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TO: MERIT SYSTEMS PROTECTION BOARD
Attention: Mr. Mathew Shannon

FAX NUMBER: 202-653-7130

FROM: DARRYL ANDERSON

DATE: August 24, 2011

MESSAGE: Please file the following Amicus Brief and Appendix on behalf of American Postal Workers Union, AFL-CIO

If you have any problems with this fax or do not receive the entire fax, please telephone us. If you received this communication in error, please immediately notify us by telephone. Thank you.

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| CYNTHIA E. LUNDY | AT-0353-10-0369-I-1 |
| MARCELLA ALBRIGHT | DC-0752-11-0196-I-1 |

Appellants

v.

UNITED STATES POSTAL SERVICE

Agency

# AMICUS BRIEF AND APPENDIX OF AMERICAN POSTAL WORKERS UNION, AFL-CIO

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## STATEMENT OF THE INTEREST OF THE AMERICAN POSTAL WORKERS UNION, AFL-CIO (APWU)

The American Postal Workers Union, AFL-CIO (APWU) represents more than 200,000 employees of the United States Postal Service employed in the Clerk, Maintenance, and Motor Vehicle crafts, and in several smaller units of employees. As the collective bargaining representative of these employees, the APWU has entered into successive collective bargaining agreements with the Postal Service, known as National Agreements, beginning in1971. The most recent National Agreement is the 2010 National Agreement that expires May 20, 2015.

As explained in more detail below, the APWU National Agreement includes Article 19, which incorporates by reference the ELM provisions that are the subject of the Board's Notice of Opportunity to File Amicus Briefs. The National Agreement also incorporates by reference other pertinent postal handbooks and manuals. Because the APWU National Agreement governs the availability of suitable work for injured workers performing work within APWU bargaining units, and because restoration of injured workers often implicates more than one postal bargaining unit, including APWU bargaining units, the APWU has a unique perspective on and direct interest in, the matters under consideration by the Board.



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Accordingly, the APWU appreciates the opportunity to submit its views to the Board as Amicus and hereby respectfully submits the following Brief for the Board's consideration.

**ISSUE ONE**

May a denial of restoration be "arbitrary and capricious" within the meaning of 5 CFR 353.304(c) solely for being in violation of the ELM, *i.e.*, may the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules?

In posing this question, the Board has made reference to several regional arbitration awards decided under the collective bargaining agreement between the National Association of Letter Carriers and the United States Postal Service. In each of those cases, the arbitrator found that Postal Service had, after a long period of accommodating an injured employee by providing work within the employee's medical limitations, abruptly applied an additional requirement for restoration that made it impossible for the employee to qualify for restoration. In each of these cases the Postal Service had unilaterally implemented its "National Reassessment Program" under which all restoration assignments were re-examined to determine



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whether they constituted "necessary work." Applying this criterion, without any other change in relevant circumstances in these cases, the agency reassigned work away from the employees who had previously been accommodated and eliminated their duty assignments. In each of these cases the work continued to be available and continued to be performed by other postal employees notwithstanding the agency's contention that it was not "operationally necessary" to combine the work into a single duty assignment for the employee who previously had been accommodated. [1]

Thus, in each of the referenced arbitration cases, the arbitrator held that the Postal Service had violated the collective bargaining agreement by reassigning work that previously had been assigned to permit restoration when it did so without any justifying change in relevant circumstance. If the appellant makes a non-frivolous allegation that the Postal Service reassigned work that had been assigned to permit restoration and did so without any change in relevant circumstance, we would urge the Board to find that the appellant made a sufficient allegation that the

[1] Eisenmenger Award at 29, 31; Sherman Award at 29-30; Duffy Award at 6; Monat Award at 8.



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action of the agency was arbitrary and capricious within the meaning of 5 C.F.R. 353.304(c).

This is not to say, however, that every decision to deny restoration that may violate a collective bargaining agreement is arbitrary and capricious. In this regard, the circumstances in Latham v. United States Postal Service, No. DA-0353-10-0408-I-1; 2010 MSPB LEXIS 5155 (September 2, 2010) provide a useful counterpoint to the arbitration awards referenced by the Board. In that case, the circumstances had changed. As the Administrative Judge observed (id., at 2):

> the agency reported that because of various market factors there has been an unprecedented reduction in the agency's workload; that less mail to be delivered means that there is less work at the agency; and that the agency instituted the NRP to review all rehabilitation and limited duty assignments to ensure that such employees were performing operationally necessary tasks within their medical restrictions. The agency indicated that the appellant was subject to the NRP review and, based on his medical restrictions and the operationally necessary tasks identified at his facility and within his local commuting area (50 miles), the appellant was informed that there was no work available. AF Tab 6.

Thus, the agency's determination that it could not continue to provide restoration to the employee resulted in part from a change in circumstances, an unprecedented reduction in the agency's workload. In contrast to the circumstances in the referenced arbitration cases, the employee did not show that the work he had been



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doing continued to be done and had merely been taken away from him and reassigned to other employees. Furthermore, also in contrast to the referenced arbitration cases, the agency provided evidence that it had taken a series of steps in an effort to find work within the employee's medical restrictions. On those facts, the Administrative Judge found that the agency's denial of restoration was not arbitrary and capricious.

In our view, the denial of jurisdiction in the Latham case is correct for two reasons. First, given the changed circumstances in that case and the fact that the agency showed that it made a purposeful and thorough search for suitable work within the employee's normal commuting area, it hardly can be said that the agency's actions were arbitrary and capricious. Accordingly, the Board lacks jurisdiction under Section 304(c).

Second, this case well illustrates the reason why the Board has not been given jurisdiction over mere contract violations. Not every violation of an agency's rules concerning restoration of injured workers to duty is an arbitrary or capricious act. Whether or not the implementation of the National Reassessment Program was itself a violation of the collective bargaining agreement is a subject



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that must be left for resolution by the Postal Service and the unions representing its employees. That resolution may come either in collective bargaining or, if necessary, through arbitration. In any event, such contract violation disputes are not within the Board's jurisdiction. Absent evidence that the agency acted arbitrarily and capriciously by, for example, denying restoration by applying a new criterion without any justifying circumstantial change, the Board lacks jurisdiction to review the agency's action.



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## ISSUE TWO

What is the extent of the agency's restoration obligation under the ELM, *i.e.*, under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

We address this issue primarily to emphasize one central point: The provision of limited duty or a permanent rehabilitation assignment that includes work within an APWU bargaining unit must be done in accordance with the seniority provisions of the APWU National Agreement.[2] Neither the FECA nor the ELM permits violation of the National Agreement as a means of providing restoration rights. The pertinent FECA regulations, 5 U.S.C. § 353.301(d) make express reference to reasonable accommodation of handicapped individuals under the Rehabilitation Act:

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[2] We observe that the Board seems to be using the term "limited duty" to refer to duties assigned to partially disabled employees who are covered by 5 C.F.R. 353.301(d) regardless of the duration of their disability and regardless of whether their partial disability is permanent. In the cases consolidated for this docket, and in the arbitration cases referenced by the Board, the employees involved have been partially disabled for a substantial period.

Under the Postal Service's Employee and Labor Relations Manual (ELM), "limited duty" is used to refer to assignments for employees who are still recovering, and the term "rehabilitation assignment" is used to refer to assignments for employees whose partial disabilities are considered to be permanent.



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> (d) *Partially recovered.* Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. **At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.** (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered employee is expected to seek reemployment as soon as he or she is able.

[Emphasis added here.] The reference to the Rehabilitation Act makes it clear that restoration under FECA does not permit violation of the seniority provisions of a collective bargaining agreement. As the Supreme Court observed in U.S. Airways v. Barnett, 535 U.S. 391, 403-404 (2002), the lower courts have unanimously found that collectively bargained seniority trumps the need for reasonable accommodation in the context of the ... Rehabilitation Act." [Citations omitted.][3] Thus, the FECA regulations, by expressly incorporating by reference standards for accommodating handicapped individuals under the Rehabilitation Act, make provision for deference to collectively bargained seniority.

Moreover, Postal Service Handbooks and Manuals, including the ELM,

[3] Under the Americans With Disabilities Act, the Court held in Barnett, the fact that an assignment would violate the rules of a seniority system ordinarily means that the accommodation is not a reasonable one. Id., at 403.



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expressly recognize the need to comply with the National Agreement. For example, the meaning of the phrase "treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, is explained in Postal Service Handbook EL-307, "Reasonable Accommodation, An Interactive Process." That Handbook provides:

Section 1-5.2, at pp. 5-6 Determining **What is Reasonable**

> .... An accommodation is not reasonable when it ... creates a job where none exists, violates the seniority provisions of a collective bargaining agreement, reallocates or eliminates essential job functions, or otherwise substantially changes the fundamental nature of a job.

* * * * *

Section 2-2.4, at p. 12 **Step Four: Determining the Reasonableness of the Accommodations and Select Options.**

> .... Consider whether the proposed accommodation would:
> * * * * *
> violate the terms of a collective bargaining agreement.

* * * * *

Section 2-2.4.3, p. 13 **Determining the Impact on Collective Bargaining Agreements**

> The Postal Service is not required to adopt an accommodation that would violate the terms of a collective bargaining agreement. Accordingly, if the accommodation involves a job restructuring, job

> reassignment, work schedule modification, or placement in a light-duty job, you must determine whether the proposed accommodation would violate the terms of a collective bargaining agreement.

The restoration to duty provisions in Part 546 of the ELM also make express provision for compliance with the National Agreement. But any consideration of what the ELM requires of the Postal Service must begin with a fundamental proposition stated in Article 19 of the collective bargaining agreements between the Postal Service and its major unions. Handbooks and manuals may not violate the National Agreement. Thus, Article 19 provides, in pertinent part:

**ARTICLE 19**
**HANDBOOKS AND MANUALS**

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, **shall contain nothing that conflicts with this Agreement**, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

[Emphasis added here.] Accordingly, some parameters of the Employee and Labor Relations Manual, including provisions related to restoration to duty, are

determined by the applicable collective bargaining agreement.[4]

The ELM repeatedly emphasizes that its provisions relating to injury compensation are intended to comply with the Federal Employees Compensation Act, 5 U.S.C. 8101, et seq. (FECA). Thus, Part 540 of the ELM provides, in part:

**540 Injury Compensation Program**

**541 Overview**

**541.1 Background**

**541.11 Law**

> Under the provisions of the Postal Reorganization Act, 39 U.S.C. 1005 (c), all employees of the United States Postal Service are covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. 81.

* * * * * *

**546 Reassignment or Reemployment of Employees Injured on Duty**

**546.1 Law**

---

[4] By virtue of the fact that Article 19 requires that handbooks and manuals be continued in effect, the union has a right to enforce handbooks and manuals through the grievance-arbitration procedure. In that sense, handbooks and manuals are incorporated by reference into the collective bargaining agreement. However, when a provision of a handbook or manual conflicts with a provision of the collective bargaining agreement, the handbook or manual provision in question is invalid.



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**546.11 General**

The Postal Service has legal responsibilities to employees with job-related disabilities under 5 U.S.C. 8151 and the OPM regulations as outlined below.

* * * * * *

Likewise, the Postal Service Handbook EL-505 provides, in part:

## Procedures

### Limited Duty Program

When a limited duty program is needed...

---

Obligation: Assigning Employees to Limited Duty Positions

The USPS has legal responsibilities to employees with job-related disabilities under OPM regulations. Specifically, with respect to employees who partially recover from a compensable injury, the USPS must make every effort to assign the employee to limited duty consistent with the employee's medically defined work limitation tolerance. The USPS, in assigning employees to limited duty, must minimize any adverse or disruptive impact on the employee (ELM 546.141).

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* * * * * *

Thus, a primary purpose of ELM Part 546 is to comply with the FECA by making provision for the assignment of injured employees to limited duty or



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permanent rehabilitation assignments. Part 546 also emphasizes the fact that its provisions must be applied in compliance with the applicable collective bargaining agreement:

**546.2 Collective Bargaining Agreements**

**546.21 Compliance**

Reassignment or reemployment under this section must be in compliance with applicable collective bargaining agreements. Individuals so reassigned or reemployed must receive all appropriate rights and protection under the newly applicable collective bargaining agreement.

**546.22 Contractual Considerations**

**546.221 Scope**

Collective bargaining agreement provisions for filling job vacancies and giving promotions and provisions relating to retreat rights due to reassignment must be complied with before an offer of reassignment or reemployment is made to a current or former postal employee on OWCP rolls for more than 1 year.

**546.222 Reassignment or Reemployment**

A partially recovered current or former employee reassigned or reemployed to a different craft to provide appropriate work must be assigned to accommodate the employee's job-related medical restrictions. Such assignment may be to a residual vacancy or to a position uniquely created to fit those restrictions; however, such assignment must not impair seniority rights of PTF employees. ...

* * * * *

The fact that the applicable collective bargaining agreement takes



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precedence over the terms of the ELM also has been confirmed by a national-level arbitrator in a case brought by the National Association of Letter Carriers to enforce Section 546.141 of the ELM. In that case, Arbitrator Carlton Snow confirmed the right of the APWU to insist that seniority rights established under its collective bargaining agreement be complied with when the Postal Service assigns APWU bargaining unit work to a letter carrier needing a rehabilitation assignment under Part 546 of the ELM. The employee had been restored to duty as a part-time flexible employee in an APWU bargaining unit. The NALC had filed a grievance arguing that the letter carrier should have been restored to a full-time assignment, not as a part-time flexible.

Arbitrator Snow found that the restored letter carrier's contractual rights had been violated, but in doing so he cautioned the Postal Service that it could not violate the APWU collective bargaining agreement in order to accommodate the injured letter carrier. Arbitrator Snow ruled:

> Rights of letter carriers and clerks are no longer determined collectively. Management must be diligent in being certain that it can keep promises it makes to each craft. If promises to one craft infringe on rights of another, the Employer is obligated to negotiate the authority to implement such rights within the craft whose rights are being infringed. The APWU is correct in asserting that those



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> reassignments and reemployment decisions under Section 546 of the ELM must be accomplished in accordance with commitments made by management in the APWU agreement. Simply because complying with one agreement would violate the other does not relieve management of its obligation to comply with both.
>
> In order to comply with ELM Section 546.141(a), the Employer is not permitted to change the status of a disabled employee when switching crafts; but if the employee is a full-time regular worker and there are part-time flexible workers in the gaining craft, then reassigning the employee as a full-time regular worker could violate conversion rights of part-time flexible employees in the gaining craft.
>
> Such an assessment, however, must be based on the APWU's agreement with the Employer, not that of the NALC...

(Appendix A to this Amicus Brief, at 23) [emphases added here]. This decision by Arbitrator Snow, unlike the regional awards referenced by the Board in its Notice of Opportunity to File Amicus Briefs, is a national-level award that has binding precedential effect on the USPS, the NALC and the APWU.[5]

Thus, it is clear that the seniority provisions of the APWU collective bargaining agreement are valid and must be applied. They are not modified by,

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[5] None of the regional awards referenced by the Board dealt with issue of compliance with the APWU National Agreement in the situation where a letter carrier is seeking restoration to work that includes work in an APWU bargaining unit.



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and cannot be violated by applying, either the FECA regulations or the ELM provisions concerning limited duty and rehabilitation assignments.

## CONCLUSION

For the reasons stated above, the Board should hold that if the appellant made a non-frivolous allegation that the Postal Service reassigned work that had been assigned to permit restoration and did so without any change in relevant circumstance, then the appellant made a sufficient allegation that the action of the agency was arbitrary and capricious within the meaning of 5 C.F.R. 353.304(c) and the Board has jurisdiction. In cases in which relevant circumstances have changed, such as in the case of excessing of employees due to loss of mail volume, and the appellant is contending that because the Postal Service made use of the NRP criteria it violated the ELM or otherwise violated the applicable collective bargaining agreement, such an allegation of contractual violations is not a non-frivolous allegation of arbitrary and capricious behavior within the meaning of 5 C.F.R. 353.304(c). Such cases should be resolved on a case-by-case basis under the terms of applicable collective bargaining agreements.



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With regard to the question of the agency's restoration obligation under the ELM, it is important for the Board to recognize that this is fundamentally a contract question, that the ELM and the EL-505 Handbook cannot conflict with and must be read in harmony with any applicable collective bargaining agreement, and that the application of the ELM may require the interpretation and application of more than one collective bargaining agreement.

Respectfully submitted,

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# APPENDIX A TO AMICUS BRIEF

# OF

# AMERICAN POSTAL WORKERS UNION, AFL-CIO



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NATIONAL ARBITRATION PANEL

| | | |
|---|---|---|
| In the Matter of Arbitration | ) | |
| between | ) | Grievant: B. Tate |
| UNITED STATES POSTAL SERVICE | ) | Post Office: Memphis, Tennessee |
| and | ) | Case No. H94N-4H-C 96090200 |
| NATIONAL ASSOCIATION OF LETTER CARRIERS | ) | |
| with | ) | |
| AMERICAN POSTAL WORKERS UNION (Intervenor) | ) | |

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES:

For the Employer: Mr. John W. Dockins
Mr. Richard A. Murmer

For the NALC: Mr. Keith Secular

For the APWU: Mr. Darrell Anderson
Ms. Melinda Holmes

PLACE OF HEARINGS: Washington, D.C.

DATES OF HEARINGS: September 17, 1997
April 21, 1998

POST-HEARING BRIEFS: August 17, 1998

CONTRACT YEAR: 1994-98

TYPE OF GRIEVANCE: Contract Interpretation



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## AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated its agreement with the National Association of Letter Carriers when it reassigned a full-time regular, partially disabled, current employee of the Carrier craft to the Clerk craft as a part-time flexible worker. In accordance with the agreement of the parties, the issue of remedy is remanded to all the parties so that they may attempt to agree on a negotiated settlement. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Arbitrator

Date: 11-4-98



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NATIONAL ARBITRATION PANEL

| | | |
|---|---|---|
| IN THE MATTER OF ARBITRATION<br><br>between<br><br>UNITED STATES POSTAL SERVICE<br><br>AND<br><br>NATIONAL ASSOCIATION OF LETTER CARRIERS<br><br>with<br><br>AMERICAN POSTAL WORKERS UNION<br>(Intervenor)<br>(B. Tate Grievance)<br>(Case No. H94N-4H-C 96090200) | ) | ANALYSIS AND AWARD<br><br>Carlton J. Snow<br>Arbitrator |

## I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994 and extended through November 20, 1998. Hearings occurred on September 17, 1997 and April 21, 1998 in a conference room of



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the Postal Service headquarters located at 475 L'Enfant Plaza in Washington, D.C. Messrs. John Dockins and Richard Murmer, Labor Relation Specialists, represented the United States Postal Service. Mr. Keith Secular of the Cohen, Weiss, and Simon law firm in New York, N.Y. represented the National Association of Letter Carriers. Mr. Darrell Anderson and Ms. Melinda Holmes of the O'Donnell, Schwartz, and Anderson law firm in Washington, D.C. represented the American Postal Workers Union, as Intervenor.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Ms. Bethany Schields of Diversified Court Reporting Services, Inc. recorded the proceedings for the parties and submitted a transcript of 153 pages. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties agreed that the matter properly had been submitted to arbitration. In the event that the Union prevailed, they petitioned the arbitrator to remand the matter to the parties for formulation



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of a remedy. The arbitrator officially closed the hearing on August 17, 1998 after receipt of the final post-hearing brief in the matter.

## II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Did the Employer violate the parties' agreement by assigning the grievant to the Clerk Craft as a part-time flexible employee rather than as a full-time regular employee? If so, what is an appropriate remedy?



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## III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 12 - PRINCIPLES OF SENIORITY, POSTING, AND REASSIGNMENTS.

Section 12.4.A A primary principle in effecting reassignments will be that dislocation and inconvenience to employees in the regulard work force shall be kept to a minimum, consistent with the needs of the service. Reassignments will be made in accordance with this Section and the provisions of Section 5 below.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

## IV. STATEMENT OF FACTS

Factual disputes are not the focal point of this case. It is reassignment rights of partially disabled employees that are at issue in the dispute. The grievant was a full-time Letter Carrier who sustained an on-the-job injury which prevented her from performing regularly assigned duties. Management responded by placing her on limited duty status in the Letter



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Carrier craft. The Employer ultimately offered the grievant a "rehabilitation job offer" according to which she would be permanently reassigned to a "modified PTF" position in the Clerk craft. Management told her that, if she did not accept the position, her OWCP benefits might be terminated. The grievant accepted the position under protest.

The National Association of Letter Carriers challenged the Employer's action by filing a grievance. What the NALC wanted the Employer to do was to withdraw its offer of a "part-time flexible clerk" position, and the NALC asked that the grievant be maintained in her current craft and job status. The NALC also sought reimbursement for all lost wages and benefits. Ultimately, the grievance came to Step 4 of the grievance procedure. When the parties were unable to resolve their differences, the matter proceeded to arbitration at the national level.

At the arbitration hearing, the parties agreed to limit the issue before the arbitrator to whether or not the Employer permanently may reassign an injured, full-time letter carrier to a part-time, flexible position in lieu of assigning the individual to a full-time, regular position in another craft.



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## V. POSITION OF THE PARTIES

### A. The National Association of Letter Carriers

The National Association of Letter Carriers argues that the Employer violated its obligation under ELM Section 546.141 by permanently reassigning the grievant to a part-time flexible position. According to the Union, the text and purpose of ELM Section 546.141(a) requires management to minimize any adverse or disruptive impact on employees. It is the belief of the Union that this obligation prevents the Employer from reassigning the grievant as a part-time flexible employee.

It is the position of the NALC that, when management realizes an injured, full-time regular letter carrier is permanently disabled, only two options exist. The Employer may allow the employee to continue in limited duty status in the Letter Carrier craft on an open-ended basis, assigning him or her to available work in accordance with ELM Section 546.141(a) criteria. Alternatively, the Employer may offer the individual a permanent reassignment to a full-time, regular position in another craft, provided that the location and schedule of the position meet criteria set forth in ELM Section 546.141. It is the belief of the Union that the Employer may not reassign an employee to a part-time flexible position in another craft because such an assignment effectively strips the employee of protection set



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forth in ELM Section 546.141(a) and, therefore, is inconsistent with a 1979 settlement agreement between the parties which resulted in the language of ELM Section 546.141(a).

It is the position of the Union that national-level arbitration precedent supports its position in this case. According to the Union's viewpoint, two prior cases held that management's assertion (that an injured employee may be demoted to part-time flexible status) necessarily imply that protections embodied in ELM 5456.141(a) become inapplicable at the point management determines that an injury is permanent and that an employee must be reassigned. Moreover, the Union contends that case law on which the Employer relies is distinguishable because the earlier precedent involved a former employee being reinstated, rather than a currently employed employee being reinstated, as is the case at hand.

It is also the belief of the NALC that issues argued by the APWU at the arbitration hearing are not really in dispute before this arbitrator. Relief sought by the NALC in this case is a return of the grievant to the Letter Carrier craft, and this action does not adversely affect any APWU clerk craft employee, in the opinion of the NALC. It is the contention of the NALC that arguments put forth by the APWU in the case are outside the scope of the present grievance and should not be addressed by the arbitrator.



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B. The American Postal Workers Union

It is the position of the American Postal Workers Union that, when reassigning a letter carrier to work in an APWU craft pursuant to ELM Section 546, the Employer must make the assignment in a manner that complies with the APWU National Agreement. This assumes that such assignments do not impair conversion rights of part-time flexible employees. Accordingly, the APWU contends that, if a partially recovered letter carrier is assigned to perform clerk work in a location where part-time flexible clerks are working, the letter carrier must become a part-time flexible clerk.

It is the belief of the APWU that Section 546 of the ELM as well as the EL-505 Handbook require this result. The Handbook, according to the APWU, requires compliance with the National Agreement of the APWU when a letter carrier is assigned to perform clerk work. The Union also contends that a letter carrier injured on duty and partially recovered may seek assignment as a full-time regular clerk by applying for such assignment pursuant to Article 13 of the NALC National Agreement. Under that contractual provision (which the parties have agreed may be applied as though the NALC and APWU were still engaged in joint bargaining), part-time flexible conversion privileges may not be adversely affected because



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the full-time vacancy created by the reassignment would be posted for bid by employees in the APWU bargaining unit.

C. The Employer

The Employer argues the claim of the NALC that placing a letter carrier into the clerk craft as a part-time flexible worker violates the National Agreement is an unsubstantiated assertion of the NALC. Management contends that there is no contractual language to support the NALC's position and that representatives of the NALC must bargain for the "full-time status" guarantee being sought by the Union. The belief of the Employer is that for the NALC to prevail would, in effect, constitute a rewriting of the parties' agreement. Additionally, the Employer contends that ELM Section 546 is silent with regard to the status of reassigned employees and that, absent contractual language to the contrary, this is an area of decision-making reserved to management pursuant to Article 3 of the parties' agreement.

It is also the position of the Employer that prior national arbitration awards are dispositive of the issue before the arbitrator. Moreover, the



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Employer contends that settlement negotiations leading to the formulation of ELM Section 546.141(a) are not relevant in this arbitration proceeding.

The Employer also contends that, because an employee's status on reassignment was not discussed in the 1979 settlement negotiations, the relevance of the negotiation is suspect in this proceeding. It is the position of the Employer that relevant ELM language is clear and that nothing in postal regulations or the National Agreement with the NALC gives a letter carrier a contractual right to retain full-time status when receiving a cross-craft reassignment. Accordingly, the Employer contends that the grievance must be denied.



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## VI. ANALYSIS

### A. Contextualizing the Dispute

At issue in this dispute are reassignment rights of partially disabled employees who sustain injuries on the job. The National Association of Letter Carriers argued that, if an employee injured on the job was a full-time regular employee, such a worker, then, must be transferred to a full-time, regular position in another craft if a cross-craft transfer is necessary. The Employer, on the other hand, argued that, while normally it might agree with such a decision, a prior arbitral decision specifically held that cross-craft transferees must enter the craft as part-time flexible employees if part-time flexible employees already are in the gaining craft. Otherwise, conversion rights of part-time flexible employees in the gaining craft are violated. Adding a layer of complexity to the issue is the belief of the American Postal Workers Union that, since the two unions no longer bargain jointly, it is necessary for the APWU to intervene in order to be certain that its bargaining unit members are protected. It is the contention of the APWU that all incoming cross-craft transfers of partially disabled employees must enter the craft as part-time flexible employees if there already are part-time flexible employees in the clerk craft of that installation.



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The departure point in unraveling the disagreement must begin with any relevant contractual language. In this case, language to be reviewed is drawn from a regulation found in ELM Section 546.141(a). The regulation states:

> *Current Employees.* When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty the USPS should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments. (*See* NALC's Exhibit No. 2, p. 2, emphasis added.)

The regulation, then, provides a detailed guideline and order of preference for locating and assigning work for partially recovered current employees.

At the core of the dispute with regard to ELM Section 546.141(a) is the meaning of language in the provision which requires the Employer to "minimize any adverse or disruptive impact on the employee." To gain a better understanding of what was anticipated when management drafted the language, it is necessary to review its history. Quoting Arthur Corbin, the great scholar on contract law, Justice Traynor of the California Supreme Court observed:

> The meaning of particular words or groups of words varies with . . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of



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> their users and their hearers or readers. A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning. (*See Pacific Gas and Electric Co. v. G. W. Thomas Drayage and Rigging Co.*, 442 P.2d 641, 643 (1968).)

Words find their meaning in context.

Mr. Vince Sombrotto, President of the National Association of Letter Carriers, testified that in 1979 he participated in negotiating changes to relevant portions of the Employee and Labor Relations Manual at issue in this case. Asked if he knew the circumstances which gave rise to the disputed language as a settlement to a Step 4 grievance, Mr. Sombrotto described the situation which led to the grievance as follows:

> I had been hearing some, what I care to describe as horror stories about letter carriers that were on--were injured on the job and were being, in their view, harassed by management by being required to be assigned limited duty well beyond the installation that they worked in and on tours that they--that were alien to them.
>
> I recall a particular case in Texas where the carrier had to go 90 miles to a different installation to go to work at 2:00 a.m. in the morning when the carrier's original starting time was 7:00 a.m., and he worked until 3:30. And here he was required to go 90 miles from his employing installation and report for duty at 2:00 a.m. in the morning.
>
> Q. So just so we are clear, these were carriers who had been injured on the job and who would be eligible for worker's compensation if they weren't working.
>
> A. That is correct.

Q. And did the NALC have a view as to why these abuses were taking place?

A. Well, it was a tactic being used, at least from our viewpoint, to harass people to come back to work whether they are injured or not. They didn't like the idea of paying compensation to employees. And the easiest way to get them off the compensation rolls was to assign them to installations or facilities within installations that were difficult for them to get to and tours that were just not within the work scheduling of the carrier in the past.

As the Union's concerns about the issue increased, the parties began discussing the problem. Mr. Sombrotto testified as follows about the nature of those discussions:

Q. Do you recall with whom you spoke and what the substance of those discussions was?

A. Well, with the Postal Service, I believe I spoke to Jim Gildea and Bill Henry, at least on some occasions.

Q. And were attorneys involved in these discussions?

A. I don't recall if attorneys were involved.

Q. And do you recall whether the parties began to discuss the possibility of resolving the NALC's concerns?

A. Yes. We were coming down to get to the point where we could make agreements on a pecking order, as I recall we termed it, as to where—what would be a carrier's rights that was on limited duty, where that carrier would be assigned, when they would be assigned, and so on.



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And we came to the conclusion that the agreement, ultimate agreement, was that they could--they would have to be assigned in their own craft, in their own installation, on their own tour of duty if there was work available under those conditions.

Q. And did the agreement contemplate the possibility of assignment across craft lines if those conditions could not be satisfied?

A. Yes. (*See* Tr., vol. 2, pp. 50-51.)

Discussions between the parties ultimately produced the present language of ELM Section 546.141(a). President Sombrotto's testimony made clear that the parties anticipated that cross craft transfers would occur. Moreover, the parties gave notice to other unions, specifically the APWU, that the negotiations were occurring, and no one voiced any objection to the agreement reached by management and the NALC on the language of ELM Section 546.141(a).

Testimonial and documentary evidence about the context of the decision to enact ELM Section 546.141(a) made clear that management agreed to make every effort to assure that partially recovered current employees would not be assigned "alien" tours of duty at distant installations. It is clear that a main purpose of the negotiation was to give the Union and the affected employee a degree of control over how reassignment would impact partially disabled workers. By using language



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chosen by management within the context of the negotiation with the Union meant that the Employer necessarily agreed to limit certain of its managerial prerogatives with respect to this category of employees.

Arbitrators long have recognized that, absent contractual restrictions, management is charged with making work assignments. As one arbitrator observed, "the right of the Company to assign work . . . is one of the fundamental rights of management . . .." (*See Olin Mathieson Chemical Corp.*, 42 LA 1025, 1040 (1964).) Within the context of relevant contractual limitations, "the concept of management rights includes all decisions and activities relating to the direction and control of the employer's operations and property." (*See* Gruenberg, The Common Law of the Workplace, 92 (1998).) It, then, is necessary to determine if the managerial limitation inherent in ELM Section 546.141(a) meant that reassigning a full-time regular employee as a part-time flexible worker violated the intent of the parties' understanding.

Article 7.1(a) of the parties' agreement sets forth the difference between full-time and part-time employees. The parties agreed that a full-time employee "shall be assigned to regular schedules consisting of five (5) eight (8) hour days in a service week" and that part-time employees "shall be assigned to regular schedules of less than forty (40) hours in a service



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week, or shall be available to work flexible hours as assigned by the Employer during the course of a service week." (*See* Joint Exhibit No. 1, p. 15). The same concept is contained in the Employer's agreement with the American Postal Workers Union. (*See* APWU Exhibit No. 18, p. 18.)

The contractual language makes clear that having the status of a part-time flexible worker does not guarantee 40 hours of work a week. This means that a partially disabled current employee will not necessarily receive 40 hours a week. Likewise, the flexibility inherent in the position of a part-time flexible worker means that an employee's schedule and tour of duty cannot be guaranteed. Even though initially assigned to a tour of duty similar to a partially disabled employee's former position, there is no contractual protection for such an individual if management should choose to change the employee's hours or schedule. The partially disabled employee's circumstances are complicated by the fact that the individual would be a member of a new bargaining unit, and an exclusive bargaining agent would not be able to enforce employee rights gained under a labor contract to which it is not a party.

Inherent in shifting a worker from a full-time regular schedule to that of a part-time flexible employee is a denial of employee protections that were gained through the settlement process which produced ELM Section



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employee across craft lines. Like the dispute before the arbitrator, the transferring employee in the earlier 1993 case belonged originally to the carrier craft; and management placed the worker in the clerk craft after the disabling injury.

Despite some factual similarities between the 1993 case and the present dispute before the arbitrator, there exists a significant difference which supports a different view of the circumstances in this case and leads to a different result. Reliance on the earlier case is not dispositive of the current situation. The earlier decision continues to be relevant but is not a key decision to be used in resolving this dispute.

In the 1993 case, the partially disabled worker was a former employee. The grievant in the dispute now before the arbitrator was still employed at the point of the transfer. (*See* APWU's Exhibit No. 7, p. 5, and Joint Exhibit No. 2.) This fact constitutes a fundamental distinction because ELM Section 546.141 treats former and current employees differently.

ELM Section 546.141(b) addresses the reassignment of former partially disabled employees. It states:

> *Former Employees*. When a former employee has partially recovered from a compensable injury or disability, the USPS must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which he or she



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> is qualified, <u>including a lower grade position</u> than that which the employee held when compensation began. (*See* NALC Exhibit No. 2, p. 49, emphasis added.)

With regard to "current" employees, the Employer promised that it would "minimize any adverse or disruptive impact on the employee." The Employer made no such commitment with regard to "former" employees. Nor is the detailed "pecking order" established for current employees also set forth for former employees. Moreover, the provision covering former employees makes clear that such employees may be reassigned to lower grade positions. The parties are presumed to have used language in a way that made no part of it superfluous, and the basic differences in the two ELM provisions makes it reasonable to conclude that management clearly intended to give current employees more protection than former employees.

It is a standard of contract interpretation that an interpretation is preferred which gives meaning to all the verbiage in a provision over an interpretation which leaves some of the language of no effect. A conclusion that former and current employees are to be treated the same way under the ELM provision would render the additional language in one part of the ELM meaningless. The difference in language required a difference in interpretation with regard to protections guaranteed the two categories of employees. Accordingly, it is reasonable to conclude that the 1993



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arbitration decision is significantly different from the current dispute before the arbitrator and is not dispositive of this case.

Even though not dispositive, reasoning in the 1993 case is useful in the present dispute to a certain extent. The 1993 case held that it may violate conversion rights of part-time flexible employees in the gaining craft to assign a former employee as a full-time regular employee. (*See* APWU Exhibit No. 7, p. 29.) This proposition still has strength. The 1993 case also held that the Employer is required to show why it is necessary to assign an employee as a full-time regular worker or risk violating conversion rights of part-time flexible employees in the gaining craft. (*See* APWU Exhibit No. 7, p. 25.) The reasoning remains sound and should provide a useful guideline in future disputes.

According to the analysis set forth in the 1993 case, the Employer in the current situation would have the burden of showing why the disabled employee is required to cross craft lines and retain her status as a full-time regular employee. It might try to justify the action to the exclusive representative of the gaining craft on the ground that to do otherwise would violate management's agreement with the NALC. Another circumstance, however, makes application of the 1993 decision more difficult today.



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The two unions have discontinued joint bargaining. This fact greatly impacts the relevance of the 1993 case to the current situation. The 1993 decision was affected by an underlying assumption which no longer exists. That assumption was that both crafts were covered by essentially the same agreement and that compliance with the agreement for one craft, in effect, would satisfy the Employer's obligation with regard to the other craft.

When the parties chose to negotiate separate agreements, they separated from the past and wrote a new chapter in their relationship. As is so often the case, however, they did not eviscerate the past. The past is prologue to the future, and the parties brought it with them but in separate contracts. Their separateness, however, never foresook the tautly knit structures set forth in numerous manuals, such as the Employee and Labor Relations Manual. The parties retained a balance between separateness and overall organizational order. The two separate union universes remained tightly connected by the somber realism of working for one employer. There are two universes in motion subtly proportioned by separate contracts. The parties committed themselves to constructing a balance between contracts while owing their allegiance to a single tradition. Their individual contracts are a monument to a performance-oriented future.



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Rights of letter carriers and clerks are no longer determined collectively. Management must be diligent in being certain that it can keep promises it makes to each craft. If promises to one craft infringe on rights of another, the Employer is obligated to negotiate the authority to implement such rights within the craft whose rights are being infringed. The APWU is correct in asserting that those reassignments and reemployment decisionsunder Section 546 of the ELM must be accomplished in accordance with commitments made by management in the APWU agreement. Simply because complying with one agreement would violate the other does not relieve management of its obligation to comply with both.

In order to comply with ELM Section 546.141(a), the Employer is not permitted to change the status of a disabled employee when switching crafts; but if the employee is a full-time regular worker and there are part-time flexible workers in the gaining craft, then reassigning the employee as a full-time regular worker could violate conversion rights of part-time flexible employees in the gaining craft.

Such an assessment, however, must be based on the APWU's agreement with the Employer, not that of the NALC. Whether or not such a transaction violates the APWU agreement is not before the arbitrator in this



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dispute. The only question to be answered is whether transferring the grievant to a part-time flexible position would violate the Employer's obligation with regard to the NALC. That question must be answered in the affirmative.



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## AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated its agreement with the National Association of Letter Carriers when it reassigned a full-time regular, partially disabled, current employee of the Carrier craft to the Clerk craft as a part-time flexible worker. In accordance with the agreement of the parties, the issue of remedy is remanded to all the parties so that they may attempt to agree on a negotiated settlement. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Arbitrator

Date: 11-4-98



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## CERTIFICATE OF SERVICE

Amicus American Postal Workers Union, AFL-CIO (APWU), through its undersigned counsel, hereby respectfully requests that the Clerk's Office provide electronic service of the Brief and Appendix of Amicus APWU.

I hereby certify that I will send a printed copy of the Brief and Appendix of Amicus APWU to non-filers by the end of the next business day, as follows:

| Name & Address | Documents | Method of Service |
|---|---|---|
| James C. Latham<br>Appellant<br>[redacted] | Agency's Opening Brief | US Postal Mail |
| Ruby N. Turner<br>Appellant<br>[redacted] | Agency's Opening Brief | US Postal Mail |

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| | | |
|---|---|---|
| Arleather Reaves<br>Appellant<br>[redacted] | Agency's Opening Brief | US Postal Mail |
| Cynthia E. Lundy<br>Appellant<br>[redacted] | Agency's Opening Brief | US Postal Mail |
| J.R. Pritchett<br>Appellant Representative<br><br>Postal Employee Advocates 86 East Merrill Road<br>McCammon, ID 83250<br>USA | Agency's Opening Brief | US Postal Mail |
| Geraldine Manzo<br>Appellant Representative<br><br>7700 Edgewater Drive Suite 656<br>Oakland, CA 94621<br>USA | Agency's Opening Brief | US Postal Mail |
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