C#03921

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PAUL C. DAVIS
NATIONAL BUSINESS AGENT

IN THE MATTER OF AN ARBITRATION

Between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

K. Allen Grievance
W1N-[redacted]-C-1548
5F
Westminster, CO

AWARD OF THE ARBITRATOR

November 7, 1983

This matter came on for hearing in Denver, Colorado, on March 30, 1983, before Arbitrator William E. Rentfro, selected by the parties to hear and render a final decision on the issue in dispute.

The Union was represented by Paul Davis, National Business Agent. The Postal Service was represented by Denise M. Alter, Regional Labor Relations Representative. Timely briefs were filed by both parties on or about April 25, 1983.

THE ISSUE

Was the Grievant denied light duty or eight hours a day of light duty in violation of Article 13 of the National Agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 13

ASSIGNMENT OF ILL OR INJURED REGULAR WORK FORCE EMPLOYEES

Section 2. Employee's request for Reassignment

A. 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 convalescence 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.

* * * * * * * * *

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

Section 3. Local Implementation

A. Through local negotiations, each office will establish the assignments that are to be considered light duty within each craft represented in the office. These negotations 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.

B. Light duty assignments may be established from part-time hours, 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.

ARTICLE 15

Section 3. Grievance Procedure - General

(a) The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

(b) The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

EMPLOYEE AND LABOR RELATIONS MANUAL

546.1 The USPS has the legal responsibility to employees with job related disabilities as outlined below.

.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....

STATEMENT OF THE CASE

The Grievant, Kenneth Allen, was a full-time Letter Carrier at the Westminster, Colorado Post Office. He became partially disabled after several injuries to his back. In 1979, Grievant alleged that his employment with the Postal Service caused and contributed to his back condition which precluded him from working full duty as a carrier. However, it was determined through a U.S. Department of Labor Compensation Order that Grievant's back condition was not job related.

Grievant requested a temporary light duty assignment within the limitations set by his physician. He was restricted to lifting no more than 10 pounds with only limited bending and stooping. He was given a temporary light duty assignment pumping gas and servicing vehicles at the Terminal Annex in November of 1980, as Management was unable to find light duty for him within those limitations at the Westminster Post Office. On June 8, 1981, Grievant requested Leave Without Pay status, asserting that some of his duties were aggravating his back injuries, and that he was waiting to learn whether his disability retirement application would be

approved. Leave Without Pay was granted by Management on June 9, 1981.

On July 13, Grievant again submitted a request for light duty and was told by Officer-In Charge Sandra Russ that he would have to provide updated medical information before consideration could be given to his request. On July 22, Grievant submitted documentation from Dr. Kaplan stating that Grievant could work subject to a 10 pound weight limitation with restricted bending and stooping. On August 14, these restrictions were confirmed by Postal Service Physician Dr. Olsen. Sandra Russ attempted to locate light duty for Grievant through the Sectional Center. She was unsuccessful and on August 10, Grievant was notified of Management's inability to locate light duty by Mary Welman, the Injury Compensation Specialist. No reasons were given for the denial. On August 18, Grievant submitted medical documentation from his physician removing all weight restrictions. On August 24, a follow-up by the Postal Service's physician maintained in effect the 10 pound lifting limitation with a bending and stooping restriction.

On September 16, Grievant submitted a second request for light duty supported by medical documentation that he could lift up to 35 pounds. This request was denied by Mary Wilman on September 23. No reasons were given for the denial. On October 28, a third request for light duty was filed. This was supported by the Postal Service's physician's medical statement raising Grievant's lifting restrictions to 35 pounds but continuing to restrict him from full duty. On November 9, Postmaster Fred Baughn denied

the request. The Union filed a grievance on November 13, 1981. On December 1, 1981, Grievant filed a charge with the N.L.R.B. alleging that the Postal Service was discriminating against him "because of his Union activities and involvement." The charge was deferred by the Board, pending arbitration, under Dubo Mfg. Corp., 142 N.L.R.B. 431.

On December 30, 1981, Grievant was instructed to report for light duty on January 2, 1982. He worked casing mail on his own route and did additional light duty when it was available. From January 2, 1982 until July 10, 1982 he worked from four to eight hours a day. During this period he also took forty hours of annual leave. Apparently Grievant had been working almost eight hours a day for the four weeks prior to his annual leave. After returning from leave, four to five hours a day of light duty was made available. In July, 1982, Grievant's disability retirement was approved.

THE ISSUE OF TIMELINESS

At the hearing in this matter a threshold issue of timeliness was raised by the Postal Service. The Union filed a Step 1 grievance on November 13, 1981, four days after Grievant's third request for light duty was denied by Management. The Union seeks compensation for Grievant for all wages and benefits he lost as a result of Management's failure to provide him with eight hours a day of light duty work from July 14, 1981 to July 10, 1982.

The Postal Service argues that the grievance is not arbitrable since it was not filed until four months after Grievant was first denied light duty. Alternatively, Management argues that if the grievance is deemed timely filed, the remedy should be limited to the period beginning fourteen days prior to the filing of the grievance. The Union contends that since the Postal Service did not raise the issue of timeliness at Step 1 or 2 of the grievance procedure, as required by Article 15, Section 3(b), it has waived any timeliness objection. Furthermore, the Union argues that Grievant had not been previously aware that a violation had occurred since it wasn't until November that he learned, after a conversation with the letter carrier servicing his own home, that others were being provided light duty at Westminster while he was not.

The evidence indicates that an objection to timeliness was not raised during Step 1 or 2 of the grievance process; thus the Postal Service is barred from later asserting the grievance inarbitrable. However, Management's argument that any remedy should be limited to beginning no earlier than 14 days prior to filing the grievance has merit. A National Arbitration award by Howard Gamser, #AB-NAT-2541 supports this position. He stated, "Also... in those cases where the Union asserts that the alleged violation ...has been on a continuing basis, a grievance filed within five or fourteen days of an alleged violation date, depending upon the Agreement, shall be regarded as having been filed in a timely fashion. However, the Employer's liability shall not extend retroactively more than the five or fourteen days specified in the pertinent Agreement." (See also Elkouri and Elkouri, How

Arbitration Works (3d Ed), 152-153. By limiting the remedy in this fashion, the employer is protected from excessive liability stemming from a complaint of which it did not have notice and yet the grievant is not completely barred from asserting the claim. After a careful consideration of the evidence presented on the issue of timeliness, the Arbitrator concludes that the grievance will be heard on the merits but that any remedy granted will be limited to the period beginning fourteen days prior to the filing of the grievance.

POSITION OF THE PARTIES ON THE MERITS

Union

The Union argues that the Postal Service violated Article 13 of the National Agreement by failing to give the "greatest consideration" to Grievant's requests for light duty. First, the Union believes that the job at the Terminal Annex could have been modified to meet Grievant's limitations. In addition, the Union alleges that even when Grievant's lifting restrictions were raised to 35 pounds by the Postal Service's own physician, Grievant was still not permitted to case his own route from October 28, 1981 to January 2, 1982.

Moreover, the Union argues that the National Agreement does not distinguish between Management's obligation to provide "limited duty" for those employees injured on the job and its obligation to provide "light duty" for those injured off the job. The Union construes the language of Article 13 as placing a firm obligation on Management to provide eight hours a day of light duty to Grievant

in this case. Since Management provided testimony indicating that "limited duty" is always available, the Union believes the denials of Grievant's requests for "light duty" were in violation of the National Agreement.

Postal Service

The Postal Service argues that the Union has not presented sufficient evidence showing that light duty was available within Grievant's limitations. Management asserts that it has an obligation to maintain the efficiency of operations, and that it was operationally not efficient to provide long-term light duty for Grievant within his restrictions. The Postal Service also argues that it is very difficult to locate light duty with a 10 pound lifting restriction. Management points out that it made an ongoing diligent search for light duty for Grievant but was unable to locate more than that which was offered.

Moreover, Management argues that it does not have the same obligation to light duty employees as to those in a limited duty capacity. Specifically, Management does not believe that it has an obligation to provide eight hours a day of light duty, but rather must only provide light duty as it is available. It contends that when employees are injured on the job and request limited duty a greater obligation is imposed on Management than for those employees requesting light duty as the result of a non job-related injury.

DISCUSSION AND CONCLUSIONS

The Arbitrator has carefully considered the evidence presented in this case, the briefs, and the arguments of the parties. Whether Management violated Article 13 of the National Agreement presents a complex question. According to Article 13, Section 2(C) the Installation Head must show "the greatest consideration" for light duty requests. Section 3(A) specifies that Management must "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." The issue at hand turns on this obligation; thus a further examination of the nature of the duty imposed on Management is necessary.

Management's obligation to provide light duty for employees injured off the job is not the same as its duty to provide limited duty to employees injured on the job. An arbitration award by Arbitrator Marshall Seidman, #82/171 (unpublished) December 1, 1982, supports this position:

> "The most the contract requires and the most arbitrators have insisted upon is that the installation head give each request for light duty careful consideration and provide work where available. Neither the contract nor the arbitral decisions make the Service the guarantor of full employment for ill or injured employees requesting light duty status. Since the grievant's light duty request arose as the result of a non-job related injury, there was no obligation on the part of the installation head to ignore her efficiency or her abilities substantially to perform her assigned tasks within a reasonable period of time and without unreasonably jeopardizing her health by requiring her to perform beyond her physical restrictions. Just because the installation head in a situation involving a job related injury, where the injured employee is entitled to full compensation regardless of whether he or she is employed at all, makes a job for the employee so that the

> service can get some economic benefit for the money paid to the employee, does not guarantee to another employee, not similarly situated, that she will have work made for her regardless of her ability to efficiently perform it within her physical restrictions."

It seems clear that the obligation Management has towards limited duty and light duty employees is distinguishable. According to the regulations in the Employee and Labor Relations Manual, Part 546.1, when an employee is injured on the job the U.S.P.S. "must make every effort toward assigning the employee to limited duty...." Article 13, on the other hand, which addresses light duty assignments, for those employees injured off the job, requires Management to show the "greatest consideration" for light duty requests. Moreover, Article 13 does not guarantee eight hours of work to injured employees. Section 3(B) specifies that light duty assignments may "consist of 8 hours or less in a service day and 40 hours or less in a service week." Further, Section 3(C) states that 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 the employee's previous duty assignment." Thus it does not follow that because Management provides eight hours per day of limited duty work to those employees injured on the-the-job, that it is obligated to provide eight hours per day of light duty for employees such as Grievant, with injuries that are not job related.

Yet as Arbitrator Holly recognized in an Article 13 award #WC-S-11517 and #WC-S-12774, May 11, 1979, the "language is clear and places a firm obligation on the installation head to exert a

bona fide effort to comply with the light duty request insofar as possible." In the instant case, the parties presented a great deal of conflicting testimony and evidence on the "availability" of light duty. The Union presented evidence that the mail volume was heavy and that several carriers were working overtime delivering their routes. Yet this alone does not indicate that Grievant could have been provided with eight hours a day of light duty from the period of July 14, 1981 to July 10, 1982. Management, according to the terms of the National Agreement, may consider operational efficiency and the grievant's medical restrictions when examining light duty requests.

Management on the other hand did present evidence that efforts were made to locate light duty within the Grievant's restrictions. Yet Management did not adequately explain why light duty was not available for Grievant from the period of July 14, 1981 to January 2, 1982. Management relies heavily on the difficulty of locating work within a 10 pound lifting restriction. The Arbitrator recognizes this difficulty, yet the weight limitation was lifted to 35 pounds by the Postal Service's physician on October 28, 1981 and still Grievant was not provided with any work until January 2, 1982. The period between July 14, 1981 and October 28, 1981 is rendered much less important since the Arbitrator has determined that any remedy will be limited to the period beginning fourteen days prior to the filing of the grievance. Thus it is not necessary to examine this period in great detail. On the other hand, it seems clear from the evidence presented by both parties that Grievant had the ability to case his own route within the 35 pound lifting restriction beginning October 28, 1981. The Postal Service did not

sufficiently indicate why this work was not available for Grievant before January 2, 1982, and yet the Union did present evidence that light duty had been made available for other employees at the Westminster station during this period. Thus, it is concluded that Management erred in not allowing Grievant to perform light duty in the casing of his own route after the 10 pound weight restriction was lifted by both physicians.

The Union also asserts that Management committed an unfair labor practice by denying Grievant light duty because of "his union activities and involvement." The N.L.R.B. charge was deferred by the Board under Dubo Mfg. Corp., 142 N.L.R.B. 431. During the course of the hearing, no evidence was presented indicating that Management discriminated against Greivant because of his Union activities. Since an examination of the entire record indicates that this was an assertion for which no evidence was adduced, the Arbitrator concludes that there is no basis for issuing a complaint.

AWARD

For the foregoing reasons, the Arbitrator concludes that Management, by failing to allow Grievant to case his own route during the period of time covered by the grievance violated Article 13 of the National Agreement. Grievant is entitled to back pay for those hours he was denied the casing of his own route from the period beginning fourteen days prior to the filing of the grievance to January 2, 1982. No adequate showing has been made that additional hours of light duty work could and should have been made available to Grievant during that time period. The Arbitrator will retain

jurisdiction to resolve any dispute that may arise over the determination of the number of hours involved.

William E. Rentfro

William E. Rentfro
Arbitrator