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August 24, 2011

Office of the Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington D.C. 20419

Re: James C. Latham, et al. v. U.S. Postal Service
Docket No. DA-0353-10-0408I-1

Dear Sir:

Pursuant to the Notice filed in the Federal Register by the Merit Systems Protection Board on July 25, 2011, we submit for filing in the above matter an amicus brief on behalf of our client, the National Association of Letter Carriers, along with attachments thereto.

This will confirm that we have sent by first class mail a copy of this brief to the parties and the parties' representatives.

Sincerely,

Keith E. Secular

Keith E. Secular

Enclosure

cc: Parties and representatives

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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JAMES C. LATHAM,
RUBY N. TURNER,
ARLEATHER REAVES,
CYNTHIA E. LUNDY, AND
MARCELLA ALBRIGHT,
Appellants,

v.

UNITED STATES POSTAL SERVICE,
Agency.

Docket Numbers:
DA-0353-10-0408-I-1
AT-0353-11-0369-I-1
CH-0353-10-0823-I-1
DC-0752-11-0196-I-1
SF-0353-10-0329-I-1

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AMICUS BRIEF OF NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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STATEMENT OF INTEREST

Pursuant to the Notice published in the Federal Register by the Merit Systems Protection Board ("MSPB"or "Board") on July 25, 2011, the National Association of Letter Carriers ("NALC") submits this amicus brief as an interested party in the above-captioned matter.

NALC is a national labor organization, headquartered in Washington D.C., and the exclusive bargaining representative of the approximately 200,000 employees of the United States Postal Service ("Postal Service") employed in the city letter carrier craft. NALC and the Postal Service are parties to a nation-wide collective bargaining agreement (the "National Agreement") covering the terms and conditions of employment of city letter carriers. As discussed below, the National Agreement incorporates rules and policies governing the employment of injured employees. NALC has a vital interest in ensuring that such rules and policies are not undermined by the Board's decision herein.

PRELIMINARY STATEMENT

The Postal Service's obligation under its internal regulations and policies (and per contractual agreement with the NALC) to provide work to employees who partially recover from job related injuries includes more than just offering assignment to existing vacant positions. Rather, this obligation includes assignment to positions specially created to accommodate injured employees, and to tasks and subfunctions combined from multiple positions. Federal Circuit and MSPB decisions establish that the Board is obligated to enforce internal agency regulations and policies in employee appeals, even when doing so creates additional rights for employees that exceed their rights under OPM regulations. Consequently, the MSPB must enforce this Postal Service

obligation in considering appeals from partially recovered Postal employees who seek restoration to duty, under the existing arbitrary and capricious standard established by OPM regulation.

FACTUAL BACKGROUND

On July 25, 2011, the Board issued a Notice of Opportunity to File Amicus Briefs ("Notice") in five pending cases involving partially recovered Postal employees with compensable injuries.[1] 76 FR 44373 (2011). In these five cases, the employees argue on appeal that the Postal Service violated their restoration rights because it failed to follow its Employee and Labor Relations Manual ("ELM"). Specifically, these appellants argue that under ELM §546.142(a) the Postal Service is required to "provid[e] medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position." Notice, 76 FR 44373. Further, at least one appellant relies on U.S. Postal Service Handbook EL-505, Injury Compensation §§ 7.1-7.2,

> which provides that limited duty assignments "are designed to accommodate injured employees who are temporarily unable to perform their regular functions" and consist of whatever available tasks the agency can identify for partially recovered individuals to perform consistent with their medical restrictions.

Notice, 76 FR 44373. Under current MSPB precedent, agencies are required "to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies" but

[1] The relevant cases are: *James C. Latham v. U.S. Postal Service*, MSPB Docket Number DA-0353-10-0408-I-1, *Ruby N. Turner v. U.S. Postal Service*, MSPB Docket Number SF-0353-10-0329-I-1, *Arleather Reaves v. U.S. Postal Service*, MSPB Docket Number CH-0353-10-0823-I-1, *Cynthia E. Lundy v. U.S. Postal Service*, MSPB Docket Number AT-0353-11-0369-I-1, and *Marcella Albright v. U.S. Postal Service*, MSPB Docket Number DC-0752-11-0196-I-1.

are not required to assemble available tasks from multiple positions to create a unique appropriate assignment. *Id.* The Board has not yet addressed whether Postal Service regulations create additional restoration rights for Postal employees appealing to the MSPB. The Board issued its Notice so that interested parties could address the following legal issues:

> (1) May a denial of restoration be "arbitrary and capricious" within the meaning 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; and (2) 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?

For the discussion below, we address the questions in reverse order.

ARGUMENT

I. The Postal Service's Obligation to Provide Limited Duty Assignments Requires it to Search for Work Beyond Established Jobs, By Combining Tasks of Multiple Positions To Create Unique Positions

The Postal Service contractual obligation to provide limited duty work to employees who partially recover from a job-related injury, found in the Employee and Labor Relations Manual (ELM)[2], requires more than a search for vacant, existing positions. It also requires the Postal Service to search for work beyond established jobs, by combining tasks that may be subfunctions of multiple positions and by providing uniquely created positions that would not otherwise exist.

[2] The USPS Employee and Labor Relations Manual can be accessed on-line at the following address: http://about.usps.com/manuals/elm/elm.htm.

This is demonstrated by the collective bargaining history regarding the relevant ELM provision, by Postal Service policy reflected in its handbooks and manuals, and by Postal Service admissions in national level arbitration proceedings.

A. The Bargaining History of ELM 546.142 Establishes that the Postal Service's Current Restoration Obligation Goes Beyond Restoration to Established Jobs

In 1978, Postal Service regulations required it to make limited duty assignments only to established jobs. The Employee and Labor Relations Manual (ELM), Issue 1, dated 4-1-78, at Section 546.21 stated:

> Maximum efforts shall be given towards assignments for employees with occupationally-related illnesses or injuries to established jobs which are not medically contraindicated, and within the requirements of applicable collective bargaining agreements.

However, in 1979 the ELM was revised, expanding the requirement by changing "*maximum efforts shall be given*" to "*must make every effort*" and by deleting the reference "*to established jobs*" and replacing it with "*to limited duty*." Moreover, these changes were effected as a result of a negotiated national pre-arbitration settlement between the Postal Service and the National Association of Letter Carriers. (A copy of the settlement is submitted herewith as Attachment A to this brief.) The settlement, dated October 26, 1979, re-numbered and changed the relevant ELM language as follows:

> Section 546.141 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 tolerances....

The settlement also established specific criteria for limited duty assignments (known colloquially as the "pecking order") which were intended to

minimize inconvenience and disruption for limited duty employees. These criteria, presently incorporated in the ELM, are as follows:

> 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:
>
> To the extent that 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.
>
> 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.
>
> 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.
>
> 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.

The above language has remained in the ELM ever since 1979. It is found in the current ELM at 546.142a.

For more than 30 years, both the Postal Service and the NALC have interpreted that language to obligate the Postal Service to provide medically suitable

work to partially recovered employees, regardless of whether or not that work comprises the essential functions of a complete and separate existing position, in order to ensure compliance with the pecking order criteria.

B. Handbook EL 505 and ELM 546.22 Also Establish the Postal Service Policy of Combining Tasks from Multiple Positions to Form Limited Duty Assignments

As stated in its Introduction, the Postal Service Handbook EL 505 *Injury Compensation* compiles all applicable USPS regulations, policies and guidelines regarding injury compensation issues.[3]

Provisions in the EL 505 reflect Postal Service policy that requires it to make every effort to assign partially recovered employees to restricted work even where such work is not part of a distinct, separate, or existing position.

Preliminarily, it is important to note that the Postal Service distinguishes between restricted work that is provided to partially recovered employees whose disability is temporary, and those whose disability is permanent. The Postal Service calls the former "limited duty" assignments and the latter "rehabilitation" assignments. However, the Postal Service recognizes that the ELM 546.142a obligation applies equally to both. ELM 546.141 explains:

> 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.

[3]While the USPS does not make its Handbook EL 505 available to the public on-line, it can be accessed at the following NALC web address: http://www.nalc.org/depart/cau/manual.html.

Handbook EL 505 has separate chapters for limited duty assignments (Chapter 7) and rehabilitation assignments (Chapter 11). Both chapters reflect policy that includes assignment of partially recovered employees to work that is not part of a complete and separate position.

Chapter 7 of EL 505 addresses limited duty provided to injured employees who are temporarily unable to perform their regular functions. Exhibit 7.1 provides guidelines and basic considerations, including the following: "[t]he assignment should be a function where temporary additional help is useful." Clearly, assignment to provide temporary additional help is not an assignment to a vacant, existing position.

Additionally, sections 7.1 and 7.2 provide for Informal and Formal Limited Duty Programs. The Formal Limited Duty Program involves a special bank of tasks that are filled only by injured employees.

> This special bank consists of limited duty tasks that are filled only by injured employees...
>
> Establish a special bank of limited duty tasks to be filled only by injured employees...

Clearly, assignment to tasks from a special bank of tasks reserved only for injured employees is not an assignment to a vacant, existing position.

Chapter 11 of EL 505 addresses Rehabilitation assignments. Section 11.7 provides:

> Consider the following possible placements:
>
> — Employee's current position. If the employee is a current employee (was never separated from the USPS rolls) and is capable of performing his or her core duties with only minor modification, assignment to the current position may be feasible. This type of accommodation is not considered a modified assignment, and the workhours are charged to the regular operation LDC.

> — Reassignment to an existing position. If a current employee can no longer perform the core duties of his or her position but is capable of performing the core duties of another authorized position for which he or she is qualified, reassignment may be offered. Since the employee is performing the core duties of the position, the workhours are charged to the regular operation LDC.
>
> — Residual vacancy. If a vacancy has been posted for bid or application and there are no successful bidders or applicants, both current and former employees may be offered a residual vacancy if they can perform the core duties of the position with only minor modification. Again, since the core duties are being performed, this is not considered a modified assignment and the workhours are charged to the regular operation LDC.
>
> — Modified assignment. If a current or former employee's restrictions prohibit accommodation as described in the categories above, individual tasks must be identified and combined to develop a modified assignment consistent with the employee's medical restrictions. These tasks are usually subfunctions and may be from multiple positions.

Thus, Postal Service policy requires that if an injured employee cannot be accommodated with assignment to an existing position (the employee's current position, other existing position, or residual vacancy), then "individual tasks must be identified and combined to develop a modified assignment...[T]hese tasks are usually subfunctions and may be from multiple positions." EL 505, Section 11.7. Use of the imperative "*must*" in this context confirms the obligatory rather than discretionary nature of the requirement.

This obligation to identify and combine individual tasks and subfunctions from multiple positions in order to develop a modified assignment is echoed in another relevant provision in the ELM. ELM 546.222 provides:

> 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....

(emphasis added). This ELM provision establishes that Postal Service policy includes assignment to positions specially created to accommodate partially recovered employees.

C. Arbitration Decisions

The National Agreement provides a grievance procedure culminating in final and binding arbitration, including national level arbitration of interpretive issues of general application.[4] NALC's sister labor organization, the American Postal Workers' Union (APWU)[5] has a similar grievance procedure in its collective bargaining agreement with the Postal Service, and both the NALC-USPS and APWU-USPS agreements provide reciprocal rights to intervene in each other's arbitration proceedings where a union feels its interests may be affected.

A national level arbitration of a grievance filed by the APWU, in which the NALC intervened, sheds light on Postal Service policy regarding assignment of limited duty to both existing vacant positions, and to uniquely created positions. The case is C-23742, E90C-4E-C 95076238, decided on October 31, 2002 by National Arbitrator Shyam Das ("Das Award;" a copy of the Das Award is submitted herewith as Attachment B to this brief).

In this case, the Postal Service had provided a rehabilitation position in the clerk craft to a partially recovered injured letter carrier. The APWU filed a grievance, arguing that the position should have been made available to its members for selection by

[4] The National Agreement may be reviewed at http://www.nalc.org/depart/cau/agreemnt.html.

[5] APWU represents all Postal Service employees in the Clerk, Maintenance, and Motor Vehicle crafts. Injured letter carriers are often assigned limited duty work in the clerk craft.

seniority bidding, prior to assignment to the injured letter carrier. In addition to ELM 546.142, ELM 546.222 was significant to the arguments in the case.

Arbitrator Das noted the Postal Service position:

> The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment. It only exists as a result of the need to reassign the injured employee. It is created under Article 21.4 and ELM Section 546. When the injured employee vacates the assignment, it will no longer exist....
>
> Creation of duty assignments is based on management's operational needs. The present assignment, in contrast, was only created because of the Postal Service's legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job. This assignment did not exist before the employee was injured and otherwise would not have been created by management, because no need for an Article 37 duty assignment existed.

Das Award, pp. 12-13. Arbitrator Das made the following finding:

> In this case, the Postal Service created a full-time assignment with fixed hours and days off consisting of various clerk duties that were within the medical restrictions of the injured letter carrier. This rehabilitation assignment was not a residual vacancy in the Clerk Craft, but was a "position uniquely created to fit those restrictions", as provided for in ELM Section 546.222.

Id., p. 18.

As noted by Arbitrator Das, the Postal Service acknowledged that the assignment at issue did not exist before the employee was injured. This assignment had been created for the sole purpose of accommodating an injured employee and would no longer exist when the employee vacated it. The Postal Service created the assignment in accordance with ELM 546.

The arbitration awards cited by the Board in the July 25 Notice illustrate the circumstances in which specific tasks must be assigned to an injured employee as limited duty under the ELM. Essentially, a task must be assigned to a partially recovered, injured employee if the task is (1) available, and (2) within the employee's medical restrictions, so long as the resulting assignment is consistent with the ELM's pecking order criteria. *See Postal Service and* NALC, Case No. E06N-4E-C 09370199 (2010) Eisenmenger, Arb) [delivering express and hot case mail and duties related to growth management]; *Postal Service and NALC,* Case No. G06N-4G-C 10205542 (2011) (Sherman, Arb.) [casing mail for roughly 4 hours per day, delivering Express and First Class Mail, performing lobby duties, answering the phone, and other activities using a special lumbar chair]; *Postal Service and NALC,* Case No. E06N-4E-C 09419348 (2010) (Duffy, Arb.) [answering phones, researching problems and correcting errors relating to the centralized forwarding system ("CFS"), paperwork, assisting supervisors on route inspections, computer work, work related to the address management system ("AMS"), shuttling vehicles and taking splits to carriers, hub and spoke runs, delivering express mail, and other duties]; *Postal Service and NALC*, Case No. F06N-4F-C 09221797 (2010) (Monat, Arb.) [casing mail and delivering regular and express mail]; and *Postal Service and NALC*, Case No. B01N-4B-C 06189348 (2010) (LaLonde, Arb.) [work performed by regular employees on overtime and other subfunctions within the grievant's restrictions].

II. The Postal Service's Limited Duty Regulations Must be Enforced by the Board

A. Statute and OPM Regulation

The restoration rights of federal employees who overcome their injury or disability are established by 5 U.S.C. 8151(b). In enacting these statutory rights, "Congress sought to do everything feasible to compensate and reinstate federal employees injured in the line of duty . . . ." *Raicovich v. U.S. Postal Service*, 675 F.2d 417, 424 (D.C. Cir. 1982).[6]

The statute, of course, provides that the restoration rights of injured employees are to be implemented through regulations promulgated by the Office of Personnel Management ("OPM"). Accordingly, the restoration of employees who partially recover from compensable injuries is governed by the OPM rule codified at 5 C.F.R. §353.301(d):

> 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

---

[6] Section 8151 was part of a package of amendments to the Federal Employees Compensation Act, enacted in 1974, which were intended to benefit employees. Both the House and Senate Reports repeatedly emphasized that the findings of the National Commission on State Workmen's Compensation Laws released in July, 1972, coupled with further congressional review of the operation of federal law, had brought to light serious deficiencies in the Federal Compensation system. The 1974 amendments, accordingly, were designed to "begin a program updating the Act so that it might clearly reflect the most equitable methods for the compensation of Federal employees injured while in the performance of their duties." H.Rep. No. 93-1025, 93rd Cong., 2d Sess. 3 (1974) at 1. As the Senate Report put it, the amendments reflect a policy designed to require the Federal Government to be a "model employer":

> "It is essential that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner. The Federal Government should strive to attain the position of being a model employer. Enactment of these Amendments will do much to achieve that goal."

S. Rep. No. 93-1081, 93d Cong. 2d Sess. (1974) at 2. Accordingly, ambiguities in the statute or its implementing regulations should be resolved in favor of injured employees.

> 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.)

(emphasis added). Significantly, this regulation, unlike the rules governing employees who fully recover, simply provides for partially recovered employees to be "restored . . . according to the circumstances in each case . . . to limited duty." By contrast, employees who fully recover are to be restored to "his or her former position or an equivalent one." 5 C.F.R. § 353.301(a) and (b). The language of paragraph (d), by itself, does not define "limited duty." Logically, the term should be applied to any duty which is considered, by regulation, custom, or practice, to be "limited duty" by the agency in question. Here, as discussed above, the Postal Service does not restrict the definition of limited duty to the essential functions of a complete and separate position.

Section 353.304's requirement that injured employees be treated "at a minimum . . . substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended" is also significant to the question posed by the Board. Decisions by the Equal Employment Opportunity Commission involving injured Postal Service employees have established that the Service's failure to provide limited duty under ELM 546 is evidence of discrimination under the Rehabilitation Act. For example, in *Pruneda v. Potter*, EEOC Appeal No. 0720050014, 2007 WL 1730018 (June 4, 2007), the Commission found that the reassignment of limited duty letter carriers "without regard to the protocol established by its applicable Employee and Labor Relations regulations, is sufficient to create an inference of discrimination so as to establish a prima facie case of disability-based discrimination." *Id.* at 13. Similarly, in *McConnell v. Potter*, EEOC Appeal No. 0720080054, 2010 WL 332083 (Jan. 14, 2010), the Commission found that the appellant "stated a claim for a violation of the

Rehabilitation Act" because she showed that "she lost her [limited duty, modified] position." The Commission further noted that where "an employee has performed a modified position for an extended amount of time, it is that position which is considered for the purposes of determining whether the employee is a qualified individual with a disability." *Id.* at 10.

Further, as outlined in 5 CFR § 353.304, partially recovered employees who are denied restoration may appeal the agency's action under an "arbitrary and capricious" standard:

> (a) Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) may appeal to the MSPB an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB's regulations.
>
> . . .
>
> (c) An individual who is partially recovered from a compensable injury *may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration.* Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

5 CFR § 353.304 (emphasis added). An agency's failure to abide by its own regulations is inherently arbitrary and capricious. Accordingly, the OPM regulations establish the Board's jurisdiction to enforce the Postal Service's limited duty rules.

B. Kachanis v. Department of Treasury

Any doubt as to the enforceability of the Postal Service's limited duty regulations is clearly resolved by the Federal Circuit's decision in *Kachanis v. Dep't of*

Treasury, 212 F.3d 1289 (Fed. Cir. 2000). In *Kachanis* a former Internal Revenue Service employee, who had been separated from employment as a result of a job-related injury, sought restoration under Section 8151(b) following his recovery. *Id.* at 1291. The Court upheld the Board's finding that the failure to restore the employee was consistent with the statute and the OPM regulations. *Id.* at 1295. However, the Court went on to hold that the agency was also bound by its Career Transition Assistance Plan ("CTAP"), a set of internal regulations covering displaced bargaining unit employees. The Court held that the Board properly considered "whether [the employee] was afforded any further rights under the CTAP." *Id.* at 1296.

> The Board properly focused on whether Kachanis was afforded any further rights under the CTAP. . . .The Board conceded, properly so, that an agency's own policy or regulations regarding the filling of vacancies *supersedes the [OPM] regulations to the extent they afford greater rights.*

Id. (emphasis added).[7]

---

[7] This result is consistent with a long line of MSPB precedent enforcing internal agency policy and regulations in a variety of contexts and Federal Circuit authority affirming this enforcement. *See Lyles v. Dep't of Army*, 864 F.2d 1581, 1583 (Fed. Cir. 1989) ("The Army must abide by its own regulation [in reassigning employees who lose their security clearances], even if it is more rigorous than necessary. . . And the Board . . . may review the Army's efforts under this regulation[.]"); *Stuck v. Dep't of Navy*, 72 M.S.P.R. 153, 157 (1996) (MSPB has jurisdiction to review employee's claims under agency's priority placement program because "the Board has found that it will enforce an agency's own policy or regulation regarding the filling of vacancies, even if that policy or regulation grants the employee greater rights than she would have under the general regulations"); *Monk v. Department of Navy*, 68 M.S.P.R. 560, 562-63 (1995) (finding employee improperly separated in violation of MOU); *Moran v. Dep't of Air Force*, 64 M.S.P.R. 77, 84 (1994) (when there is a reduction-in-force "the Board will enforce employee rights mandated by agency regulations"; finding reduction-in-force to be consistent with internal agency regulations); *Kostick v. U.S. Postal Service*, 40 M.S.P.R. 19, 22 (1989) (Postal Service applied "obsolete" ELM provision in error and therefore did not comply with MSPB decision); *Adakai v. Dep't of Interior, Bureau of Indian Affairs*, 20 M.S.P.R. 196, 201 (1984) ("There is no question that an agency is obligated to conform to procedures and regulations it adopts, and the Board is required to enforce such procedures."); *Patterson v. Dep't of Navy*, 6 M.S.P.R. 420, 421 (1981) ("where the agency implemented a regulation or established a policy whereby it is required to offer vacant positions in a reorganization, the Board will enforce such a provision").

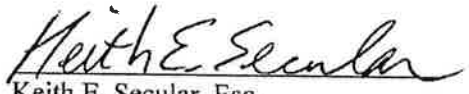
Accordingly, in the present cases, even if the Postal Service's limited duty regulations afford appellants greater rights than the OPM regulation, those greater rights must be enforced by the Board.

CONCLUSION

For the reasons discussed above, the MSPB should enforce Postal Service internal rules and regulations in applying the arbitrary and capricious standard under 5 C.F.R. 353.304 to appeals from partially recovered employees.

August 24, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the attached Documents were sent by First Class mail to each of the following:

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[redacted]

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[redacted]

James C. Latham
[redacted]

Marcella Albright
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Ruby N. Turner
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Dated: August 24, 2011

Keith E. Secular

ATTACHMENT A

M-01010

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

October 26, 1979

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

Re: Grievance No. N8-NAT-003

Dear Mr. Sombrotto:

On July 24, 1979, and several subsequent occasions, we conducted pre-arbitration discussions relative to the above-captioned grievance.

Pursuant to these discussions, the Postal Service prepared, and forwarded to you, proposed new language for inclusion in Part 546.14 of the Employee and Labor Relations Manual. The proposed new language is as follows:

New Part 546.14, E&LR Manual

.14 DISABILITY PARTIALLY OVERCOME.

.141 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 tolerances (see 546.32). 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:

a. To the extent that 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 shall constitute the limited duty to which the employee is assigned.

b. 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.

c. 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 shall 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.

d. 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 will 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 normally assigned.

.142 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 qualified, including a lower grade position than that held when compensation began.

This language, to which you indicated you and other Unions with whom you discussed it are amenable, incorporates procedures relative to the assignment of employees to limited duty that you proposed. Subchapter 540 of the Employee and Labor Relations Manual was published on October 22, 1979, as a Special Postal Bulletin. It is the intent of the Postal Service to publish Part 546.14 with the language set forth in this letter, separately, after transmitting it to the Unions under Article XIX of the National Agreement. Part 546.14 subsequently will be published along with the rest of Subchapter 540 in the Employee and Labor Relations Manual.

With regard to individual grievances which arise in connection with implementation of these procedures, the parties agree that such grievances must be filed at Step 2 of the Grievance-Arbitration Procedure within five (5) days of the effective date of the limited duty assignment. The parties further agree that, if such a grievance remains unresolved through Step 3 of the Grievance-Arbitration Procedure, the grievance may be appealed to Expedited Arbitration under Article XV, Section 4 C, of the National Agreement.

In view of the foregoing, the issue raised by this grievance relative to the assignment of letter carriers who incur job related injuries is resolved as the Postal Service, in accordance with the assignment procedures set forth above, may assign letter carriers who have partially recovered from job related disabilities to limited duty assignments outside of their regular work schedules and/or their regularly assigned work facilities. The grievance can, therefore, be considered closed.

Sincerely,

for William E. Henry, Jr.
General Manager
Grievance Division
Labor Relations Department

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

ATTACHMENT B

C-23742

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COHEN WEISS & SIMON LLP

National Arbitration Panel

In the Matter of Arbitration	)	
between	)	
United States Postal Service	)	
and	)	Case No.
American Postal Workers Union	)	E90C-4E-C 95076238
and	)	
National Association of Letter Carriers - Intervenor	)	

Before: Shyam Das

Appearances:

For the Postal Service: John W. Dockins, Esquire

For the APWU: Darryl J. Anderson, Esquire

For the NALC: Keith E. Secular, Esquire

Place of Hearing: Washington, D.C.

Dates of Hearing: October 16, 2001
January 23, 2002

Date of Award: October 31, 2002

Relevant Contract Provisions: Articles 19, 21.4, and 37; ELM Section 546

Contract Year: 1994-1998

Type of Grievance: Contract Interpretation

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NALC HEADQUARTERS

Award Summary

As set forth in the above Findings, the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 of the National Agreement, and the creation of that assignment pursuant to provisions of Section 546 of the ELM did not impair the seniority rights of PTF clerks.

Shyam Das, Arbitrator

This case arises under the 1994-1998 National Agreement between the American Postal Workers Union (APWU) and the Postal Service. The National Association of Letter Carriers (NALC) intervened and supports the position of the Postal Service in this case.

The Federal Employees' Compensation Act (FECA) and regulations issued thereunder impose certain obligations on the Postal Service to provide suitable work to employees who partially recover from a job-related injury. Article 21.4 of the APWU National Agreement provides:

> Section 4. Injury Compensation
>
> Employees covered by this Agreement shall be covered by subchapter I of Chapter 81 of Title 5 [FECA], 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.

The NALC National Agreement includes a similar provision. Section 546 of the Employee and Labor Relations Manual (ELM) includes provisions relating to Reemployment or Reassignment of Employees Injured on Duty.

In May 1995, a partially recovered letter carrier who had been injured on the job was reassigned to the Clerk Craft as a part-time flexible (PTF) employee and assigned to a "General Clerk Modified" position at Cactus Station in Phoenix, Arizona.

This was a permanent reassignment made pursuant to a Form 50. The reassigned employee was assigned to work a fixed work week of 40 hours, beginning at 6:30 a.m. and ending at 3:00 p.m., with Sundays and Mondays off. Management created this assignment as a rehabilitation position for the injured letter carrier as an application of provisions in ELM Section 546. It appears from the record that the General Clerk position at this facility (and other similar facilities in Phoenix) previously had been abolished.

The APWU filed a grievance in which it asserted that management violated the collective bargaining agreement in creating a new General Clerk position for the PTF rehabilitation employee. The Union asserted a violation of Articles 19, 37 and 12 of the National Agreement.

The Postal Service's Step 4 denial of this grievance states:

> The issue in this grievance is whether the duties of a rehabilitation position, created for an employee with work restrictions due to an on-the-job injury, must be posted for bid to all clerk craft employees.
>
> The Union contends that the reassignment of an injured employee to the clerk craft as a PTF with a fixed schedule violates the National Agreement unless the assignment is to a residual vacancy.
>
> ...[I]t is our position that the Postal Service has legal responsibilities to employees with job related injuries under 5

USC 8151 and the Office of Personnel Management. Article 21.4 provides for the promulgation of regulations to comply with those responsibilities. Those regulations are incorporated into the Employee & Labor Relations Manual 540. The assignment in this case was made in accordance with those regulations.

The rehabilitation assignment is uniquely created as required in ELM 546.222. As such, it does not constitute a newly established position which must be posted for bid under Article 37.3.A.

The assignment is an incumbent only assignment created to meet the restrictions of the employee being placed. Further, if for any reason the employee vacates the position, it will not be posted for bid.

Furthermore, past practice, negotiation history, case law, handbooks and manuals and a reading of the contract as a whole supports management's position in this case. National Arbitrator Aaron has already ruled in case number H1C-5D-C 2128 that it is too late in the day for the Union to challenge the proposition that FECA regulations can augment contractual rights.

The provisions of Article 37 cited by the APWU include the following:

ARTICLE 37

CLERK CRAFT

Section 1. Definitions

* * *

B. Duty Assignment. A set of duties and responsibilities within recognized positions regularly scheduled during specific hours of duty.

* * *

Section 2. Seniority

* * *

D. Application of Seniority.

1. Seniority for full-time employees and part-time regular employees for preferred duty assignments and other purposes shall be applied in accordance with the National Agreement. This seniority determines the relative standing among full-time employees and part-time regular employees. It begins on the date of entry into the Clerk Craft in an installation and continues to accrue as long as service is uninterrupted in the Clerk Craft and in the same installation, except as otherwise specifically provided for.

* * *

Section 3. Posting, Bidding, and Application

A. Newly established and vacant Clerk Craft duty assignments shall be posted as follows:

1. All newly established Clerk Craft duty assignments shall be posted to craft employees eligible to bid within 28 days....

Relevant provisions of ELM Section 546 include the following:[1]

546.14
Disability Partially Overcome

546.141 Obligation

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

a. 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:

[1] Issue 12 of the ELM was in effect when this grievance arose in 1995. It was replaced by Issue 13 in 1998. To the extent relevant provisions of Issue 13 differ from those in Issue 12, the parties seem to agree that the provisions in Issue 13 reflect the manner in which the corresponding provisions in Issue 12 actually were applied in practice in 1995. The provisions of Section 546 quoted in this decision are taken from Issue 13. The APWU has noted that it has challenged Issue 13 under the procedures of Article 19, but that challenge is not involved in this case.

(1) To the extent that 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.

* * *

546.142
Rights and Benefits Upon Partial Recovery

a. Seniority. Former employees who are reemployed into bargaining unit positions or current career employees who are reassigned into such positions are credited with seniority in accordance with the collective bargaining agreements covering the position to which they are assigned.

* * *

546.2
Collective Bargaining Agreements

546.21 Compliance

Reemployment or reassignment under this section must be in compliance with applicable collective bargaining agreements. Individuals so reemployed or reassigned 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 reemployment or reassignment is made to a current or former postal employee on the OWCP rolls for more than 1 year.

546.222 Reemployment or Reassignment

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 may not impair seniority rights of PTF employees....

(Emphasis added.)

APWU POSITION

The APWU stresses that all of the duties listed in the "General Clerk Modified" position at issue also are found in the standard position description of a "General Clerk", except the delivery of Express Mail, which is a duty regularly performed by general clerks and other employees, as needed. Moreover, when the APWU Steward who filed this grievance asked the bid clerk in Phoenix why this position was designated "Modified", she was told that was because the rehabilitated letter carrier would not have to pass a typing test.

The APWU contends that the Postal Service in this case established a new full-time duty assignment, as defined in Article 37.1.B of the National Agreement, which it was required

to post for bid under Article 37.3.A.1. In violation of Article 37, the APWU charges, the rehabilitated letter carrier was reassigned as a PTF clerk to a full-time regular duty assignment, without regard to the fact that she had no seniority in the Clerk Craft. This reassignment occurred when there were clerks with over 20 years of seniority waiting to bid on a day job with the hours and days off of this position, as well as PTF clerks waiting to be converted to full-time regulars.

The APWU further contends that the Postal Service violated Article 19 and ELM Section 546 by failing to post this assignment. Section 546 does not -- as the Postal Service argues -- authorize the Employer to ignore the seniority and job posting requirements of the National Agreement, but rather requires compliance with the National Agreement.

The APWU insists that the Employer's obligation to "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance", set forth in ELM Section 546.141 cannot justify violation of Article 37. First, that provision is applicable to temporary "limited duty" assignments, not to permanent reassignment following partial recovery, as was the case here. Second, the vague reference to making "every effort" in Section 546.141 cannot overcome the requirement clearly and repeatedly expressed elsewhere in Section 546 that applicable collective bargaining agreement provisions must be followed.

The requirement in Section 546.142a that employees reassigned into the Clerk Craft must be credited with seniority in accordance with Article 37 of the APWU National Agreement also means that the reassigned letter carrier's status must be determined by the employee's relative seniority within the unit. This employee had no seniority in the Clerk Craft, yet she was assigned to a full-time job with favorable hours and days off. Application of Article 37 also is expressly required by Sections 546.21 and 546.221.

The APWU argues that Section 546.222 cannot justify creating a unique position and then reassigning an employee into it in violation of the seniority and posting requirements of Article 37. What the Postal Service did here -- contrary to Section 546.222 -- undisputedly impaired the seniority rights of PTF clerks under Article 37. If the assignment had been posted for bid, there ultimately may have been a residual full-time regular vacancy that a PTF clerk could have exercised seniority to convert into it. The Postal Service's action in this case, the APWU urges, is analogous to the assignment of supervisors to the NALC bargaining unit as full-time regular employees, which National Arbitrator Snow held violated the seniority right of PTF letter carriers waiting to convert to full-time regular status in Case Nos. H7N-4U-C 3766 et al. (1990).

The APWU insists that the Employer's contention that the Union's interpretation of Section 546.222 would preclude the Postal Service from ever creating a unique position under that provision is demonstrably false. Jim McCarthy -- now APWU

Director of the Clerk Craft -- testified that as a Local Union official in Boston he regularly negotiated with management modification of residual clerk vacancies to make them consistent with the needs of letter carriers reassigned into those "uniquely created positions". Greg Bell -- now APWU Director of Industrial Relations -- also testified that, while he served as a Local Union official in Philadelphia, the Union did not grieve when letter carriers were placed in negotiated limited and light duty assignments that the local parties had agreed upon to be set aside for that purpose.

In Case No. H94N-4H-C 96090200 (1998), an NALC case in which the APWU intervened, National Arbitrator Snow ruled that any reassignment of a letter carrier into a clerk position under Section 546.141a must be made in accordance with the APWU's National Agreement and, in particular, must not impair the seniority rights of PTF clerks. That can be accomplished, the APWU asserts, by ad hoc agreements between the parties (like those testified to by McCarthy) or agreements made in advance (like those testified to by Bell) about how to handle such reassignments. In this case, however, the Postal Service's unilateral creation of a full-time assignment without posting that assignment for bid impaired the right of full-time regular and PTF employees in violation of the APWU National Agreement.

POSTAL SERVICE POSITION

The Postal Service maintains that the issue in this case, as stated in its Step 4 denial, is:

> Whether the duties of a rehabilitation position created for an employee with work restrictions due to an on the job injury must be posted for bid to all clerk craft employees.

This issue, the Postal Service stresses, is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on-the-job injury.[2]

The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment. It only exists as a result of the need to reassign the injured employee. It is created under Article 21.4 and ELM Section 546. When the injured employee vacates the assignment, it will no longer exist.

The Postal Service stresses that under Article 3 the discretion to create (or not to create) a full-time Article 37

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[2] The Postal Service acknowledges that the issue of whether the injured employee's reassignment actually is a uniquely created assignment or rather is a pre-existing duty assignment would be subject to review based on the particular facts of each case. That is not an interpretive issue, however. The Postal Service asserts that the APWU has acknowledged that, for purposes of deciding the interpretive issue in this case, the reassignment was a uniquely created rehabilitation assignment.

duty assignment rests exclusively with management. Similarly, management has the exclusive right to abolish or revert Article 37 duty assignments, as provided in Article 37.1.F and 37.1.G.

Creation of duty assignments is based on management's operational needs. The present assignment, in contrast, was only created because of the Postal Service's legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job. This assignment did not exist before the employee was injured and otherwise would not have been created by management, because no need for an Article 37 duty assignment existed.

Section 540 of the ELM was promulgated to meet the Postal Service's obligations under Article 21.4 of the National Agreement and FECA. Cross-craft rehabilitation assignments are made pursuant to Section 546.141.a, which was promulgated in 1979 pursuant to an agreement with the NALC. The record establishes that this agreement was discussed with the APWU which concurred in the change. Moreover, the APWU raised no objection to these changes under Article 19 when they were incorporated into the ELM in 1979. The Postal Service stresses that there was no claim at that time by the APWU that assignments made pursuant to the "pecking order" in Section 546.141a actually were duty assignments that had to be posted under Article 37 or otherwise violated the APWU National Agreement. It clearly is too late for the APWU to now make such a claim.

The Postal Service argues that the APWU's position leads to absurd results and would greatly impede the established injury compensation program. If, as the APWU asserts, rehabilitation assignments must be posted, it is almost certain that able-bodied clerks other than the injured employee would be awarded the bid. The injured employee would have no right to even bid on the job created for the sole purpose of reemploying the injured employee. Moreover, because management has no need for the assignment other than to reemploy the injured employee, if some other able-bodied employee were the successful bidder, the assignment would be abolished at management's discretion pursuant to Article 37.1.F. These actions, as well as other actions triggered by them in a domino-like effect, would create ongoing inefficiencies in the work place, and the injured employee would be no closer to being reemployed.

The Postal Service stresses that the APWU's current Article 37 duty assignment argument was made and rejected in a national arbitration case decided by Arbitrator Dobranski in 1998, Case No. J90C-1J-C 92056413. That case involved temporary rehabilitation assignments of rural carriers into the clerk craft, but the APWU's Article 37 argument was essentially the same.

The Postal Service further insists that creation of the rehabilitation assignment in this case did not impair PTF clerk seniority rights. Assuming, for the sake of argument, that this is an Article 37 duty assignment, PTFs cannot bid on such assignments. Moreover, in that case, the assignment would

not exist; but for the obligation to reemploy the injured employee, it would not have been created. By agreement of the parties, the Postal Service asserts, the argument that if the rehabilitation assignment was posted as an Article 37 duty assignment, that eventually would lead to a residual vacancy that might lead to conversion of a PTF clerk is not before the arbitrator. In addition, if the rehabilitation assignment was posted and filled by an able-bodied regular clerk, it surely would be abolished -- there being no need for such a duty assignment -- and that regular employee would become an unassigned regular subject to being assigned to a residual vacancy prior to consideration of converting a PTF to regular.

Finally, the Postal Service contends that testimony in the record shows that the past practice of the parties supports its position. Rehabilitation assignments have never been posted.

NALC POSITION

The NALC, as intervenor in this case, agrees with the Postal Service's position that a rehabilitation position "uniquely created" to accommodate a specific injured employee does not have to be posted for bid by able-bodied employees. As NALC Vice President Ron Brown testified, such positions have long existed in the letter carrier craft and the NALC's consistent position has been that these rehabilitation positions are created under ELM Section 540 for the express purpose of providing an assignment to a person on limited duty, and, as

such, they are not subject to the bidding provisions in the NALC National Agreement, which are not different to those in the APWU's Agreement.

The NALC points out that to the extent the APWU may be claiming that the assignment at issue is not a genuine rehabilitation assignment, that claim does not raise an interpretive issue to be resolved at national level arbitration.

The NALC also argues that the APWU's claim that failure to post this rehabilitation assignment violates the seniority rights of PTF clerks is not properly before the arbitrator. That issue, the NALC asserts, was not raised at any prior stage of the grievance. Moreover, the facts do not establish a violation of ELM Section 546.222. That provision does not generally protect seniority interests or expectations of PTFs. To show a violation of 546.222, the APWU would have to establish that a contractual seniority right of PTFs has been impaired. PTFs, however, have no right to bid on assignments. At most, they might have conversion rights to a residual vacancy at the end of the bidding cycle. If, as the Postal Service and NALC argue, Article 37 of the APWU National Agreement does not require that full-time regulars be allowed to bid on a rehabilitation assignment, there will not be any residual vacancy. If, on the other hand, the arbitrator were to find that this rehabilitation assignment should have been posted for bid, that would be sufficient to sustain the APWU's grievance without the need to consider the seniority rights of PTFs, which

raise other issues that the parties agreed are not to be decided in this case.

FINDINGS

In his 1985 decision in Case No. H1C-4K-C 17373, National Arbitrator Mittenthal pointed out:

> Part 540 of the ELM was a response to the fact that the Postal Reorganization Act placed all Postal Service employees under the coverage of the Federal Employees Compensation Act (FECA). Part 540 was a means of implementing the injury compensation program set forth in FECA. It concerns employees who suffer job-related disabilities; it requires the Postal Service to make "every effort" toward placing an injured employee on "limited duty" consistent with his work limitations. Management must make that "effort" even though no "request" has been submitted by the employee and even though no "light duty assignments" have been negotiated by the parties.
>
> (Footnote omitted.)

Even earlier, in 1983, National Arbitrator Aaron stated in Case No. H1C-5D-C 2128:

> It is obviously too late in the day for the Union to challenge the proposition the FECA regulations can augment or supplement reemployed persons' contractual rights. The language of Article 21, Section 4 of the 1981-1984 Agreement, previously quoted, makes clear that the rights of such persons

> can be augmented or supplemented by federal regulations, with which the Postal Service must comply. If the Union objects to the changes in the relevant revisions introduced by the Postal Service in purported compliance with government regulations, it may challenge them in accordance with the procedures set forth in Article 19 of the Agreement, previously quoted. This it failed to do....

In this case, the Postal Service created a full-time assignment with fixed hours and days off consisting of various clerk duties that were within the medical restrictions of the injured letter carrier. This rehabilitation assignment was not a residual vacancy in the Clerk Craft, but was a "position uniquely created to fit those restrictions", as provided for in ELM Section 546.222.

Section 546.222 specifically recognizes the reassignment of a partially recovered employee to a different craft to provide appropriate work and authorizes the Postal Service to establish a "uniquely created" position for that purpose. As best I can determine, the issue in this case essentially is (1) whether the assignment in question must be posted for bid under Article 37 of the APWU National Agreement -- given the requirement in ELM Section 546.21 that reassignment under Section 546 must be in compliance with applicable collective bargaining agreements -- and/or (2) whether that assignment impaired seniority rights of PTF clerks contrary to Section 546.222.

The General Clerk Modified assignment in question consists of a number of clerk duties -- a subset of duties included in the standard position description of a General Clerk. That does not detract from the fact that it was uniquely created as a rehabilitation assignment. As the Postal Service stresses, this assignment would not have existed, but for the obligation to find work for the injured employee. In a particular case, the APWU may factually challenge whether a designated rehabilitation assignment actually is a uniquely created position, under Section 546.222, but that is not the issue in this case.[3]

Article 37.3.A.1.a(1) requires management to post "[n]ewly established full-time duty assignments". Article 37.1.B defines "Duty Assignment" as: "A set of duties and responsibilities within recognized positions regularly scheduled during specific hours of duty." Under Article 3, the Postal Service has the exclusive right -- consistent with other provisions of the Agreement and applicable laws and regulations:

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

---

[3] At one point in the hearing (Tr. p. 202) the APWU's counsel asserted that General Clerk Modified jobs "are nothing but general clerk duties that have been reverted and set aside so that they [the Postal Service] could diminish their worker's compensation liability". This allegation is not established in the record in this case, and, in any event, raises an issue of fact. The interpretive issue in this case is predicated on the Postal Service having uniquely created the position in issue as a rehabilitation assignment.

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

These management rights encompass the right to establish new duty assignments to meet its operational needs.

In this case, the rehabilitation assignment in question was not created to meet the operational needs of the Postal Service, but to fit the medical restrictions of the injured employee with minimum disruptive impact on the employee. By definition, it would make no sense to treat such a uniquely created assignment as a duty assignment that must be posted for bid. Requiring the assignment to be posted would defeat the sole purpose for establishing the assignment, because the injured employee -- who has no seniority in the Clerk Craft -- could not bid on that assignment. To paraphrase Arbitrator Aaron, it is too late in the day for the APWU to challenge the proposition that the Postal Service may reassign an injured employee to a uniquely created position in another craft to provide appropriate work to that employee, which essentially is what the APWU's Article 37 position in this case does.

The APWU also has not established in this case that the reassignment in question impaired seniority rights of PTF employees in contravention of ELM Section 546.222.[4] PTF clerks

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[4] Despite the various advocates' efforts to dance around this issue, I believe it needs to be addressed in the context of this grievance. I have attempted to say no more than necessary to resolve this case.

have no seniority right to be assigned to a uniquely created rehabilitation position. Certainly if, as already determined, such a position is not subject to Article 37's posting provisions, it would be topsy turvy to conclude that PTFs have a seniority right to that position when full-time regulars do not. Also, because Article 37's posting provisions do not apply, PTFs were not deprived of any opportunity to convert to regular full-time status as a result of a residual vacancy occurring at the end of the bidding cycle.[5]

In this case, the injured letter carrier was reassigned as a PTF clerk -- at the bottom of the PTF seniority roll -- not as a full-time regular. This case is not analogous to Arbitrator Snow's 1990 decision in Case No. H7N-4U-C 3766 et al., in which he concluded that "the reassignment of a supervisor who has not retained his or her seniority to full-time regular status violates the seniority right of part-time flexible employees waiting to convert." Moreover, this case does not involve assignment of an injured letter carrier to a residual clerk vacancy. The issue left open in National Arbitrator Snow's 1998 decision in Case No. H94N-4H-C 96090200 is not raised and need not be decided here.

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[5] If Article 37's bidding procedures were applicable -- and they are not -- management obviously would not have posted, or would have abolished, this assignment, because it had no need for it if it could not be used as a rehabilitation assignment. Whether a PTF has a priority right to fill a residual full-time vacancy that could otherwise accommodate an injured worker under Section 546 is not an issue in this case, and no opinion is expressed on that issue.

In its post-hearing brief, the APWU argues that:

> The impairment of seniority rights of part-time flexible employees occurs because of the aggregation of 40 hours per week of clerk hours into a position taken out of the normal operation of the seniority system. It is not merely the right to bid for the particular position that has been "uniquely created" that is at stake, it is the possibility of having other regular assignments created on tour 2 that might permit conversion of a part-time flexible employee into a regular assignment, and thereby advance that possibility for every other senior part-time flexible clerk.

If I understand the logic of this argument, the APWU basically is claiming that the seniority rights of PTF clerks are impaired whenever Clerk Craft duties are packaged into a rehabilitation assignment for an employee in a different craft, because some or all of that work otherwise ultimately might be included in a newly created full-time clerk position at some indefinite time in the future, and that might result in a conversion opportunity for a PTF. In making this argument, the APWU in effect is challenging the entire notion of assigning injured employees in one craft to a uniquely created rehabilitation assignment in another craft -- at least whenever there are any PTF employees in the craft in which the assignment is created. If such an attenuated proposition was the intent behind Section 546.222, which in context seems improbable, presumably it simply would state something to the effect that injured employees may only be reassigned to a uniquely created rehabilitation position if there are no PTF employees in the facility. It does not do

that, and I am not otherwise persuaded that the impact of the rehabilitation assignment cited by the APWU constitutes impairment of seniority rights of PTF clerks.

For the reasons set forth above, I conclude that the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 and that the creation of that assignment did not impair the seniority rights of PTF clerks.

AWARD

As set forth in the above Findings, the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 of the National Agreement, and the creation of that assignment pursuant to provisions of Section 546 of the ELM did not impair the seniority rights of PTF clerks.

Shyam Das, Arbitrator