C # 01414

C8N-4J-C-12091
Gary Stebel
Green Bay, WI

VOLUNTARY LABOR ARBITRATION

In The Matter of Arbitration Between:	
UNITED STATES POSTAL SERVICE GREEN BAY POST OFFICE GREEN BAY, WISCONSIN 54305	Grievance of: GARY O. STREBEL (limited-duty assignment -out-of-schedule tour and out of craft work)
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH #618 GREEN BAY, WISCONSIN 54302	
CASE NO. C8N-4J-C 12091	OPINION AND AWARD

IMPARTIAL ARBITRATOR
ELLIOTT H. GOLDSTEIN

Appearances for the Union:

Barry J. Weiner, Regional Administrative Assistant, NALC.
Norbert P. VanPay, Witness, Carrier
Gary Strebel, Grievant, President Branch 619

Appearances for the Employer:

Lawrence G. Handy, Labor Relations Executive
James N. LeCaptain, Director, E & L.R.
Denise M. DeBeukelar, Injury Comp. Spec.
Darrel J. DeKeyser, Sta. Supt. Cofrin.
Clyde L. Weycker, Manager, Station and Branches
Howard LaPlante, Vehicle Operator Analyst.

I. INTRODUCTION

The hearing in this case was held on Friday, April 3, 1981 at the Main Post Office, 325 East Walnut Street, Green Bay, Wisconsin, 54305 before the undersigned arbitrator appointed by the parties pursuant to the rules of the United States Postal Service Regular Regional Level Arbitration Procedures. At the

hearing, both parties were afforded full opportunity to present such evidence and argument as desired, including an examination and cross-examination of all witnesses. No formal transcript of the hearing was made and upon receipt of the post-hearing briefs received by me on Monday, May 18, 1981, this hearing was declared closed.

II. STATEMENT OF ISSUE

Did the Postal Service violate Article XIII or Article XIX and part 546.14 of the Employee and Labor Relations Manual when it reassigned grievant Strebel to work outside his regular work location, tour of duty, and craft on December 18, 1979? If so, what should the remedy be?

III. PERTINENT CONTRACTUAL PROVISIONS

The Postal Service and Union cited to this arbitrator numerous contractual provisions having possible applicability herein. I have set forth fully only the sections which I have perceived have some real relevance to the matters at hand.

ARTICLE XIII states as its title "Assignment of Ill or Injured Regular Work Force Employees," and Section A, paragraphs 1 and 2, are applicable to this matter and they state as follows:

"A. Introduction

1. Part-time fixed schedule employees assigned in the craft unit shall be considered to be in a separate category. All provisions of this Article apply to part-time fixed schedule employees within their own category.

2. The U.S. Postal Service and the Unions recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employes who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within his office, after local negotiations.

B. Employee's Request for Reassignment

1. Temporary Reassignment

Any full-time regular or part-time flexible employee recuperating from a serious illness or injury and temporarily unable to perform the assigned duties may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment. The request shall be supported by a medical statement from a licensed physician or by a written statement from a licensed chiropractor stating, when possible the anticipated duration of the convalesncece period. Such employee agrees to submit to a further examination by a Public Health Service doctor or physician designated by the installation head, if that official so requests.

...

3. Installation heads shall show the greatest consideration for full-time regular or part-time flexible employees requiring light duty or other assignments, giving each request careful attention, and reassign such employees to the extent possible in the employee's office. When the

request is refused, the installation head shall notify the concernied employee in writing, stating the reasons for the inability to reassign the employee.

C. Local Implementation.

Due to varied size installations and conditions within installations, the following important items having a direct bearing on these reassignment procedures (establishment of light duty assignments) should be determined by local negotiations.

1. Through local negotiations , each office will establish the assignments that are to be considered light duty within each craft represneted in the office. These negotiations should explore ways and means to make adjustments in normal assignments, to convert them to light duty assignments without seriously affecting the production of the assignment.

2. Light duty assignments may be established from part-time hous, to consist of 8 hours or less in a service day and 40 hours or less in a service week. The establishment of such assignment does not guarantee any hours to a part-time flexible employee.

3. Number of Light Duty Assignments.

The number of assignments within each craft that may be reserved for temporary or permanent light duty assignments, consistent with good business practices, shall be determined by past experience as to the number of reassingments that can be expected during each year, and the method used in reserving these assignments to insure that no assigned full-time regular employee will be adversely affected, will be defined through local negotiations. The light duty employee's tour hours, work location and basic work week shall be those of the light duty assignment and the needs of the service, whether or not the same as for his previous duty assignment.

Section D, entitled "General Policy Procedures" is important to this matter and it states in full as follows:

"1. Every effort shall be made to reassign the concerned employee within his present craft or occupational group, even if such assignment reduces the number of hours of work for the supplemental work force. After all efforts are exhausted in this area, consideration will be given to reassignment to another craft or occupational group within the same installation.

2. The full-time regular or part-time flexible employee must be able to meet the qualifications of the position to which he is reassigned on a permanent basis. On temporary reassignment, qualifications can be modified provided excessive hours are not used in the operation.

3. The reassignment of a full-time regular or part-time flexible employee to a temporary or permanent light duty or other assignment shall not be made to the detriment of any full-time regular on a scheduled assignment or give a reassigned part-time flexible preference over other part-time flexible employees.

4. The reassignment of a full-time regular or part-time flexible employee under the provisions of this Article to an agreed-upon light duty temporary or permanent or other assignment within the office, such as type of assignment, area of assignment, hours of duty, etc., will be the decision of the installation head who will be guided by the examining physician's report, employee's ability to reach his place of employment and ability to perform the duties involved.

5. An additional full-time regular position can be authorized within the craft or occupational group to which the employee is being reassigned, if the additional position can be established out of the part-time hours being used in that operation without increasing the overall hour usage. If this cannot be accomplished, then consideration will be given to reassignment to an existing vacancy.

6. The installation head shall review each light duty reassignment at least once each year, or at any time he has reason to believe the incumbent is able to perform satisfactorily in other than the light duty assignment he occupies. This review is to determine the need for continuation of the employee in the light duty assignment. He may be requested to submit to a medical review by the United States Public Health Service or by a physician designated by the installation head if he believes such examination to be necessary.

7. When a full-time regular employee in a temporary light duty assignment is declared recovered on medical review, he shall be returned to his former duty assignment, if it has not been discontinued. If his former regular assignment has been discontinued, he becomes an unassigned full-time regular employee.

8. If a full-time regular employee is reassigned in another craft for permanent light duty and he later is declared recovered, on medical review, he shall be returned to the first available full-time regular vacancy in complement in his former craft. Pending his return to his former craft, he shall be an unassigned full-time regular employee. His seniority shall be restored to include service in the light duty assignment.

9. When a full-time regular employee who has been awarded a permanent light duty asignment within his own craft is declared recovered, on medical review, he shall become an unassigned full-time regular employee.

10. When a part-time flexible on temporary light duty is declared recovered, his detail to light duty shall be terminated.

11. When a part-time flexible who has been reassigned in another craft on permanent light duty is declared recovered, his assignment to light duty shall be terminated. Section D8, above, does not apply even though he has advanced to full-time regular while on light duty."

Sections E and F of ARTICLE XIII have no application to this particular matter.

ARTICLE III. MANAGEMENT RIGHTS

The Employe 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.

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situation, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature."

Also placed into the record of this matter was a National Level Settlement Memorandum of October 26, 1979 (Joint Exhibit 3). This settlement is now part 546.14 of the Employee and Labor Relations Manual, and provides 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 the work facility to which the eimployee 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 qulaified, 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.

Also cited to this arbitrator as having possible relevance to this matter by the Union, but not set forth herein are 5 U.S.C. §8151 (1980) as implemented by 5 C.F.R. §Section 353.306. Last, Article XV, Section 4A(6) was cited by the employer as having possible application with reference to both my scope of authority and to the remedy issue involved herein. This section is as follows:

> (6) All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

IV. FACTUAL STATEMENT

The grievant, Gary O. Strebel, is a regular letter carrier assigned to Cofrin Station in Green Bay, Wisconsin, and was so assigned at the time the grievance was instituted in the instant matter. The grievant sustained an on-the-job inury on March 26, 1979. On July 16, 1979, the grievant sustained a recurrence of this injury. Grievant reported this to his supervisor, employer-witness deKeyser and was seen by Dr. H. A. Tressler an orthopedist, who furnished a statement indicating certain work limitations to the employer. See Employer Exhibit 1, and Union Exhibit 1 (a group exhibit). The limitations which remained consistent from July 20, 1979 through December 6, 1979 included the following work restrictions:

> "No uphill climbing, no prolonged standing, or sitting, limited stair climbing..."

Moreover, as Employer Exhibit 1 revealed, grievant was limited in lifting to amounts of ten to twenty pounds.

As a result of these limitations, the grievant was unable to peform all the duties of his regular assignment as a carrier technician (T-6) because some of the routes on his 5 - route sequence had portions which would have required him to climb numerous stairs, hills, and porches. The Service, therefore, initially assigned the grievant to duty during his normal duty hours at his regular work location and within his craft, performing a variety of casing and street duties. Throughout most of this period, the grievant cased his own routes and then worked on various

spliced-together routes, or as a carrier when certain employees were on annual leave or had calledin sick (As will become clear later, management asserts that these duties and work assignments were denominated and consist of "light duty"; The Union, both in its brief and at hearing consistently utilized the term "limited duty" for the work done by grievant from July through December).

At any rate, although the grievant originally requested of management(in July, 1979) that his duty assignments be composed of casing and delivering Auxiliary Routes 201 and 110, which were mounted routes and were within his work-tolerance limitations in grievant's view, management elected to utilize the grievant in the above-described variety of other casing and street duties instead. These assignments continued through December 18, 1979, during which time the grievant continued to be treated periodically by Dr. Tressler and continued to provide the Postal Service with statements from Dr. Tressler which indicated the same medical restrictions. The precipitating incident in this matter, as this arbitrator percieves it, was that on or about December 8, 1979, the grievant was unable to complete what management viewed as a "easy route" - that is, Route 210. Grievant complained that this route caused him pain in his right leg and hip, which had been damaged by his July reoccurrence and that the climbing involved in this route was causing him sufficient pain so that he could not continue his deliveries. Therefore, the grievant returned to the Cofrin Station with some

three (3) hours of undelivered mail, which had to later be delivered by another carrier on an overtime basis. Moreover, on December 8, grievant disclosed to his supervisor that he could not use his right foot for braking either quarter ton or half ton vehicles, but instead had been using his left foot in a two-footed braking fashion.

As a result of this information, grievant on December 18, 1979, was called into the office at Cofrin Station and handed a letter dated that same day and signed by Postmaster George Farah. This letter Joint Exhibit 4, states as follows:

> "On Saturday, December 8, 1979 you called Supervisor D. DeKeyser and stated that you could not complete Route 0210 because there were too many steps. You returned to the station with approximately 3 hours of work.
>
> Further, you stated to Supervisor DeKeyser, that when you drive the ½ton vehicle for curb side delivery, you brake with your left foot. This is an unsafe practice that cannot be condoned.
>
> Since you cannot perform all the duties of your position, we will provide you work within your limitations at the Main Post Office. Please report to the Main Post Office at 3:00 a.m. on Wedensday, December 19, 1979. Thereafter, your limited duty will start at 12:00 midnight, Thursdays and Fridays off, until future notice."

Grievant has consistently maintained that there continued to be work available at Cofrin Station which he could perform within his limitations and that management's reassignment of him to duty at the Main Office on the midnight tour was in violation of the national agreement. Based on this, grievant filed the instant grievance as follows:

"On December, 1979 grievant received a letter, signed by you, notifying him thathe would be assigned to do clerk work outside his normal schedule and duty station effective December 19, 1979. Such reassignment was arbitrarily made and is in conflict with the requirements of the Employee and Labor Relations Manual. Management has failed to give proper consideration to (a) The grievant's medically defined work tolerance and (b) the availability of suitable work within the grievant's craft/tour/facility. Suitable work does exist at the grievant's normally assigned facility, within his craft, and within his normally scheduled tour.

Corrective Action Requested: That management of the Green Bay Post Office be instructed as to it's responsibilities and obligations under Section 546.14 of the Employee and Labor Relations Manual; that grievant be paid time and one-half for all hours worked outside of his normal schedule from December 18, 1979 until this grievance is resolved or until grievant is returned to his regular craft/tour/facility; that grievant be returned to his regular craft/tour/facility immediately."

The evidence presented reveals that grievant reported to the Main Post Office as instructed and remained in the "limited duty assignment"(Joint Exhibit 4) performing clerical duties until February 18, 1980, when his physician advised that grievant could return to full duty. (Joint Exhibit 6).

The Union filed a grievance on behalf of the grievant set forth above in accordance with Article XV of the National Agreement (Joint Exhibit 1) and, in its view, the "special provisions in the Limited Duty Settlement Memorandum of October 26, 1979" (Joint Exhibit 3), set forth in full above. It was upon these facts that this matter came before this arbitrator for Opinion and Award.

V. POSITION OF THE PARTIES

A. The Union.

The most significant Union contention is that this matter is controlled by the above-quoted National-Level Settlement Memorandum, Joint Exhibit 3, which is now part 546.14 of the Employee and Labor Relations Manual and therefore, through Article XIX of the National Agreement, is a full and integral part of the collective bargaining agreement between the parties. The Union notes that the major thrust of this agreement is that the employer has committed himself to limited duty assignments for the affected employee within this employee's craft, in the work facility to which the employee is regularly assigned, and during his or her regular work hours, "to the extent that there is adequate work available within the employee's work limitations tolerances, within the employee's craft." The Union notes that the settlement agreement contains, in paragraph A immediately summarized above, the controlling word "Shall". The Union argues that the words "must" and "shall" are widely recognized, particularly when utilized in contract language, as having a mandatory or an imperative effect. The Union cites this arbitrator to Black's Law Dictionary at page 33, which defines "shall" as a

> "word of command and one which has compulsory meaning denoting obligation. It has the invariable significance of excluding the idea of discretion and has the significance of operating to impose a duty which may be enforced."

Thus the Union maintains that management's assertion concerning its discretion and the needs of the Service are inapplicable in

this context; the good faith of management is irrelevant to the instant case; and the only really crucial fact question is whether or not there was adequate work available within grievant's clear work limitations (set forth above) within the Cofrin work facility during grievant's bid tour and within the carrier craft.

With respect to the employer's contention that Article XIII of the National Agreement is controlling on the instant case, the Union urges that the Service's reliance on this Article is completely erroneous and misplaced. To buttress this posture, the Union notes there is no question that the grievant was temporarily, partially disabled as a result of a job-related injury. The Union equates "on-the-job injury" with "job related injury." To the Union, Article XIII applies to light duty assignments which it interprets as off-the-job injuries suffered by postal service employees. Moreover, the Union asserts that Article XIII Section B.1 of the National Agreement clearly and unambiguously requires that a temporary reassignment to a light-duty position be effected by a written, voluntary request by the employee. The Union notes that the grievant testified credibly at hearing that he never submitted such a request, either orally or in writing. Furthermore, the Service failed to provide any evidence to dispute grievant's assertion. In addition, and perhaps crucial, the Union notes that the Service itself referred to the grievant's situation as limited duty, in its reassignment instruction to grievant on December 18. (Joint Exhibit 4). To the

Union, there is no inconsistency between Article XIII and the current Part 546.14 of the Employee and Labor Relations Manual. Instead, Article XIII of the National Agreement establishes negotiated rights and benefits for all employees in addition to the Service's mandatory statutory obligations to employees recovering from "job-related" illnesses or injuries as set forth in 5 U.S.C. §8151 (1980) and 5 C.F.R. 353.306. The Union notes that this relevant law refers specifically to "job-related" and to "limited duty". Thus, these words of art refute the employer 's line of defense which rests on the identical nature of on-the-job injuries and off-the-job injuries as both being encompassed by the light duty category of Article XIII, quoted above. The definition of limited duty as a distinct concept relating wholly to job-related (on-the-job) injuries and not to light duty assignments, therefore countermands the employer argument that the Union's interpretation of Joint 3 results in an inconsistency between the National Level Settlement and the Contract between the parties which, in turn, would result (by the provisions of Article XIX) in the terms of Joint 3 being negated.

Thus, with reference to the major contractual issues involved, the Union contends that it presented extensive and persuasive evidence and testimony at hearing to show the correctness of its position. Based on the clear intent of the intertwining and statutory sections, the Union asserts that there is absolutely no question that limited duty assignments are controlled by Joint Exhibit 3 and require the employer to

maintain an affected employee's current craft work, work assignment location and the customary work schedule of the affected employee, if work within the employee's limitations is available.

With reference to the question of fact -whether such an assignment is available in the carrier craft within the limitations prescribed at the Cofrin facility during grievant's normal tour - the Union maintains that it presented considerable evidence to sustain its burden of proof. At the hearing, the Union presented both the testimony of grievant and Union Exhibits 2 through 5 to prove that several appropriate job options were available at grievant's ordinary work facility. First, the Union contends that grievant could case and carry Mounted Auxiliary Routes 201 and 110 throughout his entire limited-duty assignment. Second, the Union notes that the grievant was under basically the same physical limitations throughout the entire period from July 16 to December 18, 1979. Yet, the employer, despite the grievant's good faith suggestions, assigned grievant to an ever-changing combination of casing and street duties on some twenty-one (21) routes. The Union concedes that the Service was not obligated to accede to grievant's work preference from July to December because there was other work available which grievant could clearly perform. Therefore, the managerial discretion exercised by supervision was not volative of the labor contract between the parties.

However, as management witnesses testified to at hearing, when the prior assignments became unavailable due to the termination of vacation leave during the month of December, management became obligated to either give grievant still-available assignments among the various routes, which management conceded, under cross examination, was still available in December, or should have assigned grievant to Mounted Auxiliary Routes 201 and 110 at this time. Management's excuses offerred at hearing (that there would be an element of "unpredictability" and undue managerial hardship involved, and that mounted routes were impossible because of the crucial safety problem with "left-foot braking") are not convincing when carefully scrutinized. Management's own instructions for examiners conducting driver's road tests (Union Exhibit 6) reveal that the safety issue is a straw man or a complete misassessment on local supervision's part. Thus, Union Exhibit 6 reads in pertinent part:

> "Experts in automotive safety differ on whether it is best to use right foot or left foot for the brake. Therefore, no penalty is given for either right or left foot operation as long as the driver uses the brake properly."

With reference to the availability of ample work within the grievant's physical limitations, the Union presented Union Exhibit 3, (the form 1840 Route Summary for Auxiliary Route 110); Union Exhibit 4 (Form 1840 Route Summary for Auxiliary Route 201); and Union Exhibit 5 (Form 1621 Carrier Route Report). These exhibits clearly establish that grievant could have been provided

an assigment at Cofrin witin the craft and within his normal work schedule within his work-tolerance limitations. (In fact, the Union argued, theseroutes would have involved less climbing than his previously limited-duty assignment as structured by the Service from July through December 18, 1979).

To the Union, these assignments would have negated any "unpredictability problems" if, in fact, any such problems were actually in existence. When viewed in conjunction with management's completely erroneous assumption that left-foot braking is unsafe, it is apparent that, on the facts, there was amply work available at Cofrin at the relevant time. To the Union, it has clearly met its burden of proof as to these basic factual points. Further, management has presented no credible evidence to counter the Union's prima facie case that work which the grievant could perform was in fact available at grievant's normal work station.

With reference to what is obviously a central fact question involved herein, the Union presented extensive testimony and argument as to the appropriateness of braking with the left foot. Thus, Union Exhibit 6 shows the official Service posture as to this point. Moreover, the Union contended, employer witness LaPlante testified on cross-examination that, although he would advise drivers not to brake with the left foot, LaPlante knew of no regulation that prohibited such actions. LaPlante conceded, moreover, that the Service would issue a SF46,(U.S. Government Motor Vehicle Operator's Card) qualifying an employee to drive

postal service vehicles even if the employee utilized his left foot for braking. Moreover, the Union contended that grievant had been braking with his left foot since July and therefore was accustomed to this procedure and did not fall within the area of concern expressed by LaPlante (that the person who habitually brakes with his right foot and the is suddenly forced to two-footed operation of a 1/4 ton or 1/2 ton truck is dangerous). Moreover, the very fact that management did not act on grievant's operation of service vehicles by braking with his left foot for some ten days from time of notice of this practice until reassignment, shows that management cannot credibly argue that left foot braking presents a safety hazard of sufficient magnitude to allow classification of left-foot braking as a restriction which destroys the clearly available work assignments within the work tolerance limits of grievant.

With reference to the last major defense asserted at hearing by the employer, the remedy issue, the Union asserts that the time and a half monetary award for all hours worked from December 19 through grievant's return to his normal work duty status is appropriate under these facts and is within the powers of this arbitrator to order. First, the Union contends that the 12 a.m. tour at the Main Post Office was severely disruptive and had an adverse impact upon the grievant in violation of both 5 U.S.C. §8151 and Joint Exhibit 3 set forth above. The Union ssserts that the above-described contract

violation began some seven days before the Christmas holiday season, whereupon grievant was involuntarily forced to work nights after working twelve years during day hours. This disrupted grievant's family life and caused grievant not to be able to sleep. Greivant found it difficult to adjust to a completely different eating pattern; he was denied time with his wife and children because he was sleeping when they were awake. Especially given the holiday season involved, the remedy requested therefore, is appropriate, in order to make the grievant whole and also to serve as a deterrent to blatant violations of the relevant provisions of the contract by the employer.

To support this position, the Union cites two precedent awards and extensively extrapolates the reasoning and analysis contained therein in support of monetary damages for the contract violation alleged by it. First, the Union cites to the arbitrator National Association of Letter Carriers AFL-CIO, and the United States Postal Service [NC-S-5426 (Gamser, 19790 at page 8] where arbitrator Gamser stated:

> "Restrictions upon the jurisdiction of the Arbitrator must be scrupulously observed. However, to provide for an appropriate remedy for breaches of the terms of the Agreement, even where no specific provision defining the nature of such remedy is to be found in the Agreement, certainly is found within the inherent powers of the Arbitrator. No lengthy citations or discussions of the nature of the dispute resolution process which these parties have mutually agreed to is necessary to support such a conclusion."
> (emphasis supplied by the Union)

In addition, the award of Arbitrator Paul J. Fasser, Jr., in the Holiday Scheduling Remedy Case, National Association of Letter Carriers, AFL-CIO and United Stated Postal Service (NC-C -6085, 1978) further buttresses the NALC argument that management under the National Agreement can and does have to pay a monetary remedy under the appropriate facts, even when no provision of the National Agreement or the Postal Service Handbook and Manuals specifically authorizes such payment. In amplifying prior arbitration precedent, Fasser's award makes it clear, to the Union, that the Service can be held liable for contract damages when it violates the right of an employee by clearly violating its Union contract, and when other remedies do not effectively make whole the individually affected employee harmed by the employer's breach.

B. The Employer.

Management emphasized six major points to support its theory of the case. First, management contended that Joint Exhibit 3, the National Level Settlement Memorandum, has no applicability to the current dispute, but instead represents a settlement of a grievance dealing with the specific area of workmen's compensation. This settlement, to management, establishes, "an order for consideration for assignment of the light-limited duty employee to useful and necessary work." Further, management notes that no where in the settlement nor in the proposed language to be prospectively included in

Employee and Labor Relations Manual (after the apprpriate concurrence by all Unions) is there any reference to the payment of out-of-schedule overtime. Additionally, neither is there any prohibition about working an employee in a different tour, classification and location other than his normal position. The last paragraph of Joint Exhibit 3 clearly acknowledges that management may assign an employee outside his "regular work schedules and/or . . . facilities." No economic penalty is assessed for this action, management asserts.

In addition, management maintains that there is no distinction between light duty and limited duty for purposes of the facts at bar. Managment notes that the Union's argument distinguishing these terms is specious and is clearly based on an erroneous reading of the applicable contract sections and statutes. To management, the parameters of 5 U.S.C. §8151 and of 5 C.F.R. 353.306 do not apply to the collective bargaining argreement involved here; instead, the controlling contractual section is Article XIII, extensively quoted above. The employer presents an extensive analysis of each applicable contract section to illustrate the discretion vested in management and the delicate balancing of the interest of the employee and the needs of the Postal Service. To management, the entire thrust of Article XIII is exemplified by the philosophy that, in melding the two distinct interests (that of the individual and the employer) no contractual obligations to create work, make jobs, or displace able-bodied full-time employees who are <u>not</u> disabled was

created. Instead, the philosophy of Article XIII is that management, within its sound business judgment and managerial discretion, will make a good faith effort to find work in the employee's craft and normal hours at the usual facility. Article XIII, however, clearly recognizes the managerial rights set forth in Article III, the Management Rights Clause. Simply put, the good of the Postal Service is the essence of Article XIII, and when this good comes into conflict with injured employee interests, the indiviudal must give way, if the employer has made a good faith attempt to accomodate him or her.

With reference to the facts, management asserts that there is no question from the evidence presented that a good faith attempt to accomodate grievant herein was made by supervision at the Cofrin facility. First, the testimony reveals that management met at least one half hour each day creating work assignments within grievant's work tolerances from July to December, 1979. Only when pre-scheduled annual leave ceased because of the Christmas load was management unable to continue to provide work. Moreover, grievant could not carry what management perceived to be "an easy route" with extremely limited porch and stair climbing. This was proved by grievant's return on December 8 from this route with three hours undelivered mail.

Further, the testimony from supervision at the affected station established that management regarded the use of a left foot for braking purposes as highly unsafe. To a certain extent,

the use by the grievant of his left foot for braking purposes (when it became known on December 8, 1979) was in part responsible for the employer's decision to take the employee from the "make-work situation" at the station, and assign him to a non-driving work area at tha Main Post Office. Vehicle operations analyst LaPlante testified that he saw no inconsistencies with the road test examination (Union's Exhibit 6) and local supervision assessment that the use of the left foot was an unsafe act, especially when a ½ ton or a ¼ton truck is involved. To LaPlante, the use of the left foot for braking purposes is unsafe, and he instructs drivers tested by him that this is so. Moreover, LaPlante empahsized at the hearing that especially dangerous is the use of the left foot by someone who is in the habit of ordinarily driving with his right foot. In addition, management presented ample evidence to show that the crucial safety issue is the small size of the brake pedal and the danger that a direct motion down to this pedal might cause a driver to miss the brake or have his foot slip off, resulting in an accident.

Irrespective of whether the assessment of local management coincides with expert opinion, the good faith and sensible basis for the concern for left-footed braking is so clear, that an arbitrator should not substitute his judgment for local management's decision. As revealed by Union Exhibit 7 itself, at paragraph 214.51c, the decision of driving safety and operation of service vehicles is left up to management. Thus, although 214.52b does permit testing even when a new employee has only

one leg, the actual decision as to whether such an employee can drive a vehicle is still clearly within management's discretion.

Thus, to management, the facts are plain in this case. Management exercised good faith discretion, after extensive effort to accomodate grievant from July until December, 1979. Only when there clearly was no work available at Cofrin station within the grievant's work tolerances did management reassign grievant. This ability to reassign is clearly vested in management by Article XIII of the National Agreement. Moreover, there is no need for a voluntary request for light duty by the employee for coverage by Article XIII. This controlling Article came into play when grievant Strebel sent in his physician's note, setting forth substantial physical limits and work restrictions. (See Employer Exhibit 1)

Perhaps, most important, to management, is the fact that there is absolutely no authoirty for this arbitrator to grant premium pay for out-of-schedule overtime. First, even Joint Exhibit 3, the National Level Settlement Memorandum - does not provide any economic penalty for any actions taken thereunder. Moreover, arbitrator Feldman, in American Postal Workers Union and the United States Postal Service, 5 CPO 172 (1980) carefully considered the relevant issue contained in this grievance. When confronted with this issue, management notes, Feldman held that full-time regular employees on light-limited duty have benefits that arise under Article XIII, and not Article VIII, (Wages and Hours). Therefore, no entitlements to notmal scheduled hours

or bid routes and/or tours, facilities or assignments apply when employees are in the light duty status. Arbitrator Cohen in American Postal Workers Union and the United States Postal Service, C8C 4A-C9860 (1980) held that out-of-schedule overtime pay was not provided by the National Agreement for employees on light-limited duty when they are assigned to different tours and hours of work (apparently, Arbitrator Gamser in a limited duty award N8-NA-0003 also found that out-of-schedule overtime as defined in Article VIII, Section 4B of the National Agreement and the Fair Labor Standards Act was not available under the provisions of Article XIII. This case, distinguished by the Union but not submitted to me, apparently occurred prior to the National-level settlement of October, 1979, and therefore would have limited applicability if the Union's contention that Joint Exhibit 3 controls is accepted by me).

In sum, management emphasized its good faith efforts on the facts. It noted that inclement weather, lack of scheduled annual leave in December, heavier mail loads, and the inconvenience and instability of work schedules made continuing scheduling of the grievant at Cofrin Station impossible. Moreover, the safety issue of left-footed braking which came to management's attention on December 8, 1979 precluded grievant's use on any mounted route.

More importantly, management's responsibility to maximize efficiency and contract language which provided no obligation for making work or guaranteeing hours allowed management to use its

discretion to assign grievant to light-duty work at the Main Post Office as it did. No contract violation inhered in this action.

Perhaps most important, this arbitrator is simply not authorized to grant monetary damages or special benefits for out-of-schedule work, by light duty employees. The contract language in no way supports such a remedy. Substantial prior arbitration precedent goes directly contrary to this demand. This is to some extent conceded, management notes, by the Union's prayer that the arbitrator design his own remedy, if I believe that my powers do not allow for premium pay.

Therefore, based on all the foregoing, the employer urges this grievance be denied in its entirety.

VI. OPINION AND AWARD

After careful consideration of the matter, including an analysis of the documentary evidence submitted and testimony presented at hearing by the parties, the arguments presented in the parties' respective briefs, precedent arbitration awards cited to me, and the inherent probability of the testimony given and the demeanor of the witnesses presented, I find as follows:

One way to evaluate the merits of this dispute is to consider the three major issues in the instant matter.

The first issue is that of contract interpretation, i.e. what clause controls here, Article XIII, defining light duty, or

Joint Exhibit 3, The National Level Settlement for Limited Duty made part of the contract through Article XIX? In my view, the employer's contention that Joint Exhibit 3, the National Level Settlement Memorandum, has no applicability to the current dispute, but instead, merely represents a settlement of a grievance dealing with a specific area of Workmen's Compensation or an order or procedure for consideration for assignment of the light-limited duty employee to useful and necessary work, must be rejected under these facts.

First, the arbitrator notes that the terms "limited duty" and "job-related injury" are utilized in the applicable federal statute (5 U.S.C. §8151); the implementing federal regulation (5 C.F.R. Sec. 353.306); Joint Exhibit 3 (The National Level Settlement Memorandum); and in the reassignment instruction to grievant, dated December 18 and issued by management itself (Joint Exhibit 4). The applicable contract clause, Article XIII, clearly and consistently uses the term "light duty". Nowhere in any of the documents submitted is there a mixing of the two concepts (light and limited duty) or a hyphenated version of these two terms except in management's brief and argument at hearing. Moreover, in other contexts the distinction between on-the-job injuries and off-the-job occurrences results in sharply different benefits, procedures, and standards of conduct. For example, job-related injuries and off-the-job incidents give clearly different reinstatement rights under the applicable contract and statute. In addition, Joint Exhibit 3, the National

Level Settlement Memorandum, does indeed seem to cover the order for consideration for assignment of limtied duty employees. Yet, Article XIII, Section D set forth above, does exactly the same thing for employees who fit in the light-duty designation. Rather than accepting the Service's argument, that the two terms are synonmous and that the National Level Settlement is redundant and inconsistent with the National Agreement, and therefore void, this arbitrator agrees with the Union that a more likely rationale for the two separate and distinct structures is that the concepts of limited and light duty are in fact separate and deal with different subject matter. (The apples and oranges analogy common to legal analysis).

Moreover, after careful scrutiny of all evidence presented, the arbitrator notes that the overall reading of the various applicable statutory and contractual sections reveal the two distinct schemes for what is consistently referred to as "job-related" or "on-the-job injury" and off-the-job incidents. I agree with the Union that the weight of evidence reveals that the distinction involved herein between light duty and limited duty assignments is the nature of the injury or harm - whether the injury occurred on the job as in the instant matter or instead was an off-the-job occurrence.

The employer has argued that Joint Exhibit 3 refers to merely irrelevant and distinct workmen's compensation problems. No evidence whatsoever, was presented to substantiate this

claim nor was background information as to intent or context of Joint Exhibit 3 presented. This arbitrator cannot presume facts des hors the record, but instead is limited to analysis of documents and testimony actually presented. Therefore, I rejectthe employer's assertion that Joint Exhibit 3 deals with workmen's compensation matters and not with standards for assignment for employees who qualify for the limited duty status.

Moreover, the clear language of both Article XIII and Joint Exhibit 3 reveal that both sections involve an order for consideration for assignment of injured employees to useful and necessary work. Crucial to the assignment, however, is the standard to be applied in balancing interests and exercising judgment in following that order. There is no doubt from reading Joint Exhibit 3 and Article XIII, especially Section D thereof, that two somewhat different standards are contained in these respective clauses. The employer is absolutely correct in perceiving Article XIII as calling for good faith, expansive management discretion, and a "best efforts" standard which may require a balance at times in favor of the service as against the individual interest of the affected injured employee in determining work assignments.

However, this arbitrator agrees with the Union that Joint Exhibit 3 evidences a somewhat different perspective. Thus, when job-related injuries are involved, the interests of the injured employee in limited duty at the work station seem to be given much greater weight. The use of the term "shall" in part 546.14 of the Employee and Labor Relations Manual and Joint

Exhibit 3, and the overall construction of new part 546 in general support the mandatory or imperative thrust of the standards to be applied in considering assignments for limited duty employees.

Thus, this arbitrator finds that Joint Exhibit 3, part 546.14 of the Employee and Labor Relations Manual controls the order of assignment or selection of work in the instant matter. Moreover, the major thrust of Part 546.14(a) is that the employer has committed itself to limited duty assignments for the affected employee (here grievant Strebel), within Strebel's craft, in the work facility which Strebel is regularly assigned to, and during his or her regular work hours, to the extent that there is adequate work available within the employee's work-limitation tolerance. Simply put, the Limited Duty Settlement, (Joint Exhibit 3) demands a higher standard of judgment to be adhered to by the Postal Service in its determination of whether a job assignment is work within the work tolerance of the grievant than if the good faith business judgment standard expressed in Article XIII controls.

With reference to the actual facts involved herein, I believe the Union has sustained its burden of proving that several work assignments were indeed available for grievant within his work tolerance. First, I note that work was found for grievant from July, until December 18, by local management. Second, the work limitations placed upon grievant's activity remained consistent from July 20, 1979 through December. The employer's evidence presented to justify the new

work assignment does not appear convincing when analyzed in the context of the susbtantial and quite convincing evidence presented by the Union at hearing. Thus the two Mounted Auxiliary Routes, Routes 201 and 110, could only be deemed unavailable if one agrees with local management's assessment that left-footed braking is unsafe and cannot be condoned. As the Union noted at hearing and in its brief, the employer's own documents and policy directly contradict this posture. See Union Exhibit 6. Moreoever, Union Exhibit 3, 4, and 5 clearly establish that grievant could have been provided other assignments at Cofrin station within his craft and within his normal work schedule that also would have fulfilled his work tolerance limitations. (See my extensive summary of the Union evidence on these points set forth above).

Thus I find in the limited duty context that the employer was indeed obligated to assign grievant to work within his craft, normal tour and work facility if such work was available within grievant's work tolerances. This is the controlling standard articulated by Joint Exhibit 3, now part 546.14 (a) of the Employee and Labor Relation Manual. Such standards which articulate a more stringent and demanding balance for individual employee interests in the limited duty rather than the light duty context: this fact clearly controls the matter before me. Moreover, the Union's proofs satisfy this arbitrator, by a preponderance of the evidence, that such assignments were clearly available in December, 1979 at the Cofrin Station within grievant's normal

tour and craft. The employer's arguments to the contrary both on the controlling contractual standard to be applied and the factual matrix underlying the decision for reassignment seem unconvincing. Moreover, Management's assessment at the local level that left-footed braking precluded mounted auxiliary route assignments is clearly misplaced and fallacious on this record.

Since I hold that this grievance is sustainable both as to the controlling contractual sections involved and the underlying facts, I find that the above-cited decisions by arbitrator Feldman and Cohen as presented by management are inapplicable. Both Cohen and Feldman's decisions are grounded on the light duty status of grievant involved therein and the clear principle that such grievants have no right to their normal bid assignments (Cohen) or to out-of-schedule pay for light duty work (Feldman).

No bargaining history or evidence of a parties' intent with reference to either Article XIII or Joint Exhibit 3 was presented at this hearing. Although the employer argued broadly that monetary premiums for out-of-schedule work for employees in light duty status has traditionally been precluded under the National Agreement, no evidence was presented to show such a clearly understood position relating to a violation of Joint Exhibit 3, which in turn means an improper assignment

directly contrary to the employer's contractual commitment.

Absent clear evidence on the record that the parties did not anticipate some way to make whole the individual employee harmed by a clear breach, I agree with the logic and reasoning presented by the Union in support of its claim for premium pay for the contract violation which clearly effected substantially this grievant's individual rights. The two precedent awards cited to me by the Union certainly support the sensible posture that an arbitrator under this contract has the authority to order a remedy which will make this grievant whole for the harm done him. In the instant matter, unlike the Gamser award noted above, no equalization formula or restructuring of future opportunities can be had. Instead, like the holiday scheduling breach facing Arbitrator Fasser, no possible future remedy can make up for time worked out of craft, away from the normal work location, and outside normal tour hours, when such assignment clearly breaches the collective bargain between the parties. Moreover, an insufficient remedy of this grievance would be an instruction to the parties - and particularly the employer - not to breach the agreement in the future. Thus, the only reasonably appropriate remedy available in light of the above fully-explicated facts is the premium pay requested by the Union herein.

The arbitrator must note this opinion and award does not in any way relate to general light duty assignments and issues of out-of-schedule pay for injured individuals in this assignment category. Clearly, prior precedent and the contract itself require

no premium pay for light duty assignment since no regular or bid entitlement is involved. The same would be true if grievant had been appropriately assigned under part 546.141(b)(c) or (d) of the Employee and Labor Relations Manual. The facts of this particular case, including my findings that the facts and controlling contract language result in an improper limited duty assignment in clear contravention of Joint Exhibit 3, form the basis for the award immediately following.

VII. AWARD

1. This grievance is sustained in its entirety.

2. The appropriate remedy is to compensate grievant Gary O. Strebel for all hours worked under the improper work assignment, as set forth above and made part hereof as if fully rewritten from December 19, 1979 until February 18, 1980 at the premium rate of 1½ times his normal hourly pay.

ELLIOTT H. GOLDSTEIN
Arbitrator

June 29, 1981
Chicago, Illinois