C# 13396

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION	CASE NO. HOC-3N-C 418

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the U.S. Postal Service:
Mr. James K. Hellquist
For the Union:
Mr. C. J. Guffey

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: August 10, 1993

POST-HEARING BRIEFS: October 11, 1993

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the dispute is both substantively and procedurally arbitrable and that there is jurisdiction to proceed to the merits of the case.

DATE: February 7, 1994

Carlton J. Snow
Professor of Law

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement when it reassigned a full-time employe who was partially recovered from an on-the-job injury to full-time regular status in the Clerk Craft. Unless in an individual case, the Employer can demonstrate that such assignments are necessary, notwithstanding the conversion preference expressed in the parties' agreement, the Employer shall cease and desist from reassigning partially recovered employes to full-time status when those reassignments impair the seniority of part-time flexible employes. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

DATE: February 7, 1994

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
) ANALYSIS AND AWARD
UNITED STATES POSTAL SERVICE)
)
AND) Carlton J. Snow
) Arbitrator
AMERICAN POSTAL WORKERS UNION)
(Case No. HOC-3N-C 418))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994. A hearing took place on August 10, 1993 in Room 1P 629 of the United States Postal Headquarters located at 475 L'Enfant Plaza, S.W., in Washington, D.C. Mr. James K. Hellquist represented the United States Postal Service. Mr. C. J. Guffey, Assistant Director of the Clerk Division, represented the American Postal Workers Union, with assistance from Mr. John Olive, President of the Pensacola, Florida Local.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Ms. Susie Spector of Diversified Reporting Services, Inc. reported the proceeding for the parties and submitted a transcript of 115 pages. The advocates fully and

fairly represented their respective parties.

The Employer challenged both the procedural and substantive arbitrability of the dispute. They, however, authorized the arbitrator to resolve all issues in dispute between them. The parties elected to submit post-hearing briefs, and the arbitrator officially closed the hearing on October 10, 1993 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUES

The issues before the arbitrator are as follows:

(1) Is the grievance substantively and procedurally arbitrable?

(2) If so, did the Employer violate the parties' collective bargaining agreement when management reassigned a full-time employe who was partially recovered from an on-the-job injury to full-time regular status in the Clerk Craft? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks, manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.

ARTICLE 37 - CLERK CRAFT

Section 2.D.5 - Conversion/Part-Time Flexible Preference

Part-time flexible employees shall be converted to full-time in the manner set forth in this section. When an opportunity for conversion to a Clerk Craft position exists employees shall, in accordance with this section, exercise a preference as to the duty assignment they desire to be converted into based on their standing on the appropriate part-time flexible roll. The Employer will continue present practice in maintaining part-time flexible rolls.

Section 2.D.7 - Changes in Which Seniority is Lost

Except as specifically provided elsewhere in this Agreement, a full-time employee begins a new period of seniority:

a. When the change is:

(1) from one postal installation to another at the employee's request.

(2) from one craft to another (voluntarily or involuntarily).

b. Upon reinstatement or reemployment.

c. Upon transfer into the Postal Service.

IV. STATEMENT OF FACTS

In this case, the Union challenges the Employer's right to reassign employes who have partially recovered from an on-the-job injury to full-time regular positions in the Clerk Craft. The reassignment that served as the basis of this arbitration involved management's decision to reassign a Carrier Craft employe who suffered an on-the-job injury in

1976. (See, Union's Exhibit No. 15). At the time of his injury, the employe was a full-time letter carrier.

In 1991, management concluded that the injured employe partially had recovered from his injury and could return to work subject to medical limitations. Because of those limitations, the employe was not able to return to the Carrier Craft. Accordingly, management assigned him to the Clerk Craft. Initially, he received a part-time flexible position, but the Employer subsequently changed his status to that of a full-time regular employe.

The Union filed a grievance contending that reassignment of the former full-time Carrier Craft employe to full-time status in the Clerk Craft violated, among others, Article 37 of the parties' collective bargaining agreement. According to the Union, the conversion was to the detriment of at least ten part-time flexible distribution clerks who enjoyed greater seniority than the reassigned carrier. The Employer denied the grievance, contending that the reassignment had been made pursuant to the Employer's obligation to injured workers under federal law and also was consistent with the Employee and Labor Relations Manual as well as the parties' collective bargaining agreement.

Following the Step 3 denial, the Union determined that the matter involved an interpretive issue and referred the dispute to Step 4 of the grievance procedure. In its Step 4 denial of August 24, 1992, the Employer offered the following justification for the reassignment:

> Section 546.22 of the Employee and Labor Relations Manual provides the Postal Service with the discretion to reemploy former employees as unassigned regulars or part-time flexibles. Furthermore, pursuant to other sections of Part 546.5 of the Employee and Labor Relations Manual, the Postal Service has certain legal obligations to employees with job related disabilities. These obligations have been established pursuant to 5 USC, Section 8151 and Office of Personnel Management regulations. Article 21, Section 4 of the National Agreement acknowledges these legal obligations. The Postal Service is under a duty to place full-time employees with medical restrictions into full-time positions they are capable of performing, even if it means placing them in other crafts. See Arbitrator Aaron's award in H1C-5D-C 2128, dated January 24, 1983. (See, Employer's Exhibit No. 1, p. 2).

When the parties were unable to resolve their differences, the matter proceeded to arbitration at the national level.

V. POSITION OF THE PARTIES

A. The Employer

The Employer challenges both the substantive and procedural arbitrability of this dispute. According to the Employer, rules governing the reassignment at issue in this case were promulgated under Article 19 of the parties' collective bargaining agreement more than fourteen years ago. Because the Union did not object to the rules at the time, it is the belief of the Employer that the Union forfeited its right to challenge the rules through "rights" arbitration.

The Employer maintains arbitrators have ruled that postal regulations promulgated under Article 19 of the parties' agreement may not later be challenged in "rights" arbitration when the Union failed to pursue a timely challenge to a regulation as permitted under Article 19.

The Employer also argues that the substance of this dispute is not arbitrable because the issue already has been decided conclusively against the Union in prior national level arbitration proceedings. According to the Employer, the precise issue raised by this grievance has been decided in the Employer's favor by Arbitrator Aaron in 1983. It is the belief of the Employer Arbitrator Aaron ruled that, because the Employer is obligated by federal law to minimize any adverse or disruptive impact on partially recovered employes who are reassigned to a new craft, management must offer former full-time employes new full-time positions consistent with their medical limitations. The Employer argues that the Union may not now attempt to relitigate the issue of the Employer's obligation to partially recovered employes.

The Employer also contends that, even were this dispute to be adjudged arbitrable, the result would not be different. According to the Employer, its obligation to reemploy workers who have suffered an on-the-job injury is established by federal law. The Employer contends that this responsibility is recognized expressly in Article 21 of the parties' agreement. The Employer believes that Article 21 of the parties'

agreement requires management to promulgate appropriate regulations to meet requirements of 5 U.S.C. Section 8151 as well as Office of Workers' Compensation Programs regulations. The Employer maintains that this has been done and that those regulations allow management to reassign former full-time employes to full-time status in new crafts.

Finally, the Employer maintains that requirements of federal law and postal regulations are reflected in the consistent past practice of the parties. The Employer argues that the national past practice of the U.S. Postal Service, as validated by credible witnesses, is that prior full-time employes are offered full-time positions. This national practice, according to the Employer, parallels exactly language of federal regulations and the Employer's own work rules. Moreover, the practice allegedly is consistent with provisions of the parties' collective bargaining agreement.

B. The Union

The Union maintains that nothing in federal law or Postal Service regulations requires or allows the Employer to offer full-time Clerk Craft positions to partially recovered employes from other crafts. According to the Union, Article 19 requires that the applicable postal work rules be consistent with the Employer's collective bargaining agreement.

Accordingly, the Union argues that the ELM positions must be interpreted in conjunction with the terms of the parties' collective bargaining agreement and that the agreement, ultimately must control.

According to the Union, Article 37 of the parties' agreement as well as supporting handbooks and manuals require that the Employer justify any reassignment which impairs seniority rights of part-time flexible employes. It is the belief of the Union that arbitrable precedent places the burden on the Employer to show why it has not followed the usual procedure of converting qualified part-time flexible workers to full-time status prior to filling a full-time position by reassignment. This burden, according to the Union, has not been met in the case of partially recovered former employes.

According to the Union, the Employer may not justify its obligation to part-time flexible employes by contending that its action is required by federal regulation. The Union contends that the Employer has misconstrued its federal law obligation where partially recovered employes are concerned. According to the Union, requirements of 5 U.S.C. Section 8151 apply only to fully recovered workers. Partially recovered workers, according to the Union, have only limited reinstatement rights.

It is the position of the Union that rights guaranteed partially recovered workers do not include status and seniority rights as is the case with fully recovered workers.

According to the Union, partially recovered workers are entitled only to an opportunity to work if available and to whatever employe rights are granted under the applicable collective bargaining agreement. Rights of a partially recovered employe, according to the Union, do not include full-time status when eligible part-time flexible workers are denied a chance for full-time status because of the reassignment.

The Union rejects the Employer's contention that the dispute is not substantively or procedurally arbitrable. According to the Union, it is not challenging language of internal work rules but merely the Employer's application of regulations in this case. According to the Union, ELM provisions, as written, do not allow the Employer to reassign partially recovered employes before management converts eligible part-time flexible workers. The Union believes that this dispute does not challenge or attempt to change any ELM provisions and, accordingly, that the dispute cannot be barred under Article 19 of the parties' agreement.

Moreover, the Union maintains that the central issue in this case previously has not been decided conclusively at the national level. It is the belief of the Union that the issues decided by Arbitrator Aaron in 1983 are not at all the same as issues raised in this case. The dispute decided by Arbitrator Aaron, according to the Union, involved only Articles 1 and 13 of the parties' collective bargaining agreement. This dispute, according to the Union, arises

under Article 37. The issue in this case, contends the Union, has not been previously decided and cannot be barred merely by reference to Arbitrator Aaron's decision.

The Union also maintains that the Employer's reliance on past practice fails for at least three reasons. First, the Union argues that the issue was raised for the first time at the arbitration hearing. Prior to the hearing, contends the Union, the Employer argued only that it had retained the discretion to make such reassignments and not that it was its historic practice to do so. Second, the Union argues that unambiguous words of Article 37 establishing priority for part-time flexible workers must be given preference over an inconsistent practice of the Employer. Finally, the Union argues the claim of binding past practice must fail because the Employer did not establish that the practice had been mutually accepted. According to the Union, it never has agreed to the practice of preferring partially recovered employes over eligible part-time flexible workers and cannot now be bound by a practice it never has accepted.

VI. ANALYSIS

A. The Matter of Arbitrability

The Employer has challenged both the substantive and procedural arbitrability of the dispute. According to the Employer, the grievance is not substantively arbitrable because the precise issue raised by the grievance already has been decided in the Employer's favor as a consequence of a prior national level arbitration decision. The grievance allegedly is not procedurally arbitrable because the Union failed to submit a timely challenge to the relevant ELM provision as required by Article 19 of the parties' agreement.

The parties are well aware of the fact that arbitration is a contractual matter and that there is no requirement to proceed to arbitration with any dispute which a party has not agreed to arbitrate. At the same time, the U.S. Supreme Court has directed that "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." (See, United Steelworkers of America v. Warrior & Gulf Nav. Company,363 U.S. 574 (1960)). Moreover, the Court has stated that doubts about the extent of the arbitration provision should be resolved in favor of coverage. In cases where there is a doubt about the coverage of an arbitration clause, the Supreme Court has directed courts to search for an express contractual exclusion, stating that "only the most

forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."(See, United Steelworkers of America v. Warrior Gulf & Nav. Co., 363 U.S. 574 (1960)).

The Employer's contention that the grievance is untimely has been based on its interpretation of requirements in Article 19 of the agreement. Article 19 is entitled "Handbooks and Manuals." It provides for an expedited process, including arbitration, to determine whether unilateral changes made in handbooks, manuals, and published regulations directly relating to wages, hours, or working conditions conflict with the parties' agreement or, otherwise, are not fair, reasonable, and equitable. Article 19 requires the Employer to notify unions of such changes. If, after a meeting requested by a union, there is concern that the change violates the parties' agreement, the matter may be submitted directly to arbitration.

It is not certain whether the parties ever intended Article 19 to have the sort of preclusive effect now asserted by the Employer. In this case, there is no need to resolve that difficult question. According to the Employer, this case involves a claim by the Union that ELM Section 546 conflicts with seniority provisions of the parties' collective bargaining agreement. The Union's response is that it has not challenged the language of the ELM itself but, rather, disagrees with the Employer's interpretation of the language.

Section 546.2 of the ELM is concerned with collective

bargaining agreements. Section 546.21 states:

> Reemployment under this section must be in compliance with applicable collective bargaining agreements. Individuals so reemployed must receive all appropriate rights and protections under the applicable collective bargaining agreement.

In view of this provision, it is not persuasive to argue that the dispute in this case is barred by Article 19 of the parties' agreement. What is to be tested here (namely, whether reemployment in this case was in compliance with the applicable collective bargaining agreement), is expressly required in the ELM provision the Employer asserts the Union cannot now contest. The ELM itself requires that all reemployment of employes injured on duty be in compliance with the parties' collective bargaining agreement. The Union has asserted that this reemployment failed to meet that requirement. The issue is not barred by the fact that it did not challenge the ELM itself in 1979.

Nor is the dispute substantively barred. As the U.S. Supreme Court has made clear, arbitration of labor agreements is the preferred method of resolving differences in the workplace. It is reasonable to conclude that forfeiture of the right to arbitrate a dispute is strongly disfavored, and clear and convincing evidence that the right to arbitrate has been waived or barred by prior agreement is required in order to support such a claim.

In this case, the Employer has depended on a single decision in 1983 according to which a National Arbitrator ruled that the Employer did not violate Articles 1 or 13 in

assigning a partially recovered employe to a full-time position in a Clerk Craft. In reaching his conclusion, Arbitrator Aaron stated that the Employer "was faithful to the applicable government regulations in assigning [the former employe] to a full-time regular position that met her medical restrictions." (See, Case No. H1C-5D-C 2128 (1983), p. 5). It is too broad an interpretation of this decision to suggest this ruling applies in all cases to establish that such assignments are consistent with the entire collective bargaining agreement.

Accepting the preclusive effect of the decision cited by the Employer is not warranted in this case. The dispute before the arbitrator in this 1993 proceeding involves an asserted violation of Article 37 of the parties' agreement. That issue was not raised in the 1983 proceeding. It is not possible without a hearing on the merits to determine, as is required by the relevant ELM provision, whether the reassignment in this case was consistent with the provisions of Article 37 in the parties' agreement. It would not be consistent with the parties' purpose in establishing a national level arbitration forum to truncate on procedural grounds the ongoing interpretation of the parties' agreement simply because a related matter previously had been the subject of national arbitration. It is institutionally healthy to bring conflicts to an end and not require parties repeatedly to adjudicate the same dispute, but the issue in this case is different from the one in 1983 and should not be barred.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the dispute is both substantively and procedurally arbitrable and that there is jurisdiction to proceed to the merits of the case.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: February 7 1992

B. Merits of the Case

The question to be resolved is whether the Employer violated the parties' collective bargaining agreement when it reassigned a full-time employe, who had been injured in an on-the-job accident and was partially recovered, from the Carrier Craft to a full-time regular status in the Clerk Craft. A violation of the parties' agreement can be found only after requirements of the agreement have been understood. In this case, the Union asserted that reassigning a partially recovered former employe to a full-time regular position in the Clerk Craft violated Article 37 of the parties' agreement. More specifically, the Union has maintained that such an appointment improperly impaired seniority rights of part-time flexible employes.

Article 37 of the parties' agreement is entitled "Clerk Craft." The article both identies the craft group and sets forth substantive rights of the craft. Article 37.2 of the agreement focuses on seniority rights of Clerk Craft members. Article 12 of the parties' agreement is entitled "Principles of Seniority, Posting and Reassignment." Article 12.2 teaches that seniority, unless it is specifically provided for in Article 12, is left to the craft articles of the parties' agreement.

A number of cases for these parties have dealt with the propriety of reassigning former supervisors returning to the bargaining unit to full-time status. (See, for example,

Case No. H7N-4U-C 3766; H7N-2A-C 4340; H7N-2U-C 4628; H7N-5K-C 10423; and H4N-5N-C 41526). Although those decisions involved supervisors returning to the Letter Carrier Craft, principles on which the cases were decided are relevant to the dispute here. Central to the issue of the proper status of returning supervisors to the bargaining unit was the determination that conversion to full-time status from the ranks of part-time flexible employes is the norm under provisions of the parties' agreement. This determination found authority in Section 522 of the PS-11 Handbook. Section 522 of the PS-11 Handbook states:

> Promotions to positions where full-time employees and part-time flexible employees are authorized are usually to part-time flexible positions. A full-time regular position is not normally filled by promotion, reinstatement, reassignment, transfer or appointment if qualified part-time flexible employees of the same designation or occupational code are available for conversion to the position. Part-time flexible employees must be changed to full-time regular positions within the installation in the order specified by any applicable collective bargaining agreement. (See, Union's Exhibit No. 10, p. 27).

Both the Clerk and Letter Crafts include positions where full-time employes and part-time flexible employes are authorized. It is reasonable to conclude that the conversion preference expressed in Section 522 of the PS-11 Handbook applies equally to Clerk Craft employes.

The existence of preference for filling full-time regular positions by conversion of part-time flexible workers, rather than by reassignment, places a burden on the Employer

to establish, if such reassignments impair seniority rights of part-time flexible employes, why it is necessary that the challenged reassignment be to the status of a regular, full-time worker. In other words, when seniority rights of part-time, flexible employes are impaired by a reassignment, the Employer must show why the preference expressed in Section 522 of the PS-11 Handbook should not be followed. Generally, this would require a showing that reassignment to full-time status is required by the collective bargaining agreement itself or, otherwise, required by law or regulation.

In the dispute before the arbitrator, there is no claim that terms of the parties' collective bargaining agreement expressly required reinstatements of former full-time employes to full-time status. Article 37 is silent on reemployment status, and it requires that a new period of seniority begin when employes are reemployed, reinstated, or moved from one craft to another. Article 37.2.D.7 states:

> Except as specifically provided elsewhere in this Agreement, a full-time employee begins a new period of seniority:
>
> a. When the change is:
>
> (1) from one postal installation to another at the employee's request.
> (2) from one craft to another (voluntarily or involuntarily).
>
> b. Upon reinstatement or reemployment.
>
> c. Upon transfer into the Postal Service. (See Employer's Exhibit No. 2, p. 137).

The Employer has justified the reassignment to full-time status under Article 21.4 of the parties' agreement. This provision states:

> Employees covered by this Agreement shall be covered by subchapter 1 of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto. (See, Employer's Exhibit No. 2, p. 103).

This contractual provision has incorporated federal workers' compensation rights into the parties' agreement. It requires the Employer to promulgate regulations extending to employes rights granted federal employes under 5 U.S.C. 8151. The Employer has promulgated the necessary regulations, and they are found in Section 546 of the ELM.

The focus of Section 546 is on reemploying employes injured on duty. Section 1 of the provision sets forth the Employer's legal duties to employes with job-related disabilities under 5 U.S.C. 8151 as well as Office of Personnel Management regulations. The Employer's legal responsibilities to employes when the disability is partially overcome have been set forth in Section 546.14 of the ELM. Under Section 546.14.1(b), the Employer's responsibility to former employes is as follows:

> When a former employee has partially recovered from a compensable injury or disability, 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 he or she is qualified, including a lower grade position than that which the employee held when compensation began. (See, Union's Exhibit No. 5, pp. 35-36).

In addition to management's obligation to make every effort toward reemployment of a partially recovered employe, the Employer also must comply with applicable collective bargaining agreements. Section 546.21 of the ELM states:

> Reemployment under this section must be in compliance with applicable collective bargaining agreements. Individuals so employed must receive all appropriate rights and protections under the applicable collective bargaining agreement. (See, Union's Exhibit No. 5, p. 37).

Once these requirements have been met, Section 546.231 of the ELM authorizes the Employer to reemploy former career employes as either career full-time or part-time employes. The provision states:

> Former career employees may be reemployed as career full-time or part-time employees. (See, Union's Exhibit No. 5, p. 37).

There is nothing on the face of the ELM regulations that requires the Employer to reassign former partially recovered employes to full-time status. At each step of the grievance procedure leading to this arbitration proceedings, the Employer argued that Section 546 of the ELM provided the Employer with the discretion to reemploy former employes as either assigned regulars or part-time flexible workers. (See, Union's Exhibit No. 2, p. 1). At the arbitration hearing, however, the Employer consistently asserted a legal obligation under 5 U.S.C. 8151 to make such full-time assignments.

Section 8151 of Title 5 sets forth retention rights for all civil service federal employes injured on the job. Under Section 8151(a), federal employes who resume employment with

the federal government must be credited with the entire time during which they received compensation "for the purposes of within grade step increases, retention purposes, and other rights and benefits based on length of service." (See, Union's Exhibit No. 6). In addition, Section 8151(b) requires, pursuant to regulations issued by the Office of Personnel Management, that employes who "overcome" their disability must be granted certain restoration rights. According to Section 8151, an agency must "immediately and unconditionally" provide employes who overcome their disability within one year their former or an equivalent position. For workers who "overcome" their disability after one year, the agency must "make all reasonable efforts to place, accord priority to placing, the employe in his former or equivalent position within such department or agency, or within any other department or agency." (See, Union's Exhibit No. 6). Focusing on those who "overcome" their disability, Section 8151 of Title 5 has made no provision for employes who partially have recovered from a disability. (See, for example, Withers v. Department of the Air Force, 28 M.S.P.R 379 (1985)).

Although Section 8151 of Title 5 is silent on the matter of partially recovered federal employes, the Office of Personnel Management has promulgated regulations covering such employes. Found in 5 C.F.R. 353.304, the regulation states:

> Agencies must make every effort to restore, according to the circumstances of the case, an employee or former employee who has partially recovered from a compensable injury and who is able to return to limited duty. (Emphasis added).

This provision has been interpreted by the Merit Systems Protection Board as granting partially recovered employes considerable restoration rights when it comes to reemployment opportunities. The MSPB has concluded that the "according to the circumstances of the case" language of the regulation, coupled with the fact that the enabling legislation does not address restoration rights of partially recovered employes, both support a determination that there is no "single right answer" when it comes to the restoration rights of partially recovered employes. (See, Withers v. Department of the Air Force, 28 M.S.P.R. 379, 380 (1985)). Partially recovered employes, while they enjoy certain restoration rights under federal law, do not enjoy the same rights as fully recovered employes.

It is important to realize that the language of Section 546.141(b) of the ELM parallels requirements of 5 C.F.R. 353.304. The postal regulation states that the Employer "must make every effort," and the statutory language refers to the department or agency making "all reasonable efforts." There is nothing in the ELM provision (nor in the OPM regulation), however, that requires the Employer to return partially recovered former full-time employes to full-time status in a new craft, unless it can be said that "every effort" requires such a result. The validity of that proposition, implicit in the 1985 award of Arbitrator Aaron and raised again in this case by the Employer, is the central issue in this dispute.

The proposition that the "every effort" requirement of federal regulations mandates that the Employer grant former full-time employes who partially recovered from on-the-job injuries a full-time position in other crafts is unpersuasive. Recall that the ELM requires the Employer to comply with requirements of applicable collective bargaining agreements. Seniority rights of part-time flexible employes under PS-11 constitute such a requirement.

In addition to the compliance requirement of Section 546.21, the instruction in Section 546.22 must also be added to the mixture. This provision states that:

> Collective bargaining agreement provisions for filling job vacancies and giving promotions, and the procedures relating to retreat rights due to reassignment, must be complied with before an offer of employment is made to former postal employees on the OWPC rolls for more than one year.

The requirement in Section 546.22 clearly places the filling of vacancies and the giving of promotions in front of the "every reasonable effort" and "every effort" obligations the Employer has toward employes.

Because neither relevant ELM provisions, nor federal law requires granting full-time status to partially recovered former employes, seniority provisions of the craft into which an employe is reassigned must determine whether full-time or part-time status is appropriate. In the case of Article 37, read in conjunction with Section 522 of the P-11 Handbook, converting part-time flexible workers normally will take

precedence over such reassignments, if the reassignment compares seniority rights of part-time flexible employes. Such reassignment may be justified in a particular case, but the burden is on the Employer to establish why such a reassignment is necessary. In this particular case, the Employer never really met its burden of showing why this reassignment to full-time status was necessary, notwithstanding its impairment of the seniority rights of part-time flexible employes. There were references to duties under federal law, buttressed by the plain meaning of applicable regulations, but this is insufficient. It is necessary to be able to point to legal or contractual provisions that clearly justify ignoring the part-time conversion preference contained in the parties' collective bargaining agreement.

The Employer also argued that full-time status for partially recovered former full-time employes constitutes the binding practice of the parties. As the parties know, the concept of binding past practice is well developed in labor arbitration. As previously stated, past practice arguments generally are used in two circumstances. (See, Case No. C7N-4Q-C 10845). First, evidence of past practice often is used to support or challenge a suggested interpretation of an ambiguous contractual provision. Second, the past practice of the parties may be used as evidence of a modification or addition to the written agreement. Whatever the intended use of the alleged practice, a party asserting a past practice

must prove that the practice (1) has clarity and consistency; (2) has longevity and repetition; (3) has acceptability; and (4) has mutuality. (See, Mittenthal, Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators (1961)).

The Employer presented testimony in this case from several supervisory personnel to the effect that offering partially recovered former full-time employes full-time positions has been the consistent practice of the Employer since the late 1970s. There is no reason to challenge the veracity of the testimony offered by the witnesses. One would expect to find such evidence, in view of the fact that the Employer has interpreted the parties' agreement as allowing it the discretion to make such appointments.

Notwithstanding the Employer's belief regarding its discretion to make such appointments, making full-time reassignments to partially recovered former employes is inconsistent with the conversion preference granted part-time flexible employes under the parties' agreement. Whether or not all those affected were aware of it, some and perhaps many of the reassignments made in the last fifteen years may have impaired seniority rights of part-time flexible employes. Such contractual violations may be justified only if it can be said that the clearest evidence demonstrated the fact that the Employer and the union mutually agreed to modify their collective bargaining agreement with respect to such assignments.

The arbitrator did not receive evidence establishing that the Union and Employer in fact or implicitly agreed to ignore the seniority provisions of the collective bargaining agreement. Seniority rights of part-time flexible workers with respect to reassignment were not fully defined until 1990. This grievance followed that period closely enough to overcome any suggestion that the Union agreed to or accepted the Employer's unilateral right to ignore seniority rights when reassigning partially recovered former employes. It is insufficient proof to show that a right has been waived merely because no grievance resulted from the alleged violation until this case.

C. An Appropriate Remedy

It normally would be necessary to remand this case to the regional level in order to determine whether the reassignment at issue actually impaired seniority rights of part-time flexible employes and whether, if that was the case, the Employer could establish why it, nonetheless, was necessary to ignore the conversion preference expressed in the parties' agreement. In this case, however, the Union has stipulated that the partially recovered employe is properly a full-time regular clerk. In view of that fact, no purpose would be served by remanding the case to regional arbitration.

Although the Union continues to seek a "make whole" remedy that, presumably, would include converting part-time flexible employes to full-time status, such a remedy is not appropriate. The Employer's error was disregarding its obligation to consider the seniority of part-time flexible employes and, if it chose to ignore such seniority, explaining why that course of conduct was necessary. Because the Union has not contested the full-time regular assignment at issue, there is nothing to be decided on remand. Unless the existing full-time assignment is put at issue, there is no position for part-time flexible workers to seek on the basis of their seniority.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement when it reassigned a full-time employe who was partially recovered from an on-the-job injury to full-time regular status in the Clerk Craft. Unless in an individual case, the Employer can demonstrate that such assignments are necessary, notwithstanding the conversion preference expressed in the parties' agreement, the Employer shall cease and desist from reassigning partially recovered employes to full-time status when those reassignments impair the seniority of part-time flexible employes. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: February 7, 1990