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In the Matter of Arbitration	)	
	)	
between	)	
	)	GRIEVANT: Ms. Hanna A. Soti
UNITED STATES POSTAL SERVICE	)	
	)	
	)	Case No. F90N-4F-C 96026953 31095
and	)	
	)	Post Office: San Jose, California
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Union: Mr. Robert V. Madrid

For the Employer: Ms. Sandra J. Savoie

PLACE OF HEARING: 1750 Lundy Avenue, San Jose, California

DATE OF HEARING: June 16, 2000

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance is procedurally arbitrable and that the arbitrator has jurisdiction to proceed to the merits of the case. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: August 4, 2000

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 management assigned the grievant to limited duty at Bayside Station instead of her home station of Robertsville. Should the grievant return to the work force, the Employer is required carefully to follow the ELM "pecking order" and to exercise good faith in an effort to place the grievant at the Robertsville Station or a station closer to her home.

The arbitrator shall retain jurisdiction in this matter for 90 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

Carlton J. Snow
Professor of Law

August 4, 2000

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Hanna A. Soti Grievance) (Case No. F90N-4F-C 96026953 31095)	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from August 19, 1995 to November 20, 1998. A hearing between the parties took place on June 16, 2000 in a conference room of the U.S. Postal facility located at 1750 Lundy Avenue in San Jose, California. Mr. Robert V. Madrid, Local Business Agent, represented the National Association of Letter Carriers. Ms. Sandra J. Savoie, Labor Relations Specialist, represented the United States Postal Service.

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. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

The Employer challenged the procedural arbitrability of the dispute, but the parties otherwise agreed that the matter properly had been submitted to arbitration. They authorized the arbitrator to retain jurisdiction in the matter for 90 days after the close of the hearing to resolve any remedial issues, should it be relevant to do so. The parties submitted the matter on the basis of evidence submitted at the hearing as well as oral closing arguments, at which time the arbitrator officially closed the hearing.

II. STATEMENT OF THE ISSUES

The issues before the arbitrator are as follows:

1. Is the grievance procedurally arbitrable;

2. If so, did the Employer violate Articles 13 and 19 of the parties'collective bargaining agreement as well as Section 546.141 of the Employee and Labor Relations Manual when management assigned the grievant to limited duty at Bayside Station instead of at her home station of Robertsville? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 13

ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

Section 1. Introduction

B. The U.S. Postal Service and the Union recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees 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 the installation, after local negotiations.

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure--Steps

Step 1:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance.

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.

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ELM

Section 546.141 Obligation

a. (4) An employee may be assigned limited duty outside of the

work facility to which the employee 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 must 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 the employee is normally assigned.

ELM 438.121

Commuting time before or after the regular workday between an employee's home and official duty station, or any other location within the local commuting area, is a normal incident of employment and is not compensable.

ELM 434.611

Out-of-schedule premium is paid to eligible full-time bargaining unit employees for time worked outside of, and instead of, their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management.

IV. STATEMENT OF FACTS

In this case, the Employer challenged the timeliness of the grievance after the Union asserted that management failed to assign the grievant to the correct location for performing her limited duty assignment. The grievant, a Letter Carrier assigned to her home station of Robertsville, was diagnosed in February of 1994 with carpal tunnel syndrome. Although she had a job-related illness, the grievant received her diagnosis when she

was away from work on maternity leave. She returned to Robertsville Station in August of 1994 and, due to her illness, was assigned to limited duty.

On November 21, 1994, management assigned the grievant to Bayside Station, another facility in the vicinity on what the grievant believed to be a temporary basis. According to the grievant, Bayside Station Manager Faye Camarillo asked for a volunteer to come to Bayside Station on a temporary basis until another employee who was away temporarily returned to work. No evidence submitted to the arbitrator rebutted the grievant's assertion that she was told the assignment to Bayside Station was temporary. In January of 1995, the ill worker at Bayside Station returned to claim her position; but management did not send the grievant to Robertsville Station. The grievant maintained that she began asking to return to Robertsville Station as soon as the ill worker returned to Bayside Station.

In October of 1995, it was apparent that the grievant's physical condition was permanent and that she would be unable to return to her regular duties. At that point, the Bayside Station Manager made the grievant a "rehab job offer." The grievant testified that she did not accept the offer because it required her to perform duties outside the boundaries of

her physical limitations and also because she wanted to return to the Robertsville Station. When she declined the offer, her personal physician indicated to management what modifications would be necessary in order for the grievant to be able to perform the duties of the job offer.

On November 20, 1995, the Union filed a grievance alleging that management violated the parties' collective bargaining agreement by not returning the grievant to her home station and requested as a remedy that she be returned to Robertsville Station. At Step 1, management denied the grievance on the basis of the fact that it allegedly was untimely as well as the fact that there had been no work at Robertsville Station for over a year which the grievant could perform. On November 21, 1995, the Union appealed the grievance to Step 2. In December of 1995, the grievant accepted a "rehab job offer" at the Bayside Station under protest. On January 10, 1996, the Employer maintained its position that there had not been and was not then available any work at Robertsville Station to be performed by the grievant. After a remand to Step 2 for further consideration, the Employer again denied the grievance at Step 3. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Employer

The Employer argues that the grievance is not procedurally arbitrable. As the Employer sees it, the grievant went to the Bayside Station in November of 1994 but failed to file a grievance in protest. When the person the grievant temporarily replaced returned to work in January of 1995, the grievant asked to return to the Robertsville Station; and management denied her request. But, still, the grievant did not file a grievance.

In October of 1995, the Bayside Station Manager offered the grievant a permanent "rehab position." The grievant declined the position due to her physical limitations. No grievance ensued. She finally grieved on November 20, 1995, some 23 days after management offered her a permanent "rehab position." In management's view, the grievance was untimely.

The parties' collective bargaining agreement requires that grievances be filed within 14 days of the precipitating event. According to the Employer, the grievant knew or should have known that her position at Bayside was permanent when she did not return to Robertsville Station in January of 1995. Even if she was uncertain in January of 1995,

management believed she knew or should have known that her position at Bayside Station was permanent on October 23, 1995 when she received the "rehab position" offer. As management sees it, the grievant should have filed a grievance by November 2, 1995 at the very latest. Filing on November 20, 1995 allegedly was too late.

On the merits, the Employer maintains that it made every effort to do so but was unable to place the grievant in a position at the Robertsville Station within her physical limitations. At the time the grievant began asking to return to Robertsville Station, there already were four employees at the station who perform limited duties. The Employer contends that the situation at Robertsville Station was of citywide concern due to the high number of limited duty employees working at the station, and the lack of adequate tasks to keep them busy. Management was sensitive to this situation when it denied the grievant the assignment she sought. It is the contention of the Employer that, with no work available for the grievant at Robertsville Station, the Employer correctly followed the ELM "pecking order" and assigned the grievant to a position she could perform within her craft at another facility within the local commuting area.

The Employer argues that management has no duty to disprove a bare assertion by the Union that work was available for the grievant to

perform at Robertsville Station. As the Employer sees it, the Union bears the initial burden of proof to establish duties within the grievant's physical limitations that were available at the Robertsville Station and that were not currently being performed by other similarly situated employees. The Employer maintains that only after the Union met its burden of proof would management need to establish that the Union was incorrect in its assertion. Since the Union made no specific assertion about work the grievant could perform at Robertsville Station, the Union allegedly failed to carry its burden of proof. Although several witnesses mentioned jobs the grievant could have performed at Robertsville Station, the Employer contends that such assertions should receive no evidentiary weight due to the fact that they were mentioned for the first time in arbitration. Moreover, the Union allegedly needed to establish that the duties were not currently performed by another Robertsville employee.

The Employer concludes that (1) because the Union failed to establish a prima facie showing of available work for the grievant at Robertsville Station and (2) because management correctly followed the ELM "pecking order" when assigning the grievant to her position at Bayside Station, the grievance should be denied. Even if a violation occurred, the Employer maintains that the remedy sought by the Union is

inappropriate. Hence, management concludes that the grievance should be denied.

B. The Union

The Union contends that the grievance is procedurally arbitrable and that the arbitrator should proceed quickly to the merits of the dispute. According to the Union, the grievant filed her claim as soon as she had sufficient knowledge to understand that a contractual violation had occurred. Moreover, it is the position of the Union that the grievant continued to be harmed by the contractual violation each day management left her assigned to the Bayside Station.

On the merits, the Union maintains that the Employer violated the ladder of progression used for assigning limited duty employees. Management allegedly ignored the correct "pecking order" described in ELM Section 546.141. As the Union sees it, it was management's obligation, first, to try to assign a limited duty employee within her normal work facility and that, only if no work was available in the facility, to assign her to another facility. The Union maintains that assignment to another

facility is fourth in the ELM's ladder of progression. The Union contends that there was work available for the grievant at the Robertsville Station and that, thus, she could have been assigned to a position there. The Union maintains that the grievant had been on limited duty at Robertsville Station before going to Bayside and that she was never without work during that earlier period of time. Moreover, the Union maintains that management added other employees to limited duty at Robertsville even after the grievant asked to return there.

Starting in January of 1995 when a sick employee returned to her position at Bayside Station, the grievant consistently began asking management at all levels to transfer her back to Robertsville Station or at least to another station closer to her home. She maintains that the 23-mile round trip necessitated by the assignment to Bayside Station was especially difficult for her due to a back injury. The grievant did not believe that management ever took seriously her request or made a bona fide effort to seek work for her at Robertsville Station or any other station closer to home.

It is the belief of the Union that management must bear the burden of proof with respect to showing that the Employer made a good faith, although unsuccessful, effort to place the grievant in each level of the "pecking order" above the level at which she ultimately landed. When the

Employer denied the grievance at each step of the grievance procedure, management allegedly claimed only that the grievance was untimely or that no work was available. The Union contends that at no time did the Employer support its assertion that no work was available at Robertsville Station. As the Union sees it, it only has the burden of proving that there was work available at Robertsville Station if the Employer, first, shows that it followed the ELM "pecking order" in good faith and still was unable to find work for the grievant in her own facility or in another facility closer to her home facility. The Union argues that, if the Employer fails to establish this prima facie rebuttal of the Union's assertion that management violated the ELM, then the Union needs go no further in proving the existence of work at Robertsville Station. In other words, the Union believes that, if the Employer violates the ELM, there is a contractual violation; and the inquiry needs go no further. Hence, the Union concludes that it must prevail in this matter.

VI. ANALYSIS

A. The Matter of Procedural Arbitrability

The grievance in this case was filed in a timely manner because it constituted a continuing grievance. The concept of a continuing grievance is well established in arbitration decisions and American caselaw. As one arbitrator defined it, a "continuing grievance" exists where "the act of the company complained of may be said to be repeated from day to day, such as the failure to pay an appropriate wage rate or acts of a similar nature." (*See Bethlehem Steel Co.*, 26 LA 550.) Professor Ted St. Antoine, past president of the National Academy of Arbitrators, has defined a "continuing grievance" in terms of the longevity of its impact. He asks whether the impact of the act persists indefinitely. (*See USS and United Steelworkers of America*,99 WL 1074562 (1999).) A delay in filing a complaint about a continuing grievance may affect remedies available to a grievant, but it does not preclude pursuing a claim to arbitration. (*See, e.g., Typefitters Union Local 636*, 75 LA 449, 454.) If it is clear that the facts of a dispute support describing it as a "continuing grievance," a grievant does not automatically forfeit all rights by failing to meet customary time limits. (*See, e.g., Brockway Company,* 69 LA 1115, 1121.)

Likewise, the United States Supreme Court has recognized the viability of the concept of a continuing grievance. (*See, e.g., John Wiley & Sons, Inc. v. Livingston,*376 U.S. 543 (1964).) Other courts have added their support to the concept. (*See, e.g., Abrams v. Baylor College of Medicine,* 42 FEP Cases 806 (1986); *Bazemore v. Friday,*41 FEP Cases 92 (1986); *Quarles v. Phillip Morris, Inc.,* 279 F. Supp. 505 (E.D.DA. 1968); and *United Airlines, Inc .v. Evans,* 431 U.S. 553 (1977).).

Jurisprudential underpinnings for the concept of a continuing grievance are rooted in the doctrine of restitution and the effort of the common law to avoid unjust enrichment. If an employer were permitted indefinitely to reject a legitimately aggrieved complaint involving some benefit to the employer on the theory that the dispute was not arbitrable, an employer might be unjustly enriched. If management were permitted to protect itself from a continuing contractual violation on the ground that the violation occurred some time ago, it would be in a position to undermine significant provisions of a collective bargaining agreement. As a consequence, courts generally have compelled parties to surrender benefits unjustly received from an injured party. An embedded value of Anglo-American common law is that no one should be unjustly enriched at the

expense of another. (*See Restatement (Second) of Contracts,* § 344, p. 106 (1981).)

As applied in this case, the concept of a continuing grievance gives the arbitrator authority to proceed to the merits of the case. Article 15.2, Step 1(a) of the parties' collective bargaining agreement makes clear that the Union had 14 days after becoming aware of a complaint to file a grievance. But in this case the facts giving rise to the grievance repeated themselves each day management continued to assign the grievant to Bayside Station, if, in fact, her assignment was incorrect. The Union had 14 days from each day of the improper assignment to challenge her work location. The grievance would be untimely if the Union filed its claim more than 14 days after the grievant was no longer assigned to Bayside Station. Because the Union filed the grievance in this case during the period when the grievant remained at Bayside Station, the dispute before the arbitrator is not untimely. Hence, there is authority to proceed to the merits of the case.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance is procedurally arbitrable and that the arbitrator has jurisdiction to proceed to the merits of the case. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: August 4, 2000

B. Merits of the Case

1. Contractual Promises

The Union maintained that the Employer violated Section 546.141 of the ELM, and both parties inundated the arbitrator with regional and national arbitration decisions parsing the meaning of Chapter 546. Not one of the cases was "on all fours" with the facts of this particular dispute, but some of the arbitral reasoning was instructive. It might be useful, first, to place provisions of the ELM in context.

Article 19 of the parties' collective bargaining agreement incorporates provisions of the ELM into the parties' labor contract as long as the ELM does not conflict with the parties' negotiated agreement. Neither party in this dispute contested the applicability or binding nature of ELM Section 546.141 to the facts of the case. Section 546.141 of the ELM sets forth three specific obligations of management when the Employer assigns duties and job location to an employee who is on limited duty. First, management must "make every effort" to assign an employee duties within his or her physical limitations. Second, the Employer must "minimize any adverse or disruptive impact on employees." (*See* Joint Exhibit 2, p. 527.) Third, management is obligated to follow the "pecking order" within the ELM provision when assigning employees to limited duty positions.

According to ELM Section 546.141(a)(1) to (4), management may assign an employee outside his or her regular work facility only if there is no work available within the designated facility, including work outside of the employee's craft or regular schedule. If management must assign an employee outside of his or her regular work facility, the Employer's obligation is to make "the effort" to assign the employee as near as possible to his or her regular work facility. Contrary to the Union's assertion, the ELM does not require management to make work for an individual. Nor did arbitration cases the Union cited for the "make work" requirement clearly and unambiguously place a duty on management to make work for employees in such circumstances. The relevant arbitration decisions make clear that the Employer is required to employ workers injured on the job in a limited duty capacity when the workers are able to perform their duties, but the decisions merely observe that making work for employees may be preferable to paying limited duty workers for doing nothing. Clearly, if there is work available in another facility, the Employer has no "make work" duty within an individual's home worksite.

Nor does the design incorporated into the parties' collective bargaining agreement require the Employer to prove a negative. If the Employer carries its burden of proving that management followed

applicable sections of the ELM, then the burden of proof shifts to the Union specifically to assert duties which a limited duty employee could perform in his or her home worksite. Before the Union has the burden of going forward with such evidence, however, the parties' system imposes on management the burden of proving that it followed the "pecking order" set forth in the ELM. In order to meet this burden of proof, the Employer needed to submit persuasive evidence that management tried to place the grievant at each level of the "pecking order" above the level at which she ultimately was placed and that management was unsuccessful in its attempts due to a lack of work. Only after this evidentiary showing by management did the Union have the burden of establishing a prima facie showing that work, indeed, existed at Robertsville Station for the grievant.

The parties have incorporated into their labor contract a system with a shifting burden of proof. It can be summarized as follows:

1. The Union must prove that an employee suffered an on-the-job injury; that the facts of the case are covered by ELM Section 546.141; and that management failed to follow the "pecking order" set forth in the ELM for this kind of situation.

2. The burden, then, shifts to the Employer to produce evidence showing that management made a good faith effort to place the grievant at each level of the "pecking order" above the level at which an individual ultimately was placed; and

3. The Union, then, has the burden of proving that work, indeed, was available for a grievant at a level of the "pecking order" above the level at which management placed the employee.

In the design incorporated into the parties' agreement, management does not have the burden of going forward until the Union fulfills its burden of proof. The Union, then, does not have the burden of proof until the Employer fulfills its burden of production.

2. How Well the Parties Performed Their Duties

The Union met its initial burden of proof in this case. The Union alleged that the grievant suffered an on-the-job injury and that the facts of her case are covered by ELM Section 546.141. The Employer did not dispute those assertions. The Union also asserted that the Employer did not correctly follow the ELM "pecking order." Allegations and evidence submitted by the Union were sufficient to shift the burden of going forward to the Employer, and it became management's burden to produce satisfactory evidence that it correctly followed applicable sections of the ELM.

The Employer failed to meet its burden of proof that it correctly followed ELM Section 546.141. Management was unpersuasive in its assertion that it attempted to place the grievant at a higher level of the "pecking order." Mr. Carl Collinge, Supervisor of Customer Service, denied the grievance at Step 1 of the procedure. By his own admission, he did not investigate other opportunities for the grievant. He contacted neither the Robertsville Station nor other stations closer to the grievant's home in an effort to place her in one of those facilities. He denied the grievance because he believed it to be untimely and because he knew that the Robertsville Station, a year before the grievance, had had no openings for a "rehab employee." Knowledge of the situation a year before a grievance failed to provide sufficient evidence to satisfy the Employer's burden of production. The ELM requires management to use "every effort" to place a limited duty employee in his or her home station. If there is no work in the home station, the Employer must use "every effort" to place the employee as close to his or her home station as possible. "Every effort" in this case did not even include a few telephone calls in the grievant's behalf.

The Employer again denied the grievance at Step 2 of the procedure and this time asserted that there was no work for the grievant at the Robertsville Station. Mr. Joe Cole, Station Manager at Bayside Station

at the time, heard the grievance at Step 2. He testified that he did not recall discussing the availability of work at the Robertsville Station with the Union and that he did not recall whether or not he made a telephone call to the Robertsville Station to inquire about work for the grievant. What he specifically recalled was the problem experienced at Robertsville Station several months prior to his hearing the grievance with respect to there being too many "rehab employees" working at the Robertsville Station. He did not state that he even attempted to verify that the problem continued to exist at the time he heard the grievance. Mr. Cole was quite certain he "somehow" got the information that there was no work for the grievant at Robertsville Station, but he had no idea at all of the source of the information. As one arbitrator stated in a Section 541 case, "a bare assertion that there was no available work, without additional substantiation, is insufficient to demonstrate compliance with Section 546.141 and does not shift the burden of proof to the Union to demonstrate that work was available." (*See* Case No. W4N-5C-C 43784, p. 26 (1989).)

Nor did any evidence establish that management made any attempt at all to find the grievant a position at a station closer to her home worksite. Even if it is positive that there was no work for her at the Robertsville Station, management was required by ELM Section

546.141(a)(4) to use every effort to place the grievant in the closest available position to her home. The grievant testified without rebuttal that she asked to be transferred to a station closer to her home if Robertsville did not have work for her. No evidence suggested that the Employer attempted to place the grievant closer to her home. The Employer attempted to answer the arbitrator's concern in this regard by pointing to a case in which an arbitrator denied a claim similar to the one filed by the grievant in this case. (*See* Case W4N-5T-C 31821, p. 6 (1989).) In that case, however, the Employer contacted an Injury Compensation Specialist in an effort to find work closer to the home worksite of the relevant employee. When the Injury Compensation Specialist was not able to locate work closer to home which the employees could perform, management transferred the employees to the General Mail Facility. No such analogous evidence is to be found in the facts of the case before this arbitrator.

The grievant testified without rebuttal that she attempted many times to explain her circumstances to management and tried to find a position closer to her home worksite. She made an effort to resolve the dispute on her own without going to the time and expense of a formal dispute resolution procedure. Persuasive evidence established that the grievant was persistent in her quest and asked management for nothing

more than a good faith effort to listen to her request and to attempt to help her. Evidence submitted to the arbitrator was persuasive that she was met at every turn with indifference and that no good faith effort was made to place her at a higher level of the ELM "pecking order."

Because the Employer failed to meet its burden of proving that it followed the "pecking order" of ELM Section 546.141, the burden of proving that there was work available at Robertsville Station or at a closer station never shifted to the Union. The Union, therefore, did not fail to meet a burden of proof that never shifted to it. The failure of the Employer to meet its burden of proof made management's objection to evidence allegedly entered for the first time at the arbitration hearing a matter that is moot. The evidence to which the Employer objected was evidence of work available at Robertsville Station which the grievant could have performed. Because the Union did not have the burden of proving the existence of such work, such evidence had no impact on the decision in the case. The Union managed to carry its burden of proof without such evidence.

B. The Matter of Remedy: Half-measure Relief

It is a general teaching of contract law that a party injured by a contract violation has a "right" to some form of relief. As prescribed by Section 347 of *Restatement (Second) of Contracts)*, "contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." (*See* p. 112 (1981).) Parties, however, have every right to bargain around this general principle and to specify in a contract that half-measures provide the limit of relief in some circumstances. Contracts are used for the purpose of allocating risks of eventualities known to be outside the control of the parties, and it is their right to decide what risks are to be assumed by the parties and how they will allocate the losses and gains in the event of a contractual violation.

In this case, the Union asked for out-of-schedule pay as well as for the grievant to receive mileage compensation due to her longer commute to work. By contract, however, the parties have made both remedies inappropriate. The parties have incorporated ELM Section 434.661 into their collective bargaining agreement to the extent that it is consistent with the agreement, and Section 434.661 makes clear that out-of-schedule pay is

compensation to be provided employees who work outside of their regular schedule. The provision states that:

> Out-of-schedule premium is paid to eligible full-time bargaining unit employees for time worked outside of, and instead of, their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management. (*See* Joint Exhibit No. 6, p. 220, emphasis added.)

The arbitrator received no evidence suggesting that management placed the grievant in something other than her regular work schedule.

Additionally, ELM Section 434.622(f) makes clear that the grievant, who was on light duty, did not qualify for out-of-schedule pay. The provision states:

> Eligible employees are not entitled to out-of-schedule premium under the following conditions:
>
> (f) When assigned to light duty according to the provisions of the collective-bargaining agreement or as required by the Federal Employee Compensation Act, as amended. (*See* Joint Exhibit No. 6, pp. 222-223, emphasis added.)

Likewise, ELM Section 438.121 makes clear that commuting time is not compensable. It states:

> Commuting time before or after the regular workday between an employee's home and official duty station, or any other location within the local commuting area, is a normal incident of employment and is not compensable. *(See* Joint Exhibit No. 5, p. 234, emphasis added.)

In none of the arbitration decisions submitted to the arbitrator by the parties did any decision-maker award mileage under circumstances similar to the grievant's. No evidence established that the grievant's situation is of such an exceptional nature to warrant granting a remedy inconsistent with the administrative regulations incorporated into the parties' agreement or with the weight of arbitral authority as it exists in the parties' arbitration system.

A regrettable aspect of this case is that the appropriate remedy is a half-measure, but it is one that appears to reflect the negotiated will of the parties. The appropriate remedy is to direct management carefully to follow the ELM "pecking order" and to use good faith in an effort to place the grievant at the Robertsville Station or at a work station closer to her home. Should the grievant return to the work force this is the remedy that will be available to her. At the moment, however, the remedy is moot due to the grievant's unavailability for work.

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 management assigned the grievant to limited duty at Bayside Station instead of her home station of Robertsville. Should the grievant return to the work force, the Employer is required carefully to follow the ELM "pecking order" and to exercise good faith in an effort to place the grievant at the Robertsville Station or a station closer to her home.

The arbitrator shall retain jurisdiction in this matter for 90 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

August 4, 2000