CERTIFICATE OF SERVICE

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

This is to certify that a true and correct copy of the Appellants Response to the Request for Briefing was sent by the undersigned by First Class Mail to the following:

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Dated: 8/23/2011

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UNITED STATES OF AMERICA

MERIT SYSTEM PROTECTION BOARD

OFFICE OF THE CLERK OF THE BOARD

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Appellants,	
v.	
UNITED STATES POSTAL SERVICE,	
Agency.	DATE: August 23, 2011

BRIEF

In response to the Board's letter dated July 25, 2011 CONSOLIDATION ORDER AND REQUEST FOR BRIEFING providing the parties a full and fair opportunity to brief the following issues:

(1) May a denial of restoration be "arbitrary and capricious" within the meaning 5 C.F.R. § 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?

Excerpt from USPS brief for Case No. E90C-4E-C 9507:

The Postal Service's legal obligations to employees injured on duty begin with Title 5, U.S. Code, Section 8151, commonly referred to as the Federal Employees Compensation Act (FECA). Section B of Section 8151 authorized the Office of Personal Management (OPM) to issue regulations concerning the administration of injury compensation programs. Pursuant to this authority, OPM issued Title 5, CFR Section 353. Section 353.301 subpart (d) states "The agencies must make every effort to restore an employee in *circumstances* in each case."

As a result of this legal mandate the parties negotiated Article 21, Section 4which states:

Injury Compensation

Employees covered by this Agreement shall be covered by Subchapter I of Chapter 81 of Title 5, and ant 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.

Pursuant to this contractual requirement, the Postal Service issued ELM 540 which contained the regulations complying with the applicable regulations of the Office of Workers' Compensation. These ELM regulations constitute the basis of the Postal Service's injury compensation program. The bottom line here is that because the legal, contractual and regulatory mandates drive the decision to create a rehabilitation assignment, it is not an article 37 duty assignment. The injury compensation regulations require that "every effort" be made to reemploy the injured employee. The every effort mandate expressly codified in ELM Sections 546 and detailed in ELM Section 546.141(a). Therefore, Rehabilitation assignments made under this provision are not Article 37 duty assignments but rather are created and governed by totally separate and distinct dynamics and forces.

Article 37 duty assignments are created by management due to operational needs. Rehabilitation assignments are created as a result of legal, contractual and regulatory requirements. But for the obligations to the injured employee, the rehabilitation assignment would not exist…

The Postal Services own position concerning the connection to Title 5 CFR, Section 353 and the ELM, section 546 are that they exist and were created to conform to each other. The agency's "internal rules" intertwine and incorporate the language and scope of all federal laws and regulations which contribute to the *circumstances* in this case.

(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?

Pre-1979 ELM language that only placed employees into "established jobs" was replaced with new ELM language that provides "limited duty" work that is available within or without the employee's craft, work facility, and regular work hours. The words "maximum efforts" were replaced with "must make every effort" to make the ELM conform to the law. And the reference to "productive" work was eliminated from the ELM provisions.

For approximately 28 years the parties have interpreted the "make every effort" language to mean that the Postal Service would offer limited duty to injured employees without regard to the work's operational necessity. Limited duty work would range from scanning duties, quality checks, manual sortation of letter mail, answering phones, all the way to carrying one's assignment with accommodation. This is verifiable through the numerous limited duty job offers generated by the Postal Service and their own NRP handout. The Postal Service verified that it provided all types of work, including what it refers to as "make work", in an NRP handout introducing the program. On one of the pages from the handout the Postal Service acknowledges that, historically, it always returned the employee to an assignment, whether it be "make work or necessary work." For nearly 3 decades, "make every

effort" meant returning employees to work without consideration of what constitutes productive employment.

It has also been established in the written record in National arbitration cases (Case No. E90C-4E-C 9507) whereas the Postal Service themselves argued that its "make every effort" obligation required it to offer work for which there was no operational necessity. The Postal Service put these arguments in a written brief when a grievance was filed by the APWU asking that a bid be posted for the work a letter carrier was performing in the clerk craft. The Postal Service defended the fact that it had not posted the work for bid by arguing that the limited duty work had no operational necessity and that the position was only created out of its contractual and legal obligations. The Postal Service cannot make simultaneous and conflicting arguments according to whatever suits its self-interest at the moment. Arguing in one forum that it has a legal obligation to provide what it calls "make-work" and then turn around in another forum and argue that it does not.

CONCLUSION

The Board has jurisdiction and the denial of restoration is "arbitrary and capricious" within the meaning 5 C.F.R. § 353.304(c) solely for being in violation of the ELM. The ELM, Section 546.142, details the Postal Service's obligation of making every effort towards assigning the employee to limited duty.

The record establishes that previous to this recent action the Postal Service had been meeting their obligation to provide medically suitable employment. However, when their newly created "National Reassessment Process" (now obsolete) was implemented within the Postal Service installation, they withdrew limited duty from the appellant, and told her that they no longer had any limited duty work available. Since by this action they have "disabled" the appellant, she is receiving OWCP wage loss compensation. As part of the NRP the Postal Service has made a unilateral decision that all restoration assignments may now consist only of work which they have identified as "necessary and productive", "operationally necessary", and/or meeting the Postal Service's "operational needs".

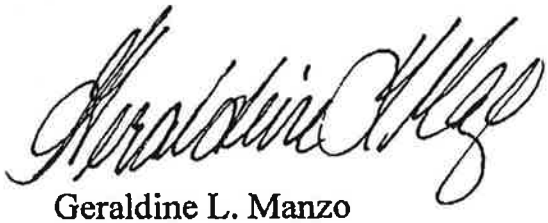
The creation and application of these new criteria are inconsistent not only with the Postal Service's long standing practice of creating limited duty assignments based simply on the employee's work limitation tolerances, but also contravene the clear language of ELM 546.142(a) and 5 CFR 103(d).

By limiting their restoration obligation to jobs that fit their self-serving criteria, they have not only violated their own personnel policy, but they have also violated both the appellants contractual and legal rights. They have improperly denied the appellant her restoration rights and have failed to "minimize any adverse or disruptive impact".

Again, it was my understanding that the Board has previously held that when an Agency is bound by agency policy, regulation, or contractual provision requiring them to offer limited duty, but they fail to do so, such action constitutes a ***prima facie*** demonstration of an "arbitrary and capricious" denial of the employee's restoration rights.

The facts of this case establish that the Postal Service violated their own personnel policy, violated federal regulations, and violated the CBA when they refused to provide the appellant with medically suitable employment. Therefore, their failure to restore the appellant to employment as a partially recovered employee with a compensable injury is "arbitrary and capricious".

Respectfully Submitted,



Date: August 23, 2011

Geraldine L. Manzo

Representative for Appellant Ruby Turner

UNITED STATES POSTAL SERVICE

Health and Resource Management
National Reassessment Process (NRP)

Rehabilitation / Limited Duty Assignment

Traditional

- Employee returned to an assignment – make work or necessary work
- Employee not returned to an assignment – OWCP Disability Rolls
- OWCP determines: compensation eligibility – Vocational Rehabilitation participation

Reassessment Process

- Employee returned to an assignment – necessary work only
- Employee formally informed no work available – file for OWCP compensation
- OWCP determines: compensation eligibility – Vocational Rehabilitation participation

EXHIBIT A

UNITED STATES POSTAL SERVICE
POST HEARING BRIEF

Case No. E90C-4E-C 95076238

Dates of hearing: October 16, 2001 and January 23, 2002

Submitted by: John W. Dockins, Esquire
Labor Relations Specialist
U.S. Postal Service

EXHIBIT B

INTERPRETIVE ISSUE PRESENTED

As stated in the Step 4 denial (Joint Ex. 2) the interpretive issue heard at Step 4 and appealed to arbitration by the APWU 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.

Additionally, after much obfuscation and discussion, the issue was sharply defined by the arbitrator and acknowledged by all parties at the end of the second day of hearing as follows:

> I think we at least are understood we're dealing with the uniquely created position, whether there's an obligation there to post. (See Transcript for second day of hearing at page 312, TR2-312)

ARGUMENT

As indicated above, the interpretive issue presented is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on the job injury. But for the employee's on the job injury, the uniquely created rehabilitation assignment would not exist and would not be posted for bid as a duty assignment.

I. The Rehabilitation Assignments at Issue are Uniquely Created and Would Not Exist But For the Obligation to Reassign the Injured Employee

The rehabilitation assignments at issue are by definition uniquely created for employees who were injured on the job and continue to have work restrictions. A uniquely created rehabilitation assignment is therefore not an Article 37 duty assignment. It only exists as a result of the need to reassign an injured employee. It is a uniquely created rehabilitation assignment created under the provisions of Article 21, Section 4 and ELM

Section 546. When the injured employee vacates the uniquely created rehabilitation assignment it will no longer exist. To the extent that the rehabilitation assignment in question overlaps with an existing Article 37 duty assignment is a matter to be decided on the particular fact pattern of each individual case. However, the APWU's position in this interpretive case is that every 40-hour a week rehabilitation assignment created for injured employees must be posted for bid in the clerk craft. The APWU's position is unreasonable and can not be supported.

The simple fact of the matter is that no Article 37 duty assignment has been created. A uniquely created rehabilitation assignment tailored to the employee's work limitation's exists. Such an assignment is created pursuant to Article 21, Section 4, Injury Compensation, and is not a "duty assignment" under Article 37.

II. Management has the Exclusive Right to Create Duty Assignments

It is clear that the right and responsibility of hiring, staffing and assigning employees rests with management. Inherent in this exclusive right is the ability to determine what duties and responsibilities are needed to move the mail at any given time in any given operation. Hence, the discretion to create (or not to create) full-time Article 37 duty assignments rests exclusively with management. Article 3 of the National Agreement states in part:

> The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
>
> A. To direct employees of the Employer in the performance of official duties;
> B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
> C. To maintain the efficiency of the operations entrusted to it;
> D. To determine the methods, means, and personnel by which such operations are to be conducted;

Accordingly, management has the exclusive right to determine when and where duty assignments are needed in order to maintain the efficiency of the operations entrusted to it. Other provisions of the Agreement such as Article 7.3 do address the ratio of full-time to part-time employees in certain size offices and the criteria for converting part-time employees to full-time. However, nothing in the Agreement impedes management's exclusive right to assign employees to work when and where they are needed and create Article 37 duty assignments to maintain efficiency of the operations.

This is in sharp contrast to rehabilitation assignments created under Article 21, Section 4. As discussed in greater detail below, Management has legal, contractual and regulatory obligations to make "every effort" to reemploy the injured employee.

III. Management Has the Exclusive Right to Abolish and Revert Article 37 Duty Assignments

Hand in hand with the exclusive right to create Article 37 duty assignments is the exclusive right to abolish or revert Article 37 duty assignments. Creating, abolishing and reverting Article 37 duty assignments are all part and parcel of the process of determining the methods, means and personnel by which such operations are to be conducted as contemplated in Article 3.

Article 37 clearly states that management has discretion to abolish or revert. Article 37.1.F states: "Abolishment. A management decision to reduce the number of occupied duty assignment(s) in an established section and/or installation".

Article 37.1.G states: "Reversion. A management decision to reduce the number of positions in an installation when such position(s) is/are vacant".

Both sections unambiguously state that it is "a management decision" to abolish or revert a duty assignment. [1] Additionally, APWU counsel acknowledged that it is management's choice to revert or abolish Article 37 duty assignments. (TR1-19,20) Common sense dictates that if it is a management decision to abolish or revert that it must also be a management decision to create Article 37 duty assignments. This is consistent with the language of Article 3. If management did not have to exclusive right to create Article 37 duty assignments it simply would exercise its ability to abolish a newly created duty assignment that was not wanted. Therefore, contractual language and common sense dictate that management has the exclusive right to control the existence of any Article 37 duty assignment in the work place.

IV. The Rehabilitation Assignment Would Not Have Existed "But For" the Obligation to Find Work for the Injured Employee, Therefore No Article 37 Duty Assignment Exists

Because this is a national interpretive issue of general application we need not address every possible fact scenario regarding the creation of reassignments for injured employees. Indeed, the APWU has acknowledged that for the purpose of this interpretive issue that the reassignment was in fact a uniquely created rehabilitation assignment. (See TR2-312.)

This alone is fatal to the APWU's case. If it is a uniquely created rehabilitation assignment it is by definition not an Article 37 duty assignment. The rehabilitation assignment would not exist but for the obligation to reassign the injured employee. Management never created a duty assignment pursuant to Article 37. Management reassigned an injured employee pursuant to Article 21.4 and ELM Section 546 as part of the established injury compensation program. Had there been no injured employee the rehabilitation assignment would not exist. The decision to create a new Article 37 duty

[1] Of course this decision can be grieved by the Union. For instance, issues of fact application as to the existence of the duty assignment after it was abolished are routinely grieved. Similarly, the issue of whether the injured employee's reassignment was actually a uniquely created assignment or a pre-existing duty assignment would be subject to review based on the particular facts of each case.

assignment is determined by Management based on operational needs, not the needs of injured employees. This distinction is critical.

This is not the first time the APWU has taken the position in a National case that Article 21 rehabilitation assignments are somehow superceded by other contractual provisions. In Case No. G94C-4G 96077397 (See USPS Ex. 11) the APWU argued that rehabilitation assignments trigger the notice requirements of Article 7.2, Employment and Work Assignments. National Arbitrator Dobranski did not agree. In his award he draws a distinction between assignments made for the purpose of Article 7 and those made for the purpose of complying with the rehabilitation and injury compensation program. The same distinction is present in this case.

In yet another National award (N8-NA-0003, Attachment A), Arbitrator Gamser was presented the interpretive issue of whether injured employees reassigned out of their normal schedule were entitled to overtime or out of schedule pay pursuant to Article 8 of the National Agreement. In denying the grievance at page 12 Gamser concluded that the Postal Service was obligated to make "every effort" to find suitable work for injured employees. Accordingly, he held that the provisions of the F-21 and F-22 handbooks disallowing overtime and out of schedule pay were not in conflict with Article 8. The determining factor was that the reassignments were made pursuant to the injury compensation program.

In the instant case, as in the Dobranski and Gamser cases, the rehabilitation assignment was created as a result of the injury compensation contractual requirements. The rehabilitation assignment did not exist before the employee was injured on duty and would not have been created by management because no need for the Article 37 duty assignment existed.

It is undisputed that the reassignment was a uniquely create position created solely because of management's responsibilities to reassign or reemploy employees because of on the job injuries. The guidance provided in these previous national awards should be

followed. The APWU has failed to show why the Dobranski and Gamser rationale should be overruled.

V. Article 37 Duty Assignments and Article 21 Rehabilitation Assignments are Separate and Distinct

As discussed above, management has the exclusive right to create, abolish or revert Article 37 duty assignments. Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates.

The Postal Service's legal obligations to employees injured on duty begin with Title 5, U.S. Code, Section 8151. This is commonly referred to as the Federal Employees Compensation Act (FECA). (See USPS Ex. 1) Section B of Section 8151 authorized the Office of Personal Management (OPM) to issue regulations concerning the administration of injury compensation programs. Pursuant to this authority, OPM issued Title 5, CFR Section 353. (See USPS Ex. 2) Section 353.301 subpart (d) states "The agencies must make every effort to restore an employee in circumstances in each case."

As a result of this legal mandate the parties negotiated Article 21, Section 4 which states:

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

Pursuant to this contractual requirement, the Postal Service issued ELM Section 540 which contained the regulations complying with the applicable regulations of the Office of Workers' Compensation. (See USPS Ex. 3) These ELM regulations constitute the basis of the Postal Service's injury compensation program.

The bottom line here is that because the legal, contractual and regulatory mandates drive the decision to create a rehabilitation assignment, it is not an Article 37 duty assignment. The injury compensation regulations require that "every effort" be made to reemploy the injured employee. The every effort mandate has been expressly codified in ELM Section 546 and detailed in ELM Section 546.141(a). Therefore, rehabilitation assignments made under this provision are not Article 37 duty assignments but rather are created and governed by totally separate and distinct dynamics and forces.

Article 37 duty assignments are created by management due to operational needs. Rehabilitation assignments are created as a result of legal, contractual and regulatory requirements. But for the obligations to the injured employee, the rehabilitation assignment would not exist and would not be created under Article 37. Therefore, rehabilitation assignments are not Article 37 duty assignments.

VI. The Established Injury Compensation Program Was Approved By the APWU and It is Far Too Late To Argue that Rehabilitation Assignments are Duty Assignments

As discussed above, Article 21, Section 4 requires Management to promulgate appropriate regulations to comply with federal law. These regulations can be found at ELM Section 540. In 1979 the NALC filed a national level grievance challenging the application of ELM 540 in that Letter Carriers injured on duty were being reassigned to clerk craft positions "well beyond the installation that they worked in and on tours that they—that were alien to them". (See APWU Tab 5, page 13 and USPS Ex. 4)

The filing of this grievance by the NALC led to discussions with the Postal Service regarding the regulations governing the application of the workers' compensation program. On October 26, 1979 the Postal Service came to an agreement with the NALC regarding the injury compensation program. (See USPS Ex. 5)

It is significant to note that this agreement was discussed with the APWU in advance and the APWU concurred with the change to the regulations. Not only does the body of the

settlement expressly state that the changes were discussed with other unions and the other unions were amenable to the changes, the testimony of Richard Bauer also confirmed through personal knowledge that the APWU was involved in the agreement. (See TR1-147) This testimony stands unrebuted. Additionally, Arbitrator Snow found that the APWU was involved in this settlement and did not voice an objection at the time it was negotiated in 1979. At page 15 of Case No.H94N-4H-C 96090200 (See APWU Tab 5) National Arbitrator Snow states:

> Discussions between the parties ultimately produced the present language of ELM Section 546.141(a). President Sombrotto's (NALC National President) 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.

Clearly, the APWU was on notice that cross craft rehabilitation assignments would be occurring. If the APWU felt that these rehabilitation assignments were in violation of the National Agreement or that they were actually Article 37 duty assignments that required posting in the clerk craft, the APWU should have raised those concerns in 1979. To now make such arguments is disingenuous.

Additionally, when the settlement langue was incorporated into the ELM in 1979 the APWU was provided the changes pursuant to Article 19 and still did not raise an objection or submit the issue to national arbitration. (See USPS Ex. 6) The reason is obvious: the APWU agreed that such cross craft rehabilitation assignments were necessary to accommodate employees who were injured on duty. The APWU now finds that position to be politically unpopular given the fact that due to mail processing

operational needs there are fewer day shift job assignments. However, the APWU may not escape the consequences of its prior actions.

The NALC settlement agreement became ELM Section 546.141(a) and is the mandatory pecking order used to place injured employees into rehabilitation assignments. If the APWU felt that this regulation violated the National Agreement the APWU was obligated to object at that time. They failed to do so. As Arbitrator Aaron stated in Case No. H1C-5D-C 2128 (APWU Tab 9) at page 6:

> 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 suet forth in Article 19 of the Agreement, previously quoted. This it failed to do. Moreover, it raised no objection to the statement in Gildea's letter of 26 July 1979 to Newman, previously quoted, which clearly anticipated the reason for the action taken by the Postal Service in the case of Akins.

Clearly, the APWU did not object to the detailed language in ELM 546.141(a) that mandates creating rehabilitation assignments, therefore the APWU is obligated to honor the established injury compensation program. If the APWU's "duty assignment" argument is upheld they will have successfully circumvented and thwarted the employer's ability to reemploy injured employees.

VII. The APWU's Position Leads to Absurd Results and Will Greatly Impede the Established Injury Compensation Program

The contract must be read as a whole. The interrelationship of Article 37 duty assignments and Article 21 rehabilitation assignments must be viewed in the context of the real world. Accordingly, an analysis of the impact of the APWU position in this case is very insightful. If uniquely created rehabilitation assignments must be posted for bid as Article 37 duty assignments for all clerk craft employees, it will lead to unproductive

inefficiencies such as ongoing postings, repostings , abolishment of duty assignments and the assignment of unassigned full-time regular clerk into full time residual assignments, without ever being able to assign an rehab injured employee into an assignment under ELM 546. Such an unnecessary administrative effort unrelated to the catalyst for such effort, the need to assign an injured employee, was certainly never intended by the parties. The APWU's approach will lead to absurd results.

This interpretive case is predicated on the fact that these are uniquely created rehabilitation assignments tailor made for the injured employee. If in fact the 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. (See Suriano testimony at TR1-179) In fact, the injured employee would never be reassigned into the clerk craft until a job offer is made that would pass the approval of the Department of Labor and the Office of Workers' Compensation. Such job offer could not be made if the assignment had to be posted within the gaining craft for bid first. It would not be an available assignment until the bidding process was completed. Therefore, the injured employee for whom the rehabilitation assignment was created would not be able to bid for the assignment since they still have not been assigned to the gaining craft.

Following the APWU logic, if the rehabilitation assignment was posted within the gaining craft the successful bidder would be awarded the uniquely created rehabilitation assignment. Because management has no need for the assignment other than to reemploy the injured employee, if any other employee were the successful bidder the assignment would be abolished at management's discretion pursuant to Article 37.1.F. An abolishment would then leave the senior bidder as an unassigned regular without an assignment and would trigger "an elaborate set of procedures to follow if somebody's position is abolished" according to APWU counsel at TR1-19.

Concurrent with the abolishment of the uniquely created rehabilitation assignment, the vacant duty assignment the successful bidder previously held would probably be posted as operational needs would dictate the filling of the now vacant duty assignment. Accordingly, the currently vacant duty assignment would be posted for bid and another successful bidder would then be placed in that job. The next subsequent vacant duty assignment created by the next sequential job awarding would than have to be posted for bid by all craft employees. This domino effect would create ongoing inefficiencies in the work place. Even worse, the injured employee for whom the original rehabilitation assignment was created for would be no closer to being reemployed.

In an attempt to reemploy the injured employee management would then create another unique rehabilitation assignment. The process would then play itself out all over again as the APWU would require that the new rehabilitation assignment be posted for bid. Mr. Bauer testified that there are presently over 12,000 employees on rehabilitation assignments throughout the country. (See TR1-153) The disruption this would cause to operations nationwide would be monumental and would be disastrous to the injury compensation program.

If the APWU wants to limit, change, alter or amend the established injury compensation program it must do so in collective bargaining, not through arbitral fiat in rights arbitration. It is far too late in the day for the APWU to challenge procedures they agreed to in 1979.

VIII. The APWU's Current Arguments Have Been Rejected In a Previous National Arbitration Award

This is not the first time the APWU has made the same identical Article 37 "duty assignment" arguments in national arbitration. In National Case No. J90C-1J-C 92056413, (APWU Tab 8) Arbitrator Dobranski was presented with the same exact argument that is the lynchpin of the APWU's position in the case at hand. It was rejected in its entirety and the grievance was denied.

The issue in the Dobranski case dealt with temporary rehabilitation assignments of rural carriers into the clerk craft. One of the arguments made by the APWU was that "Article 37, Section 1.B defines duty assignments and Article 37, Sections 3.A.1(a) and (b) require these regularly scheduled duties, full-time or part time, to be posted to the clerk craft." (See APWU Tab 8 at page 12) The instant case deals with a city carrier with a permanent rehabilitation assignment, the Dobranski case dealt with with a rural carrier with a tempory rehabilitatin assignment. However, this minor distinction does nothing to resuscitate the merits of the APWU arguments. The APWU Article 37 "duty assignment" argument fails just the same in both cases.

The Postal Service joined issue with the APWU on the Article 37 "duty assignment" argument at page 21 of the Dobranski award and argued that it had no merit. In making his ruling Arbitrator Dobranski painstakingly addressed every argument presented by the APWU including the Article 37 "duty assignment" argument. He states at page 33:

> Finally, in reaching my conclusion in this case, I have carefully considered and examined all of the arguments put forth by the APWU, including the applicability of Articles 37 and 30, and whether specifically addressed above or not, and find them without merit. For all these reasons, the grievance in denied.

Therefore, the identical issue that the APWU has put forth in the instant case has already be joined, presented, argued and denied by a previous National Arbitrator in a nearly identical case. Clearly, the APWU position in this case is without merit. Once again, the instant arbitrator should not disturb established controlling National arbitral precedent. The APWU's position has been previously rejected and this grievance must be denied.

IX. The Creation of the Rehabilitation Assignment Does Not Impair PTF Clerk Seniority Rights

The APWU places heavy reliance on the notion that uniquely created rehabilitation assignments somehow impair PTF seniority rights. This simply is not true for two reasons; 1. Assuming, arugendo, that the rehabilitation assignment is an Article 37 "duty assignment", PTF's can not bid on Article 37 duty assignments, and 2. the rehabilitation

assignment would not exist but for the obligation to reemploy the injured employee and would never have otherwise been created. In any event the PTF's seniority rights are not impaired.

The APWU also argues that if the rehabilitation assignment were to be posted as an Article 37 duty assignment that it would eventually lead to a residual vacancy that may lead to the conversion of a PTF to full-time. (See TR1-22) This argument is speculative and assumes that management would not abolish the original uniquely created rehabilitation assignment when an able bodied clerk bids into it. As the rehabilitation assignment was tailored to the needs of the injured employee it would serve no purpose to allow a healthy employee to work such an assignment. It would surely be abolished. The able bodied craft employee would become an unassigned regular subject to be assigned to a residual vacancy prior to any consideration of converting a PTF to regular. If there was a bona fide operational need for a craft duty assignment it would have been created long before the rehabilitation assignment was created.

Regardless, the residual vacancy argument is not before this arbitrator. (See discussion and agreement of the parties at TR2-311-312) It is only offered to show the further weakness of the APWU logic.

X. Past Practice of the Parties Favors the Postal Service

The Postal Service offered credible testimony from James Ulicnik, Charisse Newberry, Mary Lou Pavoggi, Theresa Hantzsche, Richard Bauer, Janice Smith, David Wichterman and Bill Shane on how the established injury compensation program has been

administered over the past 25 years across the country. Each witness testified that they were not aware of a single rehabilitation assignment being posted as a duty assignment any where at any time. Mr. Bauer gave credible testimony regarding the establishment of the injury compensation program as embodied in ELM 540 and the discussions leading up to the settlement of the current ELM 546.141(a) language. As Headquarters Injury Compensation specialist he also reaffirmed the long standing national practice of not posting rehabilitation assignments as Article 37 duty assignments.

The APWU offered the rebuttal testimony of Cliff Guffey, Greg Bell and Jim McCarthy. They did nothing to rebut the testimony of the Postal Service witnesses regarding application of the injury compensation program. The fact that the Postal Service has never treated a rehabilitation reassignment as a "duty assignment" remains unchallenged. The APWU witnesses did testify that in their local installations they did from time to time file grievances challenging the establishment of some, but not all, rehabilitation assignments.

In fact Mr. Bell testified that that not all rehabilitation assignments would even trigger the need to post a duty assignment. At TR2-259 he admits that "It's not automatic that it would be posted, no." This is fatal to the APWU's position that rehabilitation assignments are always duty assignments. Apparently Mr. Bell is applying criteria that are inconsistent with the APWU's position in this interpretive case.

Similarly inconsistent, Mr. McCarthy first testified that every collection of assignments must be posted as a duty assignment if it totals 40 hours of work without exception. (See TR2-270) He also engaged in an irrelevant dialogue regarding Article 13/30 light duty assignments negotiated at his local office. This case of course does not involve an Article 13/30 assignment. As Mr. McCarthy acknowledged, Article 13/30 is only triggered by an employee request. It is a separate process distinct from the injury compensation program. He then stated that he was not aware of any non-Article 13/30 grievances ever filed as a result of a clerks being reassigned with the clerk craft. (See TR2-276) Surely, if every collection of assignments that totaled 40 hours triggered the obligation to post a new

"duty assignment" as Mr. McCarthy testified, it would apply to clerks being reassigned to rehabilitation assignments as well. Yet, Mr. McCarthy testified that he was not aware of a single such clerk "duty assignment" grievance ever being filed.

It is significant to note that none of the APWU rebuttal witnesses were at the National level when then 1979 ELM 546.141(a) injury compensation language was agreed upon. It is apparent from their collective testimony that a few renegade APWU locals were unhappy with the agreed upon ELM language and hence, occasionally filed grievances to quell dissatisfied clerks who did not understand the agreed upon pecking order to reemploy injured employees. This is understandable but does not negate the established injury compensation program. If the current APWU leadership is dissatisfied with the status quo the place to change it is at the bargaining table, not in rights arbitration.

The single NALC witness gave unrebutted and credible testimony regarding how the Postal Service and NALC have historically applied the duty assignment language. Mr. Brown's testimony dove tailed with that of the Postal Service's witnesses. Rehabilitation assignments within the carrier craft were not, and are not, treated as duty assignments and are not posted for bid. (It was stipulated that the NALC contractual duty assignment language is identical to the APWU duty assignment language, TR2-230)

The witness testimony weighs greatly in favor of the Postal Service's position in this matter.

XI. Prior Regional/Area Arbitration Supports the Postal Service

It is well established that Regional/Area arbitration awards do not control any subsequent National arbitration. Regional/Area awards may be cited for persuasive value only. The rational for this is obvious; interpretive issues of general application must be decided at the national level with the full involvement of the national parties.

A review of prior Regional/Area awards reveals that several grievances regarding the creation of rehabilitation assignments have been decided by field arbitrators. Most of these cases deal with local facts surrounding the "uniqueness" of the rehabilitation

assignment, i.e., whether or not the assignment existed as an Article 37 duty assignment prior to the creation of the rehabilitation assignment. As previously stated, the present interpretive issue is based on the stipulation that the rehabilitation assignment is in fact a uniquely created assignment. Therefore, the arbitrator need not delve into that thorny issue of fact based application. Accordingly, those prior field arbitrations that deal with that issue offer no insight to the present interpretive issue.

However, as often happens interpretive issues evolve in the field before they are declared interpretive and appealed to national arbitration. This is the case here. With that in mind, one particular field case warrants close attention as it was a virtual dry run of the APWU's interpretive issue arguments as set forth in the instant case. In fact, the APWU advocate in the field case (Mr. Guffy) was also a witness for the APWU in this case.

In Case No. W7C-5R-C 18309 (Attachment B), Arbitrator McCaffree was presented with the same arguments that the APWU presented in the instant interpretive case. At page 26 he states:

> Any violation of Article 37.3.A.1 can be disposed of without lengthy consideration. Section A and Section A.1. each refer to "newly established and vacant Clerk Craft duty assignments" or "all newly established craft duty assignments." Thus where Section 546 provides for an assignment pursuant to medically defined work restrictions of a specific employee and duties are collected as found in these cases, no clerk craft duty assignment per se was established. Rather, as the Employer argues, these were special duty assignments mandated by law. None would exist were it not for the presence of an injured worker whose duties are determined by medically defined work limitations. . . The Employer did not violate Article 37.3.A by a failure to post any of the jobs to which the injured workers were assigned under Section 546 of the ELM.

Clearly, Arbitrator McCaffree considered the same arguments set forth in the instant case and soundly rejected them.

SUMMARY

The rehabilitation assignment created pursuant to ELM Section 546 would not exist but for the injured employee. The Postal Service was mandated by Federal law to make

"every effort" to reemploy injured on-duty employees. This legal mandate was incorporated into the Collective Bargaining Agreement in Article 21, Section 4 which further requires the employer to "promulgate appropriate regulations" which comply with Federal law. The Postal Service promulgated ELM Section 546 in direct compliance with Article 21, Section 4. ELM Section 546 was submitted to the APWU pursuant to Article 19 and no objection was forthcoming. It is far too late in the day for the APWU to now object to the injury compensation program that they did not take issue with at its inception.

Additionally, implementation of the APWU's position would lead to a continuous game of musical chairs with rehabilitation assignments being created and abolished while the injured employee is no closer to being restored to duty as required by law. This is an absurd result and would lead to inefficiencies in mail processing operations.

CONCLUSION

Uniquely created rehabilitation assignments created pursuant to Article 21.4 are not considered Article 37 duty assignments. There is no contractual requirement to post such rehabilitation assignments for bid under Article 37 and this interpretive grievance should be dismissed in its entirety.

Submitted by:

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April 15, 2002

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