE: Kathy L. Eisenmenger, J.D., Labor Arbitrator

APPEARANCES:

For the U. S. Postal Service: Shirley T. Pointer

For the Union: Coby Jones

Place of Hearing: Cheyenne, WY

Date of Hearing: February 18, 2010[1]

AWARD:

Date of Award: April 22, 2010

PANEL: Colorado/Wyoming or Arizona

Award Summary

The grievance is sustained. The Postal Service violated the National Agreement and applicable Postal Service regulations incorporated under Article 19 when the Service failed to provide Limited Duty to the Grievant, Craig Boyce.

Kathy L. Eisenmenger, J.D.

[1] The parties elected to submit post-hearing briefs. Briefs were scheduled to be postmarked no later than March 18, 2010. The Postal Service's brief was received on March 18, 2010, and the Union's brief was delivered to this Arbitrator on March 20, 2010. I closed the arbitration record on March 20, 2010.

Issues

The parties agreed to the following statement of the issue: "Did the Postal Service violate the National Agreement when it failed to provide Limited Duty to the grievant? If so, what is the appropriate remedy?"

Pertinent Contractual Provisions

Article 2
Non-Discrimination and Civil Rights

Section 1. Statement of Principle

The Employer and the Union agree that there shall be no discrimination by the Employer or the Union against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

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.

* * * *

Section 3. Grievances

Grievances arising under this Article may be filed at Formal Step A of the grievance procedure . . ..

JCAM 2.3 . . . . Article 2 also gives letter carriers the contractual right to object to and remedy alleged violations of the Rehabilitation Act through the grievance procedure. Postal Service guidelines concerning reasonable accommodation are contained in Handbook EL-307, Guidelines on Reasonable Accommodation.

* * * *

Article 3
Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

* * * *

Article 5
Prohibition of Unilateral Action

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

* * * *

Article 13
Assignment of Ill or Injured Regular Workforce Employees

JCAM, Page 13-10

***Limited Duty** work is work provided for an employee who is temporarily or permanently incapable of performing his/her normal duties as a result of a compensable illness or injury. The term limited duty work was established by Title 5 Code of Federal Regulations, Part 353 – the O.P.M. regulation implementing 5 U.S.C. 8151(b), that portion of the Federal Employees' Compensation Act (FECA) pertaining to the resumption of employment following compensable injury or illness. USPS procedures regarding limited duty are found in Part 540 of the* Employee & Labor Relations Manual (ELM). *The Office of Workers' Compensation Programs has the exclusive authority to adjudicate compensation claims and to determine the medical suitability of proposed limited duty work.*

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 Union 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.

JCAM, Section 15.1

Broad Grievance Clause. *Article 15.1 sets forth a broad definition of a grievance. . . . Other types of disputes that may be handled within the grievance procedure may include:*

- *Alleged violations of postal handbooks or manuals (see Article 19);*

* * * *

- *Disputes concerning the rights of ill or injured employees, such as . . . compliance with the provisions of ELM Section 540 and other regulations concerning OWCP claims. . . . However, decisions of the Office of Workers' Compensation Programs (OWCP) are not grievable matters. OWCP has the exclusive authority to adjudicate compensation claims, and to determine the medical suitability of proposed limited duty assignments.*

* * * *

Article 21
Benefit Plans

Section 4. Injury Compensation

Employees covered by this Agreement shall be covered by Subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

<u>Pertinent Postal Service Regulatory Provisions</u>

Employee and Labor Manual (ELM)

546 Reassignment or Reemployment of Employees Injured on Duty

* * * *

Section 546.14 Disability Partially Overcome

Section 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. Persons in permanent rehabilitation positions have the same rights to pursue promotional and advancement opportunities as other employees.

Section 546.142

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

a. *Current Employees.* When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

1. To the extent there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.

2. If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.

3. If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.

4. An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the

employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.

Handbook EL 307
Reasonable Accommodation, an Interactive Process

13 Applicable Laws

Section 131 The Rehabilitation Act

The Rehabilitation Act prohibits discrimination against qualified employees . . . with disabilities in the federal government, including the United States Postal Service.®
The Rehabilitation Act also imposes an obligation on the Postal Service to find reasonable ways to accommodate a qualified individual with a disability. In other words, the Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of a particular job, ...

* * * *

Section 542 Reassignment as a Reasonable Accommodation

Reassignment is a form of reasonable accommodation which may be required if no other accommodation will allow the employee to perform the essential functions of the position and the proposed reassignment does not violate seniority provisions of a collective bargaining agreement. Barring undue hardship, reassignment will be required as a reasonable accommodation of last resort if it is determined that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position.

Handbook EL-505
Injury Compensation

Limited Duty Assignment Guidelines
Basic Considerations

The USPS should minimize any adverse or disruptive impact on the employee in assigning limited duty. (ELM 546.141)
Consider the following when making limited duty assignments:

— Match the limited duty job as closely as possible to the regular job. Do not make the limited duty job more desirable than the employee's regular job.
— The limited duty work environment should be similar to that of the regular job. If the limited duty environment is more attractive, it may seem like a reward. If the environment is less attractive, it may seem like a punishment.
— The limited duty job should have similar pay. To put an injured employee in a job that pays more than the regular job creates a problem, especially if the employee performs well. To put an injured employee in a lower paying job (i.e., a job that requires less skill) makes poor use of resources.
— Little or no training should be required. Don't expect supervisors to train someone in a skilled assignment when they know he or she will only be there a short time.
— The assignment should result in a tangible product and should not be a "make work" job.
— The assignment should be a function where temporary additional help is useful. This will help ensure that injured employees make a useful contribution to the organization.

Statement of Facts

The Grievant, Mr. Craig Boyce, has been employed with the Postal Service since March 31, 1984. He sustained an injury on November 1, 1999, while handling mail containers and working as a City Letter Carrier. Documentation pertaining to his injury describes it as involving a sprain or strain to the ligament, muscle and/or tendon in his right elbow. The Grievant applied for injury compensation benefits with the Office of Workers Compensation Program (OWCP) administered by the U.S. Department of Labor (DoL). The OWCP accepted his claim, but the claim was closed as of April 26, 2004. The record indicates that the Grievant did not lose any work time due to his injury.

In August 2000, almost a year after the Grievant's injury, he underwent a functional capacity evaluation by a private medical concern. The examining physician found that the Grievant was unlimited in his sitting, walking, standing, twisting and operating a motor vehicle with wrist activities. The physician recommended limitations of reaching no more than two (2) to two and a half (2.5) hours per day, including above the shoulder; repetitive use of his right elbow no more than four (4) to five (5) minutes at one time and no more than fifteen (15) minutes per hour nor greater than a total of one and a half (1.5) hours per an eight (8) hour work day; pushing and pulling up to thirty (30) pounds and no more than ten (10) pound lifting with his right arm at one time. The physician also found the Grievant employable in a light duty work

category on a full time basis. Lastly, the examining physician opined that the Grievant had reached maximum medical improvement. (Joint Exhibit [JX] 2, pages [pp.] 55-57).

The record contains a number of rehabilitation assignments made for the Grievant as a result of his limitations due to his on-the-job injury. On or about April 13, 2001, the Postal Service issued the Grievant a "Reassignment Job Offer" as a Modified Letter Carrier with work hours from 1:00 a.m. to 9:30 a.m. The reassignment offer included the duties to analyze S999 mail, to analyze Quality Carrier/Quality Case mail, to analyze Machine rejected and residue mail, to assist with firm delivery confirmation scanning, to review mail pieces/parcels in OTR for accuracy, to answer telephones, to take hold mail to customers in the lobby, to review firm holdouts for accuracy and other duties within his physical restrictions. The Grievant accepted this modified letter carrier job but objected to the shift hours as creating a burden on him and his family and as a form of punishment because of his injury. JX 2, pp. 30-32.

On or about March 12, 2007, a supervisor certified that the Grievant was performing duties under a "Rehabilitation Position" as a city carrier that included delivery of Express Mail, delivering of hot case mail and growth management but no casing or carrying mail. JX 2, p. 29. On or about April 9, 2008, Management at the Cheyenne MPO made the Grievant an Offer of Modified Assignment (Limited Duty). The proposed duties for the limited duty work involved one (1) to three (3) hours to deliver Express Mail, up to thirty (30) minutes to deliver hot case mail and to perform growth management up to three (3) hours. The offer noted the physical requirements for the modified assignment as lifting up to twenty (20) pounds for three (3) hours intermittently, simple grasping for one (1) hour intermittently and no casing or delivery of mail except Express Mail and no driving an LLV for more than four (4) stops per day. The Offer pertained to the Grievant's OWCP claim. The Grievant accepted the offer on April 25, 2008. JX 2, p. 28

On August 28, 2009, Supervisor Marie Pitt issued the Grievant an "Employee Leave Information Letter, Complete Day" that informed him he was being sent home inasmuch as Management's search for "necessary tasks" meeting his medical restrictions in all crafts and on all tours within the Grievant's facility and throughout the Local Commuting Area could not identify "any available necessary tasks within [the Grievant's] medical restrictions." JX 2, p. 23. Mr. Paul Davis, a regular letter carrier and the Local Branch President for the Union, was present when the Grievant received his letter. Mr. Davis testified that the Grievant was told there was no

necessary work available for him. Mr. Davis further stated that the Grievant had not been apprised prior to the issuance of the letter of the action. The parties stipulated at the Formal A grievance process that the National Reassessment Process (NRP) had been implemented at the Cheyenne Main Office. Joint Exhibit (JX) 2, page (p.) 2. Mr. Davis filed the informal grievance and the Step A grievance on behalf of the Grievant on September 9, 2009. The grievance alleged violations of the parties' Joint Contract Administrative Manual (JCAM) and National Agreement, Articles 2.1, 3, 5, 13.6, 14.3.C, 15.1, 19, 21.4 and postal regulations/guidelines EL-307, EL-505, ELM 546.11, ELM 546.14, Title 4 Chapter 81 of the United States Code (USC), Title 29 of the USC (the Rehabilitation Act of 1973) and M-[0]1550.

The document M-01500 constitutes a Pre-arbitration settlement dated October 8, 2003 at the parties' National level to resolve the issue whether Management violated Article 41.2.B.4. of the National Agreement when a part-time flexible (PTF) city letter carrier was taken off a "hold-down" assignment to provide work to a full-time city letter carrier on limited duty. The parties agreed to the following:

> Full-time employees when on limited duty as a result of a job-related illness or injury, may "bump" a PTF on a "hold down" assignment (or portion of hold down assignment) only if the duties on the "hold down" assignment are included in the written/verbal (see ELM 545.32) limited duty assignment and there is no other work available to satisfy the terms of the limited duty assignment.

The Grievant testified that he had performed a variety of duties prior to his receipt of the August 28, 2009, letter. The list is contained at JX 2, p. 25. His Express Mail duties involved sorting the Express Mail after the first dispatch arrived between 10:00 a.m. and 10:30 a.m. He added that he did this each morning unless he was given delivery cuts to take to a route or routes. He added that a regular letter carrier did not take the Express Mail because that type of mail did not arrive until after the carriers had left the office for their deliveries. The Grievant stated that his Express Mail deliveries took on an average of three (3) to four (4) hours per day, sometimes up to five (5) hours per day and had to be done by 3:00 p.m. He further explained that he would drive outlying areas for distances of at least 100 miles a day and sometimes up to 150 miles per day. The Grievant testified that maybe once a month the office would receive an Express Mail piece that he could not deliver because it exceeded his twenty (20) pound weight limitation. The Grievant also testified that he performed pick-up and collection duties on an average of two (2) hours per day. He explained that he would take the collections from about twenty (20) free-

standing mail deposit boxes. He stated that he made all the collections except for a large insurance business and the State's administrative office because the mail volume in those boxes exceeded his lifting limitations. The Grievant testified that he would work the hot case mail; i.e., mail sorted to the wrong route, usually performed by a clerk. He explained that if the carrier for that route had left the office before the hot case mail had been sorted he would take the mail to the carrier for delivery. The Grievant stated that most days there was some hot case mail to take. The Grievant also testified that he would deliver cuts to the appropriate carrier for delivery. He added that this happened almost everyday. The Grievant testified that he also would deliver certified and registered letters to customers if the carrier on those routes lacked the time to make the delivery. He explained that this task was performed a few times a week, not everyday. The Grievant further testified that he conducted inventories of collection boxes on a quarterly basis, which would take between three (3) to four (4) days to complete. This work involved inspecting the boxes and their labels, to make sure they were in safe working order, to be sure the scanned bar was correct and whether the box needed paint. The Grievant stated there are forty (40) boxes throughout the City.

The Grievant testified that he was assigned by a supervisor to conduct growth management duties. He explained that when the City had a new development established he would meet with the developers and rural and City officials, assist in making new addresses in the county, decide what type of delivery the structure would receive and make up the schemes for the new additions or changes of addresses. The Grievant estimated that while he performed this duty he was involved in thirty (30) new developments. One such development consisted of 750 homes. The Grievant testified that this duty involved three (3) to four (4) hours a day in the past but was reduced as a result of the affects of the poor economy.

The Grievant testified that he performed other duties on an ad hoc basis, such as taking pictures of damaged or vandalized collection boxes and answering the telephone, although he was not in the office much of the time. He stated that he was doing something eight (8) hours a day and never sat around. He added that he pre-assigned duties every day.

The Grievant testified that after he received the August 28, 2009, letter he was given thirty (30) days administrative leave because of his military veterans status. He added that after the thirty (30) days expired he used his leave. The Grievant stated that since October 24, 2009 he exhausted his leave and has had no income.

The Union submitted a recent regional arbitration award that interpreted the M-01706 Settlement agreement, as follows:

> *What the Settlement language reveals is that nothing has changed in the obligation of the Service to provide limited duty and rehabilitation jobs to injured employees. Further, there have been no new criteria developed by the Service for assigning limited duty jobs. Also, the Settlement reaffirms that ELM 546 and CFR Part 353 are controlling when it comes to limited duty assignments and the requirements and extent of the obligation placed on the Service. The terms of the Settlement clearly support the Union position that the Service was employing new and different criteria (or its implementation) in the Grievant's situation; criteria different from what had been done in the past. The "necessary work" and "operational need" standards used by the Service as justification where it has not been shown to have been applied in the past is not in conformance with the clear understandings derived from the Settlement between the Parties."*[10]

The Union argued that the National Award of Arbitrator Bernstein established that "Section 546.14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place."[11] The Union submitted three (3) regional awards that up the interpretation that Section 546.141 to provide limited duty on a continuing basis.[12]

The Union asserted that the Postal Service failed to meet its legal and contractual obligations to the Grievant, specifically those contained in ELM 546.142. The Union observed that the Postal Service complied with the regulation for almost ten (10) years until August 28, 2009. The Union contended that the Grievant's medical restrictions had not changed and that the existence of the work he had been doing for the past decade had not changed. The Union posited that the only change was local Management's implementation of the NRP. The Union claimed that Management used a narrow and very restrictive definition of "necessary work" that blinded Management from adhering to its obligations under ELM 546.142. The Union further asserted that the M-01706 National Pre-arbitration Settlement puts to rest any notion that Management

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[10] Case Nos. B01N-4B-C 06189348/55606 (LaLonde, 2010).

[11] Case No. H1N-1J-C 23247 (1987) at p. 14. Arbitrator Bernstein continued by stating that, "Therefore, the Service must be prepared to modify a limited duty assignment outside of the employee's craft, facility or hours, when work within those conditions becomes available." *Id.*

[12] Case Nos. W7N-5N-C 22042/15773 (Barker, 1991); Case No. W0N-5TC- 862 (Abernathy, 1993); Case No. E98N-4E-C-01097720 (Freitas, Jr., 2002)

to the National Level Settlement agreement dated January 28, 1997, JX 2, p. 144.[15] See also, JCAM, page 13-11; JX 2, p. 86. The cited provisions states as follows:

> ELM 546.14 specifies the steps that must be taken in seeking limited duty work in order to ensure the assignments are minimally disruptive to the ill or injured employee. The Step 4 Settlement G90N-4G-C 95026885, January 28, 1997 (M-01264), specifically provides that the provisions of ELM 546.141 (currently ELM 546.142) are enforceable through the grievance/arbitration procedure.

The Union also referred to traditional industrial relations sources for the proposition that doubts as to arbitrability should be resolved in favor of proceeding with arbitration resolution. The Union asserted that Articles 3 and 5 of the National Agreement also provide for the arbitration of violations of applicable laws and regulations. The Union cited regional arbitration awards that have granted remedies in cases similar to the Grievant's. In an award rendered by Arbitrator Edna E. J. Francis, the arbitrator held the issue of remedy was within her authority, stating in pertinent part:

> . . . Under those circumstances [that limited duty was available but denied in violation of policy], to state that the grievant received compensation because of the finding of the OWCP that he was "totally disabled" is to pervert the facts. The truth is that the grievant received compensation because he was not afforded limited duty in accordance with his contractual rights – and, therefore, was denied the right to continue his regular salary and benefits and, therefore, was forced again to obtain injury compensation. If the limited duty had been continued, as required, reinstatement of his injury compensation would not have been necessary and the grievant would not have received compensation from the OWCP or been placed in a LWOP status (with the consequent loss of leave benefits and regular salary).[16]

As remedial relief, the Union seeks that the Grievant be returned to work and made whole for all lost wages and benefits; including but not limited to any loss of sick and annual leave, any lost holiday pay, and any lost contributions to the Thrift Savings Plan. The Union also seeks economic remedies due to the Grievant's financial harm by awarding one and a half (1.5) times

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[15] M-01264 ("[W]e agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process. Whether an actual violation occurred is fact[-]based and suitable for regular arbitration if unresolved.").
[16] Case No. W7N-5C-C-29751 (Supp. 1992), pp. 28-29.

make a claim under the FECA. A number of laws, coded regulation, and contractual provisions bear on the exercise of the provisions of ELM 546.142. Therefore, the Grievant's release from work per the Postal Service's August 28, 2009 letter (see pages 8-9 above) must be reviewed under all the applicable regulations and legal requirements current at the time of the Postal Service's action. Of pertinent relevance here is the requirement under ELM 546.142 that the Postal Service must "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance" and to "minimize any adverse or disruptive impact on the employee." Additionally, EL-505, Exhibit 7.1 states that "The assignment should result in a tangible product and should not be a 'make work' job."

The crux of this grievance rests on what constitutes appropriate duties, tasks or work that the Postal Service must assign to the injured employee so as to comply, at least at the minimum degree, with ELM 546.142 and EL-505. Unfortunately, ELM 546.142 and EL-505, Exhibit 7.1 do not define what type of work is involved. ELM 546.142 speaks in terms of "limited duty" and EL-505 refers to "tangible product" and prohibits "make work." This language is not particularly helpful by itself and requires further reference and interpretation.

The reference to tangible product in the EL-505 seems misplaced. The Postal Service is not a manufacturing entity: it produces no real product as that term is commonly used in the industrial relations lexicon. The Postal Service, as its name suggests, provides postal services to its customers; i.e., the delivery and collection of mail, the sale of postal products such as stamps and postage, the rental of mail boxes, etc. In absence of real tangible products made by the Postal Service, I find the interpretation of "tangible product" to consist of specific work tasks a postal employee would perform in the furtherance of the mission of the Postal Service. The examples are too many to articulate in a regional arbitration award, or perhaps in any forum. However, using the above interpretation, I find that the delivery of Express Mail to constitute a tangible product as intended under EL-505. Express Mail involves a customer's desire for a special and time-sensitive mail delivery for which the customer pays a premium postage. Thus, the delivery of Express Mail is a specific work task that employees perform in the furtherance of the Postal Service's mission to its public customers. Likewise, the delivery of certified and registered mail consists of a tangible product that requires specific work tasks an employee could perform that fulfils the mission of the Postal Service. Similar to Express Mail, the customer's purchase of certified or registered mail service requires special treatment of the piece at a higher

cost than regular mail and for which the customer agrees in consideration for the special attention. Other specific duties, such as making rounds to pick up the mail customers have placed in convenient collection boxes and to deliver cuts and hot mail to carriers already on their routes, accomplish in a direct manner the furtherance of the Postal Service's mission to collect and deliver the mails. Therefore, these duties fall within the above interpretation of "tangible product."

Additionally, some tasks may have an indirect affect on the accomplishment of the Postal Service's mission but are nevertheless to be found as tangible products. The inspection of collection boxes ensures the working order of those receptacles and that the collection times posted on them are accurate. This task provides access of the mail flow to customers to deposit their mail in a safe place and for the customer to confidently rely on the collection time. Further, the tasks performed relative to growth management contribute to the mission of the Postal Service in its service to be provided to the customers who will eventually take up residence in the new developments. Without systematic and planned action, postal service to the new customers could suffer from undue disorganization and untimely delivery and collection of their mail.

The Postal Service focused in the grievance on the elaborate efforts it conducted in searching for limited duty work for the Grievant and sought to have the grievance denied on the basis that the Postal Service had observed the various steps of the pecking order under ELM 546.142. However, the process undertaken in the NRP assessment, which led to relieving the Grievant of duties he had performed without incident, was based on a faulty premise. The Postal Service simply refused to accept that the work the Grievant had been doing for the previous decade was acceptable for the purposes of assigning limited duty work under ELM 546.142. Throughout its entire process, the Postal Service through its agents used an erroneous and improper standard of "necessary" work by which to evaluate the available work tasks; i.e., that whatever work could be found must satisfy the definition of "necessary" work the Postal Service had created unilaterally.

The standard of necessary work is faulty on many counts. ELM 546.142, the primary governing regulation in the Grievant's case, does not require the high standard of "necessary" work, as the Postal Service defines it. The regulation is devoid of any criteria or standard of work that constitutes "limited duty," except to the extent that such work must be within the

injured employee's medical restrictions and the circumstances in performing the work (work location, hours of work) should minimize any adverse or disruptive impact on the employee. From an evidentiary standpoint, the criteria of "necessary" work has been created in contravention of the applicable contractual, statutory and regulatory provisions that apply to situations such as the Grievant's. A careful review of all such provisions fails to reveal that the Postal Service is permitted to raise the bar of what constitutes limited duty to the heightened standard of "necessary" work, at least to the extent the Postal Service applied it in an improper and narrow manner. By operation of this standard, the Postal Service failed to make a good faith effort to the place the Grievant at any level of the pecking order under ELM 546.142.

The burden of persuasion next shifts to the Union to show that work was available for the Grievant at the level of the pecking order above the level at which Management placed him. In this case, the Grievant was placed at none of the levels of the pecking order but was relieved of duty under the erroneous application of the "necessary" work standard. Nevertheless, the Union demonstrated with credible and persuasive evidence that work did indeed exist for the Grievant to perform. Local Management acknowledged that the Grievant had performed those duties listed in JX 2, p. 25 for a sustained period and on a consistent basis. Moreover, those duties continued to exist after Management relieved the Grievant of those duties and placed him in a non-work status. Those duties were merely re-allocated to other personnel and for reasons that are not supported by the Postal Service's obligations to injured employees (to prefer to have PTFs and/or TEs or supervisors or clerks perform those duties rather than the injured employee for efficiency reasons). The evidence shows that local Management properly accommodated the Grievant's medical restrictions with tangible work for his limited duty assignments prior to August 28, 2009. The evidence fails to show that local Management could not continued to assign the Grievant the work he had been doing for many years after his on-the-job injury. Thus, the Union has met its burden of production to show that there existed legitimate work under ELM 546.142 and related regulations and statutes that should have been assigned to the Grievant as limited duty. Likewise, the Union has shown that the Postal Service violated the National Agreement under the above-cited provisions when the Service ceased the Grievant's limited duty assignments and caused an adverse and disruptive impact on him. Relieving the Grievant from proper limited duty and placing him in a position of non-pay and loss of corresponding employment benefits constitutes the ultimate adverse and disruptive impact.

Having found that the Postal Service violated the National Agreement in this matter, this would normally resolve the grievance in full. However, the Postal Service raised several issues that should be addressed.

The Postal Service argued that it took its actions relative to the Grievant's situation within its authority under Article 3 and that the Postal Service had the sole authority to decide what work was appropriate to assign to the Grievant. This argument cannot be sustained. Article 3 sets forth rights reserved to Postal Service Management, but those rights pertaining to limited duty requirements take precedence by operation of Article 2, Article 19 and the applicable handbooks and manuals and Article 21.4. To allow Article 3 to grant Management *carte blanche* as the sole authority would nullify contractual provisions to which the parties have agreed and that may be redressed through the grievance-arbitration procedure.

The Postal Service also argued that the grievance is substantively outside the jurisdiction of the negotiated grievance procedure, particularly as it relates to remedy. I find that this grievance pertains directly upon the application of Postal Service regulations (ELM 546.142, EL-307 and EL-505) as incorporated under Article 19. As such, Article 15 is an appropriate mechanism to enforce those rights granted to injured employees and the obligations the Postal Service has to comply with those regulations. Further, provisions of the National Agreement, as expressed at Article 15.1 of the JCAM and Article 2.3, specifically allow for grievances containing the issues brought in the instant grievance. It is true that the OWCP/DoL retain exclusive jurisdiction over injury compensation claims filed under the FECA. However, this grievance does not seek to overturn an OWCP determination or to force any such determination. The true nature of this grievance involves violations of the National Agreement and the appropriate remedy to resolve those violations. Should the OWCP accept the Grievant's pending claim for injury compensation, the OWCP will make the necessary adjustments, if any are needed, to the Grievant's compensation claim before that forum. However, the claim with the OWCP is outside this grievance and has no bearing on the decision in this Award.

The Postal Service argued that the vehicle the Grievant used in making his deliveries was no longer available and implied that there were no other accommodating vehicle in the Cheyenne fleet. The evidence does not support this argument. The Grievant is not completely limited from operating a LLV. He may do so as long as he has no more than four (4) stops to make on a particular run. The Postal Service presented no evidence to show how or in what way the

Grievant's limited use of a LLV would preclude him from making any deliveries. Additionally, PTF Osterman testified that he uses a van to make his Express Mail runs, thereby showing that the Cheyenne fleet owns at least one (1) van.

The Postal Service also argued that it is more efficient to have other employees, such as clerks, rural carriers and supervisors, deliver Express Mail than for the Grievant to accomplish the delivery and that the Express Mail delivery is not an exclusive duty to the Letter Carrier craft. These arguments are basically irrelevant when assessing limited duty work to be assigned to an injured employee. ELM 546.142 expressly allows for the assignment of duties from "other crafts." Also, EL-307, Section 131, states that "... the Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of a particular job." Therefore, the Postal Service is expected to look to different ways to accomplish work that would meet the medical restrictions of the injured employee, and ELM 546.142 expands the obligation to work that is outside the core duties of the employee's occupational craft. This is what the "reasonable accommodation" obligation is all about. If efficiency of operations were the primary factor, it would effectively eviscerate the Postal Service's obligation to make reasonable accommodation and to "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances."

The Postal Service seems to assert that assigning the Grievant to accomplish collections from collection boxes is "make work." As described in detail above, this assertion cannot be sustained. First, the duty is one needed to fulfill the mission of the Postal Service. Secondly, the evidence shows that the Grievant is capable of making all of the collections except for two (2) stops (out of forty total) that are located close to the MPO. The Postal Service presented no evidence to show that the manner in which collections were made by the Grievant prior to August 28, 2009, posed an undue hardship on the Service's operation.[31] Once the Grievant is returned to performing this duty, as ordered below, the TE primarily responsible for it may be

[31] The EEOC has defined undue hardship to mean that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business. An employer may not refuse to provide an accommodation just because it involves some cost. An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

used to accomplish other duties. This holds true for the other duties local Management allocated to other personnel when the Grievant was placed in a non-work status. What was once allocated to those employees on or after August 28, 2009, must now be re-allocated to the Grievant upon his return to work on limited duty.

The Postal Service asserted that the duties performed by the Grievant prior to August 28, 2009, belonged to other personnel and have been returned to them per their job descriptions. This assertion turns the Postal Service's obligations to provide limited duty assignments under ELM 546.142 and in reasonable accommodation for the Grievant's medical restrictions on their heads. Contrary to the Postal Service's assertion, the re-allocation of duties from some personnel to the injured employee squarely complies with the Service's obligations to provide reasonable accommodation and to assign limited duty. The Postal Service's assignment of those duties that occurred long before August 28, 2009, complied with those obligations. The Postal Service presented no legitimate reasons for not continuing to assign the Grievant those duties. To the contrary, the Postal Service's withdrawal of those limited duty assignments constituted violations of those obligations owed to the Grievant.

Additionally, the fact that some of the duties the Grievant performed prior to August 28, 2009, were done on an inconsistent basis is not the test by which those duties may be assigned to an injured employee or withheld from the employee. Nothing precludes the Postal Service from assigning work that occurs on an ad hoc basis. The test involves that the work is available and that it is within the injured employee's medical capabilities (in addition to the consideration that it minimize any adverse or disruptive impact on the employee). The evidence of record shows in this case that delivery of hot case mail, cuts and certified and registered mail comes available with a high degree of frequency and is within the Grievant's medical restrictions. Thus, this type of work qualifies for limited duty under ELM 546.142 for assignment to the Grievant. Inasmuch as the work must be performed, it does not constitute "make work."

Award

The grievance is sustained. The Postal Service violated the National Agreement and applicable Postal Service regulations incorporated under Article 19, cited above, when the Service failed to provide Limited Duty to the Grievant, Craig Boyce.

The Postal Service is hereby ORDERED to return the Grievant to work status upon receipt of this Award. Because the Grievant's placement in a non-work status resulted from contractual and regulatory violations, the Grievant is entitled to "make whole" relief that includes appropriate back pay and restoration of benefits he lost as a result of the erroneous action of August 28, 2009. However, the Grievant received pay during a period of thirty (30) days of administrative leave. Therefore, in making the computations of back pay the Postal Service may properly omit the thirty (30) day period from the back pay distribution. Otherwise, the Postal Service is hereby ORDERED to make the Grievant whole for all lost wages, salary, benefits and other employment issues the Grievant suffered as a result of the erroneous action taken on August 28, 2009. The Postal Service is referred to decisions published by the National Labor Relations Board for guidance relative to back pay, restoration of benefits, etc., that are used when the employer is ordered to reinstate a discharged employee. In essence, the Postal Service is required to reconstruct the Grievant's employment as though the erroneous action of August 28, 2009 never occurred and make the corresponding restoration of pay and benefits to him.

The Postal Service is also hereby ORDERED to return the Grievant to the limited duty assignments he was performing prior to the August 28, 2009, action, to include at a minimum those duties listed at JX 2, p. 25 of the arbitration record. However, this ordered remedy does not preclude the Postal Service from re-assessing the Grievant's situation, upon his return to work, provided the re-assessment is accomplished in strict compliance with ELM 546.142 and related obligations. In doing so, the Postal Service is ORDERED to cease and desist from utilizing the erroneous standard of "necessary" work as the Postal Service has improperly restricted its meaning.

Other remedies requested by the Union are not granted.

The Arbitrator will retain jurisdiction of the effectuation of the above-ordered remedies should issues arise in this regard.

Date: April 22, 2010

Kathy L. Eisenmenger

Kathy L. Eisenmenger, J.D.
Labor Arbitrator

CERTIFICATE OF SERVICE

Ruby N. Turner v. United States Postal Service
Docket No. SF-0353-10-0329-I-1

This is to certify that a true and correct copy of the Appellants Petition for Review was mailed by the undersigned by First Class Mail to the following:

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