C# 7233

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE	)	Case No. H1N-1J-C 23247
	)	
and	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
	)	

Before
Neil N. Bernstein,
Arbitrator

APPEARING

FOR THE SERVICE: James G. Merrill,
Director, Human Resources
San Jose Division
1750 Lundy Avenue
San Jose, California 95101-9994

FOR THE UNION: Keith E. Secular, Esq.
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330 West 42nd Street
New York, New York 10036

OPINION OF THE ARBITRATOR

The parties have agreed that the only issue to be resolved in this proceeding is the following:

> Whether management may permanently transfer an employee who sustained an injury on duty and who is performing limited duty to another craft on an involuntary basis?

Upon resolution of that issue, the case is to be remanded to the regional level for further proceedings on whatever issues will be remaining in the grievance itself.

I

The relevant facts in the particular grievance were stipulated to by the parties at the arbitration hearing. The Grievant, Marisa Puppolo, was hired as a fulltime regular letter carrier in New Haven, Connecticut, in September 1979. In February 1980, she suffered an on-the-job injury to her knee that prevented her from performing the duties of her position. Thereafter until August 1983, she worked a variety of limited duty tasks at the New Haven Post Office within the letter carrier craft and within normal daytime working hours.

The instant grievance arose on August 1, 1983, when the

Service informed her that, effective August 6, she was being reassigned to the clerk craft as a Distribution Clerk and that she would be working as a clerk from 5:30 p.m. until 2:00 a.m. with Tuesday and Wednesday as her non-scheduled days.

The Union, after an unsatisfactory Step 1 meeting, filed the instant grievance on Ms. Puppolo's behalf on August 10, 1983, asserting that her transfer violated the National Agreement in several respects. The grievance has been processed through the fourth step in the parties' disputes resolution procedure without a voluntary resolution. Thereafter, the Union appealed the case to National arbitration on the single issue set out above.

II

Since at least 1974, the Service has been subject to the Federal Employees Compensation Act (5 USC 8101 et seq.). That statute provides compensation for employees who are disabled as a result of on-the-job injuries or employment-related illnesses. Such employees receive continuation of their pay for 45 days and a portion of their wages thereafter for the period of their disability; those compensation payments are assessed against the budgets of the agencies who had employed them.

The Office of Personnel Management is empowered by the FECA to issue regulations governing the administration of the statute.

One of its regulations, 5 CFR 353.306, specifically deals with the treatment of employees who have partially recovered from their injuries, but not sufficiently to enable them to return to their regular positions. The regulation directs the agency involved to make "every effort" to restore such an employee to some form of "limited duty".

The Postal Service has endeavored over the years to comply with the directive set out above. In 1979, the Union filed a grievance challenging certain of its efforts on the ground that they constituted "punitive practices." The Service, with the concurrence of this and all other affected unions, promulgated a regulation resolving that grievance, which regulation was incorporated into the Employee and Labor Relations Manual as Section 546.14. The mandate of that regulation is one of the questions to be resolved in this proceeding.

Section 546.14 has previously been the subject of a National arbitration involving the Service and the American Postal Workers Union, in case H1C-4K-C 17373. That case concerned a letter carrier who suffered a compensable injury that was determined would permanently prevent him from performing carrier work. The Service then offered the carrier a limited duty job as a full-time regular Distribution Clerk, and informed him that if he refused to accept a permanent reassignment to that clerical craft position, management would "so advise the Office of Workers

Compensation for action deemed warranted". The carrier accepted the position and transferred to the clerk craft. The APWU then demanded that the vacancy created in the carrier work complement by his reassignment be posted for bid by employees in the clerk craft, pursuant to Article 13, Section 5 of the National Agreement. Management refused, and the case eventually was heard by National Arbitrator Richard Mittenthal.

Mittenthal rejected the Union's claim. He held that Article 13 applied only to Article 13 reassignments, which occur when an employee makes a "voluntary request" and the transfer is to a "light duty assignment" established through "local negotiations". He concluded that the transfer in question was made pursuant to Part 540 of the ELM and that such transfers are not covered in any way by Article 13. He also found that the transfer involved in that case was "voluntary", in spite of the fact that it was made only after the Service advised that it would inform the Office of Workers Compensation of any refusal, because that statement merely informed the carrier of the action that the regulations required the Service to take.

III

The Union argues first of all that transfers between crafts can only take place if they are explicitly authorized by some provision of the National Agreement. The particular reassignment

involved in this case is not authorized by any provision, including the provisions of the manuals and handbooks that are incorporated into the Agreement by Article 19.

Secondly, the Union asserts that this reassignment is not only not authorized by Part 540, but it is inconsistent with that Part of the ELM, because it cuts off all future opportunity for the Grievant to work in her craft, if suitable work ever becomes available at a future date. Moreover, it creates many significant disadvantages for the Grievant, such as loss of her craft seniority.

Third, the Union asserts that the action in question constitutes an amendment to Section 546.14, which can only be effected through the utilization of the procedures set out in Article 19, Section 2. Those procedures were not followed in this case.

Finally, the Union argues that Arbitrator Mittenthal's decision in Case 17373 did not dispose of this dispute, because the facts of the two cases are materially different.

IV

The Service argues first of all that the instant grievance is not arbitrable. It claims that there is no contractual

provision in dispute and that the parties have previously agreed that management had the right to reassign an employee with a compensable injury from one craft to another. In addition, it asserts that its right to do so has been affirmed by several arbitration awards, including Mr. Mittenthal's.

On the merits, the Service maintains that it has the absolute right to make such involuntary transfers. Its right to do so is "ingrained" in the Management Rights provision of the National Agreement, which is Article 3. In addition, Section 546.14 does not talk only of temporary assignments to limited duty work in other crafts, but it also covers permanent assignments, which would involve transferring the employee to another craft. In addition, it claims, such a transfer is not irrevocable, and if the employee ever recovers, he or she can request reassignment to the original craft.

Finally, the Service contends that leaving an employee in a craft for which he or she cannot perform the work is inefficient, because another employee can not be assigned to the injured employee's bid duty assignment on a permanent basis while the employee remains attached to that craft.

The Service also points out that there were 348 permanent reassignments in the last year from one craft to another, and that this is the only case which challenges its right to make

such reassignments.

V

The relevant language of Section 546.14 of ELM is the following:

.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.... 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.

* * * * *

VI

The Arbitrator concludes that the Service violated the National Agreement by involuntarily assigning the Grievant, an employee disabled by a compensable injury, from one craft to another. The case should be remanded to the regional level for further proceedings consistent with that finding.

Thus conclusion is derived from the following considerations:

A

First of all, the grievance is clearly arbitrable. The only question that can properly be considered in an arbitration is whether the action taken by the Service violated that National Agreement in any way. The fact that there is not a specific provision which explicitly prohibits involuntary transfers across craft lines is of no significance, if such a prohibition can be

found in the agreement by implication or construction.

In addition, Arbitrator Mittenthal's decision, although it is important to the resolution of this proceeding in a number of respects, did not determine that the Service had the power to make involuntary reassignments across craft lines. To the contrary: the Union involved in that case, APWU, presented the contention that the transfer of the carrier involved had been an involuntary one, because he had been warned that the Office of Workers Compensation would be notified if he did not agree to take the job (the significance of that argument to the issues before Mittenthal is not clear to this Arbitrator). Mittenthal rejected that contention and explicitly held that the carrier had not been coerced to take the assignment. Thus, the case was decided as a voluntary transfer under Part 540 of the ELM.

Further, the present National Arbitrator is not bound in any way by awards issued by regional arbitrators on this issue. The whole purpose of the national arbitration scheme is to establish a level of definitive rulings on contract interpretation questions of general applicability. National decisions bind the regional arbitrations, and not the reverse.

Finally, the Step 4 settlement cited by the Service that supports its contention is of even less value, especially since the Union was able to produce a comparable settlement of a

different dispute that supported its contrary contention. It is precisely that kind of confusing and conflicting interpretations that establish the need for the national arbitration cases.

B

Turning now to the merits, the Arbitrator notes that the Service throughout this proceeding has taken two separate, and relatively conflicting, positions. First of all, it has contended at various times that it has the inherent management right, as incorporated in Article 3, to make reassignments of employees across craft lines because there is no prohibition of same in any explicit term of the agreement. If that argument were accepted, the only limitation on the Service's power to make such reassignments would be the general prohibition against arbitrary and capricious actions. At other times, however, the Service has taken the position that it derives its power to permanently reassign partially recovered employees with work-related injuries from the language of Section 546.14, quoted above. The Arbitrator can find no merit in either of these contentions.

The argument that the Service has the general power to make any permanent reassignments across craft lines that are neither arbitrary or capricious is totally inconsistent with the language in Article 12, Sections 4 and 5, which set out a very precisely regulated and limited power in the Service to make such

reassignments under very specific circumstances. Moreover, the last sentence of Section 12.4A directly states,

> "Reassignments will be made in accordance with this Section and the provisions of Section 5 below."

This language, and indeed both sections, would be totally superfluous if the Service had a general power to make such reassignments that it could exercise whenever the precise criteria of Article 12 could not be satisfied. Moreover, the only provision in the National Agreement that appears to allow for permanent reassignments is Article 13, which had been conclusively construed by Arbitrator Mittenthal to be available only for voluntary reassignments initiated by the employee involved.

Consequently, the Arbitrator holds that the Service is empowered by the Agreement itself, only to make the involuntary reassignments across craft lines that satisfy the criteria set out in Article 12.

C

This leaves only the Service's argument that Section 546.141 of the ELM empowers it to make involuntary craft transfers of partially disabled employees who are permanently unable to meet

the requirements of their craft. If that power were found in this section, it could lead to a second interesting issue as to whether the section is void under Article 19 because it "conflicts with this Agreement". Happily, that issue need not be resolved in the present case.

The Service finds its power to make such involuntary reassignments in the language of the section empowering it to "assign the employee to limited duty" consistent with his or her medical tolerances, within or without the employee's craft. The Service contends that this language gives it the right to permanently assign an injured employee to such work and that such a permanent reassignment would be a reassignment across craft lines.

The Arbitrator holds that this interpretation of the provision is barred by the specific mandate in the section that the Service "should minimize any adverse or disruptive impact on the employee". The Arbitrator agrees with the Union that this mandate creates an obligation on the Service that is a continuing duty for the entire period of the employee's disability. The Service is contending that there should be a point in time at which it has the right to "wash its hands" of a particular injured employee and move him out of his craft and into another one for the remainder of his career. Perhaps it would be sound policy to have such a provision in the section, but there is no

language to that effect in that section at this time. Section 546.14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place. Therefore, the Service must be prepared to modify a limited duty assignment outside of the employee's craft, facility or hours, when work within those conditions becomes available.

The Service protests that such a holding would be "inefficient" because it would prevent awarding the employee's bid duty assignment to anyone else on a permanent basis as long as the employee remains assigned to the same craft. The Arbitrator questions first of all whether this argument is factually correct, because the applicable statute and regulations obligate the Service only to hold the employee's position open for one year. After that date, it would appear that the duty assignment could be awarded to another, but that the employee's position in the craft complement would have to retained and never filled by anyone else. However, even if the Service's contention is correct, the same situation would occur where the employee was permanently unable to perform the duties of his or her bid assignment, but could handle limited duty that was available in the craft. The Service has agreed to accept the resulting

inconvenience in that situation, and there is no valid reason why the circumstances should be different just because the limited duty is only available in a different craft. Finally, even if the Service could operate more efficiently if it could "wash its hands" of partially disabled employees, its inefficiency must be balanced against the adverse consequences to the employees that would flow from the deprivation of their total craft seniority.

Thus, the most reasonable construction of Section 546.14 is that it empowers the Service to assign partially recovered employees to limited duty outside their craft on an "indefinite" basis under the criteria set out in the regulation, but that it does not have the power to remove them against their will from future consideration for whatever craft work becomes available at a later date.

This is not to say that the Service's hands are tied in this situation. It can continue to make such duty assignments for as long as the needs of the particular installation justify it. In addition, it can offer a permanent transfer to the employee involved and point out to him or her the advantages of accepting the reassignment (right to bid on better jobs or vacation schedules, etc.) and it can inform the employee, as was done in the case before Arbitrator Mittenthal, that the Office of Workers Compensation will be notified if the employee turns the transfer down. But the Service does not have the power to make an

involuntary permanent reassignment across craft lines if the employee decides to take his or her chances and refuse a voluntary transfer.

VI

For these reasons, the Arbitrator concludes that the Service violated the collective bargaining agreement by involuntarily transferring the Grievant from carrier complement to the clerk complement. This is not to say the assignment of clerical work to her on a different tour was proper or improper, or that any other action taken with respect to her employment was correct or incorrect. Those questions are to be determined in a suitable forum at the regional level.

THE AWARD

The Arbitrator finds that management did violate the provisions of the National Agreement when it involuntarily permanently assigned the grievant from the letter carrier craft to the clerk craft based on her medical condition.

The case is remanded for further proceedings in accord with this holding.

Neil N. Bernstein

NEIL N. BERNSTEIN,
Arbitrator

August 7, 1987